

1 **Memo to Bob Rindy**  
2 **From Al Johnson**  
3 **May 30, 2008**  
4 **Re: ORS 197.309 Issues**  
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6 The text of ORS 197.309 is set out below, with some comments and questions about its scope  
7 and effect. Mainly questions, not answers. Some questions might be answered through  
8 rulemaking.  
9

10 **ORS 197.309**  
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12 (1) Except as provided in subsection (2) of this section, a city, county, or  
13 metropolitan service district may not adopt a land use regulation or  
14 functional plan provision, or impose as a condition for approving a permit  
15 under ORS 215.427 or 227.178, a requirement that has the effect of  
16 establishing the sales price for a housing unit or residential building lot or  
17 parcel, or that requires a housing unit or residential building lot or parcel to  
18 be designated for sale to any particular class or group of purchasers.  
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20 (2) This section does not limit the authority of a city, county or  
21 metropolitan service district to:  
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- 23 (a) Adopt or enforce a land use regulation, functional plan  
24 provision or condition of approval creating or implementing  
25 an incentive, contract commitment, density bonus or other  
26 voluntary regulation, provision or condition designed to  
27 increase the supply of moderate or lower-income units; or  
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29 (b) Enter into an affordable housing covenant as provided in  
30 sections 1 to 6 of 2007 Or Laws Chapter 691.  
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32 **Issues:**  
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- 34 1. **Grammatical note:** Section (1) doesn't quite scan without inserting the word "as"  
35 between "adopt" and "a land use regulation." I doubt the omission is significant.  
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37 2. **Authorities addressed:** Cities, counties, and Metro. Does not restrict state or state  
38 agencies from adopting regulations that have the inclusionary requirements and effects  
39 addressed by the statute.  
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41 3. **Regulatory provisions addressed.** The term "land use regulation" is defined at ORS  
42 197.015(12) as "any local government zoning ordinance, land division ordinance. . . , or  
43 similar general ordinance establishing standards for implementing a comprehensive  
44 plan."  
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46 The term "land use regulation" apparently does not include state statutes, goals and rules.

1 It does not include local ordinances establishing standards for implementing requirements  
2 of a state statute or of a rule implementing a state statute.

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4 It does not include local comprehensive plan provisions if they are not part of a  
5 “functional plan.”

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7 The term “functional plan” is not defined, but no doubt a look at the legislative history  
8 will show that it refers to Metro’s “Functional Plan.”

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10 4. **Types of permits addressed.** ORS 215.427 (county) and ORS 227.178 (city) establish  
11 processing time limits and vesting rights for “a permit, limited land use decision, or zone  
12 change.” ORS 197.309 mentions conditions for a “permit” under these statute. It doesn’t  
13 mention conditions for a limited land use decision or a zone change. The general rule is  
14 that a partial listing expresses an intent to exclude the items not listed. In addition, courts  
15 have held that amendments to comprehensive plan text or maps are not covered because  
16 ORS 215.427 and 227.178 don’t mention them. See *State ex rel. Holland v. Cannon*  
17 *Beach*, 153 Or App 176, 181, 956 P2d 1039 (1998).

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19 It could be argued that conditions on limited land use decisions, plan changes, and zone  
20 changes are not addressed by ORS 197.309, as long as those conditions are based on  
21 something other than “a land use regulation or functional plan provision . . .that has the  
22 specific effect proscribed by the statute.

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24 5. **“Imposed” vs. “voluntary”:** Section (1) says that conditions, etc., can’t be “imposed.”  
25 Section (2) allows the adoption or enforcement of “voluntary” inclusionary conditions,  
26 density bonuses, etc. Is a condition “imposed” when a developer agrees to it in order to  
27 get a density bonus? Is it “imposed” if the developer can’t get the bonus without agreeing  
28 to it? HB 3485, now 2007 Or Laws Chapter 691 amended ORS 197.309 to specifically  
29 authorize “Affordable housing covenants.” Does that have implications for how the  
30 courts will now have to read ORS 197.309(2)?

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32 6. **Proscribed effect:** The proscribed effect is “establishing the sales price of a housing  
33 unit, residential building lot or parcel.” This language is limited in several ways.

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35 What must be established is the “sales price,” not the rental price.

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37 The effect must be to “establish,” not just to “influence,” “affect,” “constrain,” or “limit.”  
38 The statute does not define “establishing.”

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40 Would a regulation requiring that a certain number of units be made available for rental  
41 or sale at prices or rentals not exceeding a specified affordability standard “establish” a  
42 sales price?

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44 Would a regulation requiring that certain property be developed only with non-owner-  
45 occupied housing affordable to certain income levels “establish” a “sales” price at all?

1           Would a regulation establishing a cap on sales prices have the effect of “establishing”  
2 those prices?  
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- 4       7.   **Proscribed designation:** What is proscribed is adoption of local land use regulation  
5 regulation or imposition of a condition “that requires a housing unit or residential  
6 building lot or parcel to be designated for sale to any particular class or group of  
7 purchasers.”  
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9           Questions raised by this language include:

10           Does it address rental units or the lots and parcels under those units?

11           How specific must the designation be? What if specific lots, units, and parcels are not  
12 mentioned? What about requirements that a certain percentage of units be sold at below-  
13 market rates? What about minimum floor area or acreage limits that have the effect of  
14 limiting sales to a group or class defined as everyone who can afford a \$500,000 home?  
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16           What is “a particular class or group of purchasers?” This clause doesn’t seem to have a  
17 price or income element. That makes it pretty broad. It seems to take in housing for sale  
18 only to seniors, for example, without regard to price or income.  
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