



2016

Real Estate and Land Use Seminar

April 14, 2016 | Multnomah Athletic Club | Portland, Oregon

balljanik.com



101 SW Main Street, Suite 1100
Portland, Oregon 97204

balljanik.com

t 503.228.2525
f 503.295.1058

April 14, 2016

Dear Guests:

Welcome to Ball Janik LLP's 2016 Real Estate and Land Use Seminar. We have a great lineup of speakers again this year, and it promises to be a fast-paced event.

The market continues to push projects at a fast pace. Whether you're a developer, broker, landlord, tenant, investor, owner or borrower, we hope you will leave today with a better awareness of potential legal issues and how to navigate them.

Due to the tight schedule, we invite you to ask us questions immediately following the seminar, or contact us at a time that is more convenient for you.

We look forward to a successful 2016 for all of you!

Sincerely,

A handwritten signature in blue ink, appearing to read "S. Janik".

Stephen T. Janik

A handwritten signature in blue ink, appearing to read "D. Hall".

Damien R. Hall



101 SW Main Street, Suite 1100
Portland, Oregon 97204

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Ball Janik LLP's 2016 Real Estate and Land Use Seminar

April 14, 2016

Agenda

Time	Topic	Speaker
7:15	Registration and Breakfast	
7:45	Welcome	Damien R. Hall
7:50	Zoning for Affordability, the Carrot and Stick Approach	Damien R. Hall
7:55	Commercial Leases – Drafting and Disputes	Gregory H. Baum Bruce H. Cahn
8:10	Stories from the Trenches – What to Avoid to Keep Your Construction Project on Track	Christopher M. Walters
8:25	Possibilities and Pitfalls: Choosing an Entity While Avoiding Litigation in Real Property Transactions	Ciaran P. A. Connelly Mary Jo N. Miller
8:40	Show Me the Money! Market Trends and Current Opportunities in Real Estate Finance	Matthew Anderson David W. Criswell Daniel J. Lee Marcus Parker Brad Shain
9:10	The New Central City Zoning Code	Stephen T. Janik
9:15	Conclusion	



real estate is our territory

Ball Janik LLP's real estate practice group represents leading and emerging developers, businesses, property owners and public agencies in Oregon, Washington, California, and numerous other states in the acquisition, disposition, development, construction, permitting, financing, management and leasing of office, industrial, retail, multi-family and mixed-use projects.

Our client base is exceptionally broad and we are very active in representing clients in all product types and for projects of all sizes. Our broad commercial development practice includes some of the most complex residential and commercial development transactions in the region such as the Rose Garden Arena, South Waterfront, Cascade Station, Bridgeport Village, the Vancouver Conference Center, and Seattle Seahawks Stadium.

Our experience includes serving clients in the following areas:

- Commercial Leasing
- Industrial Parks
- Office
- Retail
- Finance and Corporate
- Financing and Equity Arrangements
- Debt Financing
- Equity Financing
- Public/Private Partnerships
- Workouts
- Residential Development
- Multifamily and Condominium Development
- Planned Communities
- Tax Planning
- Tax-Deferred Exchanges
- Construction and Design
- Construction Disputes
- Destination Resorts
- Eminent Domain
- Entitlements/Land Use
- Medical Facilities
- Public Agencies and Schools
- Real Estate Disputes
- Real Estate Licensing and Compliance
- Tax Disputes
- Tax Incentives



highlights of our real estate work

South Waterfront Urban Redevelopment – Williams & Dame Development

Ball Janik LLP represented the developers of South Waterfront, a \$2 billion, multi-phase, public/private project that is the largest urban redevelopment in the history of Portland, Oregon. The project included approximately 33 acres of former “brownfield” land along the Willamette River just south of Downtown Portland. Ball Janik LLP negotiated and drafted a complex development agreement between several entities managed by Williams & Dame Development and the Portland Development Commission. The agreement provided for the construction of the first aerial tram built in the United States in decades; an extension of Portland’s vaunted streetcar line; a public park and riverfront greenway; multiple high-rise residential towers; and affordable housing.

City of Portland – Major League Soccer

Ball Janik LLP’s Real Estate practice represented the City of Portland (City) in the renovation of PGE Park, a then-existing AAA Baseball stadium, into a Major League Soccer (MLS) stadium that is now home to the MLS Portland Timbers. We worked with the City’s Chief

Administrative Officer, the Mayor’s Economic Development Director and the City Attorney’s office to negotiate and document a public-private partnership with the Hank Paulson family for the remodeling of the 20,000 seat stadium. Acting as the City’s outside counsel, the Ball Janik LLP team led and participated in all negotiations, drafted all documents and helped forge the final agreement.

City of Portland – PGE Park AAA Baseball

The Real Estate practice represented the City of Portland in all aspects of its project to renovate its aging Civic Stadium into a AAA baseball stadium with corporate skyboxes and other amenities.

City of Portland – Rose Garden Arena Project

Ball Janik LLP represented the City of Portland in all aspects of the \$267 million Rose Garden Arena Project.

City of Vancouver – Vancouver Conference Center

The firm represented the City of Vancouver, Washington and its Downtown Redevelopment Authority in the financing, development and construction of the new \$73 million Conference Center and Hilton Hotel project.



City of Vancouver, Washington – Columbia Riverfront

The Real Estate practice negotiated, documented and closed a public-private partnership on behalf of the City of Vancouver for the redevelopment of a former industrial site on the Columbia River into a new four million square foot mixed-use project, which includes mid-rise offices, residential, retail, parking and public amenities.

Clackamette Cove – Oregon City, Oregon

On behalf of the City of Oregon City, the Real Estate practice negotiated, documented and closed a public-private partnership for the development of Clackamette Cove, a mixed-use project in Oregon City situated on a former landfill and gravel extraction site.

Commercial Loan Restructuring

Ball Janik LLP represented a privately held company that is the financial partner in numerous large commercial real estate projects in the Northwest and assisted the client in the restructuring of approximately \$1.2 billion in real estate loans on commercial and residential projects at various stages of development and leasing and sales.

Courthouse Financing Project

Ball Janik LLP provides pro-bono legal services to the Courthouse Facilities Task Force, convened by the Honorable Paul De Muniz, former Chief Justice of the Oregon Supreme Court.

Fujitsu Semiconductor America, Inc.

Ball Janik LLP assisted Fujitsu Semiconductor America, Inc. with the original design and construction of its wafer fabrication facility in Gresham, Oregon, then one of the most substantial construction projects ever undertaken in Oregon.

Hoyt Street Yards

Ball Janik LLP represents Hoyt Street Properties, the developer of Hoyt Street Yards, a mixed-use project on 40 acres of railyard in Portland's Pearl District, which the client transformed into a high-density residential and commercial neighborhood.

Seattle Seahawks Stadium

The firm represented the Washington State Public Stadium Authority in the \$430 million development, construction and leasing of Seahawks Stadium.

State of Oregon – Mill Creek

Ball Janik LLP negotiated, documented and closed a disposition and development agreement for the sale of a 52.6-acre parcel in the new Mill Creek Corporate Center to a Fortune 500 company.

Strategic Investment Program Successes

Ball Janik LLP has represented several companies in successfully obtaining approvals and agreements under Oregon's Strategic Investment Program (SIP), a property tax program created to induce companies to build new facilities in Oregon and increase employment.

Successful Financings

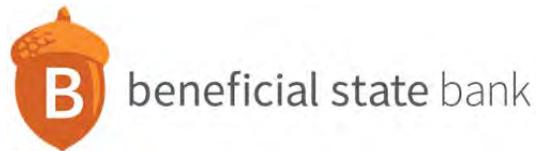
Ball Janik LLP guided three financings for the development and operation of Mary's Woods at Marylhurst, one of Oregon's largest continuing care retirement communities.

Trammell Crow Company

The firm represents Trammell Crow Company in various aspects of real estate development. This includes Cascade Station near the Portland International Airport, as well representing the company in the negotiation of a ground lease with the University of Oregon for the construction of the Oregon Research Institute, located in the City of Portland.

Matthew Anderson
Senior Vice President

503.200.5508
manderson@beneficialstate.com
www.beneficialstatebank.com



1100 SW Washington St
Portland, OR 97205



Matthew Anderson began his commercial lending career in 2000 in equipment financing. In the past 16 years, he has held analyst, underwriter, portfolio manager, and relationship manager positions. Matt's in-depth understanding of credit enables him to provide effective solutions in a variety of situations. At Beneficial State Bank, he is second in command in the Pacific Northwest region with oversight into credit policy, human resources, and business development. Matt has been the top producer at Beneficial State Bank since 2012 with the vast majority of his portfolio in commercial real estate.

Matt earned his MBA and BS from Arizona State University. He enjoys spending time with his family, running, and golfing.



Gregory H. Baum

Of Counsel

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“Take your work seriously, but not yourself.”

Gregory Baum practices in Ball Janik LLP's Business and Corporate, Financial Services and Real Estate Practices. His nearly 40 years of law firm, solo practice and corporate experience gives him a broader perspective than that of most lawyers. For most of his career, Mr. Baum has been a business executive, Corporate Secretary and General Counsel in the technology and real estate investment sectors. “A venture capital-backed computer H/W & S/W developer with US & foreign sales has far more in common with a multi-state real estate investment developer than just the word ‘developer.’ While their specific activities and jargon differ, they share with all organizations the need to tailor their legal entity type to their circumstances, to hire, train and manage their employees effectively, and to raise capital and finance their operations. These are things I can help clients do better.”

Mr. Baum has been directly involved in business organization and compliance, labor and employment matters with union and non-unionized workers, intellectual property protection, technology sales and licensing, real estate acquisition, management, financing, leasing and sales of hotel, retail, office, industrial and multi-family property types. In his 16 years as VP, Secretary and General Counsel of Harsch Investment Corp., a \$2 Billion privately-held real estate company, he established and oversaw compliance of its more than 40 affiliated entities. His civil engineering education has been utilized working on development and construction projects and coordinating environmental risk assessments and remediation programs. He has structured and negotiated more than 200 financing transactions with banks and institutional lenders aggregating over \$3.5 Billion.

“Throughout my career, I have engaged the services of lawyers in dozens of states and foreign countries, across many professional disciplines. As my company's chief legal officer, effectively, I have been their client. The lawyers who won my respect were rewarded with return business and my recommendations of their abilities to others. What characteristics did these lawyers have in common? Every one of them:

practice areas

Business and Corporate
Financial Services, Bankruptcy
and Creditor Rights
Real Estate

education

J.D., 1976
Northwestern School of Law of
Lewis & Clark College

B.S., Civil Engineering 1969
Cornell University

admissions

Oregon
U.S. District Court for the
District of Oregon
U.S. Supreme Court

honors

BV® Distinguished™ Rating
from Martindale-Hubbell®,
American Registry

Oregon Chapter President,
Association of Corporate
Counsel 2004-2007

Chair, Oregon State Bar
Corporate Counsel Section
2001-2002

news

Gregory H. Baum Joins Ball
Janik LLP's Portland Office as
Of Counsel
11/05/2015

events

Ball Janik LLP's 2016 Real
Estate and Land Use Seminar
04/14/2016
Portland, Oregon

- Knew their subject matter thoroughly and would readily admit what they didn't know;
- Listened carefully;
- Returned phone calls or emails promptly;
- Communicated clearly and concisely;
- Recommended a course of action; didn't just list potential alternatives or say "no";
- Demonstrated sensitivity to the overall cost of the work they were asked to do; and
- Maintained a sense of humor.

I strive to be that kind of lawyer every day. I wouldn't hire a lawyer that didn't demonstrate all those characteristics and don't believe any client should.



Bruce H. Cahn

Partner

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“Achieving success for our clients depends on a clear strategy for victory, intense preparation and skilled advocacy. Our ability, and willingness, to take each case to trial strengthens our hand at every stage of a dispute.”

Bruce Cahn is a trial and [appellate lawyer](#) whose practice is focused on sophisticated large-dollar commercial, business, and real estate disputes. He represents both plaintiffs and defendants in complex cases, including business torts, trademark infringement, fraudulent transfer claims, banking matters, construction cost overruns and condemnation of property. He represents clients in numerous industries including hospitality, transportation, construction, banking, financial services, natural resources and technology, and he represents governmental clients in a variety of matters. Mr. Cahn received the AV® Preeminent™ Rating from Martindale–Hubbell®. In 2013, Mr. Cahn was recognized as one of “Oregon’s Top Rated Lawyers” for Commercial Litigation by ALM Legal Leaders, a publication affiliated with Martindale–Hubbell®, The American Lawyer and Corporate Counsel magazine.

Mr. Cahn was one of the primary attorneys involved in litigating the notable case, *MAN AG v. Freightliner, LLC*, which resulted in a favorable judgment for our client totaling \$1.1 billion, the largest verdict in the United States in 2006. The award consisted of \$850 million in compensatory damages and \$350 million in punitive damages, which is one of the largest punitive damages awarded in Oregon history.

Mr. Cahn’s litigation experience includes securities fraud and antitrust cases, large scale condemnation matters, natural resources litigation, as well as general business disputes. Prior to moving to Portland, Mr. Cahn was a member of the corporate practice group Sidley & Austin (in its Los Angeles office), where he worked on mergers and acquisitions, securities offerings, film financing, and copyright and trademark licensing for the

practice areas

Public Agencies and Schools
Construction and Design
Securities Litigation
Litigation
Financial Services, Bankruptcy
and Creditor Rights
Environmental
Construction Defect

education

J.D., 1990
Loyola University School of Law
Member, St. Thomas More
Law Honor
Society
Staff Member, International &
Comparative Law Journal

B.A., Radio-Television
Broadcasting, 1986
California State University,
Northridge

admissions

California
Oregon
Washington
U.S. District Courts of Oregon,
Washington
U.S. Court of Appeals for the
Ninth Circuit
U.S. Court of Appeals for the
Federal Circuit
U.S. Court of Federal Claims

honors

AV® Preeminent™ Rating from
Martindale–Hubbell®.

Recognized as one of “Oregon’s
Top Rated Lawyers” in 2013 for
Commercial Litigation by ALM
Legal Leaders, affiliated with
Martindale–Hubbell®, The
American Lawyer & Corporate
Counsel magazine.

news

Bruce H. Cahn’s Appellate
Experience

entertainment industry.

Mr. Cahn has authored a number of articles on a variety of litigation issues and has lectured on a wide range of legal topics, including construction law, real estate disputes, condemnation law and trial practices. He served on the Executive Committee of the Business Litigation Section of the Oregon State Bar from 2000 to 2009, and was the Committee Chair in 2008. Mr. Cahn serves on the Board of Directors of LifeWorks Northwest, a non-profit organization dedicated to promoting a healthy community by providing quality and culturally responsive mental health and addiction services across a person's lifespan. He also is a volunteer coach for the Classroom Law Project, where he leads a "We the People" team at Central Catholic High School, a constitutional law team which engages high school students in a curriculum designed to foster understanding of the institutions of American democracy.

Mr. Cahn's representative litigation experience includes:

- Successfully defended a mobile technology company against a \$650,000 lawsuit for claims of breach of contract, breach of warranty, and negligence regarding allegedly-defective touch-screen monitors for use in industrial vehicles. The case was settled for a fraction of the demand.
- Successfully represented a development company in connection with the expulsion of an LLC member who was improperly competing against our client by using trade secrets and confidential information to benefit the member's separate enterprise. Mr. Cahn settled the complex extraction of interests and all improperly taken electronic data and documents were returned.
- Successfully represented a local school district in the acquisition of site for a new high school. This included filing condemnation actions to acquire the property and litigating the amount of compensation for the property. The resulting acquisition was within budget and was prosecuted to the satisfaction of our client.
- Successfully defended a developer against a breach of contract claim brought by a general contractor for cost overruns on two hotel projects in Glendale, Arizona.
- Successfully prosecuted a cost overrun and professional negligence action against the architect of two high rise luxury condominium buildings along the Willamette River, which resulted in a very favorable settlement for our client.
- Successfully defended efforts by environmental groups to prevent, stall or delay fire salvage operations on federal timberlands for a timber client. This was part of a series of actions brought to prevent salvage harvest operations and the sale to our client was the only sale that was not delayed. This representation involved opposing numerous motions to stay operations at both the trial court and at the Ninth Circuit Court of Appeals, as well as arguing the merits of the challenges at the trial court.
- Successfully challenged government regulations under the Magnuson-Stevens Fishery and Conservation Act that would

Suffering property tax sticker shock?

12/11/2014

Ball Janik LLP Named One of Oregon's 2014 Most Admired Companies

12/05/2014

Asset Freeze Injunctions in Securities Litigation: A New Tool for Plaintiffs?

Who Pays When? Understanding "Pay When Paid" Clauses

01/01/2013

New Oregon Law Changes Risk Management Practices in The Construction Industry

Verdict For The Record Books: Jury Awards \$850 Million in Case Tried by Ball Janik

02/01/2007

events

Ball Janik LLP's 2016 Real Estate and Land Use Seminar

04/14/2016

Portland, Oregon

8th Annual Eminent Domain: Current Developments in Condemnation, Valuation & Challenges

06/04/2015

Portland, Oregon

7th Eminent Domain: Current Developments in Condemnation, Valuation & Challenges

06/05/2014

Portland, Oregon

6th Annual Eminent Domain: Current Developments in Condemnation, Valuation & Challenges

06/06/2013

Portland, Oregon

Accounting and Financial Records as Evidence: A Primer on Discovery and Trial Uses of Evidence in Cases Involving Accounting Issues

Evidentiary Issues in Condemnation Cases Eminent Domain (2011 & 2010)

have shut down recreational fishing for all grouper in the Gulf of Mexico. Received an order on an expedited basis significantly limiting the ban to a specific species of grouper and to a specific geographic area (20 miles off the western coast of Florida). This resulted in a significant victory for our client among recreational fishers throughout the Gulf area.

- Successfully defended a commercial landlord in a complex breach of lease action concerning the exercise of a right of first refusal. Defeated a preliminary injunction request after a two-day evidentiary hearing in the Multnomah County Circuit Court.

Generally, throughout his career Mr. Cahn has:

- Represented clients in business disputes, minority shareholder oppression matters, partnership and fraudulent transfer claims;
- Assisted banks with troubled loans, complex commercial loans, lender liability claims and pool-purchase loans;
- Represented clients on a number of intellectual property matters, including claims of trademark infringement; and
- Represented governmental entities and private property owners in high profile condemnation proceedings related to public transportation and infrastructure projects.
- Represented commercial landlords in disputes with tenants, including breach of lease claims and FED (eviction) actions.



Ciaran P. A. Connelly

Partner

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“My goal is to distill complex legal matters into clear terms that will allow clients to make the right decisions.”

Ciaran Connelly joined Ball Janik LLP in 2011 as a Litigation associate in the firm’s Portland office. He is a business and trial attorney with broad experience in business and commercial litigation. As an associate with two prominent New York law firms, Mr. Connelly handled diverse matters ranging from complex commercial lease and contract disputes to mass–tort and insurance disputes, to regulatory and compliance investigation and defense.

Mr. Connelly’s experience with complex commercial contract and real estate disputes includes representing an investment bank in a \$100 million lease dispute with its landlord, where he was responsible for all aspects of litigation from initial document gathering and client interviews to depositions, witness preparation, client counsel, trial preparation, mediation and arbitration sessions, and drafting of appellate briefs, motion papers, affidavits, and letters. More recently Mr. Connelly worked on a dispute involving the control and ownership of several high–profile office buildings in Portland. He consulted with a biotechnology firm to assess the merits of a potential contract and intellectual property dispute with its joint–venture research partner over an enzyme to be used in the production of biofuels. He also represented a bank in a contract dispute with its client, a CEO, regarding a complex derivative transaction called a “cashless collar.” Mr. Connelly also has experience working on contract disputes with subjects as diverse as complex inter–lender agreements, railroad trackage rights, and head–hunting fees.

Mr. Connelly has broad tort experience, including defending a Fortune 200 company in a nine–month civil RICO trial in the U.S. District Court for the District of Columbia and in the subsequent appeal. He represented a Fortune 100 company in a shareholder dispute related to a multi–billion–dollar merger, and was part of a team that recovered \$30 million on behalf of a union for actuarial malpractice. He also helped resolve a reinsurer’s liability in

practice areas
Securities Litigation
Litigation

education

J.D., first in class, 2004
University of Utah, S.J. Quinney
College of Law
Order of the Coif
Utah Law Review
National Moot Court Team
S.J. Quinney Merit
Scholarship
William H. Leary Scholar

A.B., Philosophy/Government,
1999
Dartmouth College

admissions

New York
Oregon
Utah
Washington
U.S. Court of Appeals for the
Ninth Circuit
U.S. Court of Federal Claims
U.S. District Courts for the
Eastern and Southern Districts
of New York
U.S. District Court for the
District of Oregon
U.S. District Court for the
District of Utah
U.S. District Courts for the
Western and Eastern Districts of
Washington

news

Ciaran Connelly and Adele
Ridenour Named Partners of Ball
Janik LLP
01/15/2016

Ciaran P. A. Connelly Joins Ball
Janik LLP as Litigation
Associate
12/13/2011

events

Ball Janik LLP’s 2016 Real

connection with a \$1 billion Ponzi scheme. In a significant insurance coverage case, Mr. Connelly represented a reinsurance company in a \$300 million bad-faith dispute with its reinsured related to an asbestos claim. In that case, he was responsible for preparing for a mock-jury exercise, including performing factual and legal research, synthesizing arguments, coordinating those arguments with retained experts' views, and developing effective presentation materials. Most recently Mr. Connelly has represented large institutional investors in mortgage-backed securities in their multi-billion-dollar securities claims against a number of Wall Street banks.

Mr. Connelly has significant experience representing corporations in regulatory and internal investigations. In addition to responding to FINRA and state attorney general requests, he represented a major accounting firm in an SEC investigation of the accounting practices of its largest client. He also aided an investment bank with an internal FCPA investigation into its business in China. Mr. Connelly also has experience in criminal appeals work, having handled two pro-bono appeals, one on behalf of a defendant, and one on behalf of the King County (Brooklyn) District Attorney's office.

Depth and Experience

Prior to joining Ball Janik LLP, Mr. Connelly was an associate with Grais & Ellsworth LLP, a boutique New York City law firm, where his practice focused on private label mortgage-backed securities litigation. Mr. Connelly's responsibilities included researching legal and factual bases for claims, drafting pleadings and client memoranda, and managing teams of attorneys preparing for discovery.

From 2004 to 2009, Mr. Connelly was an associate with Davis Polk & Wardwell LLP, an internationally recognized law firm, where his work focused on complex commercial litigation, white collar criminal cases, and regulatory investigations.

Before entering law school in 2001, Mr. Connelly was a litigation paralegal for two years with Paul, Weiss, Rifkind, Wharton & Garrison LLP in New York.

Mr. Connelly is a member of the American Bar Association, the Multnomah Bar Association and the Dartmouth Lawyers Association.



David W. Criswell

Partner

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“Clients appreciate our ability to take on complicated financial situations, to distill the law and the facts, and to lay out a clear path toward resolution.”

David Criswell is Ball Janik LLP's Managing Partner and Chair of the Bankruptcy and Creditor Rights group. His principal areas of practice are business bankruptcy, corporate restructuring, loan workouts, insolvency, and real estate. He has represented numerous debtors-in-possession, secured lenders, and purchasers in complex Chapter 11 cases. He has also represented lenders and borrowers in out-of-court loan restructurings. Mr. Criswell is often sought out by community banks and hedge funds in the Pacific Northwest and beyond for assistance with loan recoveries, loan documentation and other financial services issues. Mr. Criswell was recognized as a 2015 and 2016 Best Lawyer in America in Bankruptcy and Creditor Debtor Rights / Insolvency and Reorganization Law in Portland, Oregon.

Prior to joining Ball Janik LLP in 1992, Mr. Criswell practiced for three years at the Chicago law firm Rudnick & Wolfe, which later became part of DLA Piper.

Mr. Criswell is a member of the Debtor/Creditor Section of the Oregon State Bar Association. He was listed as one of "Oregon's Top Rated Lawyers" by Legal Leaders, published in 2013 by The National Law Journal, The American Lawyer and Corporate Counsel magazine, affiliated with Martindale-Hubbell®. Mr. Criswell was recognized by his peers as an Oregon Super Lawyer from 2011-2015 in Bankruptcy & Creditor/Debtor Rights. He has earned the AV® Preeminent™ Rating from Martindale-Hubbell®, American Registry.

practice areas

Financial Services, Bankruptcy
and Creditor Rights
Real Estate

education

J.D., cum laude, 1989
University of Wisconsin-Madison
Law School

B.A., 1986
Dartmouth College

admissions

Oregon
Washington
U.S. District Court for the
District of Oregon and for the
Western and Eastern Districts of
Washington

honors

AV® Preeminent™ Rating
Martindale-Hubbell®, American
Registry

Best Lawyers in America, 2015–
2016

Recognized as one of "Oregon's
Top Rated Lawyers" in 2013 by
The National Law Journal, The
American Lawyer and Corporate
Counsel magazine, published by
ALM Legal Leaders, affiliated
with Martindale-Hubbell®.

Named by peers as an Oregon
Super Lawyer in Bankruptcy and
Creditor/Debtor Rights, 2011–
2015

news

Ball Janik LLP Ranked as a
2016 "Best Law Firm" by U.S.
News – Best Lawyers®
11/02/2015

Six Ball Janik LLP Attorneys
Recognized by Best Lawyers
2016

08/17/2015

Ball Janik LLP Attorneys Named
2015 Oregon Super Lawyers
07/10/2015

Ball Janik LLP Named One of
Oregon's 2014 Most Admired
Companies
12/05/2014

Briefly Stated Publications

Ball Janik LLP Attorneys
Recognized by Best Lawyers
2015
08/19/2014

Ball Janik LLP Attorneys Named
2014 Oregon Super Lawyers
07/11/2014

Ball Janik LLP Announces New
Leadership
06/17/2014

Ball Janik LLP Receives
Recognition as Top Ranked Firm
by Chambers USA 2014
05/29/2014

Ball Janik LLP Attorneys Named
2013 Oregon Super Lawyers
07/10/2013

Ball Janik LLP Top Ranked Firm
by Chambers USA 2013
05/23/2013

Ball Janik LLP Attorneys Named
2012 Super Lawyers
09/18/2012

Ball Janik LLP Attorneys Named
2011 Super Lawyers
09/13/2011

events

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04/14/2016
Portland, Oregon

28th NW Bankruptcy Institute
05/01/2015
Portland, Oregon

RMA and Ball Janik LLP Present
"Stump the Lawyers" in Spokane
01/15/2015
Spokane, Washington

RMA and Ball Janik LLP Present
Stump the Attorney
06/16/2014
Orlando, Florida

Commercial Lending What Can
go Sideways How to Protect
Yourself
05/14/2014

Bend Golf & Country Club

Ball Janik's 2014 Real Estate
and Land Use Breakfast
Seminar
03/12/2014
Portland, Oregon

Ball Janik's 2013 Real Estate
and Land Use Breakfast
Seminar
03/06/2013
Portland, Oregon

The Sunwest Cases: An Assault
on SPE Structure
Philadelphia, Pennsylvania

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Damien R. Hall

Associate

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“Understanding and shaping the political and regulatory environment in which a real estate project takes place can be crucial to the success of each stage of the project, from planning and entitlements to financing and construction.”

Damien Hall is Ball Janik LLP’s Chair of the Land Use and Real Estate practice groups. Mr. Hall has worked for several years representing both property owners and local governments, helping them navigate Oregon’s unique land use requirements and political sensitivities to controlled growth and land development. Mr. Hall’s approach is based on working collaboratively with developers, local government, and communities to establish common objectives and allow clients to achieve their development goals. His background is in urban planning and development, and in addition to his land use practice, he regularly assists clients with real estate transactions, natural resources law, municipal law, and formation and organization of business entities. Mr. Hall is a member of the National Black Lawyers Top 100 and was recognized in 2016 by Portland Business Journal’s esteemed “Forty Under 40.”

Mr. Hall is actively involved in development issues in Portland. He is on the Board of Commissioners for Home Forward and the Board of Directors for Portland Community Reinvestment Initiatives, Inc. (PCRI). Mr. Hall is a member of the Portland Development Commission’s (PDC) Central City Budget Advisory Committee, and formerly served on the Oregon Convention Center Urban Renewal Area Advisory Committee, as a committee member from 2007 through 2010, and as Chairperson from 2010 through 2013. He has been a member of the Young Leaders group of the Urban Land Institute (ULI) of Oregon and SW Washington since 2008. Further, he is a member of the Oregon Chapter of the National Association of Industrial and Office Properties (NAIOP), and is on its Developing Leaders Committee. Mr. Hall participated in the PDC’s N/NE Economic Development Initiative Advisory Committee from 2010-2011 and

practice areas

Public Agencies and Schools
Land Use
Real Estate

education

J.D., 2008
Northwestern School of Law of
Lewis & Clark College

B.S., Public Policy, Planning and
Management, 2005
University of Southern California

admissions

California
Oregon
Washington

honors

Recognized by Portland
Business Journal’s 2016 “Forty
Under 40”

2015 Runner-Up, Portland
Business Journal’s “Forty Under
40”

2015 National Black Lawyers
Top 100

“Up and Coming Lawyer,”
Daily Journal of Commerce,
2011

news

Damien Hall of Ball Janik LLP
was named as part of the 2016
class of Forty Under 40
01/27/2016

Damien Hall Appointed to Home
Forward Board of
Commissioners
06/16/2015

Ball Janik Attorneys Recognized
by Portland Business Journal;
Jim Prichard Named Forty Under
40
02/23/2015

in the City of Portland's North/Northeast Quadrant of I-5
Broadway/Weidler Stakeholder Advisory Committee from 2011-
2012.

In addition to his active professional engagements, Mr. Hall is
dedicated to the community. He was appointed in
November 2014 to the Board of Directors for CareOregon, a
nonprofit providing health plan services to four Coordinated Care
Organizations, serving about 250,000 Oregonians. CareOregon's
vision is healthy communities for all individuals, regardless of
income or social circumstances. Additionally, Mr. Hall serves as
a Board Member of Groundwork Portland, and he represented
"Verde – Let Us Build Cully Park!" as pro bono counsel.

Damien Hall Appointed to
CareOregon Board of Directors
02/06/2015

Briefly Stated October 2014
10/28/2014

Briefly Stated Publications

Ball Janik LLP Receives
Recognition as Top Ranked Firm
by Chambers USA 2014
05/29/2014

Briefly Stated May 2014
05/05/2014

PCRI Welcomes Damien Hall to
Its Board
11/11/2013

Briefly Stated December 2013
12/16/2013

Ball Janik LLP Welcomes
Damien Hall to Portland Office
10/16/2013

Ball Janik LLP Top Ranked Firm
by Chambers USA 2013
05/23/2013

events

Ball Janik LLP's 2016 Real
Estate and Land Use Seminar
04/14/2016
Portland, Oregon

Ball Janik's 2014 Real Estate
and Land Use Breakfast
Seminar
03/12/2014
Portland, Oregon



Stephen T. Janik

Partner

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Portland, Oregon 97204
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“We have always been committed to advancing our clients’ interests through superior legal work, creativity and cost effectiveness.”

Steve Janik is a founding partner of Ball Janik LLP. His principal areas of practice are real estate, real estate finance, and land use law, with an emphasis on large, high-profile projects. He has guided private and public clients through some of the region’s most important real estate projects, including mixed-use, multi-block developments, major office towers, hotels, and major league sports arenas and stadiums. Mr. Janik has argued several of Oregon’s landmark land use cases.

Mr. Janik has been recognized by his clients and peers as one of the Best Lawyers in America since it was published in 1983 and has been selected as Best Lawyers’ Portland, Oregon “Lawyer of the Year” in 2010, 2012, and 2013 in several areas related to real estate and land use. He is perennially ranked by Chambers USA as an industry leader in real estate and land use, and has led Ball Janik’s Real Estate practice group to Chambers USA’s top-tier ranking every year since Chambers started reviewing Oregon firms. Chambers has ranked Mr. Janik as a “Star Individual” lawyer in real estate since 2007, a ranking given to lawyers with exceptional recommendations in their field. Chambers commentators widely agree that Mr. Janik is “the best real estate lawyer in town,” with one going so far as to call him “a meteoric superstar” of the real estate market. Mr. Janik has been recognized as one of Oregon’s “Top 10” attorneys by Oregon Super Lawyers. He has also earned the AV® Preeminent™ Rating from Martindale-Hubbell®, American Registry.

Mr. Janik has mentored many of the firm’s attorneys and has helped create a culture characterized by superior professional work, client loyalty, camaraderie and community service. In 2007, 2010, and 2013 Ball Janik was recognized as one of the region’s “Most Admired” professional services firms in a survey of CEOs conducted by the Portland Business Journal.

practice areas

Public Agencies and Schools
Construction and Design
Real Estate
Land Use
Business and Corporate

education

J.D., cum laude, 1974
Harvard Law School

M.B.A., With Distinction, 1974
Harvard Business School

B.A., magna cum laude, 1969
Harvard College

admissions

Oregon

honors

“Lawyer of the Year” in Real Estate Law (2010) Oregon, in Real Estate Litigation (2012), in Land Use and Zoning Law (2012), and in Land Use & Zoning Litigation (2013), Portland, by Best Lawyers in America

Best Lawyers in America 1983–2016

Chambers USA Industry Leader, Real Estate/Land Use, 2007–2015

Chambers USA “Star Individual,” 2007–2015

Named by peers as an Oregon Super Lawyer in Real Estate, 2006–2015

OSB President’s Membership Service Award
Oregon State Bar, 2007

AV® Preeminent™ Rating
Martindale-Hubbell®, American Registry

Mr. Janik represented the developers of South Waterfront, the largest urban redevelopment project in the history of the City of Portland. He has represented the State of Oregon, the City of Portland and other regional cities on a variety of high-impact real estate projects. He has established the firm as a leader in helping large businesses successfully take advantage of Oregon's Strategic Investment Program (SIP).

Mr. Janik has developed special knowledge in public/private partnerships and stadium financing. He represented the City of Portland in the development and financing of the Rose Garden Arena (home of the NBA Portland Trailblazers), the remodeling of PGE Park for AAA Baseball, and the recent renovation of the park for Major League Soccer. He also represented the Washington State Public Stadium Authority in the \$430 million development, construction and leasing of Seattle Seahawks Stadium.

Mr. Janik was elected to the American College of Real Estate Lawyers in 1990. He has served as the Chairman of the Oregon State Bar Real Estate and Land Use Section and as an editor of the Bar's multi-volume treatise Real Property. He lectures frequently on a broad range of real estate and land use topics at professional seminars.

In 2007, Mr. Janik received the Oregon State Bar President's Membership Service Award for his work on the Court Facilities Task Force. At the request of the Chief Justice of the Oregon Supreme Court, Mr. Janik participated in the task force addressing Oregon's statewide lack of funding for rehabilitation or reconstruction of the state's county courthouses, most of which are more than 70 years old. His efforts led to the creation and funding of an interim legislative task force to address court facility issues and to bring proposed legislation to the 2009 Oregon Legislature. As a follow-up to this work, Mr. Janik has provided pro bono service to a Multnomah County committee charged with developing a plan for funding the much-needed new Multnomah County Courthouse.

Mr. Janik has served on numerous civic boards, regional task forces and special projects. He has served as a Trustee of the Portland School District Real Estate Trust; a member of the Board of Pioneer Courthouse Square, 2000-2006; President of the Board of Pioneer Courthouse Square, 2004-2006; Trustee of the Oregon Health & Science University Foundation, 2011-present; Oregon Health & Science University Foundation Nominating Committee Chair, 2016; Vice Chair of Oregon Health & Science University Foundation, 2016; Trustee of the Portland Art Museum, 2009-2015; Chair of the Portland Art Museum Governance Committee, 2012-2015; Knight Cancer Council Board Member, 2013-present.

Member, American College of Real Estate Lawyers since 1990

Oregon Governor's Film Advocate Award, 2005

news

Ball Janik LLP Ranked as a 2016 "Best Law Firm" by U.S. News – Best Lawyers®
11/02/2015

Six Ball Janik LLP Attorneys Recognized by Best Lawyers 2016
08/17/2015

Ball Janik LLP Attorneys Named 2015 Oregon Super Lawyers
07/10/2015

Steve Janik Helps Secure Victory for Higher Education in Central Oregon
06/09/2015

Ball Janik LLP Receives Recognition as Top Ranked Firm by Chambers USA 2015
06/15/2015

Ball Janik LLP Named One of Oregon's 2014 Most Admired Companies
12/05/2014

Briefly Stated October 2014
10/28/2014

Briefly Stated Publications

Ball Janik LLP Attorneys Recognized by Best Lawyers 2015
08/19/2014

Ball Janik LLP Attorneys Named 2014 Oregon Super Lawyers
07/11/2014

Ball Janik LLP Announces New Leadership
06/17/2014

Ball Janik LLP Receives Recognition as Top Ranked Firm by Chambers USA 2014
05/29/2014

Ball Janik LLP Recognized by Best Lawyers 2014
08/15/2013

Ball Janik LLP Attorneys Named 2013 Oregon Super Lawyers
07/10/2013

Ball Janik LLP Top Ranked Firm by Chambers USA 2013
05/23/2013

Steve Janik and Jack Orchard
Selected as 2013 Top Rated
Lawyers by Martindale-Hubbell®
01/25/2013

Ball Janik LLP Attorneys Named
2012 Super Lawyers
09/18/2012

Stephen T. Janik and Brad T.
Summers Named Portland
“Lawyers of the Year” in Two
Specialty Areas by Best
Lawyers
09/17/2012

Ball Janik LLP Attorneys
Recognized by Best Lawyers
2013
08/30/2012

Ball Janik LLP Top Ranked Firm
by Chambers USA 2012
06/08/2012

Stephen T. Janik Named
Portland “Lawyer of the Year” in
Two Specialty Areas by Best
Lawyers
10/24/2011

Seven Attorneys Named to The
Best Lawyers in America 2012
09/13/2011

Ball Janik LLP Attorneys Named
2011 Super Lawyers
09/13/2011

Ball Janik LLP Top Ranked Firm
by Chambers USA 2011
06/13/2011

Steve Janik Assists Multnomah
County Courthouse Committee
02/01/2011

Six Attorneys Named to The
Best Lawyers in America 2011
08/30/2010

Ball Janik LLP Top Ranked by
Chambers USA 2010
06/14/2010

Ball Janik LLP Attorneys Named
to 2010 Best Lawyers
01/19/2010

Ball Janik LLP Attorneys Named
2010 Super Lawyers
11/17/2010

events

Ball Janik LLP's 2016 Real
Estate and Land Use Seminar
04/14/2016
Portland, Oregon

YLS Lunch and Learn with Steve
Janik of Ball Janik LLP

04/13/2016
Portland, Oregon

Ball Janik's 2014 Real Estate
and Land Use Breakfast
Seminar
03/12/2014
Portland, Oregon

Ball Janik's 2013 Real Estate
and Land Use Breakfast
Seminar
03/06/2013
Portland, Oregon

Ball Janik LLP's 2010 Annual
Conference on Current Issues in
Real Estate and Land Use
09/29/2010
Portland, Oregon

The Sprawling of America: Who
Decides the Shape of the Urban
Future?

Daniel J. Lee
Chief Credit Officer

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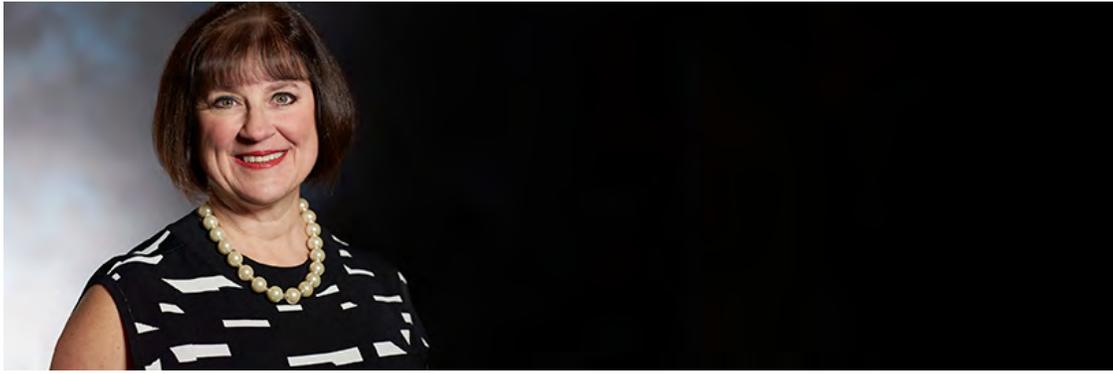


Dan Lee is a named executive officer for Bank of the Cascades (Nasdaq: CACB), the second largest bank headquartered in Oregon. As Chief Credit Officer he currently chairs the Loan Committee and participates in the Audit Committee. Dan's management experience includes assignments as a Chief Credit Officer, Regional Market President, and District Head of Corporate Banking.

As a financial services professional, Dan has broad experience. He has been involved in commercial banking, investment banking, mezzanine debt, corporate treasury, strategic planning, venture capital, and private equity. Past employers include General Motors Corporation (Treasurer's Staff), NatCity Investments (now part of PNC Financial Corporation), Bank One Corporation (now part of JPMorgan Chase), KeyCorp, and Regions Financial Corporation. Dan represented the State of Oregon as a board member of the American Bankers Association Government Relations Committee.

Dan has financed companies from launch stage to the Fortune 500, and has been involved in the following notable transactions in the healthcare and financial services industries: the original IPO for Anthem (the 3rd largest health insurance company in the United States), the sale of Summex Health Management to WebMD (\$40MM), the sale of Union Federal Bank to Sky Bank (\$330MM), and the purchase of Home Federal Bank by Bank of the Cascades (\$266MM). In 2014 Dan was a co-founder of Cascades Angels, an early stage venture capital fund based in Bend, Oregon.

Dan holds BS and MBA degrees from Indiana University where he has been an adjunct professor and student advisor. Dan attended the Stonier Graduate School of Banking (currently part of the Wharton Business School) and is a Certified Turnaround Professional (CTP) through the Turnaround Management Association.



Mary Jo N. Miller

Partner

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“Law practice is most rewarding when we can craft creative solutions that are based on a deep understanding of the client, its people, and its needs, priorities and strengths.”

Mary Jo Miller joined Ball Janik LLP as a partner in the finance, corporate, and real estate practices. Her practice focuses on finance, merger and acquisition, securities, and general corporate matters, with a strong focus on renewable energy-related projects and companies. Ms. Miller’s clients include public and private companies, financial institutions, underwriters, private equity companies and investment funds, governmental and quasi-governmental entities, and developers. She has handled a broad range of transactions, including syndicated and bilateral loan facilities, asset and stock sales, project finance, public bond financing, and public offerings and private placements of debt and equity securities. Ms. Miller has represented both lenders and borrowers in financing transactions, and both buyers and sellers in merger and acquisition transactions.

Ms. Miller’s legal experience prior to joining Ball Janik LLP includes three years as a member of the bank finance group of Baker & McKenzie in Chicago, four years as a member of the capital markets group of Shearman & Sterling in London and New York, and 10 years as a member of the Corporate group of Stoel Rives in Portland. Ms. Miller also has 10 years of commercial lending experience as an officer of PNC Financial Corp and served as interim General Counsel for Erickson Air-Crane for six months in 2010.

Ms. Miller is an author of the State Q&A Topic on Oregon Corporation Law for Practical Law Company. She is a member of the Board of Directors of the Multnomah Bar Foundation. Ms. Miller’s community activities include the Race Committee of Komen Oregon, the West Point Parents Club of Oregon and Southwest Washington, and the Jesuit High School community.

practice areas

Business and Corporate
Financial Services, Bankruptcy
and Creditor Rights
Real Estate

education

J.D., cum laude, 1995
University of Notre Dame Law
School
Executive Editor, Journal of
College
and University Law

M.I.B., 1982
University of South Carolina

B.S., magna cum laude, 1980
John Carroll University

ABA Stonier Graduate School of
Banking, with honors, 1992

admissions

Illinois
Oregon

news

Mary Jo N. Miller Joins Ball
Janik LLP’s Portland Office
02/10/2016

events

Ball Janik LLP’s 2016 Real
Estate and Land Use Seminar
04/14/2016
Portland, Oregon

Marcus Parker, CFA

President, Chief Compliance Officer

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MORRISON STREET CAPITAL

121 SW Morrison Street, Suite 1875
Portland, Oregon 97204



Marcus Parker is the President and Chief Compliance Officer for Morrison Street Capital. He is responsible for firm operations, fund and investment structuring as well as investment oversight on behalf of the funds. In addition, Mr. Parker serves on the Investment Committee. Mr. Parker was formerly Vice President of Finance for Harsch Investment Properties, a privately held owner and operator of over 21 million square feet of commercial property in the western United States. He has over 18 years of commercial real estate and structured finance experience. Mr. Parker received his Master's degree in business administration from the University of Oregon. He is a CFA Charterholder, and is a member of NAIOP. Mr. Parker is a past president of the Portland Alternative Investment Association, an Adjunct professor in Alternative Investments at PSU, and has participated in several speaking engagements for the University of Oregon, the University of Portland and numerous industry groups.

Founded in 2002, Morrison Street Capital, LLC places investment capital on behalf of the Morrison Street series of private equity funds. The firm is a trusted source for mezzanine debt and preferred equity, filling the gap between borrower's equity and available first mortgage proceeds.

Morrison Street Capital has a unique ability to customize investment structures to individual transactions in order to meet the needs of its borrowers and partners.

Bradley Shain

Fund Manager



425.445.9922

brads@columbiapacific.com

www.ColumbiaPacific.com



Bradley Shain is an executive that possesses extraordinary vision, strong leadership and has more than 24 years of proven success in building exceptionally profitable companies where others have failed. He is an expert at transforming stigmatized businesses into highly respected brands. Mr. Shain has 20 years of experience at the board level, and is deeply experienced in scaling businesses ranging from start-ups to \$70 million companies. He has deep expertise in all aspects of real estate leasing, developing, valuing and repositioning, and is highly skilled at raising capital through equity markets and banks. Mr. Shain is willing to invest his own capital for the right opportunity.

Areas of Expertise

- Strategic Business Planning
- P&L/Budget Management
- Brand Building
- Real Estate Valuation, Lending, Developing and Leasing
- New Business Development
- Operating Systems & Processes
- Organizational Development
- Start-ups & Turnarounds
- Employee Development
- Cost Containment

Experience & Achievements

Columbia Pacific Advisors 2011-Present

Fund Manager

Brad Shain started this fund from scratch to its current level of \$365M under management over 4.5 years. The fund is designed as an income producing strategy centered around commercial real estate. The fund seeks out opportunities to provide bridge debt of 3M to 50M on income producing commercial real estate throughout the U.S. Since its inception the fund has completed 92 transactions for 510M and has generated a 9.5% net yield to its investors since inception. The loans are geographically and asset diverse.

As the fund manager, Mr. Shain oversees all aspects of the fund including the underwriting of every transaction, capital raising, loan committee presentations, business and employee development, organizational and strategic planning, all HR, setting expectations and accountabilities.

Education

B.S. in Applied Physics, Minor in Math, University of Utah, Salt Lake City, UT (1986)



Christopher M. Walters

Partner

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“The focus of my practice is to understand and address clients’ needs in a way that adds value to their projects.”

A partner with Ball Janik LLP, Chris Walters has practiced at the firm for over 25 years. His areas of practice include real estate, construction, finance, sales and leasing, venture formation and representation, public contracting, and all aspects of project funding, development and management. He has assisted developers, investors, landlords, tenants, lenders, corporations, public agencies, contractors, design professionals, health organizations, resort and hospitality providers, and religious, nonprofit and community associations in a wide variety of matters. His representation of public agencies has included the State of Oregon, the City of Portland, the Portland Development Commission, the City of Vancouver, and several Oregon school districts. He has established and represented community associations in all aspects of their operation, governance, construction activities, and claims management. In recognition of his achievements, Mr. Walters has earned the AV® Preeminent™ Rating from Martindale-Hubbell®, American Registry.

While Mr. Walters has provided professional guidance on many high profile matters throughout the Pacific Northwest, much of his work supports clients with smaller, unique, and innovative projects. He has experience with a wide range of developments, including office towers, condominiums, subdivisions, hotels, retail centers, sports facilities, stadiums, mixed-use developments, energy projects, infrastructure projects, industrial, warehousing and high-technology facilities, hospitals, and schools.

Prior to joining Ball Janik in 1990, Mr. Walters practiced for four years with Pillsbury Winthrop, a large San Francisco law firm. During his career in Portland, he has served as the chair of the Oregon State Bar Real Estate and Land Use Executive Committee. He has co-authored the Commercial Association of Brokers® legal forms package and the lease package published by the Portland Building Owners and Managers Association (BOMA), and has served as editor of the Oregon State Bar

practice areas

Real Estate
Business and Corporate
Financial Services, Bankruptcy
and Creditor Rights
Construction and Design
Public Agencies and Schools
Community Associations

education

J.D., 1986
University of California,
Berkeley, School of Law
Member, California
Law Review

B.A., cum laude, 1983
Stanford University

admissions

California
Oregon
Washington

honors

AV® Preeminent™ Rating
Martindale-Hubbell®, American
Registry

Recognized as one of "Oregon's
Top Rated Lawyers" in 2013
by The National Law Journal,
The American Lawyer and
Corporate Counsel magazine,
published by ALM Legal
Leaders, affiliated with
Martindale-Hubbell®

news

Ball Janik LLP Named One of
Oregon's 2014 Most Admired
Companies
12/05/2014

Briefly Stated October 2014
10/28/2014

Briefly Stated Publications

Blogs and Publications

manual, Real Estate Disputes. Mr. Walters served on the panel that authored the State of Oregon's model rules for alternative contracting methods. Mr. Walters is a frequent speaker on real estate and business law topics, and serves on BOMA's program committee.

A long-time resident of Portland, Mr. Walters enjoys spending time with his family and friends and participating in his children's school functions.

Ball Janik LLP Receives
Recognition as Top Ranked Firm
by Chambers USA 2014
05/29/2014

Ball Janik LLP Top Ranked Firm
by Chambers USA 2013
05/23/2013

Construction Contracts—Five
Tips for Owners
05/01/2013

Construction Law Report, Spring
2013
05/01/2013

Construction Law Report, Spring
2011
04/17/2011

events

Ball Janik LLP's 2016 Real
Estate and Land Use Seminar
04/14/2016
Portland, Oregon

Oregon School Boards
Association's 2016 Bonds,
Ballots and Buildings
Conference
02/05/2016
Salem, Oregon

BOMA's "Ask a Lawyer"
11/18/2015
200 Market Building, Portland,
Oregon

BOMA's "Ask a Lawyer"
11/19/2014
200 Market Building, Portland,
Oregon

Ball Janik's 2014 Real Estate
and Land Use Breakfast
Seminar
03/12/2014
Portland, Oregon

BOMA's "Ask a Lawyer!"
11/20/2013
200 Market Building, Portland,
Oregon

Ball Janik's 2013 Real Estate
and Land Use Breakfast
Seminar
03/06/2013
Portland, Oregon

Ball Janik LLP's 2010 Annual
Conference on Current Issues in
Real Estate and Land Use
09/29/2010
Portland, Oregon



101 SW Main Street, Suite 1100
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Zoning for Affordability, the Carrot and Stick Approach

April 14, 2016

Prepared by:

Damien R. Hall
dhall@ballkjanik.com
503.228.2525



HOUSING TRENDS

27,000 new residents since 2010

Limited housing development during recession

Low vacancy rates (holding steady between 3 and 4 percent for the last 5 years)

Significant new residential development to respond to demand (>15,000 new units between 2010 and 2014 = rate of 3,000 / year)

Affordable housing is only a small part of new development (approximately 325 units of 15,000 = 2.5%)

THE PROBLEM(S)

Population Growth Outpacing Residential Unit Starts

Rent Increases Outpacing Income Growth

PUBLIC SOLUTION(S)

Put Public Revenue to Work

- Tax Increment Financing
- Federal Programs

Revise the Zoning Code

ZONING SOLUTIONS

Incentive (Bonuses)

- Central City Height & FAR
- Neighborhood Height & FAR
 - Reduction to base FAR allowances

Inclusionary (Mandatory Affordability)

- State Law Change (SB 1533)
- Local Implementation
 - Additional cost to build



TRADE-OFFS

Incentive Zoning

- Reduction to base density allowances
- Only projected to address a fraction of the need for affordable housing
 - 1,000 to 1,600 new units by 2035
 - Projected need for 16,000 new units

Inclusionary Zoning

- Increases building cost per unit, unless costs are effectively offset
- May reduce overall unit construction
 - 123,000 new houses by 2035, all price levels
 - At 3,000 per year (2010 – 2014) only 60,000 total



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Say What You Do and then Do What You Say

April 14, 2016

Prepared by:

Gregory H. Baum
gbaum@balljanik.com
503.228.2525



Say What You Do and then Do What You Say

It's more than a slogan. If you make it your mantra in all your business dealings with others, you will insist that any written agreement accurately reflects your current and future intentions, and that written agreement will be your roadmap for fulfilling those intentions.

When the bargaining is done and the deal memorialized in writing, each party will be subject to and measured against the contract's provisions. If any dispute arises involving the content of the document or its subject matter, the words on the paper will be what is read and interpreted by a judge and/or jury. If the agreement is incomplete as to key elements or is written ambiguously, the judge or jury will be left to interpret its meaning. There are recognized principles for this process, but do you really want to be at their mercy? Likewise, if the agreement does not reflect how you actually conduct your business operations or your employees don't follow its protocols, it's like having a map to the wrong destination. You will not get to where you want to be and, if challenged, you will be on the losing end of any litigation that ensues.

Legal advice in the creation, interpretation and enforcement of contracts is what we do. Whether we help you review a document from a prospective business counterpart, select and tailor a form agreement or write an agreement specifically for your situation, we provide counsel on the applicability and appropriateness of certain provisions and the tradeoffs of using others. We can help you write an agreement that truly says what you intend to do and, if questions arise along the way about how you or your counterpart are performing, we can also clarify your understanding of how to do what was said. We are ready to help you.

Creating (Say what you do) and Using (Do what you say) Legal Documents

Forms versus Customized Documents in General

Form documents for many different purposes are available and used with varying degrees of frequency. When was the last time you saw a custom purchase and sale agreement for a single-family home sale as opposed to a broker-generated Oregon Real Estate Form? Contrast that practice to the commercial office, retail and industrial world. In more sophisticated transactions involving larger dollar amounts it is more common to find documentation specifically created by the parties or their lawyers for the deal at hand, but BOMA and NAIOP-sponsored forms are also frequently seen. The design and construction industry has its counterpart in the library of forms sponsored and licensed by the AIA.

All of these forms were written by talented, experienced lawyers and other professionals who collaborated on the creation of the forms and revise them



regularly to reflect the latest curveballs thrown by the legislature or the courts. Setting aside the question of whether the transaction you are about to undertake is fairly vanilla or unique, a standard form costs less to obtain than a custom one. Rightly or wrongly, a trade association sponsorship lends an aura of neutrality – it must not contain language more favorable to one side because it came from BOMA, right? The AIA forms are less subtle – it doesn't take long to realize they didn't come from the American Institute of Owners, but those regularly engaged in the field know that and how to cope. Notwithstanding another familiar mantra, that a camel is really a horse designed by committee, this is not an editorial bashing the use of form documents. Form document usage can take less time, foster a less adversarial negotiation and result in a totally satisfactory business transaction. However, it's not always clear whether it will be cheaper in the long run. Even form documents tend to be modified to one degree or another by the users or their attorneys.

The key to success in making the initial decision to use a form document is to be aware of your choices and think about what you are doing. Examine your circumstance and ask yourself: Does this form document reflect my situation? Is this a one-off deal or a recurring one? If recurring, what will be my frequency of use? Am I (or my counterpart) willing to engage in any significant negotiation over the wording? When you have answered those questions, then you can evaluate the appropriateness of using a particular form document, modifying a form to some extent or undertaking preparation of a fully customized one. Regardless of the buy (use a form) or build (create a custom document) decision, it is imperative that you read the document of choice to understand what it says (and doesn't say). If your practices do not correspond to what the contract document says you must modify the document to reflect what you actually do or change your practices to conform to the document. Which sounds easier? In this setting, the "do nothing alternative" – ignoring what the document says even if it's not what you do – is always the wrong choice. If you don't say what you do and then do what you say, bad things will happen.

Letters of Intent (LOI)

You either love 'em or hate 'em, but they serve a valuable purpose as long as you take a disciplined approach in using them. The whole point is to identify and agree on the key elements of the deal. Once mutually agreed, the LOI sets the framework for the drafting of the loan, the purchase and sale agreement or lease, as the case may be. It will shorten the overall negotiation time because your counterpart or their attorneys won't be re-visiting those deal points. Those who try to re-open the discussion have to be very persuasive once they've said otherwise.



If you are going to use an LOI, insist upon all communications leading up to its finalization being written (or phone calls and face-to-face meeting discussions promptly reduced to writing). Failing to stick to that approach can make things actually take longer since most conversations tend to address just one element or another. If you don't get the issues in writing or fail to incorporate them into the LOI framework, you lose the intended benefit of having an LOI in the first place.

Everyone knows to assert before the signature blocks that the LOI is non-binding and the parties are not obligated to proceed with the contemplated transaction until a mutually-acceptable document (loan, PSA, lease, etc.) has been produced, executed and delivered by both parties. That is necessary, but not sufficient. The prudent party clearly establishes the absence or existence (and duration) of any exclusivity period applicable to the discussions or suffers from wondering if there will ever be a deal, whether the deal may get taken by someone else or whether they can pursue alternatives in parallel.

If you have the hot location and multiple offers coming your way, you don't want to tie yourself up with tire-kickers. You can take the auction approach, where you invite written offers until a specified time and indicate that after that you will select one party with whom to negotiate for a final deal. That has been amply demonstrated in Portland's residential real estate market in recent times, but happens less in the commercial setting. In the latter situation you should state in your LOI to a particular candidate (or send a written counteroffer, if you got the initial LOI from a prospect) that the deal terms you are proposing are valid only until date "X" – then stick to that! If the prospect fails to respond by the deadline or comes back with different terms, be brave and write back that the deal you proposed is off. That allows you to entertain an offer from candidate #2 or to propose a new deal to candidate #1, but reduces the risk that candidate #1 can argue you must deal with them. The nightmare scenario has one (or more) folks pointing to endless meetings, phone calls or emails that suggest you led them to believe they had a deal with you that justified them spending time and money, etc., etc.

Contract Drafting Hints When Dealing With Future Events

The purpose of a contract is to establish a predicted outcome. In the real estate context, particularly leasing, but also in sales, a lease or purchase and sale agreement will have provisions dealing with the current circumstances, but also address matters to occur in the future. The current aspects can be described with great certainty and the consequences being presently known can be easily evaluated and accommodated through negotiation. The further into the future the parties attempt to create a predicted outcome, however, the more difficult it becomes. Neither party can be sure of its own needs so there is a desire for flexibility that puts them at odds. Each party says they merely want to have a



choice...so long as it is the one with the power to choose. Duration elements get traded for rent escalation or concession, etc. Each party would like to be able to choose what it would do when the time comes, but that undercuts the certainty sought by the opposing party; the solution is usually a fragile compromise.

Duties of Restoration Upon Expiration or Early Termination

It is axiomatic that different tenants have different space needs and landlords want to optimize the attractiveness of their buildings to the pool of prospective tenants. At initial construction, the landlord has a vanilla shell to offer to everyone. Following full tenanting, the landlord may have as many different kinds of built-out spaces as it has spaces. Some landlords routinely require up-front that vacating tenants must return the premises to the condition at the time of lease commencement, normal wear and tear and casualty damage excepted. Sometimes the landlord gives itself the right to postpone that obligation of the tenant until the eve of the departure. The landlord who uses the up-front approach can achieve the same flexibility by waiving the obligation at the end if it so chooses, but the tenant can't claim it didn't expect a restoration duty. Obviously, the landlord wants to assess the marketability of the space with the improvements that were allowed during the tenancy.

Where this concept becomes problematic is when it is not clear what the condition was at the time of lease commencement. Was it the bare concrete floor and visible demising wall studs showing when the tenant toured during lease negotiations? Was it after completion of the agreed-upon landlord's work? Was it the condition after the initial TI work done for the tenant pursuant to an allowance by the landlord? Was restoration and removal only applicable to the alterations performed in the space following move-in? One helpful technique is to include photographs of the expected condition to be achieved at termination or early expiration. Since that condition may not exist at the time of the lease execution (perhaps some early amount of build-out will be permissibly left), the lease can provide that the parties will photograph the space when that condition is achieved and that those photos will become part of the lease. This photographic exhibit approach is particularly valuable when a new landlord takes ownership. It also is helpful when the parties fail to expressly revisit the restoration obligation at the time of tenant lease assignments or lease renewals or combinations of both, e.g., when did the lease commence for the tenant who has renewed or extended its lease twice, but came into occupancy via assignment? What constitutes the condition of the premises at the commencement of the successor's occupancy? Obviously, it is not easy to "do what you say" if you didn't say anything in the first place...



Rights of First Refusal

One of the most common aspects of uncertainty in the leasing context has to do with the size and/or location of the premises. What is adequate for today's fledgling business tenant may not be in 5 years if things go well, but because they know moving is a major and costly interruption, they want the assurance of an ability to expand into that adjacent space they can't afford today. The landlord wants to rent as much of the space it has available today, but knows it may lose the tenant if it can't promise an expansion opportunity later, and so it begins. Something has to give. The common solution is a right of first refusal (ROFR) or a variant, a right of first offer (ROFO).

The challenge for any drafter of such a provision is to fully and clearly define the scope of the subject matter and the mechanics of its implementation. E.g., is the potential expansion area a particular space or merely the right to an amount of space on the same floor, in the same building or same business park? [Practice tip warning – today the adjacent space is called Suite 500, but by the time the opportunity to exercise the right arises, the building has been re-configured and Suite 500 is half its original size or otherwise does not exist as it did at the lease commencement date – maybe it no longer has direct access to a hallway, etc. – what should the expectations and solutions be? Maybe the landlord concedes the costs of relocating the tenant to an entirely new space elsewhere in the building or park to provide the expanded premises the tenant expected in exchange for the landlord's flexibility to demise Suite 500 differently...].

The mechanics of implementation of ROFRs or ROFOs are possibly even more daunting than addressing all the physical aspects. In the classic formulation, the landlord can market the affected space and if it obtains a legitimate offer from a third party it must present that proposal to the tenant holding the ROFR. The ROFR tenant is given a specified period of time to exercise the ROFR and take the affected space on the terms and conditions of the offer or decline and allow the landlord to lease the space to the third party. One major objection of landlords to granting ROFRs at all is that the very existence of the ROFR diminishes the marketability of the affected space. Third parties are reluctant to invest the time and effort negotiating with the landlord if the bargain they strike can be lost to the holder of the ROFR. This is where the variant ROFO can offer some limited benefit to the landlord. Instead of being required to wait for a third party willing to make a legitimate offer, the landlord can trigger the ROFO by advising the tenant that the space is now available on terms specified by the landlord. If the tenant declines to exercise the ROFO, the landlord is at liberty to market the space and close a lease with anyone else so long as the terms are no more favorable than those presented to the ROFO holder.



There are numerous trouble areas and permutations in the ROFR or ROFO context, but the biggest problem of all for landlords who have granted them is REMEMBERING they did so. Particularly if you have numerous properties or you've purchased a property and overlooked its existence in your own due diligence. A few of the drafting problems are: Is the ROFR or ROFO one-time only opportunities or do they continue to exist (or be revived) if the offer was initially declined by the tenant holder, but the landlord fails to enter into a lease with the identified third party offeror or the landlord isn't diligently marketing the premises? What if all the business points mentioned in the ROFR's lease are not addressed in the third party offer? Is the ROFR personal to the original tenant or can it be assigned with the lease?



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Commercial Lease Disputes— Tales from the Court

April 14, 2016

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I. Legal Principles for Interpreting Leases

- A. Leases are contracts, so contract principles apply.
- B. When interpreting contracts, Oregon courts apply a 3-part analysis—

- 1. The court first examines the text of the contract in the context of the document as a whole. If the contract is unambiguous, the analysis ends, and the document is enforced according to its terms.

- a) For example, the following is allegedly ambiguous—

- “During the term of the lease, including any extensions thereof, parking that Landlord has available for customers and patrons of X will also be available for utilization, on a non-exclusive and first-come, first-served basis, by patrons of Y.”

Per the court, “During the term of the lease” is unclear—why is that included?

Based on this, the court concluded that this provision could either mean (a) that Landlord need only provide to Y whatever it provided to X, which could be zero parking spaces, or (b) that Landlord must make available for the entire lease the same number of spaces to tenant that it had when the lease was signed.

Per the court, in order to make it fluid, the language should read—“During the term of the lease, whatever parking is available to X then will also be available to Y” and in order to make it static, the language should read—“During the term of the lease, the parking that is available to X now (*i.e.*, at the time of the lease) will also be available to Y.”

- b) Words are given their “plain meaning,” however dictionary definitions may be given more weight than common usage.
 - c) Grammar used can have an impact on determining ambiguities (practice tip: Watch for errant commas).



d) Extrinsic evidence from the time of contracting may be considered in order to understand the context in which the parties entered into the lease (but extrinsic evidence cannot, in and of itself, create an ambiguity).

2. Where a contract is ambiguous, the court proceeds to the second analytical step, which involves the examination of extrinsic evidence to determine the intent of the parties.

a) This means emails, correspondence, notes from meetings, other agreements, conduct consistent with one interpretation over another, etc. (this can be very expensive to compile and review in litigation).

b) Course of dealing or subsequent conduct is used to support the parties' intent with regard to the contract term at issue.

3. If the intent of the parties is not clear from the extrinsic evidence, then the court applies traditional maxims of contractual construction. Some examples of "maxims of construction" include—

a) A word should be construed in the context of the terms immediately preceding and following it.

b) Do not insert what was omitted nor omit what was included.

c) Contracts are to be construed to avoid internal inconsistencies and to give effect to all terms.

d) Favor specific terms over general terms.

e) Ambiguous terms are construed against the drafter.

f) Ambiguous terms are construed in favor of the party that the term is intended to benefit.

II. Recent Lease Disputes and the Court's Approach to Contract Interpretation

A. Scenario No. 1—Right of First Refusal Dispute

1. Facts—

a) Landlord purchased a commercial building that was fully leased.



- b) Landlord reviewed the leases and knew that Tenant A had a right of first refusal ("ROFR") on other space in the building leased by Tenant B, if it became vacant.
- c) Tenant B wanted to terminate early and its agent negotiated both the early termination and assisted in finding a new tenant for the space. Landlord signed a letter of intent (LOI) setting forth the basic terms of a new lease and termination of the existing lease, and then negotiated a new lease for the space with Tenant C. After the new lease was signed, Landlord gave Tenant A notice of the lease with Tenant C and 10 days to exercise the ROFR. Tenant A attempted to exercise the ROFR under more favorable terms to itself than under the new lease.
- d) Litigation ensued over two issues—first, when the ROFR was triggered and second, whether the acceptance on different terms was sufficient to exercise the ROFR.

2. Lease Provision at Issue—

"21.14 – Right of First Refusal.

Assuming that Tenant is not in default, Tenant shall have the Right of First Refusal (ROFR) on Suite 500 which becomes available February 28, 2019, as the existing Tenant of Suite 500 does not have a renewal option. Tenant shall be required to provide six (6) months prior written notice, no later than August 28, 2018, to exercise this right. Upon receipt of written notice, Landlord shall have ten (10) days to provide Tenant with a written proposal including the rate and other terms for the expansion space. Tenant shall have ten (10) days to provide a written acceptance or rejection of Landlord's proposal. Rejection of the proposal shall not terminate Tenant's Right of First Refusal to Suite 500.

If Tenant exercises the ROFR **during the first twelve (12) months** of their lease term **(as a result of default or early termination of the existing lease)**, all terms and conditions of the lease including the then-current lease rental rate schedule shall remain the same, although the initial interior improvement allowance and rental concessions (free rent period) will be prorated for the balance of the term.



If Tenant exercises the ROFR **after the first twelve (12) months** of the term, the rental rate, interior improvement allowance, and other concessions will be subject to the then-current market conditions (as defined by the terms which Landlord is willing to agree with another tenant for such space). If Tenant exercises the ROFR and there is less than thirty-six (36) months remaining on the original lease term, the original lease term will be extended to a minimum of a thirty-six (36) month term. *The ROFR will be triggered by a proposal from a prospective tenant to Landlord for the subject space which Landlord is ready and willing to accept.*

Tenant will have ten (10) business days from receipt of Landlord's notice to either accept the space in accordance with the financial terms identified herein (if during the initial twelve (12) months of the term) or in accordance with Landlord's offer based on the then-current market terms and conditions (if after the initial twelve (12) months of the term)."

3. Issues—
 - a) Whether the ROFR triggered when Landlord entered into the LOI with Tenant C or when the lease was in a form that Landlord was ready to sign.
 - b) Whether Tenant A adequately exercised the ROFR when, after it was given notice of the lease terms with Tenant C, attempted to exercise based on the more favorable terms in its lease.
4. The Court's decision—
 - a) The ROFR was not ambiguous.
 - b) The ROFR was not triggered by the LOI because additional material terms needed to be negotiated.
 - c) Tenant A did not exercise under the ROFR because it did not accept the terms of the lease with Tenant C within 10 business days.
5. Lessons learned—
 - a) Avoid ROFR's whenever possible.
 - b) If you have an ROFR in a contract, make sure that you give notice and comply promptly.



- c) If you buy a building, make sure you know what is in each lease.
 - d) Create a check list for each tenant including all ROFR rights and make sure that an action of the Landlord will not trigger the ROFR right.
- B. Scenario No. 2—FED for Failure to Pay Rent during Build Out
- 1. Facts—
 - a) Tenant was paying rent under a lease and was in the process of building out a restaurant space when it stopped paying rent and failed to satisfy other obligations under the lease—e.g., providing sufficient insurance to cover its use of the space and allowing its contractors to lien the property.
 - b) Landlord sued in an FED to evict the tenant.
 - c) Tenant filed a concurrent breach of lease case and sought a preliminary injunction to prevent landlord from evicting tenant from the space.
 - d) Tenant’s claims were based on the argument that landlord had not completed all of its prerequisites under the lease to trigger commencement of rent payments (meaning that prior rent payments were not due and there was no obligation to pay additional rent until landlord’s prerequisites were satisfied), and that landlord had interfered with the buildout of the space and frustrated tenant’s schedule to complete and open the restaurant by a date certain.
 - 2. Lease Provision at Issue—
 - a) The original lease stated that rent payments were to commence on the later of February 1, 2014 or the date that landlord delivered possession with landlord’s work complete.
 - b) However, the parties executed lease amendments and other documents which included acknowledgments by the tenant that landlord had met all of its contingent obligations under the lease.



c) Examples—

(1) "This Amendment shall also confirm that the Commencement Date [of the lease] began on March 1, 2014."

(a) Thus, the parties expressly confirmed that the lease had commenced already;

(b) Tenant waived the completion of landlord's work as a precondition to commencement; and

(c) The parties substituted a date certain for commencement rather than the prior contingent commencement date.

(2) The parties entered a separate payment plan agreement that provided—

"Tenant acknowledges that Landlord is not in default of Lease and that Landlord has performed all of Landlord's obligations under the Lease of an inducement nature, including, without limitation, the performance of all Landlord's obligations with respect to the condition of the Premises and the delivery of the Premises to Tenant."

3. Issues—

a) Whether tenant could raise landlord's lack of compliance as a defense to failing to pay rent.

b) Whether tenant could raise equitable defenses to a statutory obligation to pay rent under ORS Chapter 91 (relating to Landlord/tenant relations).

c) Whether tenant waived its right to assert that landlord failed to comply with its obligations under the lease or that rent commencement had not yet begun in light of the amendment and separate agreement acknowledgments.



4. The Court's decision—
 - a) The separate breach of contract action and injunction request were improper because there was a pending FED action and all claims had to be brought there.
 - b) Although there are limited defenses in an FED action, tenant was able to argue that it signed the amendment and separate agreement under fraudulent circumstances.

The case settled out of court with the parties agreeing to terminate the lease, tenant further agreeing to vacate the premises and remove its FF&E, and restore the premises to pre-buildout conditions. Landlord agreed to waive rent in arrears and paid for some costs associated with the move-out.

5. Lessons learned—
 - a) From the tenant's perspective, pay rent, even under protest, while you challenge the propriety of the rent. Do not withhold payment until the dispute is resolved—you can lose your right to challenge landlord's conduct.
 - b) From the landlord's perspective, know what your obligations are under the lease to ensure that all conditions precedent are satisfied before charging rent.

C. Scenario No. 3—Violation of Key Store Tenant Obligations

1. Facts—
 - a) Mall owner leased space to a national retailer.
 - b) Owner and retailer had entered into at least two other shopping center leases prior to the lease in question, and used the first lease as the form for the second lease, which in turn was used as the form for the third lease. Terms that were not specifically negotiated were carried over from the prior lease without modification.
 - c) The lease had provisions requiring certain specified retailers (Key Stores) also be tenants of the mall to ensure the proper mix of stores that would attract the retailer's preferred type of customers. Before



the lease commenced, the mall owner needed to have leases in place for 7 Key Stores off of an approved list. Thereafter, the mall owner was required to maintain 8 Key Store tenants in the mall. If a Key Store closed, it could be replaced by a new Key Store off of an approved list, as long as certain conditions were met. If a Key Store was not replaced, then the retailer was entitled to a significant discount in rent until a new Key Store replacement was added to the mall.

- d) The lease also allowed the retailer to terminate the lease early if its revenues were not above a certain threshold—with a penalty of \$200,000 if the mall owner was not in default of the lease and without penalty if the mall owner was in default at the time of termination.
- e) A new owner purchased the mall.
- f) A Key Store tenant closed and the new owner asserted that another tenant from the replacement Key Store list but already in the mall could be used as a replacement Key Store for the purposes of the Key Store provisions. Retailer disagreed and asserted that the mall owner was in default, triggering the reduced rent.
- g) The retailer also gave notice of early termination, but asserted that it did not need to pay the \$200,000 early termination fee because of the Key Store default.

2. Lease Provisions at Issue—

a) Operating Requirement Provision—

“The “Operating Requirements” are satisfied only when (a) one (1) of the following: the Theatre, X or Y (each an “Anchor” and collectively, “Anchors”); plus (b) eight (8) of the Key Stores plus (c) Retailers (excluding the Premises, the Anchor that is open for business and the Key Stores) having an aggregate of fifty percent (50%) (and sixty-five percent (65%) commencing on the first (1st) day of the seventh (7th) month following the Commencement Date) or more of the total GLA of the Shopping Center as constructed at any given time (excluding the GLA of



the premises, the Anchor and the Key Stores) are open for business in the Shopping Center). Notwithstanding the preceding sentence, if more than one (1) of the Anchors is open for business or more than eight (8) Key Stores are open for business, the smallest of such Anchors and the eight (8) smallest of the Key Stores, as applicable (based on the GLA of such Anchors and/or Key Stores), and the GLA of such Anchors and/or Key Stores shall be excluded for purposes of clause (c) of this Section 14.3(A). An "Operating Requirements Failure" occurs when the operating Requirements are not satisfied."

b) Key Store Replacement Provision, in part—

"Notwithstanding the foregoing, Landlord may replace a Key Store vacating its premises with another Retailer for purposes of satisfying the Operating Requirements without tenant's consent if: (i) the substitute Retailer is one of the national or regional Retailers identified on Exhibit G (the "Substitute Key Store List"); (ii) *such substitute Retailer is required to initially open and operate for retail purposes in at least ninety percent (90%) of the GLA of the vacating Key Store's premises under the tradename identified on the Substitute Key Store List; and (iii) Landlord notifies Tenant in writing of the substitution promptly following the execution of such substitute Retailer's lease and provides evidence reasonably acceptable to Tenant that the conditions for such substitution were met. Tenant's right of approval under this Section is solely for the purpose of determining whether the substitute Retailer qualifies as a Key Store under this Article, and is not intended to impair or restrict the freedom of Landlord to enter into leases or operating agreements with any party with whom Landlord desires in the exercise of its sole and absolute discretion."*

3. Issues—

- a) Whether a replacement Key Store needed to move into the same geographic space in the mall that was previously occupied by the vacating Key Store tenant.



- b) Whether the replacement Key Store lease needed to be provided to the tenant when it was signed or when the mall owner decided to use that lease to satisfy the Operating Requirements provision in the lease.
 - c) Whether, based on the above, tenant should have been charged full rent or reduced rent, and whether tenant was properly charged the early termination fee.
4. The Court's decision—
- a) There was no geographic requirement in the lease requiring that the replacement Key Store take over the same space vacated by the exiting Key Store.
 - b) Mall owner needed to provide a copy of the replacement Key Store's lease at the time it was entered into, and not when the mall owner decided to use that tenant as a replacement Key Store.
 - c) Because mall owner did not provide notice of the replacement Key Store lease to tenant at the time the replacement lease was executed, the mall owner was in breach at the time tenant exercised its right to early termination.
 - d) Therefore, mall owner should only have collected reduced rent and should not have collected the early termination fee.
5. Lessons learned—
- a) When you buy a leased property, know what is in your leases. Check with the prior owner and lease negotiation files.
 - b) If there is a dispute as to whether a certain action cures a default, take further action to ensure that the default is cured (here, new mall owner could have sought to lease a space in the mall to a new replacement Key Store rather than just relying on its position that an existing Key Store tenant would satisfy the Operating Requirements under the lease).

Stories from the Trenches – Keeping Your Construction Project on Track



Christopher M. Walters
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Stories from the Trenches – Keeping Your Construction Project on Track

1. When to Sign Your Team
 - ▶ Consultants
 - ▶ Architect
 - ▶ Contractor

Stories from the Trenches – Keeping Your Construction Project on Track

2. So-Called Standard Forms

- ▶ American Institute of Architects
- ▶ Vendor Standard Contracts
- ▶ Developing Your Own

Stories from the Trenches – Keeping Your Construction Project on Track

3. Exhibit Bombs

- ▶ Scope of Services
- ▶ Conditions and Assumptions
- ▶ Inconsistencies

Stories from the Trenches – Keeping Your Construction Project on Track

4. Look Out for Limits on Liability

- ▶ Waiver of Consequential Damages
- ▶ Waiver of Insured Claims
- ▶ Time and Dollar Limits

Stories from the Trenches – Keeping Your Construction Project on Track

5. Lien Latency

- ▶ Liens Track Back
- ▶ Notices (Right to Lien and Nonresponsibility)
- ▶ Lien Waivers
- ▶ Lien Bonds

Possibilities and Pitfalls: Choosing an Entity While Avoiding Litigation in Real Property Transactions



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Possibilities and Pitfalls

1. Factors to Consider in Choosing an Operating Entity

- ◆ Nature of the real property assets (land and improvements)
- ◆ Business purpose in acquiring real property assets
- ◆ Length of time assets will be held
- ◆ Desire of owners to receive and use profits and losses
- ◆ Nature and number of owners
- ◆ Nature and number of employees
- ◆ Preferences of any applicable lender

Possibilities and Pitfalls

2. Entity Choices

a. C Corporation

i. Pros

- Limited liability for the obligations of the entity (subject to personal guaranties and “piercing the corporate veil”)
- Employee benefits paid by entity are deductible as business expense of entity and not includable as gross income of the employee
- No limit on the nature of investors

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Possibilities and Pitfalls

ii. Cons

- Taxation at corporate and owner levels
- Corporate losses not deductible by owners
- Need to respect corporate formalities

b. S Corporation

i. Pros

- Pass-through treatment of entity profits results in only one level of taxation
- No self-employment tax on profits in excess of a “reasonable” salary
- Limited liability for the obligations of the entity

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Possibilities and Pitfalls

ii. Cons

- Not more than 25% of total income can come from passive investments, such as rent
- Corporate losses are deductible to extent of owner's investment (capital + loans made to entity) only
- No more than 100 shareholders are permitted, each of which must be a real person and U.S. citizen or permanent resident
- Each owner's percentage of voting power and profits and losses must be identical to his percentage of equity ownership
- Only one class of stock is permitted (but voting and non-voting stock is OK)

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Possibilities and Pitfalls

c. Limited Liability Company

i. Pros

- If election is made to be treated as a partnership or S corp for tax purposes, pass-through treatment of entity profits results in only one level of taxation
- All entity losses are deductible by owners
- Limited liability for the obligations of the entity
- Fewer formalities
- More flexible management and capital contributions

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Possibilities and Pitfalls

- Limits on transferability of equity interests make it difficult for a creditor to foreclose
- An owner's entitlement to a voting power and percentage of profits and losses can vary from each other and from its ownership percentage
- ii. Cons
 - Owners may have to pay self-employment taxes on all profits received (with an exception for rental income)
 - Some jurisdictions impose revenue taxes on LLCs that do not apply to corporations
 - In some states, any business that requires a state license, certification or registration cannot be organized as an LLC

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Possibilities and Pitfalls

- d. Limited Partnership
 - i. Pros
 - Pass through treatment of entity profits results in only one level of taxation
 - Limited partners have limited liability for the obligations of the entity
 - ii. Cons
 - The need to form 2 entities: the general partner and the limited partner
 - The general partner has unlimited personal liability for the obligations of the entity
 - Only the general partner has management rights

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Possibilities and Pitfalls

e. General Partnership

i. Pros

- Pass through treatment of entity profits results in only one level of taxation
- Partners are able to disproportionately allocate profits and losses among themselves (but liability is still joint and several as against third parties)

ii. Cons

- Unlimited personal liability of each partner for the obligations of the entity (and each other partner)
- Each partner has an equal right to participate in management and deal on behalf of the entity

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Possibilities and Pitfalls

f. Benefit Company

i. Background

- New in Oregon as of January 1, 2014
- Can be structured as a corporation or an LLC

ii. Pros

- The "pros" outlined above of the applicable entity choice
- Broader legal protection for "governors" with respect to fiduciary duty (permitting pursuit of social missions in addition to shareholder value)
- Possible "branding" advantage due to ability to focus on "triple bottom line" of people, planet, and profit

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Possibilities and Pitfalls

iii. Cons

- The “cons” outlined above of the applicable entity choice
- Entity must have a business objective of providing “a material positive impact on society and the environment”
- Entity must publish a publicly available annual report describing the extent to which it provided a public benefit and the methods it used to do so
- Requirement for a board of governors means less management flexibility if the entity is structured as an LLC

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Possibilities and Pitfalls

3. The choice is made and owners assume the best...



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Possibilities and Pitfalls

...but disputes come up.



Possibilities and Pitfalls

What can you do to minimize or resolve disputes?



Possibilities and Pitfalls

Call your Ball Janik counselor.





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The New Central City Zoning Code

April 14, 2016

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The New Central City Zoning Code

1. Planning Process

- Between 2010 and 2015 the City developed the Central City Comprehensive 2035 Plan.
- It is based on the 2012 Central City Concept Plan.
- These are comprehensive plans that are largely statements of goals and policies, with some maps showing the general concept. These are not detailed regulations.
- The City has now published the draft of the Central City Zoning Code and Maps. This document is derived from the comprehensive plan documents and sets forth the detailed regulations that implement the plan policies.
- The draft was published in February, as a discussion draft. There will be months of public hearings on the draft and the current schedule provides for the new zoning code to be adopted and effective in 2017.
- The red-lined document showing changes from the current code is 758 pages long, with 20 maps, each of which depicts a specific regulation. Unfortunately for clients, this will mean more visits with your land use attorney.

2. The Regulatory Context

- The original Central City Zoning Code, Chapter 33.510, was adopted in 1988 and has been amended numerous times.
- It is a District Plan which means that it overrides the base zone. So if you own land in the Central City it will have a base zone, say neighborhood commercial, with its own detailed regulations for matters like height, floor area ratio, setbacks. The Central City District Plan overrides all of the base zone regulations.
- Within the Central City District there are 10 sub-districts and 1 sub-area. The zoning regulations will frequently be different from one sub-district to another. [See attached Map 510-1]



3. The Major Changes

- The new zoning code makes numerous significant changes. As you may imagine, overall the regulations have not been reduced.
- Given the limited time I have I can only cover a few of the most significant changes.

4. Floor Area Ratio ("FAR") Limits

- There are few revisions to the map of maximum FAR allowed on a site.
- Map 510-2 is the proposed map of the new FAR limits. In order to see the changes, you have to compare this map with the current version of Map 510-2. Both are attached.
- In general, there are few FAR changes. There is a change in an area in south downtown from 2:1 to 4:1 covering several blocks. There are also changes for the US Post Office 14 acres from 4:1 to 7:1 and for the OMSI area.
- For the first time, minimum FAR's have been established. They are generally one-third of the maximum FAR.
- There are new restrictions on transferring FAR from one site to another:
 - the sending site can't transfer FAR below the minimum FAR, so FAR transfers from surface parking areas are prohibited; and
 - transfers from historic buildings can only occur if the historic building retrofits the building to meet seismic codes and the historic building agrees to demolition review, which could lead to demolition denial. The retrofit has to be completed before the FAR transfer.
- Transfer of FAR from single room occupancy buildings are eliminated.
- A transfer of FAR from one site in a sub-district to another site in that same sub-district is allowed, subject to certain limitations.
- Under the current Code, there are 19 different ways to earn bonus FAR. The concept was that the City would offer an incentive to a developer to do publicly beneficial things by allowing "bonus" FAR. The new Code eliminates virtually all of those bonuses and replaces



them with bonuses only for: affordable housing, historic preservation and donating open space along the river.

- An affordable housing bonus of up to 3:1 can be achieved if the developer makes at least 25% of the bonus floor area affordable to people earning less than 80% of median family incomes and agrees to keep the units affordable for 60 years. So if the developer has a 20,000 site, with a 4:1 FAR, allowing for 80,000 square feet of building, the developer can earn a 1:1 bonus FAR, or 20,000 square feet of floor area, by making 5,000 square feet be affordable housing. If the developer wants the maximum bonus of 3:1 the developer would be entitled to 60,000 additional square feet of building of which 15,000 square feet would have to be affordable.
- Under the current code, just building market rate residential would entitle the developer to a maximum bonus of 3:1 or 60,000 square feet, with no affordable housing.
- Alternatively, the developer can buy bonus floor area by paying a fee to the Portland Housing Bureau. The current proposed fee is \$38 per square foot, and it will be adjusted every three years.
- Among the current bonuses being eliminated are the following:
 - Residential: If you build new housing, you get a bonus of one square foot of FAR for each square foot of housing, subject to an overall maximum of 3:1 and a height bonus. This means you can build a larger and taller building. This was part of the 1988 strategy of getting more housing in the Central City. The goal was 5,000 new housing units. In fact, since 1988, the bonus has been used in 51 projects and a total of 12,000 housing units have been built. The plan does not disclose how many of those units did not use the residential bonus.
 - The new Code is premised on the policy that enough new market rate housing has been created through the incentive offered by the bonus and, therefore, the bonus is no longer needed. The concept is, if there is a market for more market rate housing, it will get built without the bonus. Now the policy is to incent developer to build more affordable housing in the Central City. However, there are a few issues to consider: (i) given that affordable housing generally requires a public subsidy, will the "bonus" of additional square footage for market rate housing in the same building be enough of a financial subsidy to eliminate the need for other public subsidy, (ii) will developers want



to build projects with a mix of affordable housing and market rate housing, (iii) does it make sense to have a lot of affordable housing in the Central City, as distinguished from spreading affordable housing throughout the City, and (iv) given that a lot of housing in the Central City is concrete and steel construction, could more affordable housing be built in lower cost wood frame buildings.

- Percent for Art bonus, where money spent on public art resulted in an FAR bonus is eliminated.
- Roof top garden bonus is eliminated.
- Water features bonus, locker room bonus, and middle income housing bonus, have all been eliminated.
- A new bonus is the Riverfront bonus, which is only available for properties adjacent to the Willamette. Right now, you have to have a 25' set back from mean high waterline. The new Code increases that to 50'. The bonus is only available if you dedicate land to the City beyond the 50' set back. The bonus is 1 square foot of FAR for each square foot of dedicated land.
- The new Code eliminates the bonus for eco roofs. However, another section of the new Code now makes eco roofs mandatory for 70% of the roof top outside of mechanical equipment.

5. Height Limits

- Attached are the current maps showing maximum heights. Bonus height provisions are in the text and apply generally to any site. Those maps are Map 510-3.
- The new Code uses a different approach. Map 510-3 shows maximum heights for all sites in the Central City, while Map 510-4 shows the more limited number of sites that can earn height bonuses. Map 510-4 has cross-hatched areas where you can earn bonus height.
- Let me give you an example. Map 510-3 shows an area east of Portland State with a maximum 100' height, but the potential of a height bonus. Map 510-4 for some of that area shows a maximum height of 460'.
- I can't generalize about changes in maximum height. You have to look at a specific site, and compare the current Map 510-3 to the new maps to understand the impact of the new Code.



- The way to achieve bonus height varies by certain sub-districts. There are special rules for South Waterfront, the North Pearl Sub-Area, and large sites that receive City approval of a Master Plan. For all other sites, the only ways to get bonus height are to build affordable housing, pay into the affordable housing fund, or obtain a FAR transfer from an historic building.
- However, certain height increases must provide a shadow study that shows that the shadow on open space from the taller building would not exceed the shadow cast by a building allowed under Map 510-3. If the height increase is more than 75' you have to show that if there is a residential zone within 500 feet, the shadow would not have "significant negative impacts on houses in the residential zone."

6. LEED Certification

- A new section now requires that all new buildings of at least 50,000 square feet must meet LEED gold level certification. Note, there are alternative certification systems that are less expensive and time consuming, but the City gives no alternative to LEED certification by the US Green Building Council.

7. Drive-Through Facilities

- The old Code prohibited drive-through facilities in only the Downtown, Goose Hollow and South Waterfront sub-districts. The new Code prohibits drive-thru facilities in all of the Central City District.

8. Central Eastside Sub-District

The new Code recognizes that new residential, office and retail uses may be allowed in the Central Eastside Sub-district and that those uses may complain about noise, vibration, odors, glare and truck traffic from industrial and employment uses in the Central Eastside District. The new Code now requires, as a precondition to the issuance of a building permit, that the developer of a residential, office or retail use in the Central Eastside Sub-District record an Industrial Impacts Disclosure Statement. Further, the owner must give a copy of the Statement to all future tenants and buyers and post the Statement in the entry to the building.



9. Transportation Demand Management

Transportation Demand Management is a planning term for reducing: (i) the number of vehicles that come to a building and (ii) the number of single occupancy vehicle trips to a building. TDM is designed to encourage, if not require, the use of alternative modes of transportation.

For the first time, the proposed Central City Zoning Code will require transportation and parking demand management throughout the Central City District as a pre-condition to issuance of a building permit. The City Council has directed staff to develop and implement a TDM program. TDM requirements will apply to: (i) any residential development of more than 10 dwelling units and (ii) any building with 25,000 square feet or more of gross building area, including additions to existing buildings.

The specific TDM regulations will be codified in Title 17 and not Title 33, the Zoning Code. The TDM regulations will be designed to implement the new Transportation System Plan, which will be a separate document. Finally, the Central City District Code will incorporate the TDM regulations by reference. These documents are still being drafted by the staff.

However, the City Council has proposed the following “targets” to be achieved in 19 years, which is 2035.

- The number of miles Portlanders travel by car should be reduced to 11 miles per day on average and 70% of commuters should walk, bike, take transit, carpool or work from home.
- By 2035, the mode share of daily non-drive alone trips will be 70%, meaning only 30% of people will drive alone. That is the target for the entire City. For the Central City the target is 87%, meaning only 13% will commute alone by car.

In order to comply with these TDM regulations, a developer must either: (i) agree to a pre-approved standardized plan, prepared by the Portland Bureau of Transportation or (ii) go through a Transportation Impact Review process. The pre-approved plans will include such things as: secure bicycle parking, public transit incentive of \$50.00 per month, per employee, performance standards for reducing vehicle trips in designated target percentages, and required corrective actions if targets are not met. Developers will have to demonstrate how their building will achieve these goals by 2035 on a straight line incremental basis. The current draft does not include enforcement mechanisms; rather the approach is no building permit unless the developer’s TDM plan is approved, either by adopting a PBOT standard plan or going through Transportation Impact Review.

All of this will be regulated by the Portland Bureau of Transportation. The details of both the pre-approved plans and the Transportation Impact Review have not yet been published.



10. Maximum Parking Ratios

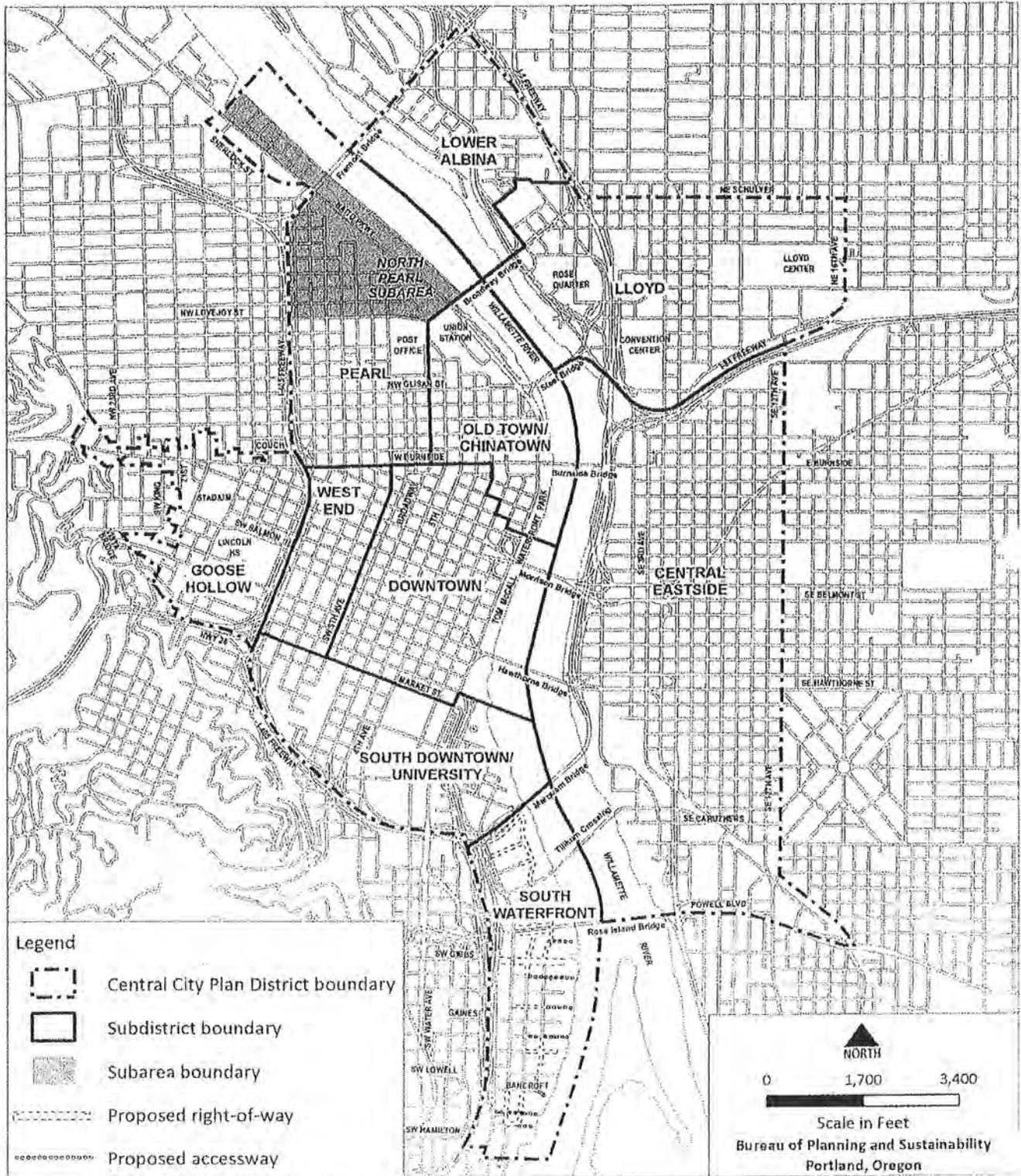
The provisions in the Central City Zoning Code dealing with parking types and parking ratios have been simplified. The new Code reduces the number of types of parking. The types of parking are growth (new development) preservation (parking in garages for buildings with no on-site parking) visitor parking (parking by visitors not employees, usually in structures) and undedicated general parking (existing surface lots). As a starting point, maximum parking ratios vary depending on which parking sector the site is in and what is the type of use. For the Core Area, Maximum parking ratios have been modestly changed: the office maximum ratio has been modestly increased from .7 and .8 per 1,000 square feet to 1.0 per 1,000 square feet; the maximum ratio for residential uses have been modestly reduced from 1.35 per dwelling unit to 1.2 per dwelling unit; and industrial has been modestly increased from .7 to 1.0.

There are new regulations prohibiting access to parking areas or structures. Parking access is prohibited: (i) on 5th and 6th from NW Irving to SW Jackson; (ii) on Naito Parkway from SW Salmon to NW Davis; (iii) on SW Park from Salmon to Jackson; (iv) on NW Park and NW 8th from Burnside to Lovejoy; (v) on Morrison and Yamhill between 1st and 18th; (vi) on any street with light rail or streetcar tracks where access would cross the tracks; and (vii) on any Major City Bikeway, Major City Traffic Street, or Major Transit Priority Street.

Draft Central City Plan District and Subdistricts

Map 510-1

Map Revised Xxxxx, 201X



2/8/2016

Discussion Draft Central City 2035 Plan
Chapter 33.510, Central City Plan District



Legend

-  Central City Plan District boundary
-  Maximum FAR area boundary
-  Area where floor area ratio (FAR) is determined by base zone
-  Proposed right-of-way
-  Proposed accessway

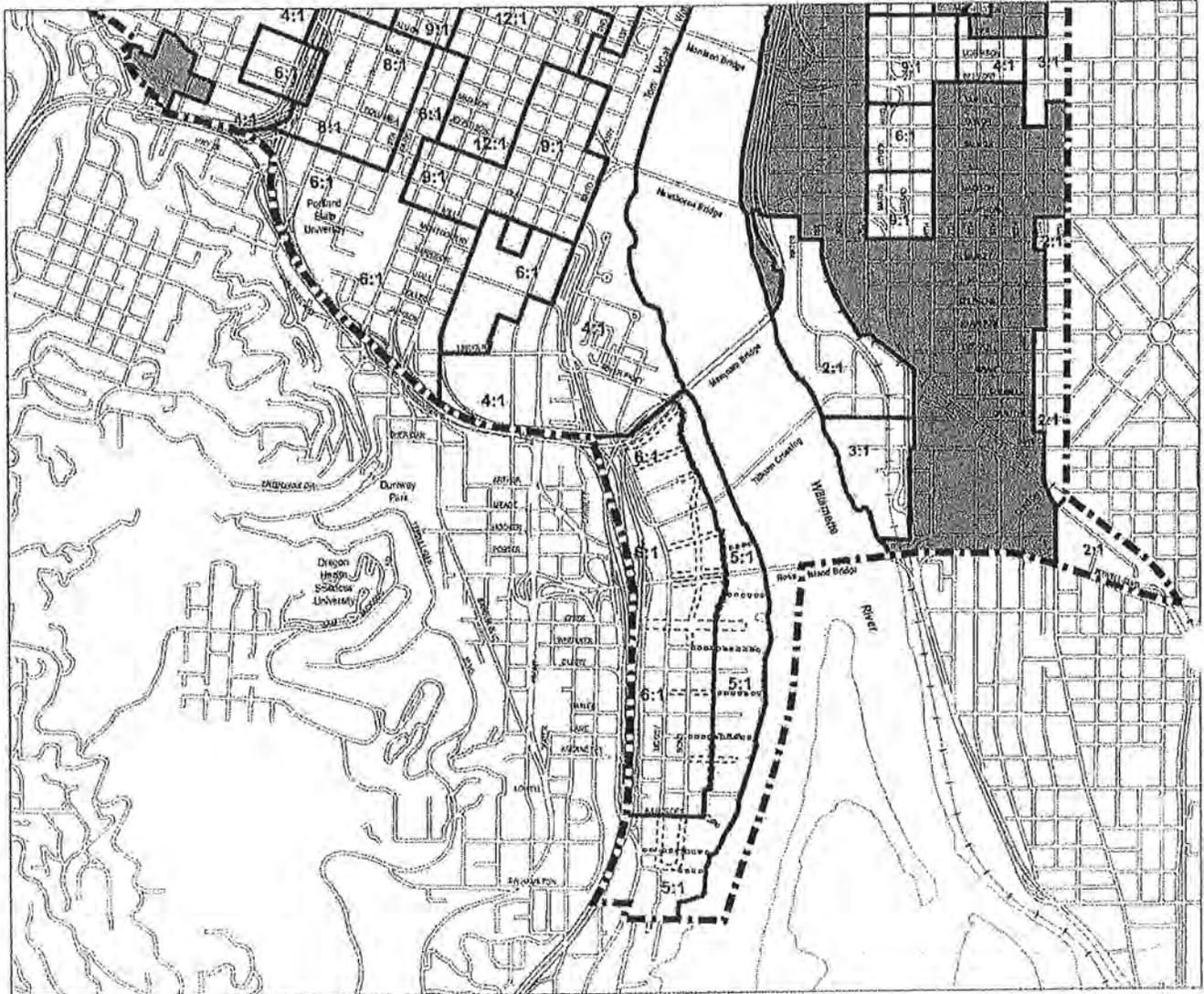
- X:Y Maximum FAR
- X = Gross square foot of building
- Y = Square foot of site
- (X:Y) Residential maximum FAR



Scale in Feet
 Bureau of Planning and Sustainability
 Portland, Oregon

2/8/2016

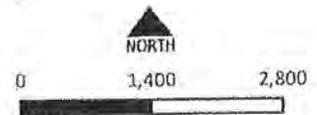
Discussion Draft Central City 2035 Plan
 Chapter 33.510, Central City Plan District



Legend

-  Central City Plan District boundary
-  Maximum FAR area boundary
-  Area where floor area ratio (FAR) is determined by base zone
-  Proposed right-of-way
-  Proposed accessway

- X:Y Maximum FAR
X = Gross square foot of building
Y = Square foot of site
- (X:Y) Residential maximum FAR



Scale in Feet
Bureau of Planning and Sustainability
Portland, Oregon

2/8/2016

Discussion Draft Central City 2035 Plan
Chapter 33.510, Central City Plan District

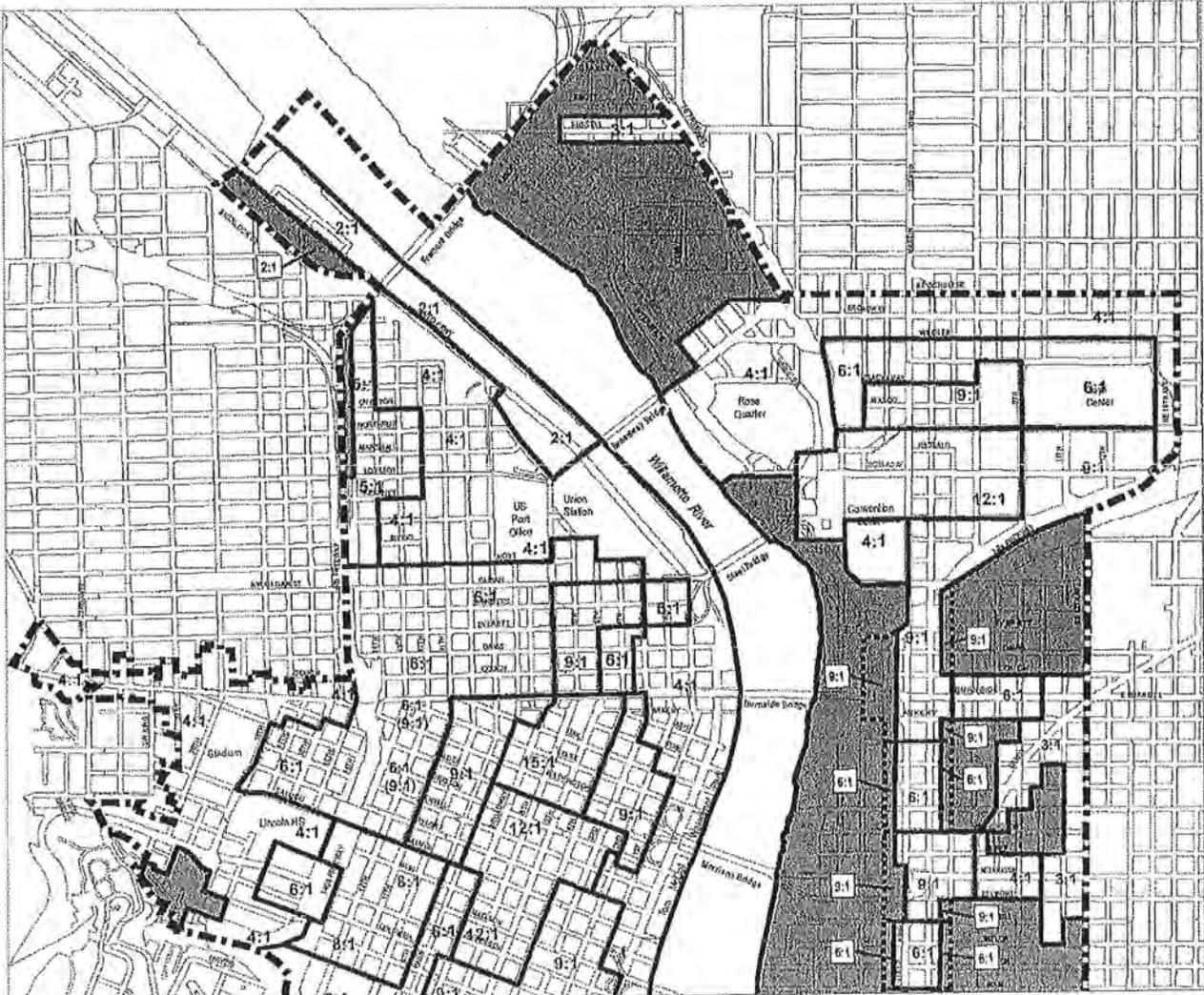
Floor Area Ratios

Map 510-2

CURRENT CODE

Map 1 of 2

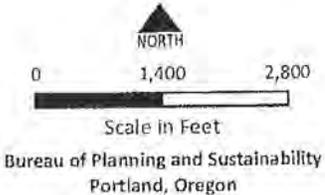
Map Revised March 1, 2015



Legend

- X = Gross square foot of building
- Y = Square foot of site
- X:Y Maximum FAR
- (X:Y) Residential maximum FAR (33.510.56.200.B)
- [X:Y] Allowable FAR when rezoned to EX
- [Shaded Box] Area where floor area ratio (FAR) is determined by base zone
- [Solid Line] FAR area boundary
- [Dashed Line] Boundary of allowable FAR when rezoned to EX

Central City Plan District boundary



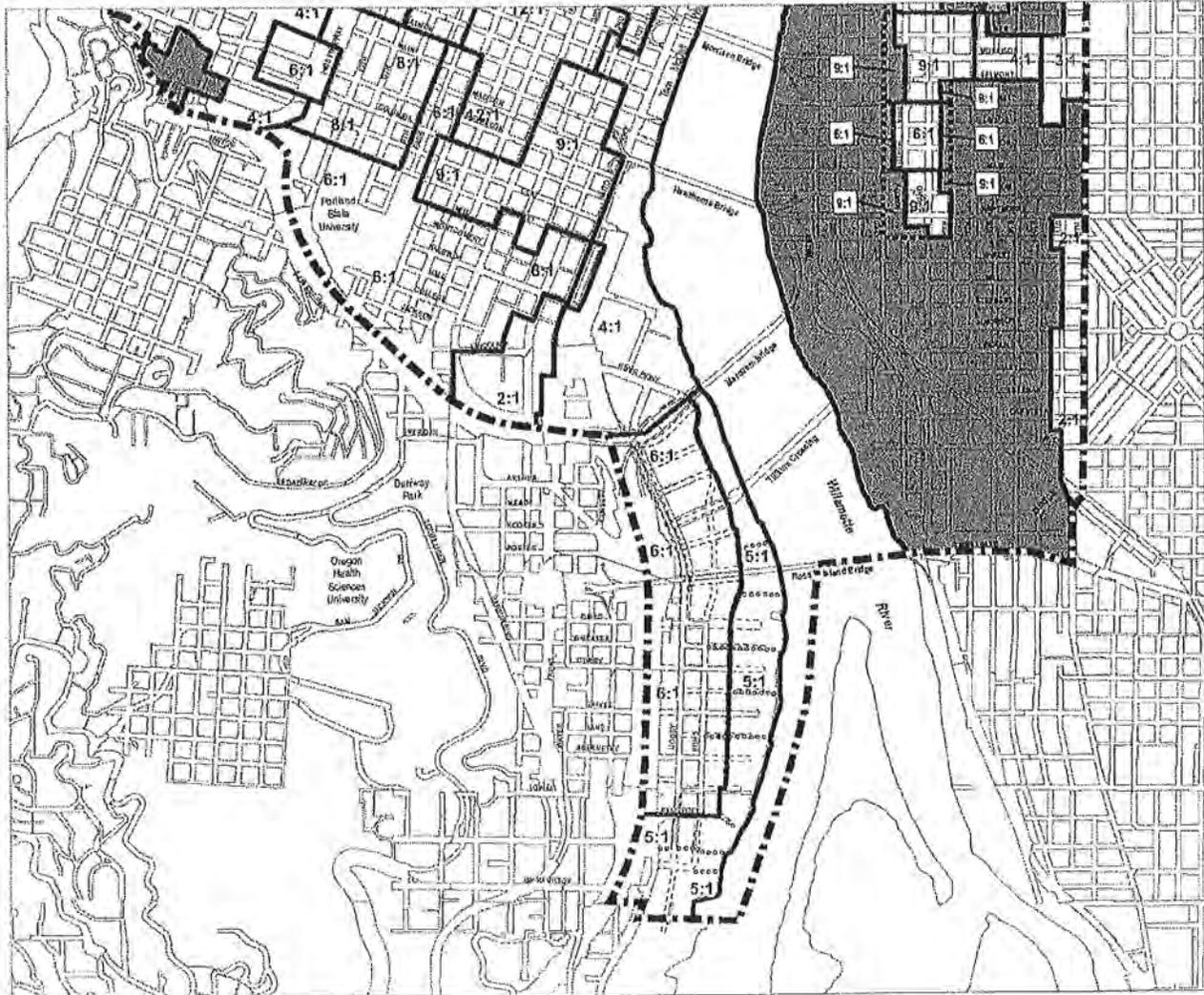
Floor Area Ratios

Map 510-2

CURRENT CODE

Map 2 of 2

Map Revised March 1, 2015



Legend

- X = Gross square foot of building
- Y = Square foot of site
- X:Y = Maximum FAR
- (X:Y) = Residential maximum FAR (33.510.56.200.B)
- [X:Y] = Allowable FAR when rezoned to EX

-  Area where floor area ratio (FAR) is determined by base zone
-  FAR area boundary
-  Boundary of allowable FAR when rezoned to EX

 Central City Plan District boundary



Scale in Feet
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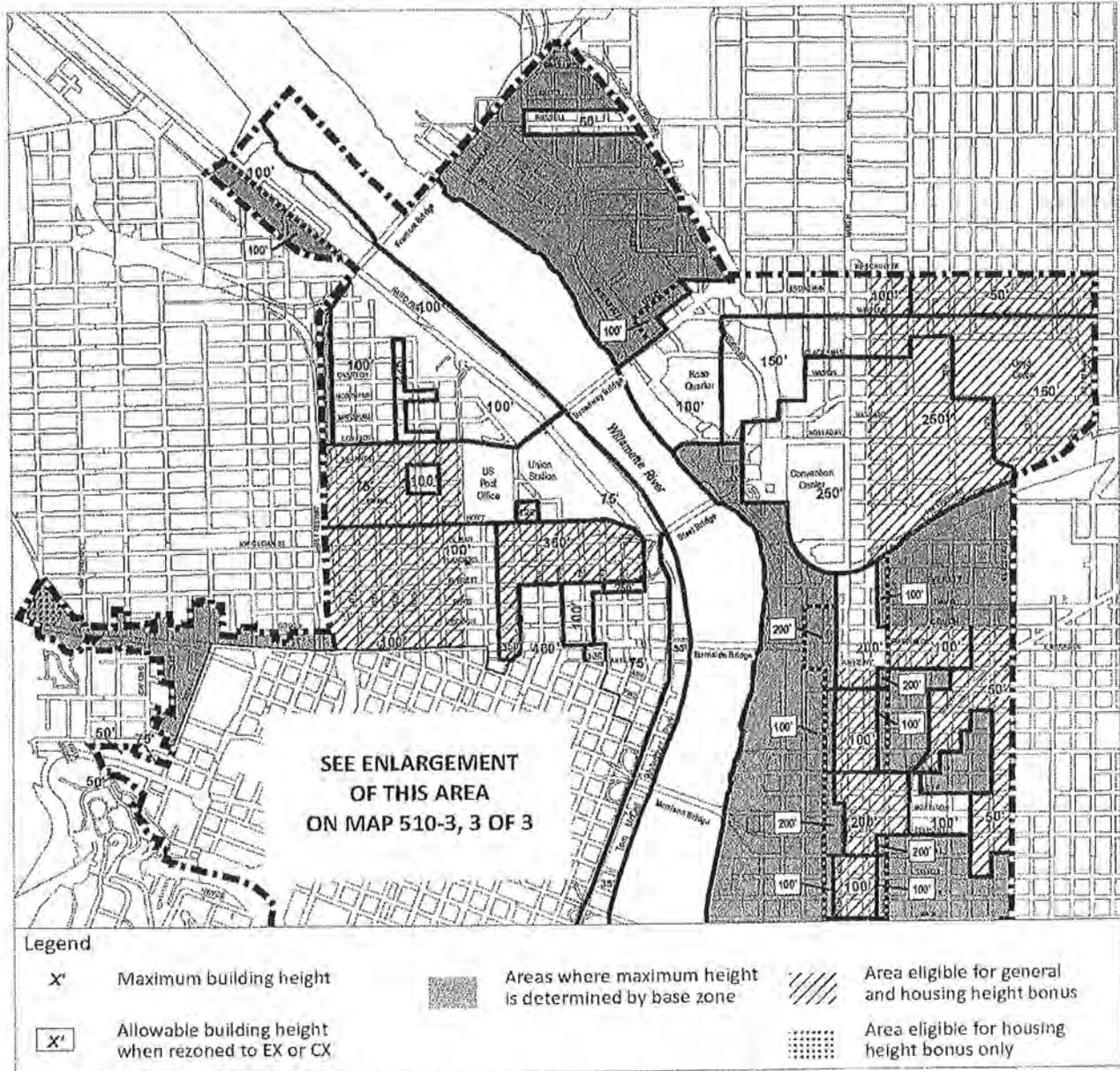
Maximum Heights

Map 510-3

CURRENT CODE

Map 1 of 3

Map Revised March 1, 2015



- Central City Plan District boundary
- Maximum heights area boundary
- Boundary of area when building heights are tied to rezoning to EX or CX

NORTH

0 1,400 2,800

Scale in Feet

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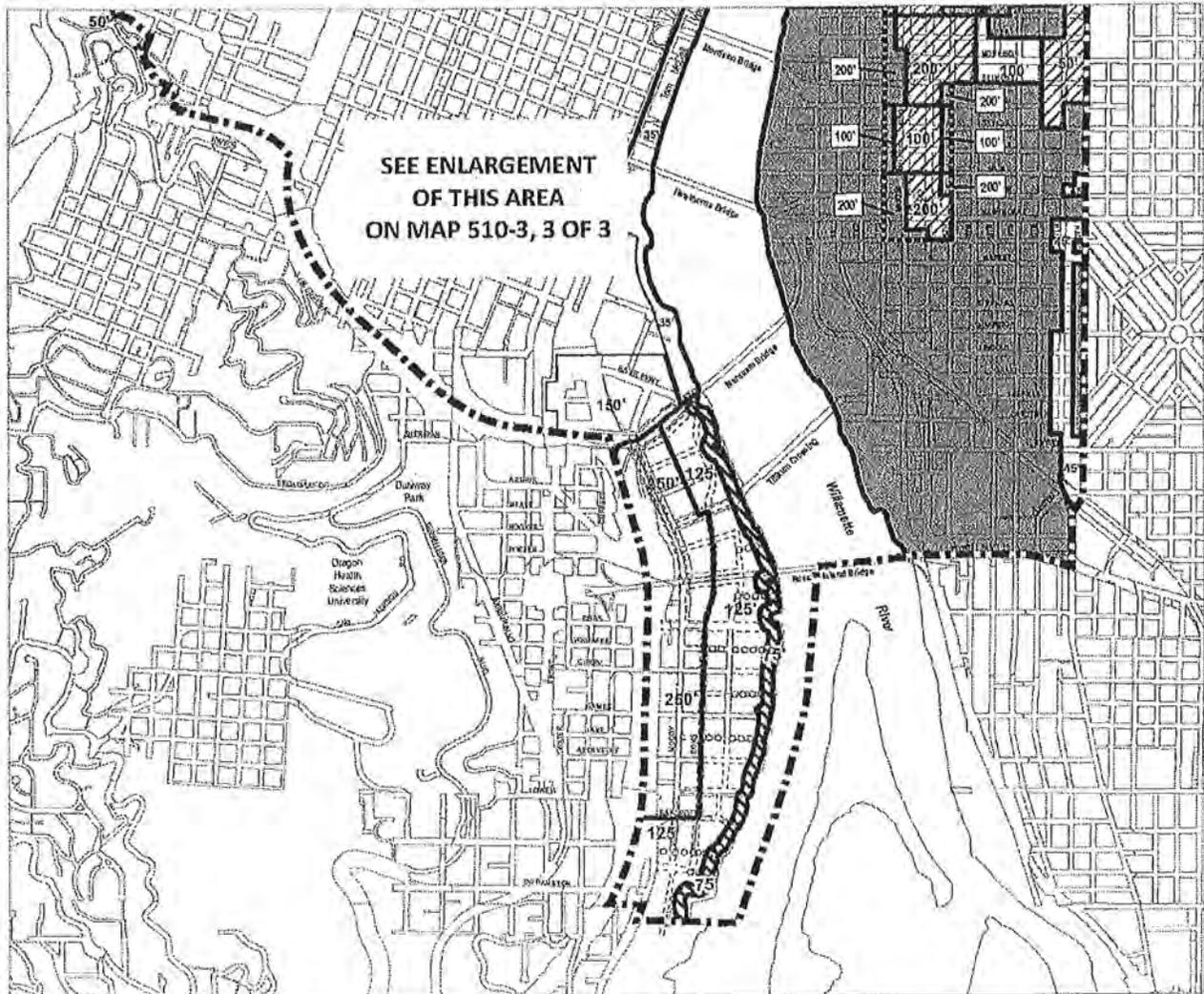
Maximum Heights

Map 510-3

CURRENT CODE

Map 2 of 3

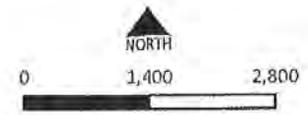
Map Revised March 1, 2015



Legend

- Maximum building height
- Allowable building height when rezoned to EX or CX
- Areas where maximum height is determined by base zone
- Area eligible for general and housing height bonus
- Maximum height limit of 75' for first 125 feet from top of bank
- Proposed right-of-way
- Proposed accessways

- Central City Plan District boundary
- Maximum heights area boundary
- Boundary of area when building heights are tied to rezoning to EX or CX



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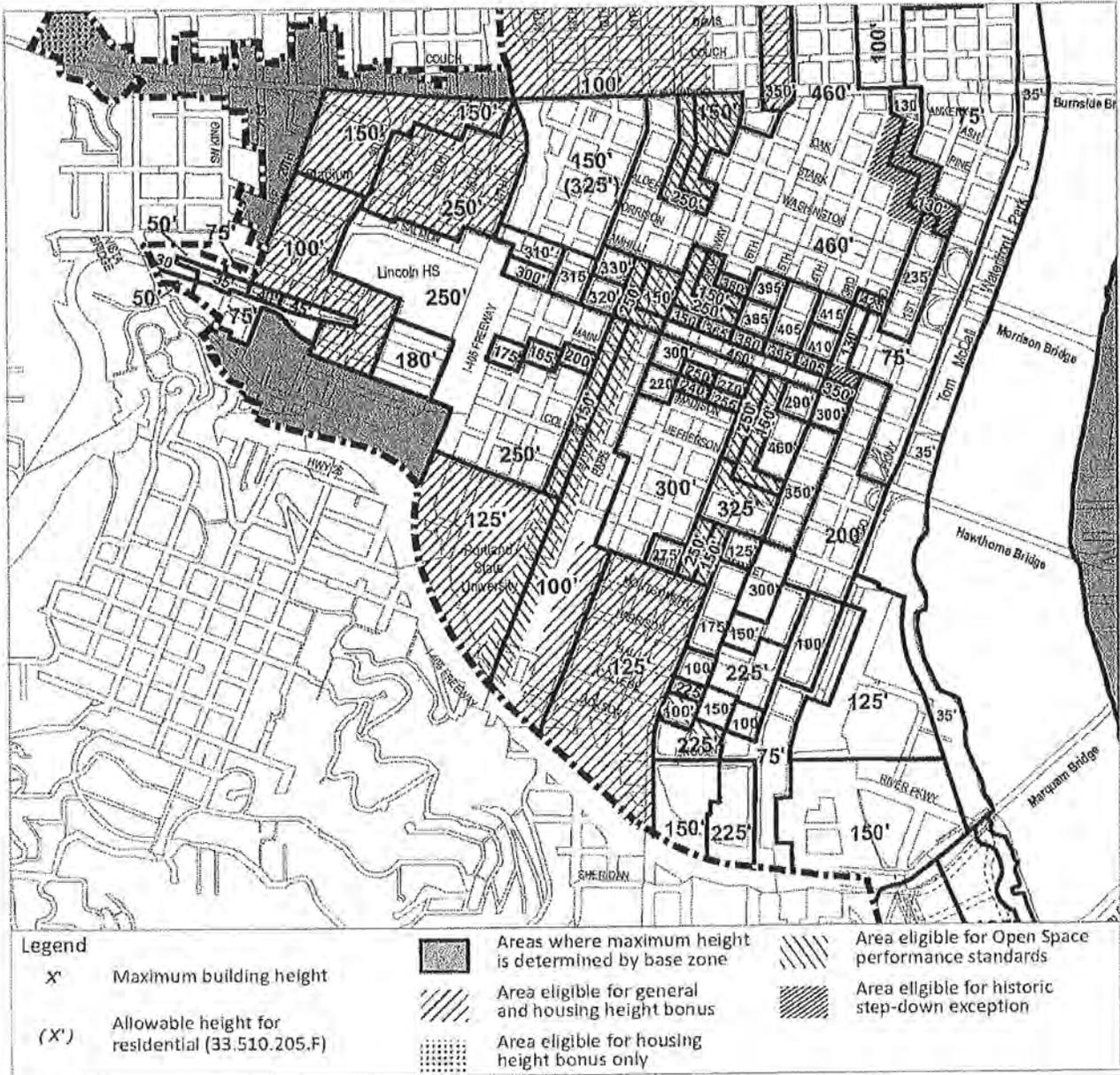
Maximum Heights

Map 510-3

CURRENT CODE

Map 3 of 3

Map Revised March 1, 2015



Central City Plan District boundary

Maximum heights area boundary



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PROPOSED

Map Revised Xxxxx XX, 201X



Legend



Central City Plan District boundary



Maximum building height



Areas where maximum height is determined by base zone



Area eligible for height increase



Maximum height limit of 75' for first 125 feet from top of bank

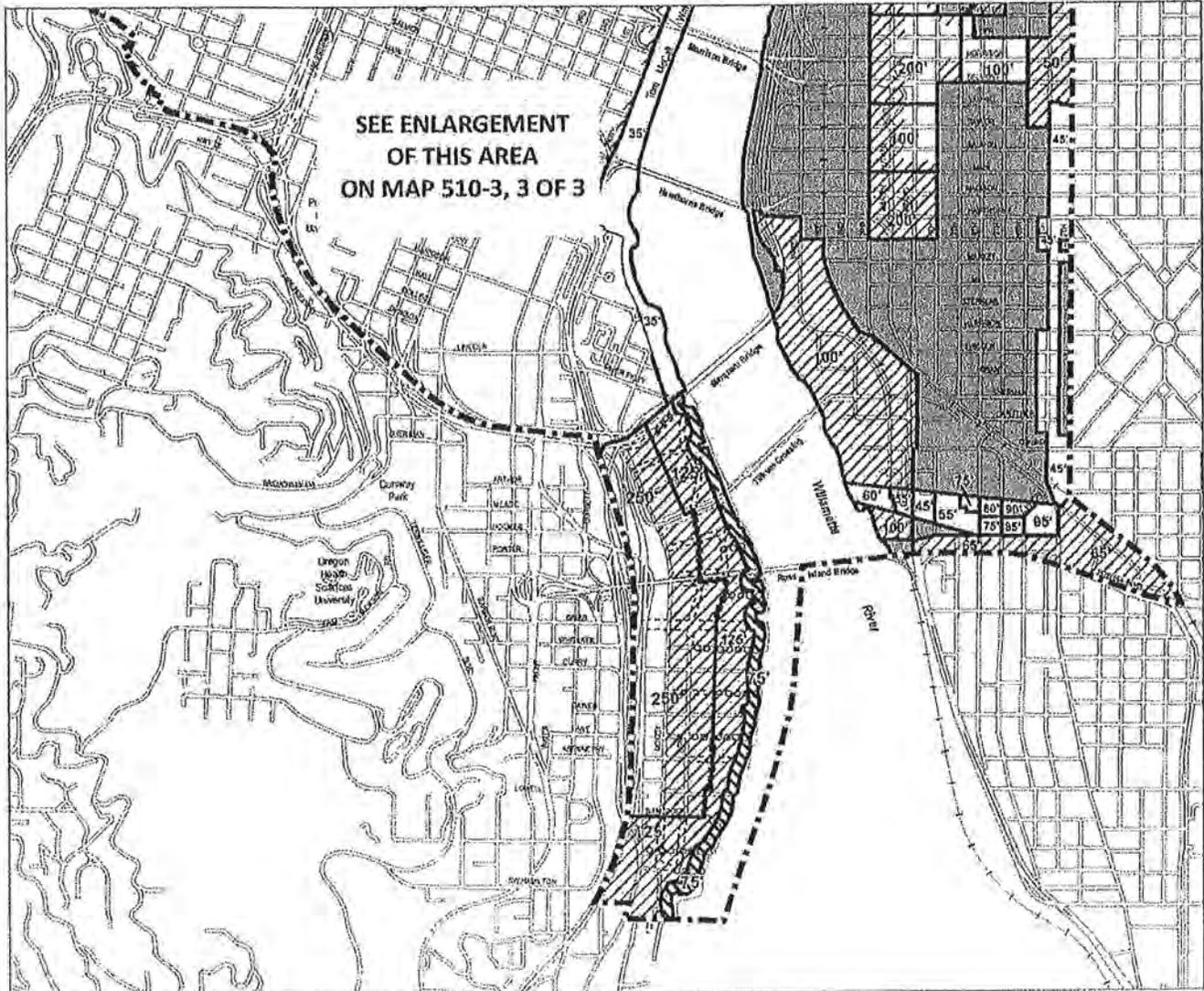
Proposed right-of-way

Proposed accessways



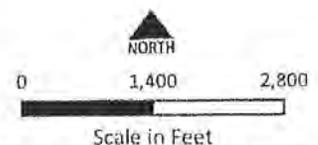
Scale in Feet

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Legend

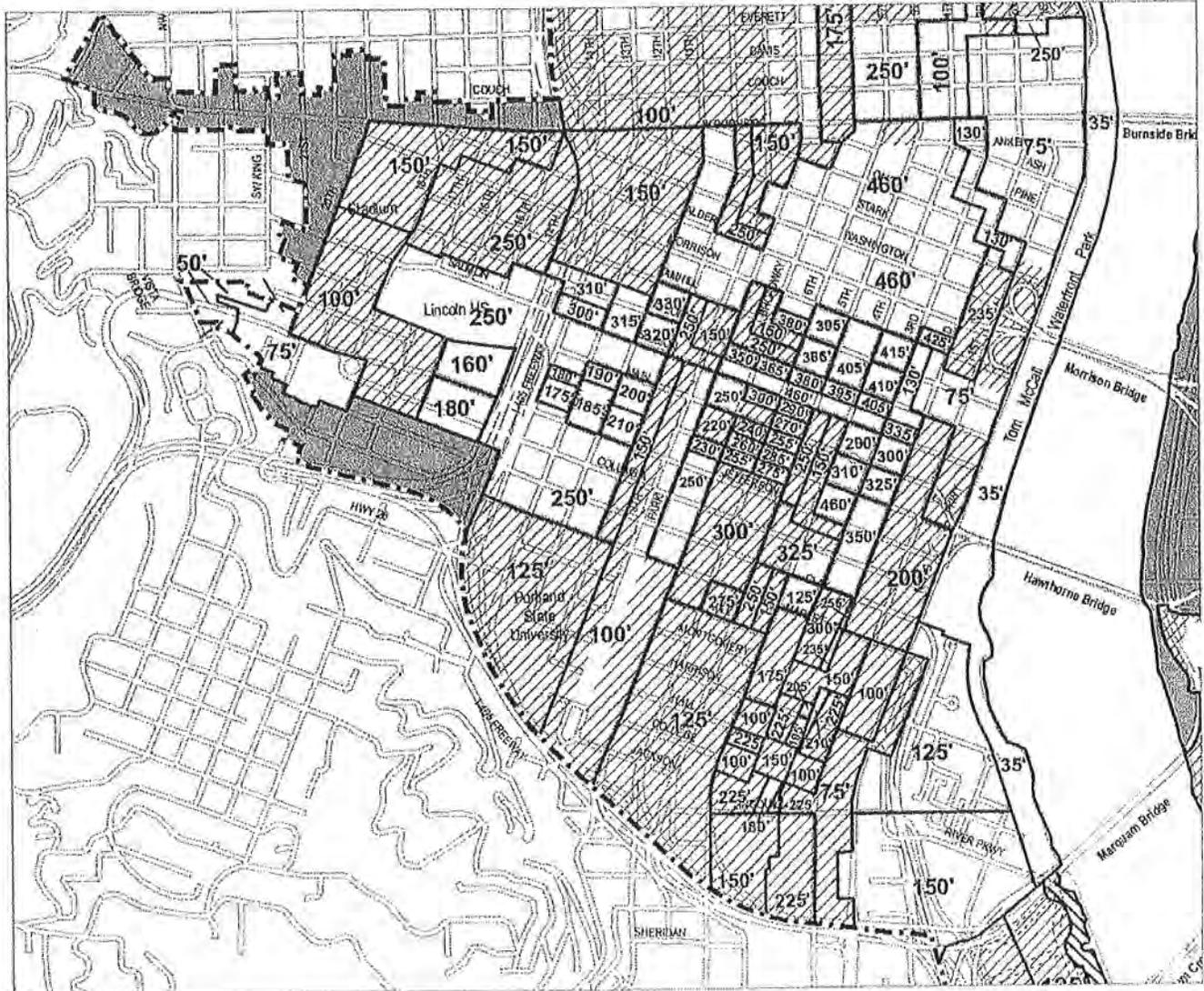
-  Central City Plan District boundary
-  Maximum building height
-  Areas where maximum height is determined by base zone
-  Area eligible for height increase
-  Maximum height limit of 75' for first 125 feet from top of bank
-  Proposed right-of-way
-  Proposed accessways



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Legend



Central City Plan District boundary



Maximum building height



Areas where maximum height is determined by base zone



Area eligible for height increase



Maximum height limit of 75' for first 125 feet from top of bank

Proposed right-of-way

Proposed accessways



Scale in Feet

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Draft Maximum Heights including Eligible Height Increases

Map 510-4

PROPOSED

Map 1 of 3

Map Revised Xxxxx XX, 201X



SEE ENLARGEMENT
OF THIS AREA
ON MAP 510-4, 3 OF 3

Legend

-  Central City Plan District boundary
-  Maximum building height including eligible height increases
-  Areas where maximum height is determined by base zone
-  Proposed right-of-way
-  Proposed accessways
-  Areas where a shadow analysis is required
-  Unlimited height allowed



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Note: See Map 510-16 for additional height opportunity areas in the North Pearl subarea and South Waterfront subdistrict.

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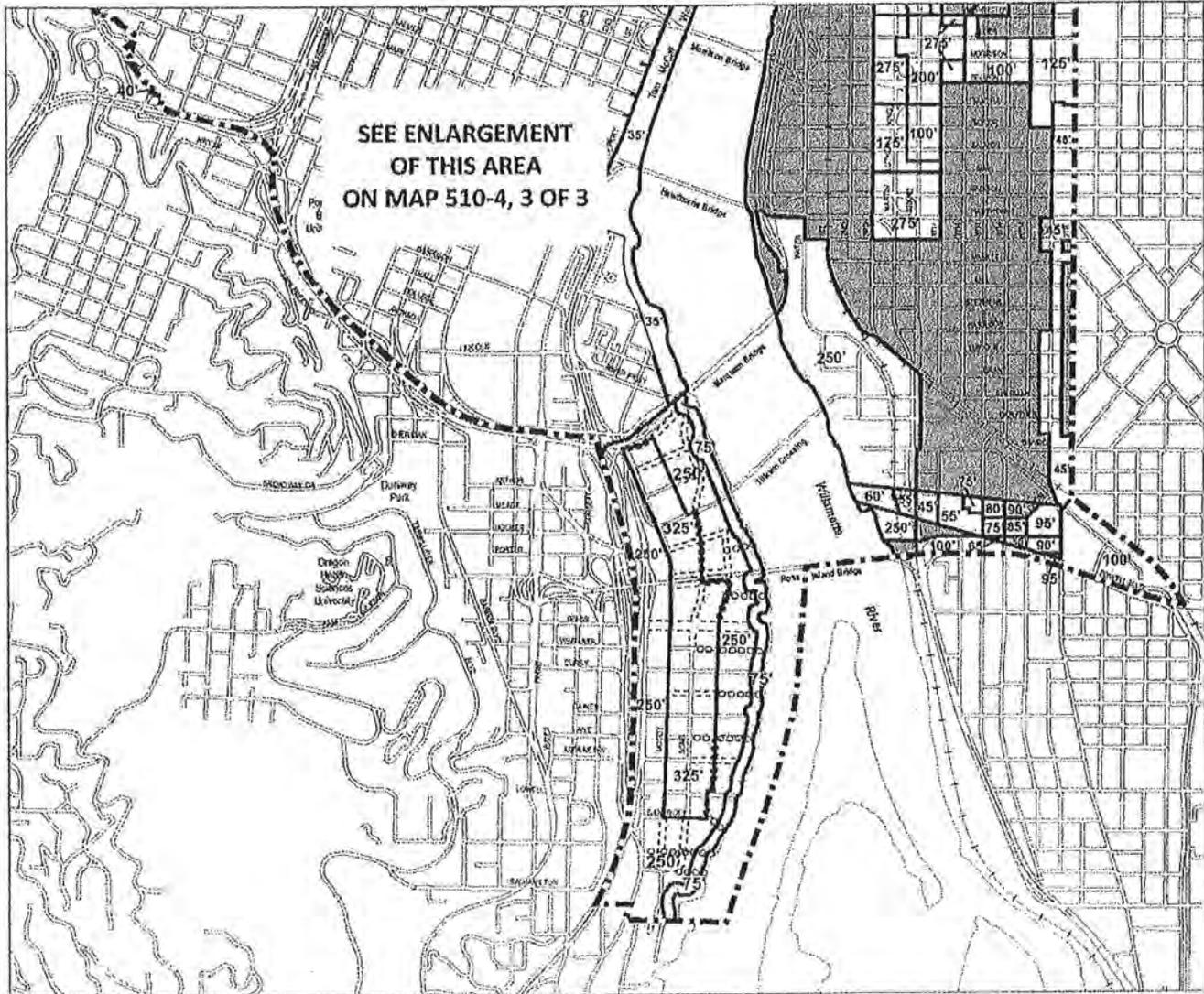
Draft Maximum Heights including Eligible Height Increases

Map 510-4

PROPOSED

Map 2 of 3

Map Revised XXXXX XX, 201X



Legend



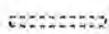
Central City Plan District boundary



Maximum building height including eligible height increases



Areas where maximum height is determined by base zone



Proposed right-of-way



Proposed accessways



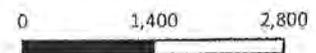
Areas where a shadow analysis is required



Unlimited height allowed



NORTH



Scale in Feet

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Note: See Map 510-16 for additional height opportunity areas in the North Pearl subarea and South Waterfront subdistrict.

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Chapter 33.510, Central City Plan District

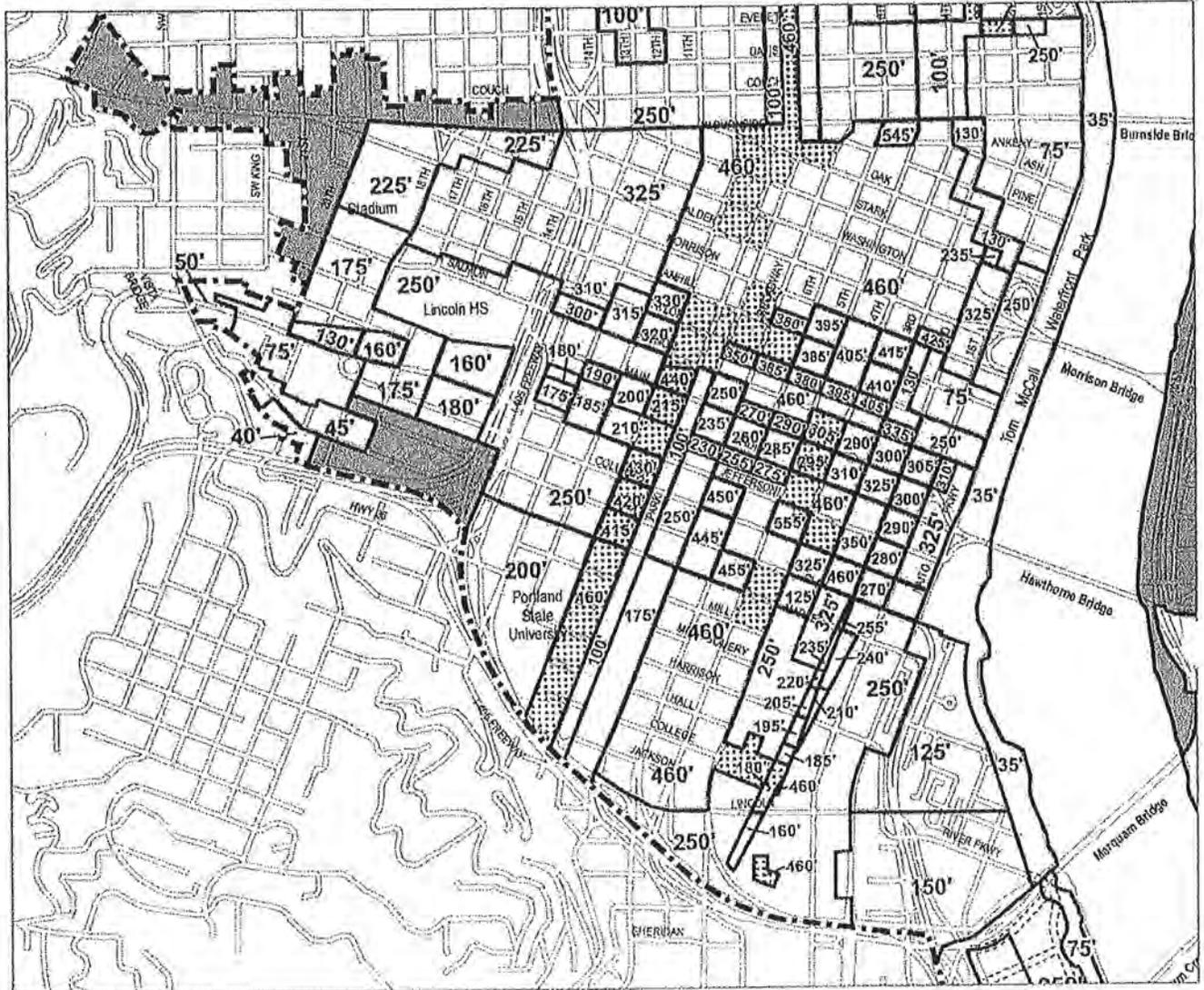
Draft Maximum Heights including Eligible Height Increases

Map 510-4

PROPOSED

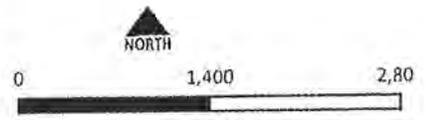
Map 3 of 3

Map Revised Xxxxx XX, 201X



Legend

-  Central City Plan District boundary
-  Maximum building height including eligible height increases
-  Areas where maximum height is determined by base zone
-  Proposed right-of-way
-  Proposed accessways
-  Areas where a shadow analysis is required
-  Unlimited height allowed



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Note: See Map 510-16 for additional height opportunity areas in the North Pearl subarea and South Waterfront subdistrict.

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