TESTIMONY IN OPPOSITION TO HB 3526

Co-Chairs Helm and Owens, Vice-Chair Finger McDonald, and members of the House Committee on Agriculture, Land Use, Natural Resources, and Water,

Oregon REALTORS® is a trade association comprised of roughly 18,000 real estate brokers, principal real estate brokers, property managers, and affiliated industry professionals, who in turn represent hundreds of thousands of Oregonians in real estate transactions across Oregon. Thank you for the opportunity to provide testimony in opposition to HB 3526.

Oregon REALTORS® strongly opposes HB 3526. A new cause of action that buyers can bring against sellers related to well testing in real estate transactions is both unneeded and unwise. The premise behind the concept seems to be that sellers aren't providing the well testing results to buyers, and that buyers don't currently have an adequate remedy if they don't receive the test. Our experience has been the opposite. Nearly all real estate licensees in Oregon use either the Oregon REALTORS® forms (the ones we create) or the Oregon Real Estate Forms (OREF) created by the Portland Metro Association of REALTORS®. Both sets of forms have a contractual requirement for the seller to indicate whether the property is serviced by a well and, if so, include an addendum in the contract addressing the well. The addendum (drafted by real estate attorneys with blank lines for the parties to fill-in transaction-specific details) reiterates the statutory requirement for the seller to test for arsenic, nitrates, and total coliform bacteria **and makes this requirement a contractual obligation in addition to a statutory one**. Both forms go on to give the buyer contractual rights and remedies beyond the statutory requirements including:

1. Right to all well logs, previous testing reports, agreements and documents
2. Right to request additional testing beyond the statutorily required tests
3. Information on any filtration systems that exist
4. The right to terminate the transaction and receive a full refund of earnest money should buyer not receive or disapprove of the well test results or any other documentation described above.

As a result of these contractual forms, there is already teeth and a remedy associated with the seller's well water testing requirement. Here is a link to the Oregon REALTORS® form and here is a link to the OREF form. We have also submitted these forms for the record.

Adding an additional statutory cause of action and remedy creates a perverse incentive. The buyer could proceed with a transaction and then sue a seller for damages ***even through the buyer was aware of their right to receive the test results, to terminate the transaction should they not receive or disapprove of the results, and receive a full Earnest Money refund.***

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Additionally, we are concerned about the modifications to the Seller Property Disclosure Statement. Here are some of those concerns

- The SPDS is typically filled out by the seller when the seller lists the property but before receiving an offer from the buyer. As described above, when the offer comes in, the sale agreement itself requires the seller to indicate the water source of the property and, if a well, the parties will be required to include the well addendum. At that time the buyer and seller can negotiate additional tests on top of the statutorily required tests including additional water quality tests and flow tests. The Seller will also be required to provide all records related to the well and information on any filtration systems. The buyer will have a right to terminate the transaction should seller not provide any of the required well information or tests, or if the results are not satisfactory to buyer. At this point the buyer and seller can also negotiate for any repairs/remedies to well deficiencies, should the buyer want to continue with the transaction under the condition that any well-related defects are remedied. Thus, there is a timing problem here. Frontloading this into the SPDS is not necessary and it will require the seller to disclose information before the tests would typically be completed and before the buyer has had the opportunity to negotiate additional tests. If the buyer is going to request additional tests, it would be ideal for all of the testing to be done at once, which would be after the SPDS was completed, and in the context of negotiating the well addendum.

- Question 2(d) of the SPDS already asks whether flow, bacteria or chemical tests have been completed. The addition of the new question about whether the ORS 448.271 tests have been completed doesn't seem to add much. The main addition seems to be the follow-up question about whether the test results have been submitted to the State. In most cases the well testing is going to be done after the completion of the SPDS, so the addition of this question provides little value. Also, the point of the SPDS is to provide information relevant to buyers, not information relevant to the State. At this point in the transaction, buyers aren't going to care whether the seller has submitted the information to the State.

As for moving the program to DEQ: The rules, list of accredited laboratories, etc. associated with the domestic well-testing program are established within OHA and on OHA websites, and OHA administers the federal Safe Drinking Water Act and the Oregon Drinking Water Quality Act and related drinking water administrative rules. There are a lot of opportunity costs that would need to be considered if shifting the program to DEQ. Our understanding of the nature of the challenge with the program is not that OHA is the wrong agency—because both agencies would need to collaborate regardless of which one was leading—but rather that the program needs to be adequately staffed and funded. Our understanding is that the program was funded by a federal grant through 2020 but the grant funding went away and the funding has not been restored on

an ongoing basis.[1]

We would like to work with Rep. Hartman and the Committee to ensure that ORS 448.271 is working as intended. We don't believe that that creating a statutory cause of action, modifying the SPDS or even moving the program to DEQ are the best ways to do that, but rather ensuring that the program is adequately staffed or funded so that the state can make use of the information it is receiving from sellers.

[1] See September 2020 letter from OHA to the EPA, which we have submitted to the record

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