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VIA EMAIL

Mark Long
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Re: Opinion: House Bill 2398 (2021)

Dear Mark:

We have been asked to examine House Bill 2398 (2021), to assess its impact on current Oregon law, and to consider whether changes should be recommended. We conclude that, by authorizing local governments to mandate Oregon's "Reach Code" instead of the existing state building code, the bill raises several problems:

- It would contravene Oregon's longstanding policy requiring statewide building code uniformity. Current law deliberately prohibits local building codes, and for good reason.
- It would make the state's code administration and enforcement duties harder, costlier, and more error-prone—and it would make some all but impossible.
- It would allow localities to mandate standards that never underwent the rigorous process by which Oregon now adopts and amends its building code.
- By allowing localities to mandate standards that aren't fully tested, it could increase the risk of construction defects—for which builders would bear the liability.
- And by letting localities mandate standards that were enacted to be voluntary, it would flatten the economic incentives that make aspirational building code systems work.

If HB 2398 proceeds, it should be amended to no longer authorize local governments to mandate different standards than Oregon's building code requires. If that provision is not removed, it will be necessary to amend HB 2398 to correct for a wide variety of statutory conflicts and contradictions such a change would create in existing Oregon law.

If HB 2398 proceeds without removing that provision, the bill should be amended to include changes to Oregon's statute of repose for construction defects, so Oregon's building industries are not forced to bear the increased liabilities that the legislation could create. Oregon law recognizes that the Reach Code is intended to be experimental and voluntary. We should not impose on Oregon's builders the risks inherent in building to such untested standards.

1. Current Oregon Law

There are important and purposeful differences between Oregon's statewide building code and its "Reach Code." They are two independent sets of standards that serve different purposes. They are adopted under different procedures, and they are of different legal effect. The building code is uniform and mandatory, while the Reach Code is optional. The building code is enforced by the state; the Reach Code is not. And while amending the building code entails a rigorous process requiring approval of the state's building advisory boards, the Reach Code can be changed without those boards' approval – precisely because it doesn't impose mandatory rules.

Those differences are deliberate, and they reflect clear policy choices. HB 2398 would contravene those policies.

a. *Oregon's Building Code*

Oregon's building code is in place to ensure that builders follow the rules – to "establish uniform performance standards providing reasonable safeguards" for the "health, safety, welfare, comfort, and security" of those who use and occupy buildings in this state. ORS 455.020. To ensure those rules are uniform and well-established, the statutes direct that the building code should conform "to model building codes generally accepted and in use throughout the United States," and that it "shall be based on the application of scientific principles" and "approved tests" and the "professional judgment" of those who conduct and oversee building in this state. ORS 45.110(3).

That is why the Director of the Department of Consumer and Business Services must obtain "the approval of the appropriate advisory boards" in order to amend the building code. ORS 455.110(2). The membership of those boards is set by statute, see ORS 455.132 – 455.140, and each consists of a variety of industry professionals appointed by the governor, including engineers, general contractors, electricians, plumbers, utility representatives, and others.

Their expertise is important because the standards and systems involved in construction are not isolated. They work in conjunction, so changes to the requirements governing one system often significantly impact another. In order to adopt and implement a statewide system of standards, the experts in each of those fields must review and consider how each change to that system's governing rules will impact the whole. Those advisory boards' expertise is important also

because the building code governs what building professionals in Oregon are required to do. The Director cannot alone make changes to what the code requires; rather, the law calls for the advisory boards' review and approval to ensure that proposed changes are appropriate to mandate.

In order for that system to be developed coherently, Oregon law expressly prohibits municipalities from adopting their own stricter building code standards. The statutes mandate that the state building code shall be "uniform throughout this state," and that "no municipality shall enact or enforce any ordinance, rule or regulation relating to the same matters encompassed by the state building code but which provides different requirements" than the building code, unless the Department of Consumer and Business Services provides otherwise (and it has not). That statewide uniformity allows for consistent and orderly development of the building code.

That uniformity is also essential in order for the building code to be administered and enforced by the state, as Oregon law requires. The Department is tasked with reviewing suspected violations of the code (ORS 445.070), conducting plan review (ORS 455.465), deciding permit appeals (ORS 455.475), and enforcing the code by enjoining violations (ORS 455.083), among many other administration and enforcement duties. Without uniform statewide standards, those processes would have to change substantially—and, given the differences between the codes, they would become costlier and more complex.

b. The Reach Code

Oregon's "Reach Code" is different. It is a set of "optional construction standards and methods" that are "separate from the state building code" and which are not required of anyone. See ORS 455.500(1)-(2). Its provisions are selected not to provide greater safety or security to those who use and occupy buildings, but instead to "achieve greater energy efficiency than the energy efficiency required by the state building code." ORS 455.500(2). Builders can choose to adhere to those heightened standards, but they are never required to do so by the law.

Because the Reach Code is not mandatory, its provisions need not be based on national model building codes, and they need not be the product of the same rigorous process. Rather, they must merely be shown to be "feasible," economically and technically. ORS 455.500(2). Likewise, amending the Reach Code does not require the approval of Oregon's building code advisory boards. See ORS 455.500(1). The Director engages in "consultation" with those bodies, but the law does not require their approval. *Id.* And when a Reach Code provision includes a standard or method for installation of a product, equipment, or device, that inclusion "[e]xempts [it] from product certification requirements" under the state building code, as well as under Oregon's plumbing and electrical laws. ORS 455.500(4)(b).

Once it is established that a provision of the Reach Code can be implemented in reliable and cost-effective ways, it can “be removed from the Reach Code and adopted in the state building code.” ORS 455.500(3). But in order to do so, the Director still must undertake the rigorous process of adopting new building code provisions described above, just as it must with any building code amendment.

2. [HB 2398](#)

House Bill 2398 contains several proposed changes to ORS 455.500, the statute that governs Oregon’s Reach Code. Two changes are most prominent:

- First, the bill would require that the Director “ensure that standards for energy efficiency in the Reach Code mandate achieving a site energy use of not more than 90 percent” of what statewide codes require.
- Second, the bill would permit a municipality to “require adherence to the Reach Code as a minimum construction standard” within its jurisdiction, notwithstanding the statewide building code.

It is the second change that is especially problematic, for several reasons.

Allowing municipalities to mandate different building code standards would be contrary to Oregon’s policy of a single, uniform statewide building code. Oregon law mandates that there be a single set of “uniform performance standards,” and prohibits municipalities from adopting their own standards. By allowing municipalities to mandate the Reach Code within their jurisdictions, HB 2398 would contravene those policies—and it would require amending dozens of statutes throughout ORS chp 455 to fix the statutory conflicts and inconsistencies such a change would create.

Allowing municipalities to mandate adherence to the Reach Code would sidestep the rigorous process required under Oregon law for adopting mandatory building standards. The Reach Code’s provisions were not adopted to be mandatory standards, and those provisions never underwent the process required under Oregon law in order to become mandatory standards. There exists a process for identifying and addressing potential inconsistencies, impracticalities, conflicts, or ripple effects when a new provision is to be moved from the Reach Code into the building code. That process is in place for good reason. There is no sound reason for sidestepping it, as HB 2398 would do.

Allowing municipalities to mandate different standards than the building code would make the state’s job of code enforcement harder, costlier, and more error-prone. It is the job of the Department of Consumer and Business Services to enforce Oregon’s building code throughout the state. That job will be far more difficult if different sets of standards apply from

one county and city to the next. Avoiding those problems of discontinuity is why current Oregon law prohibits localities from adopting different building codes.

Indeed, if localities could mandate standards different from the state building code, much of the state's administration and enforcement duties would be all but impossible. For instance, under current law, a permit decision can be appealed first to a chief inspector at the Department of Consumer and Business Services, and then to the appropriate state advisory board. ORS 455.475(1). A decision impacting multiple parts of the building code can be further appealed to the Director. *Id.* That all makes sense: the advisory board that approved enactment of the code provision can speak to what it was intended to mean, and an administrative agency in Oregon is entitled to decide administrative appeals concerning its own rules. But the Reach Code consists of standards that those advisory boards never approved and which the Department never mandated. It is not clear how the Department could conduct enforcement and appeals of standards that it decided *not* to adopt in the building code—and which a local government, not the Department, decided to require of builders.

Mandating the Reach Code contravenes the economic incentives of the model that has driven green-building progress in Oregon—and it may increase construction defects.

Achieving the standards in Oregon's Reach Code often entails the use of different and newer materials than are used in other construction. Some provisions call for installation of more modern, higher-efficiency products, or entail different methods than are commonplace in traditional construction. Some of the innovations used to reach those higher standards turn out well. But others turn not to work as intended, or they develop unforeseen problems that more traditional, well-tested methods and products don't face. That is why incorporation of new product installations into the Reach Code expressly *exempts* those products from many of the product certification requirements that would ordinarily apply.

Even in view of those risks, voluntary, aspirational codes like Oregon's Reach Code incentivize builders to learn newer, higher-efficiency methods and installations, because builders can charge a premium for that work. Builders can choose to apply those higher standards, and clients can choose to pay for them. Those voluntary participants allow the state to determine over the long term which of the Reach Code's changes are the most cost-effective and useful, and which are less so.

If Oregon permits a locality to mandate building to the Reach Code, that system will change. It will require builders to employ those newer methods, standards, and installations on all jobs—regardless of whether they turn out to be reliable, effective, and free of unforeseen consequences. It would create a "test lab" out of an entire community, regardless of whether the clients want it, and regardless of whether the builders want to take on the additional risk. As David Heslam of Earth Advantage stated in testifying in support of HB 2398, the bill would allow localities to "become testing labs" to "test out the Reach Code in those localities, to see if what

was included in the Reach Code to deliver that higher level of savings actually works: Is it implementable? Is it able to be done in cost-effective ways?"

Builders will bear the consequences of that approach because Oregon's laws subject them to liability for construction defects for as much as 6 to 10 years. ORS 12.135. Certainly, that potential for liability is appropriate when the applicable standards are approved and adopted by the state authorities. But for standards that Oregon's advisory boards have not approved and the state has not adopted, it is both inappropriate and contrary to legislative policy to mandate that the builders adhere to them anyway—and then place the risk on their shoulders if anything should go wrong as a result.

3. Recommended Changes to HB 2398

If HB 2398 proceeds, it should be amended to no longer authorize local governments to mandate different standards than Oregon's building code requires. If that provision is not removed, it will be necessary to amend HB 2398 to correct for a wide variety of statutory conflicts and contradictions such a change would create in existing Oregon law. Further research will be necessary to identify all of the statutes that will need to be amended. We have identified several, but we expect there are many others.

If Oregon does allow localities to require builders to serve as "test laboratories" for such unproven standards, it should not simultaneously require builders to bear the increased risks that would entail. Oregon law recognizes that the Reach Code is intended to be experimental and voluntary—by, for instance, waiving certain certification standards for products installed under the Reach Code. It should treat builders the same way. Thus, if HB 2398 proceeds without removing the above provision, it should be amended to include changes to ORS 12.135, reducing the statute of repose that governs construction liability for projects that were required by a local government to be constructed under the Reach Code. We should not impose on Oregon's builders the risks of requiring them to build to untested standards.

Best regards,



J. Aaron Landau

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