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STATE OF OREGON
LEGISLATIVE COUNSEL COMMITTEE

April 29, 2021

Representative Ken Helm
900 Court Street NE H490
Salem OR 97301

Re: Effect of House Bill 2534-A on facially neutral policies of homeowners associations

Dear Representative Helm:

You asked whether the prohibition in A-engrossed House Bill 2534 that prohibits a homeowners association (HOA)[1] from adopting any restrictions within its planned community "based on . . . the number of individuals" occupying a dwelling could be interpreted to outright overturn a variety of development restrictions unrelated to any protected status. You further wanted to know whether the bill could bar HOAs from enacting or enforcing any facially neutral policies and whether there would be any legal effect in adding to the bill a section stating that "Nothing in this 2021 Act prohibits a planned community from adopting, or a government document from containing, a facially neutral housing policy as defined in ORS 659A.425, or a facially neutral land use classification, siting or development standard, that applies equally to all persons."

We conclude it is very unlikely that HB 2534-A's prohibition on discrimination based on the number of individuals who occupy a dwelling would be interpreted to broadly restrict most facially non-discriminatory land use or development standards that impact housing capacity. While it is possible that there are other facially neutral policies that could be unlawfully discriminatory under HB 2534-A, this bill would not materially change the analysis in most instances. Amending HB 2534-A to exclude its applicability to facially neutral housing policies may marginally strengthen the interpretation that the bill does not invalidate most development standards and may also eliminate other possible effects the bill may have on certain policies by homeowners associations that may be facially neutral but are discriminatory in purpose or application.

Legal background:

In Oregon,[2] ORS 659A.421 (2) prohibits a variety of forms of discrimination with respect to housing, including discrimination based on "race, color, religion, sex, sexual orientation, national origin, marital status, familial status or source of income." Prohibited actions include discrimination in advertising, selling, renting, expelling from or conditioning the use of a dwelling. ORS 659A.421 (2) also prohibits coercing or threatening an individual based on a protected status or taking any other

[1] House Bill 2534-A applies equally to both homeowners associations that govern planned communities and condominium associations that govern condominiums, but the focus of your questions and of this opinion is on HOAs.
[2] Federal law, particularly the Fair Housing Act, is also applicable to claims of discrimination related to housing. 42 U.S.C. 3601, et seq. Oregon law is intended to be substantially equivalent to federal law. *See* Staff Measure Summary on Senate Bill 725-A (2007), House Committee on Workforce and Economic Development, 74th Legislative Assembly, https://olis.oregonlegislature.gov/liz/2007R1/Downloads/MeasureAnalysisDocument/5375; *Owens v. Latitude Properties*, 2021 U.S. Dist. LEXIS 61054, at *24 (D. Or., Jan. 20, 2021) (Plaintiff's claims brought under ORS 659A.421 and 659A.425 "mirror the Fair Housing Act claims.").

action to assist or induce another to take a prohibited action. ORS 659A.145 provides additional comprehensive protection against discrimination against individuals with disabilities. These current anti-discrimination laws could entail liability for HOAs based on existing discriminatory language in their planned communities' governing documents, under a theory that retaining obsolete discriminatory language is an unlawful form of discriminatory advertising or intimidation or that it assists others in discriminating while selling.[3]

Actions that could otherwise be considered a "facially neutral housing policy" may nonetheless be deemed unlawfully discriminatory under ORS 659A.425[4] if the disadvantage to a protected class outweighs the business purpose of the policy and the impracticality of adopting alternatives. ORS 659A.425 applies only to transactions involving residential tenancies and therefore would seldom directly implicate the policies or actions of HOAs.

Separately, ORS 93.270 prohibits the use of certain discriminatory language in all conveyances of real estate. This includes language that unlawfully discriminates "by reason of" the protected classes listed in ORS 659A.145 and 659A.421, except that it does not include familial-status or source-of-income discrimination. It also prohibits deed restrictions that limit the use of a home for childcare or residential care or that require roofing materials with insufficient fire rating to comply with state building code. People who acquire properties that violate ORS 93.270 can petition a court to have those restrictions removed by expedited processes established in ORS 93.272 and 93.274.

House Bill 2534-A:

Section 1 of A-engrossed House Bill 2534 would amend ORS 93.270 to insert subsection (2). The new subsection also prohibits certain forms of discrimination but applies only to recorded instruments governing a residential community, namely the bylaws or the declarations of covenants, conditions and restrictions (commonly known as "CC&Rs"). It would include the same protected classes as ORS 659A.145 and 659A.421, but it would also add protections against discrimination against the "number of individuals, including family members, persons of close affinity or unrelated persons, who are simultaneously occupying a dwelling unit within occupancy limits."

Much of the content of the new ORS 93.270 (2) duplicates the requirements of existing law. For example, restrictive covenants explicitly based on race have not been enforceable in the United States since 1948.[5] However, cross references in sections 4 and 6 of HB 2534-A also obligate[6] HOAs and condominium associations, respectively, to review their governing documents and provide associations with an expedited method for updating governing documents to remove provisions that would violate the new ORS 93.270 (2) criteria.

Section 2 of the bill clarifies that the prohibition against discrimination under the new ORS 93.270 (2) applies retroactively to currently existing governing documents, rather than only to documents created after the bill is enacted.

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[3] Under the time constraints necessary in producing this opinion, we did not find any relevant cases that challenge an HOA's retention of unenforced discriminatory language under Oregon or federal fair housing laws.

[4] ORS 659A.425 was enacted as section 2, chapter 36, Oregon Laws 2008, following the repeal of identical language in ORS 659A.424 by sections 15 and 15a, chapter 903, Oregon Laws 2007.

[5] *Shelley v. Kraemer*, 334 U.S. 1 (1948).

[6] Although sections 4 and 6 use the word "shall" to impose mandatory affirmative requirements for associations, the ability to obtain statutory damages and attorney fees under section 3 or 6 of HB 2534 as introduced was eliminated by the adopted -2 amendments. Although a lot owner or potential lot owner aggrieved by the failure of an association to act as required under section 4 or 6 of HB 2534-A may be able to compel action under these sections, more likely ORS 93.272 or 93.274 already provides a more direct mechanism for enforcing the amendments to ORS 93.270 by section 1 of HB 2534-A.

Analysis:

A. Effect of protections for "number of individuals" on development standards

One concern that has been raised[7] is that, based on the addition of the phrase "number of individuals" to HB 2534-A, a lot owner could challenge a variety of prohibitions in HOA bylaws or CC&Rs as indirectly limiting the number of individuals that can reasonably reside on the property. These challenged prohibitions could be myriad, but might include limits on the number of bedrooms, the maximum size of a dwelling, requirements for mandatory setbacks or protections for open space or common areas. The argument would be that any restriction that could limit the dwelling's size or the configuration of the dwelling could thereby limit the number of individuals who could practically or lawfully fit inside and would therefore violate the protections for the "number of individuals" who may occupy a dwelling under new ORS 93.270 (2). Under this argument, whether or not the lot owner intended to increase the occupancy of the premises, the owner could exploit a loophole in ORS 93.270 (2) to infinitely increase the footprint of the development up to the physical limits of the lot, potentially even developing a multi-story apartment complex on what was otherwise designated by the HOA as open space. This argument has a variety of flaws.

First, as demonstrated, such an interpretation taken to its extreme would create an absurd result invalidating much of HOAs' abilities to regulate development. This sweeping change to HOA law is not reasonably contemplated by the legislature and appears nowhere within the purpose of the bill.[8]

Second, the argument also ignores that, for a restriction to be invalid, the restriction must be "*because of* . . . the number of individuals," rather than simply affecting the number of individuals. (Emphasis added.) Even if a test similar to the one articulated in ORS 659A.425 (3)[9] were applied, there are many legitimate reasons unrelated to household-size discrimination for an HOA to want to establish land use and development restrictions. Although a hypothetical HOA limitation allowing only garages that accommodate two or fewer vehicles could adversely impact larger households, an HOA should be able to successfully argue that the limitation is a reasonable standard enacted to further legitimate homeowner concerns related to aesthetics, neighborhood uniformity, traffic and air and noise pollution and that the restriction was not enacted "because of" the size of the household.

Finally, this hypothetical argument ignores the language in new ORS 93.270 (2) that states that the number of individuals occupying a dwelling must be "within occupancy limits." Although HB 2534-A does not define "occupancy limits," it most reasonably refers to a lawful limit of occupants established by a governmental body, such as a building or fire code.[10] If "occupancy limit" instead meant a limit established by the HOA, that would render the interpretation of this phrase in HB 2534-

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[7] Letter from Brad Skinner, Board President, Sunriver Owners Association, to Kayse Jama, Chair, Senate Committee on Housing and Development (April 26, 2021) (public testimony on HB 2534), https://olis.oregonlegislature.gov/liz/2021R1/Downloads/PublicTestimonyDocument/27282 ("[House Bill 2534-A] could also be misconstrued in a manner that precludes planned communities from adopting facially-neutral land use classifications [and] siting and development standards.").

[8] *See State v. Vasquez-Rubio*, 323 Or. 275, 282-283 (1996) (describing maxim against absurd results).

[9] ORS 659A.425 (3) provides:

> In determining under subsection (2) of this section whether a violation has occurred and, if a violation has occurred, what relief should be granted, a court or the commissioner shall consider:
>
> (a) The significance of the adverse impact on the protected class;
>
> (b) The importance and necessity of any business purpose for the facially neutral housing policy; and
>
> (c) The availability of less discriminatory alternatives for achieving the business purpose for the facially neutral housing policy.

[10] *E.g.*, 2019 Oregon Fire Code, section 1004 https://codes.iccsafe.org/content/OFC2019P1/chapter-10-means-of-egress#OFC2019P1_Pt03_Ch10_Sec1004 (requiring base of 200 square feet per residential occupant).

A into a self-contradictory and nonsensical command: an association may not discriminate based on the number of individuals occupying a dwelling unless the association limits the number of individuals who may occupy a dwelling. Because the occupancy limit established by code[11] is itself based on the size and configuration of the residential unit, which is in turn based on codes established by a governmental body, for HB 2534-A to be interpreted to allow the development of a building of any size would effectively eliminate the purpose of the phrase "within occupancy limits" entirely. A lot owner could not sensibly argue that a maximum occupancy limit that is established because of the development characteristics of the dwelling provides a basis for eliminating all restrictions on those development characteristics.

The only reasonable interpretation of the HB 2534-A section 1 amendments to ORS 93.270 is that the new prohibition against HOA policies that enact restrictions "because of . . . the number of individuals . . . within occupancy limits" only applies to restrictions that directly state the number of individuals who may be present within the dwelling.[12]

B. Effect of HB 2534-A on other facially neutral policies

However, just because HB 2534-A would have no cognizable impacts on HOAs' adoption of non-discriminatory development standards, it does not necessarily follow that HB 2534-A would never limit HOAs' ability to enact or enforce all facially neutral policies. In some cases, certain policies might already be subject to a challenge under existing discrimination law, and, in limited circumstances, HB 2534-A might expand the availability of such challenges or allow the additional remedy of having the policy struck.

ORS 659A.425 provides a specific mechanism, directive and test for when otherwise facially neutral policies may be considered discriminatory. Although the statute requires the application of this specific test only under narrow circumstances, that does not imply that those are the only circumstances in which an otherwise "neutral policy" may be considered discriminatory in purpose, practice or effect.[13] And the enactment of HB 2534-A could newly render certain policies unlawful if the policy were deemed discriminatory despite being applied equally to all individuals in a facially neutral manner.

For example, consider that HB 2534-A adds "familial status" as a protected class under ORS 93.270 and clarifies that this protection applies to HOA governing documents, and that these prohibitions are retroactive. If HB 2534-A becomes law, a lot owner might be able to successfully challenge a hypothetical restriction in an HOA's declaration that allows for gazebos but prohibits playhouses. Even though the restriction is "facially neutral" because it bans playhouses for both adults and children alike,[14] a court could determine that under new ORS 93.270 (2), the restriction unlawfully has the purpose or intent of fostering discrimination against families with children and is not justified by any other nondiscriminatory business purpose of the association or its members.

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[11] However, even if "occupancy limit" were interpreted to mean the number of individuals that could physically fit within the dwelling, it would remain a constraint that is established by the development limitations on the building.

[12] Although it could be *possible* that there exists some facially neutral restriction that, because of its purpose, narrow effect or implementation, is unlawfully restrictive on the number of individuals, that possibility seems remote and we cannot imagine any such scenario.

[13] *See, e.g., Texas Dep't of Housing & Community Affairs v. Inclusive Communities Project, Inc.*, 576 U.S. 519 (2015) (describing test by which disparate-impact claims are cognizable under the Fair Housing Act to challenge race-neutral policies that perpetuate racial disparities despite FHA's narrow "because of race" anti-discrimination language).

[14] Neither ORS 659A.421 nor ORS 93.270 prohibits discrimination based upon age. However, ORS 659A.421, like the amendments to ORS 93.270 (2) by section 1 of HB 2534-A, does protect against discrimination based on family status, which applies to children under 18 or individuals who are pregnant or in the process of securing legal custody of a child. ORS 659A.001 (6).

Another hypothetical could involve a challenge to an HOA that regularly enforced a facially neutral prohibition against religious displays, except as it applied against lots displaying Christian nativity scenes. Such discriminatory conduct is likely already unlawful under ORS 659A.421, but the amendments to ORS 93.270 by section 1 of HB 2534-A could provide a new remedy allowing a lot owner to have the restriction invalidated under ORS 93.272 or 93.274.

In either scenario, the court would have to apply a balancing test, like the test already applied in ORS 659A.425 or adopted by the United States Supreme Court for fair housing claims, to determine whether the ostensibly neutral policy was unlawfully hiding actual discrimination.[15] House Bill 2534-A does not contain any specific test or direction regarding facially neutral policies.

The Senate Committee on Housing and Development is investigating whether to add additional language to the bill specifically prohibiting its application to "a facially neutral housing policy as defined in ORS 659A.425." Such an addition would certainly bolster the already seemingly clear interpretation with respect to the bill's applicability to development standards addressed in section A of this analysis. The language would also likely eliminate a lot owner's ability to use HB 2534-A as described in the above examples. Whether this change would reflect the intended policy preference is a question to be resolved by the committee and the Legislative Assembly.

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Very truly yours,

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[15] *Inclusive Communities Project*, 576 U.S. 519.