

CONTENTS

Property Tax Exemption for Low Income Housing Judgment and Opinion in <i>Corvallis Neighborhood Housing Case Vacated!</i>	1
ORS Chapter 65 Review Project Update: Recommended Changes and a Request for Feedback	5
Brown Bag Lunch Announcement	7

Property Tax Exemption for Low-Income Housing Judgment and Opinion in *Corvallis Neighborhood Housing Case Vacated!*

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Practitioners should note that the judgment and opinion in *Corvallis Neighborhood Housing Servs., Inc. v. Linn Cnty. Assessor & Dep't of Revenue*, 21 OTR 95 (2013), have been **vacated**. In this case, the Regular Division of the Oregon Tax Court held that low-income housing leased to private individuals and used solely as personal residences did not qualify for the charitable-use exemption provided by ORS 307.130 (or any other exemption provided by statute). The taxpayers owned and leased multifamily rental apartment buildings and single-family rental homes to low-income individuals and families. The tax court expressed sympathy for the taxpayers' position—that providing low-income housing for use as personal residences is essential to the taxpayers' charitable purpose—but ultimately held that “there is no provision of Oregon law providing for an exemption from property tax for property leased to private individuals and used solely as a personal residence.” See 21 OTR at 109.

During the appeal to the Oregon Supreme Court, the parties entered into a settlement, agreeing to vacate the tax court's judgment and opinion. However, as of when this note was written, research services such as West and Lexis apparently have not yet updated their databases to reflect this fact. The authors of this note have contacted West and Lexis to alert them.

The extent to which practitioners may continue to rely on the tax court's reasoning is unclear, but the parties to the settlement have indicated that they expect the Oregon Legislature to address the core matter at issue in the case—whether low-income housing owned by a charitable institution and leased to low-income tenants may qualify for property tax exemption (outside of the numerous, highly specific ORS provisions)—in one of its upcoming sessions. Legislation adopted in 2014 allows the continued exemption (with respect to tax years beginning before July 1, 2018) of a nonprofit corporation's property that was granted exemption pursuant to ORS 307.130(2)(a) for the tax year beginning on July 1, 2012 and that was actually offered, occupied or used as low-income housing. See 2014 Or Laws ch 7 (HB 4039).

ORS Chapter 65 Review Project Update: Recommended Changes and a Request for Feedback

Susan N. Gary, University of Oregon School of Law

The Nonprofit Organizations Law Section (NOLS) of the Oregon State Bar has formed a work group to review Chapter 65 of the Oregon Revised Statutes – the Nonprofit Corporation Code. The NOLS Legislation Committee (“the Committee”) has met during the past year and expects to continue its work with the goal of preparing a bill for the 2017 Oregon legislative session. The Committee sought and received useful suggestions from many members of the Bar, and those suggestions have been helpful in its work.

Now that the Committee has worked through a portion of the statute, the Committee would like to report on its work and seek input about the proposed changes. The Committee is reaching out to members of NOLS, and also to members of the Estate Planning Section of the Bar and the Nonprofit Association of Oregon (NAO) (whose members are nonprofit organizations). Comments, questions and suggestions should be sent to Susan Gary, the Chair of the Committee and Reporter for the project, or to any member of the Committee. Members of the Committee are David Atkin, Susan Bower, Cindy Cumfer, Elizabeth Grant, Kate Kilberg, Marisa Meltebeke, Nancy Murray, Anne O’Malley, and Jim White. The Committee includes members from small and large law firms, the charities section of the office of the Attorney General, and the Nonprofit Association of Oregon.

The Committee began its work by establishing two guiding principles. First, the Committee will recommend changes that clarify or improve the functioning of the statutory framework, but the Committee does not plan to make policy changes to the legal structure for nonprofit corporations in Oregon. Second, the Committee decided that with limited exceptions a nonprofit corporation should be able to draft its own governance rules through its Articles and Bylaws. Certain rules will be mandatory and will be clearly identified as such in the statutes. Most rules will be default rules and will apply if the Articles and Bylaws of a nonprofit corporation are silent on the issue.

The Committee began with the statutory sections on members, rather than starting from the beginning of Chapter 65. The Committee has developed some recommended changes to definitions, which this article describes first, but the Committee plans to return to the remaining definitions and the sections that precede the sections on members at future meetings.

Definitions Relating to Directors

The Committee proposes adding definitions for appointed and designated directors, so that the provisions on the election of directors could be written more clearly. Most directors are elected by the incorporators, the current directors, or the members, but in some nonprofit corporations directors may be appointed or designated. An “appointed director” is one appointed by someone other than the board of directors, and a “designated director” is one who serves by virtue of holding a position in another entity, as specified in the Articles or Bylaws (for example, the Mayor of a city).

Notice

The Committee recommends a new notice provision that will apply to notice throughout Chapter 65. Under the current structure, notice provisions are located in different sections, which can be confusing. In addition, the Committee proposes updating the notice provision to include the types of notice currently used. Notice may be delivered orally or in writing. Written notice can be delivered electronically or by mail or private carrier. The provision will include effective date rules for each type of notice: (1) oral notice is effective when communicated; (2) electronic notice is effective on the earlier of when it is received or two days after it is sent; and (3) written notice delivered by mail or private carrier is effective on the earlier of when it is received, five days after it is mailed, or the date of receipt if sent by certified or registered mail. Notice will be correctly addressed if addressed to the address shown on the records of the corporation for the director or member. The statute will also provide that the Articles and Bylaws can provide for alternative notice rules for members or directors, but not for notice required to be provided to the Attorney General.

The Committee requests feedback as to what the statutes should require in terms of the addresses shown on the records of the nonprofit corporation. There are two issues. First, the current statute seems to require nonprofit corporations to obtain physical address information for members and directors. However, it seems reasonable to allow a member to provide the type of address the member wishes to provide for notice purposes. If the person does not want to disclose a physical address, the person could use an email address. Or, if the person does not use email, the person could provide a physical address. The second issue relates to the members' right to get the list of addresses for all members. Currently, members are entitled to inspect a membership list, containing addresses, at certain times and for certain purposes. *The Committee has not yet agreed on the scope of such access and requests feedback on how best to address the issue.*

The Committee would also like feedback on whether requiring two days for electronic notice, as a default rule, is too long.

Members

The Committee began its discussion of members by noting the confusion in many nonprofit corporations about members. A new nonprofit may decide it wants to have members so that the members will pay dues, without realizing the role voting members play in an organization. Alternatively, a nonprofit may intend to have members who actively participate as voting members but over the years may find it cumbersome to have voting members and may stop having member meetings and votes. If a nonprofit's Articles state that it has members, but the nonprofit operates as if it does not have members, the legal functioning of the nonprofit is at risk. If the members do not elect the directors, then the directors may be acting without authority.

Initially, the Committee thought that it could emphasize that "members" as used in the statute means voting members by using the term "voting member" throughout the Chapter, in place of the term "member." On further consideration, however, the Committee found that approach too cumbersome and probably not any more effective than the current statute. The Committee decided instead to propose the following strategies:

The definition of member could be strengthened to emphasize the voting rights of members.

The default rule with respect to members could be reversed. Currently, ORS 65.137 says that a nonprofit corporation will have members unless the Articles say it does not have members. That section could be revised to provide that a nonprofit corporation will have no voting members unless the Articles say it does have voting members.

The Committee will recommend more guidance on the Secretary of State's form of Articles.

The Committee will recommend creating a new process that will make it easier for a nonprofit to convert from an organization having voting members to one without voting members. The challenge will be to facilitate the transition for nonprofits that have not been functioning as member organizations, while protecting the rights of voting members in situations in which members want to participate.

Rights and Obligations of Voting Members

ORS 65.144 will continue to permit a nonprofit corporation to create different classes of members with different voting rights. If a nonprofit has voting members, the right of members to vote on amendments to the Articles and any action that would reduce or eliminate the right of members to vote cannot be restricted by the Articles or Bylaws. The Committee is still considering whether any other rights of voting members should be mandatory. Most voting rights will be subject to restriction in the Articles or Bylaws. ORS 65.144 will be revised to list the things on which members can vote, unless the Articles or Bylaws provide otherwise, so that all the rights of the members will be found in one place. Currently, those rights appear throughout Chapter 65.

A partial list of the rights of members in current Chapter 65 is as follows:

65.311 – the right to elect directors.

65.324 – the right to remove directors.

65.307(2) – the right to vote on any change to the number or the range for the size of the board or a change from a fixed or a variable-range size board if the Articles establish the size or range.

65.774 -- the right to inspect and copy the records of the corporation.

65.803 -- the right to vote on the sale, transfer, exchange option, convey, merge or otherwise dispose of all or a significant portion of the assets of the corporation.

65.624 -- the right to vote on dissolution of the corporation.

65.361 -- for voting members of a mutual benefit corporation, the right to approve a conflict of interest transaction.

The Committee seeks input on which of these rights should be mandatory and not subject to removal by the Articles or Bylaws.

The Committee recommends a clarification to ORS 65.167 to provide that when notice is given to a member concerning termination, expulsion or suspension, the reasons for the action must be given only if cause is required to take the action.

Derivative Suits

The Committee recommends adding the Attorney General as a party who can bring a derivative suit.

Delegates (ORS 65.177)

No one on the Committee had experience with this section, and the Committee would like input on whether this section is used. While it does not seem harmful to leave it in, there is an advantage to streamlining the Chapter if the section is unnecessary.

Annual Meetings

Under current ORS 65.201, a nonprofit corporation with members must hold an annual meeting. The annual meeting serves two purposes. One purpose is to provide information to the members on the activities and financial condition of the nonprofit. The second purpose is for the members to vote on directors. The Committee was concerned that for some nonprofits an annual meeting of members is an ineffective way to accomplish those purposes because few members come. The Committee proposes allowing a substitute procedure that a nonprofit could use in lieu of an annual meeting. Under this procedure a nonprofit would provide members with an annual report, either by mailing it (electronically or otherwise) or by posting it on the nonprofit's website, and then would provide for electronic voting under ORS 65.222.

With the recommended change, a nonprofit corporation's members can take action in the following ways:

Hold annual and regular meetings under 65.201.

Conduct an annual meeting without meeting, by following the procedure in a new section.

Act by written consent without a meeting, but only if every member entitled to vote takes the action.

ORS 65.222 currently provides for action by written ballot without a meeting, if the nonprofit corporation delivers a ballot to each member. Language could be added to clarify that if action is taken by written ballot, the number of ballots submitted will constitute the number of votes cast (comparable to the number of members present at a meeting) for purposes of determining the number of votes needed to take the action.

Directors

The Committee recommends amending ORS 65.307 to clarify that a director may be under the legal age of majority.

The Committee recommends adding a new section to provide that if a nonprofit has no directors and no members who can vote for directors, the circuit court can appoint one or more directors.

The section providing for removal of directors, ORS 65.324, needed clarification. The recommendation is to have separate sections to make clear the procedure for removal under different circumstances. The default rules, unless the Articles or Bylaws provide otherwise, are the following:

Directors elected by members can be removed without cause by the members, by a majority vote of the votes cast.

Directors elected by directors can be removed with or without cause by a majority vote of the directors in office. This is a recommended change from a requirement of two-thirds of the directors in office.

Directors can be removed automatically for missing a specified number of meetings, but only if the Articles or Bylaws provide for the automatic removal at the beginning of the director's term. This is a new provision.

If the Articles or Bylaws provide reasons for removal of a director elected by members or by directors, a majority of the directors can remove a director for such reasons.

A court can remove directors as set forth in ORS 65.327. No changes are recommended.

A designated director can be removed by changing the designation.

An appointed director can be removed by the person appointing the director. The Committee recommends adding that the board of directors can remove an appointed director in the same fashion as any other director.

Meetings of the Board

The Committee recommends adding to ORS 65.337 an explanation of a regularly scheduled meeting. The revised statute should provide that such a meeting, which requires no further notice to directors, is one that the Board schedules in a manner that provides all directors with the date, time and place of the meeting without additional notice.

The Committee wanted to clarify and update the ways in which a Board can take action, particularly with respect to the use of electronic forms of communication. The recommendation is to provide for actions in the following ways:

A meeting. A nonprofit corporation can permit a director to participate through a form of communication if all directors can simultaneously communicate with each other. The Committee thought that in connection with a meeting, simultaneous communication is critical. The Committee is aware that technology will continue to change, so the statute can simply provide for "simultaneous communication" and that will cover changes in technology. Under current technology, a director could participate by conference call or Skype, but not by email, because email does not permit simultaneous communication.

Email. The Committee recommends a new section to provide for action by email. Members of the Committee noted that Boards already take action in this way, and wanted to provide a structure for doing so that would guide and protect the nonprofit. The new section will first note that directors can use email to discuss matters that come before the board. This certainly is current practice. The new section will then state that an action can be taken by email and provides the process for doing so. First, an email announcing that a vote will be taken must be sent to each director. The email must include a description of the matter and a deadline for the vote, which must be at least 48 hours from the time of the email. The directors can then vote by email, and a director can change his or her vote at any time before the deadline. An affirmative vote of a majority of directors in office is effective.

Unanimous written consent. ORS 65.341 will continue to provide that directors can take action by written consent, without a meeting, if the consent is unanimous.

Quorum and Voting

The Committee recommends a slight change to ORS 65.351 to provide that a quorum consists of a majority of directors in office immediately before the meeting begins. The Articles or Bylaws can provide otherwise, but cannot provide for a quorum of fewer than one-third of the directors in office immediately before the meeting. The current statute sets the default rule for a corporation with a fixed number of board members at a majority of the fixed number, rather than a majority of those in office. The language for a corporation with a variable range for its board is confusing and will be clarified to set the quorum at a majority of the directors in office.

In current ORS 65.351(4) a director who is present at a meeting is deemed to have assented to action taken at the meeting unless certain requirements listed in the statute are met. The Committee recommends changing “deemed” to “rebuttably presumed,” to allow for evidence of lack of assent in other situations that might occasionally arise.

Committees

The Committee recommends changes to the sections on committees to clarify that all voting members of committees exercising the authority of the board must be directors. A new section will provide that the board can create committees that do not exercise the authority of the board and these committees can have members who are not directors or members of the corporation. The current statute seems to assume the use of these other committees, but clarification seems appropriate.

Additional Sections

The Committee has not yet discussed the remaining sections dealing with directors or other sections of the statutes. Also, the Committee has not yet addressed all the suggestions it has received.

Feedback

Please send comments, suggestions, and feedback on these proposals or on any section of the nonprofit corporation statutes to Susan Gary at sgary@uoregon.edu or to any member of the Committee.

NOLS Brown Bag Lunch Discussions

The Nonprofit Organization Law Section is pleased to offer a brown bag lunch discussion series in an effort to provide section members an opportunity to connect with peers and discuss issues they are encountering in their practice in an informal, collegial setting.

Brown bag lunch discussions are scheduled as follows:

Wednesday, May 13, 2015

Wednesday, August 12, 2015

Wednesday, November 4, 2015

All brown bag lunch discussion will be held from **noon – 1:00 p.m.** at the offices of **Tonkon Torp, LLP, 888 SW 5th Ave., Suite 1600, Portland, Oregon 97204**

Please note, this is not a lecture format. Attendees will be encouraged to engage in the discussion, share challenges they have encountered and practices they have found to be effective.

A conference call number will be provided for those who cannot attend in person and would like to participate by phone. Please contact Susan Bower at susan.a.bower@doj.state.or.us for the conference call information.

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