NEW LAWS FOR FARMLAND USAGE

By Jeffrey C. Misley

Oregon’s land use laws historically have severely limited commercial activities on land zoned for exclusive farm use (EFU). On August 2, 2011, Governor Kitzhaber signed two bills into law that expanded the range of commercial activities allowed by wineries, vineyards and other agricultural enterprises on property zoned EFU. Both HB 3280-B and SB 960 are expected to provide some much needed certainty as to the private events, facility rentals, and other commercial activities that may be allowed on EFU land.

HB 3280-B

HB 3280-B greatly expands the list of approved activities or events that may be held on land zoned EFU, but only affects wineries or vineyards that are at least 15 acres. Under the new law, qualifying wineries are allowed to offer activities “conducted for the primary purpose of promoting wine produced in conjunction with the winery,” including such events as wine tastings, wine tours, wine clubs, and other “similar activities”. Under HB 3280-B, wineries may also market and sell items directly related to the sale or promotion of the wine, including the sale of food and beverages.

The new law is not without limitations. Oregon wineries are limited to twenty-five (25) event days annually for “private events” hosted by the winery or patrons, including dinners and other events where food may be served. The new law also allows outdoor concerts and other celebratory events as part of the 25 days, provided the county where the winery is located previously allowed such events. The gross income from such events or activities cannot exceed 25 percent of the gross income from on-site wine sales, and the bill allows previous permitted uses and activities that existed prior to the bill’s enactment.

HB 3280-B also allows larger winer-
NEW LAWS FOR FARMLAND USAGE (continued from page 1)

ies to establish a restaurant on the premises of the winery. To qualify, the winery (a) must be owned and sited on a tract of 80 acres or more, at least 50 acres of which is a vineyard; (b) must own at least 80 additional acres of planted vineyards in Oregon; and (c) must have produced at least 150,000 gallons of wine in at least three of the five previous calendar years.

SENATE BILL 960

Senate Bill 960 also expands the types of events or activities that may be conducted on EFU zoned land. Specifically, SB 960 allows “agrotourism and other commercial events or activities that are related to or supportive of agriculture.” SB 960 is not limited to only vineyards and wineries (like HB 3280-B), but applies to all agricultural enterprises located on EFU land. For the events or activities in question to qualify as approved activities, they must be “incidental and subordinate to existing farm use” on the property. A number of additional limitations apply under the new law. Commercial events and activities must not exceed 72 consecutive hours in duration. Maximum attendance is limited to 500 people, and parking and other event restrictions apply.

SB 960 also allows a county to approve a smaller, single event on an “expedited” basis, provided such event occurs between the hours of 6 a.m. and 10 p.m. and is limited to 100 attendees and 50 vehicles. Event approvals will be through a local approval process that occurs at the county level. While additional restrictions apply, SB 960 greatly expands the range of events and activities previously allowed on EFU zoned land.

HOW TO PROPERLY HANDLE EMPLOYEE TERMINATIONS

By Heather A. Kmetz

The recession has presented employers with both difficulties and opportunities. Greater efficiencies have in some instances increased profits. High unemployment rates have increased the pool of highly-skilled workers seeking employment. While employers have innovated and added, they have likely also been faced with the unpleasant task of terminating some existing employees.

Oregon has unique statutory provisions relating to payment of wages on termination of employment, and there are significant penalties for failure to comply with these statutory provisions. Presuming that an employee is “at will” (not subject to employment agreements or collective bargaining agreements), the following checklist is a starting point for employers looking to terminate an employee in Oregon.

FINAL PAYCHECK AT TERMINATION

When an employer terminates an employee, all wages earned and unpaid at the time of the termination become due and payable not later than the end of the first business day after the termination. It is generally best to deliver the final paycheck at the time of termination and the terminated employee should sign a receipt, acknowledging calculation and receipt of the final paycheck. Further, if a severance is offered to the terminated employee, you will want the employee to sign a release.

In calculating the final paycheck, include (in accordance with company policy) any accrued but unused:

• sick leave
• vacation leave
• flexible time off

Also consider any commissions that were earned but unpaid at the time of termination. In determining whether a commission is earned at the time of termination, you will want to consider whether the terminated employee was the “procuring cause” of a transaction. In Lenchitsky v. H.J. Sandberg Co., 217 Or. 483 (1959), the court frames the issue as “whether the plaintiff can claim commission on sales made by him for furnaces installed and billed to the purchaser after the termination of his employment.” And, in Christenson v. Oregon Modular Designed Inc., Corp., 273 Or. 499 (1975), there was an executed sales agreement between the third-party plaintiff and the plaintiff prior to the termination of the third-party plaintiff’s franchise agreement with the defendant.

UPDATE CONTACT INFORMATION FOR TERMINATED EMPLOYEE

Ask your terminated employee to provide a mailing address to which all future notices may be mailed. This information can be incorporated into the paycheck receipt, whereby they direct you to send all notices to the specified address. It is also helpful to request a phone number and email address.

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ALTERNATIVE DISPUTE RESOLUTION
A Viable Option To Litigation

By Michael D. Levelle

Reasonable people will disagree. Historically, when they did, they generally used the courts as the primary form of dispute resolution which is a rights-based system and structured on an adversarial method of adjudication, where a neutral decision-maker adjudicates disputes, after the adversaries have argued the dispute in a contested proceeding.

However, since the 1970s there has been a steady trend for the courts to turn to alternative dispute resolution methods (“ADR”) that are non-adversarial and are designed to reconcile the disputants’ interests, rather than focus only on the disputants’ rights.

DISPUTE RESOLUTION METHODS
Generically speaking, ADR refers to a wide variety of alternatives to litigation, the purpose of which is to manage and quickly resolve disagreements at a lower cost and with as little adverse effect as possible on the relationships of the parties involved.

There are basic differences between adversarial and non-adversarial methods of dispute resolution. In the adversarial system, if one disputant wins, the other must lose, and disputes may

PROPERLY HANDLE EMPLOYEE TERMINATIONS (continued from page 2)

RETURN OF COMPANY PROPERTY / TERMINATION OF ACCESS

All company property should be promptly retrieved from the terminated employee, including but not limited to keys, personal data devices (e.g. iPhone, Blackberry, Droid), laptops and tablets (e.g. iPad), parking pass, and company books and records (including any not maintained on company premises).

Confirm all user names, passwords, and other electronic access information with the terminated employee and take the necessary action to ensure company information and accounts cannot be accessed (e.g. remote access to company server and on-line banking).

If the terminated employee is an officer in the company, ask the terminated employee to sign a resignation. If it is an essential officer position, you may need to appoint a replacement officer. Consider filing an amended annual report with the Oregon Secretary of State if the terminated employee is listed in their records.

If the terminated employee is an authorized signer on any company account, contact your financial institution(s) in advance of the termination to obtain any paperwork required to remove that person as an authorized signer. Some institutions may require the terminated employee’s signature, so have this paperwork ready for signature at the time of termination.

NOTIFY HEALTH CARE PLAN ADMINISTRATOR

The health care plan administrator must be notified immediately of the employees’ termination. The plan administrator has 14 days from the date of termination to send the terminated employees notices required under the Consolidated Omnibus Budget Reconciliation Act (COBRA). COBRA requires that terminated employees (and their families) who lose their health benefits be given notice of their right to choose to continue group health benefits provided by their group health plan for limited periods of time. The plan administrator must send the required notices within 14 days from the date of termination.

NOTIFY QUALIFIED RETIREMENT PLAN ADMINISTRATOR

Generally, qualified retirement plans (i.e. 401(k) and profit sharing plans) provide for rollover or payments of benefits after terminating employment. The plan’s Summary Plan Description (SPD) should set forth the plan’s rules for notifying the terminated employees of their options and required timing for completing the rollover/distribution. Be sure to note vesting schedules (as unvested portions are generally forfeited on termination of employment) and confirm the plan administrator takes all necessary actions to ensure the plan remains in compliance with tax and ERISA rules following termination of the employees.

PROMPTLY RESPOND TO OREGON UNEMPLOYMENT INSURANCE DEPARTMENT

Assuming your terminated employees seek unemployment benefits, you will be contacted by the state. You will want to ensure that your information on record with the Oregon Unemployment Insurance Department is current – and submit a Business Contact Change form if it is not (http://www.oregon.gov/DOR/forms/business/business_contact_change_form_150-211-159.pdf).
be resolved through application by a third party of some general rule of law.

However, when the non-adversarial method of mediation is used, all parties can benefit through a creative solution to which everyone agrees or are at least willing to accept. Each situation is unique and need not be governed by any general principle other than acceptance by the parties and possibly court approval.

Facilitated negotiation or mediation may be more productive than litigation. Further, research proves that facilitated negotiation and mediation have greater durability and compliance by the parties.

Consider:
• the parties’ relationship;
• the complexity of the issues;
• the avoided litigation costs;
• the concern for privacy;
• the relationship of the parties with their attorneys;
• the likelihood of resolution; and
• the impact of alternative dispute procedure on subsequent litigation, if not resolved.

FACILITATED NEGOTIATION
While lawyers may directly negotiate on behalf of their respective clients, often there is concern that the first party to propose settlement is in a weaker negotiating position. For this reason, a neutral third-party facilitator may have a better chance at getting the matter resolved. The facilitator helps the parties identify the problems and guides them through procedures for resolving the problems. However, the facilitator refrains from offering settlement suggestions. This way the parties retain control over the process, decide what the important facts are, and together decide the best solution.

MEDIATION
Mediators work with the parties to reach a mutually acceptable resolution and the process works well for disputes that have multiple issues that may be integrated with one another, or where the resolution of one issue is contingent on the resolution of another. Advantages of the mediation process include:
• Efficiency;
• General privacy;
• Opportunity to deal with emotional issues (not just the legal issues);
• May preserve ongoing business and family relationships;
• Resolutions may be more flexible (perceived as “fair”); and
• Parties retain significant control over procedure and outcomes.

There are various models of mediation. “Facilitative mediation” focuses on a resolution or settlement of the dispute and, in order to attain that goal, the facilitator routinely offers both advice and substantive direction on matters of process.

The “transformative mediation” model is designed to facilitate conversation without a predetermined end. The mediator typically offers no advice or substantive direction as to either content or process, but seeks to enhance the parties’ perspective. The belief is that if the parties better understand each other’s point of view, settlement will take care of itself.

Under the “evaluative mediation” model, the mediator confidentially provides expert case evaluation (assessing strengths and weaknesses of each party’s case), substantive settlement recommendations and attempts to persuade the parties to accept those recommendations. However, the parties retain the right to reject the mediator’s recommendations.

Regardless of the mode or model, the parties should consider alternatives to litigation early on in a dispute. Alternative dispute resolution offers attorneys, their clients and other interested parties the opportunity to work together and avoid unwanted, unnecessary and expensive litigation.
BUSINESS RECEIVERSHIPS IN OREGON

By Barry P. Caplan

Occasionally creditors may wish to consider whether the liquidation of a debtor business (particularly by sale of its assets) can be better achieved outside of bankruptcy court. An alternative would be to seek to have a receiver appointed by a state or federal court. Legal proceedings for foreclosure of a security interest in the debtor’s assets, or statutory proceedings such as dissolution of a corporation due to shareholder disputes, are grounds for the appointment of a receiver.

Recent bankruptcy decisions have raised concerns about bankruptcy sales in certain factual scenarios. In addition, cost factors sometimes cause creditors to consider a receivership as an alternative to a Section 363 sale in a Chapter 11 bankruptcy proceeding.

Rule 80 of the Oregon Rules of Civil Procedure (ORCP) sets forth grounds for appointment of a receiver and procedural rules following the appointment. The rule also provides certain requirements of a receivership order.

ORCP 80 outlines some of the structure of the receivership. ORCP 80(B) provides the grounds for appointment of a receiver, and ORCP 80(D) sets forth the requirements for a receivership order.

The order appointing receiver is the source of the duties and powers of the receiver. It needs to be carefully and comprehensively prepared for approval by the judge. Oregon also has relevant older case law which provides further guidance.

A receiver is a qualified third party appointed by a court to take control of the debtor’s assets and to administer them on behalf of creditors. Ordinarily, the major source of the receiver’s authority and power is found in the Order Appointing Receiver. In several states (but not in Oregon) there are statutes that provide specific direction of the role of a receiver (see Washington RCW 7.60).

Ultimately, one key benefit from an appointment of a receiver, as compared to a Chapter 11 filing, is whether the receiver can sell assets free and clear of liens cheaper and faster. While the Washington statute and federal courts have clearer “roadmaps” for such proceedings, it can also be successful in Oregon where, for the most part, the practice is structured by court order and by guidance of an experienced receiver with knowledgeable lawyers.

In some receivership cases there can be a need for proofs of claim filings by creditors or filing of a formal distribution plan. These steps are not required if the proceeds from a sale of all assets goes entirely to the secured lender and/or other lien holders. There are both general and custodial receiverships. A custodial receiver is appointed for the protection of the foreclosing creditor. A general receiver is appointed when there are sufficient assets and anticipated proceeds from assets or operations to allow distribution to other creditors. The general receiver’s duties are owed to all parties and creditors.

In recent years Oregon has had some large receivership cases, i.e. Sunwest Management and North Pacific Group. These cases were liquidating receiverships. Both cases benefited other creditors as well as the plaintiff in the receivership lawsuit. (Sunwest needed to be followed up by a substantively consolidated Chapter 11 upon approval of the Distribution Plan.)

While receivers are common in real estate foreclosure cases, they are not frequently used in business cases. Often debtors who file voluntary bankruptcy cases or creditors who file involuntary bankruptcy petitions do so without considering the receivership alternative. In some instances, the receivership alternative could be a better choice for liquidating a business.
AARON J. BESEN ELECTED PARTNER OF THE FIRM
Aaron J. Besen has been elected Partner of the firm. Aaron is Chair of the firm’s Health Care Practice Group and a member of the Business Group. He has extensive experience representing long-term care providers including skilled nursing, assisted living and independent living facilities, management companies, and the landlords related to these businesses.

DAVID D. VANSPYEBROECK JOINS SUSSMAN SHANK LLP
David D. VanSpeybroeck joined the firm as a Partner in our Litigation Practice Group. David brings more than 22 years of experience and will continue to focus his practice on complex litigation, commercial disputes, and insurance coverage.

David’s experience includes representing businesses in contractual disputes, securities fraud cases, litigation, intellectual property suits, and insurance coverage litigation.

Prior to joining the firm, David was a Shareholder with Bullivant Houser Bailey PC. He was selected for inclusion in the 2012 Best Lawyers in America® in the area of commercial litigation.

WELCOME PETAR M. KLAETSCH
Petar M. Klaetsch joins the firm as an associate. Initially, Petar will work in each of the firm’s main practice groups. Petar was a summer associate at Sussman Shank in 2010 and gained legal experience by working on cases involving business litigation, business formation, and creditor and debtor rights.

WELCOME BETHANY REISBERG
Bethany joined Sussman Shank LLP as a legal assistant in the firm’s Bankruptcy & Creditors’ Rights Group. Her seven plus years of legal experience are a great asset to the firm.

WELCOME NEW MEMBERS OF THE SUPPORT SERVICES TEAM
Steve Mayock and Honore Arias both joined the firm as general clerks on our support services team. Steve and Honore both have strong educational credentials, professional experience, and great enthusiasm.

NENA COOK RUNS FOR POSITION ON THE OREGON SUPREME COURT
Nena Cook, a Partner at Sussman Shank LLP, has filed to run for Position 3 on the Oregon Supreme Court. Nena is a trial attorney with over 20 years of experience. Her practice focuses on complex business disputes, appellate law and professional liability defense. In addition to her law practice, Nena serves as a Circuit Court Pro Tem Judge for Multnomah County. Nena’s campaign website is: nenacookfororegonsupremecourt.org

SUSSMAN SHANK CONGRATULATES JOHN MCCORMICK ON BECOMING EXECUTIVE VICE PRESIDENT, FINANCE & GENERAL COUNSEL OF BOB’S RED MILL
After 20 years with Sussman Shank LLP, Partner John E. McCormick leaves the firm to join Bob’s Red Mill as Executive Vice President, Finance & General Counsel.

“Bob’s Red Mill has been a great client of the firm over the years, and this opportunity knocked, which allows John to more directly combine his legal skills with his MBA background. We wish him well in this next adventure of his career and look forward to continuing to work with John in his new position,” said Bob Carlton, managing partner of Sussman Shank.

Sussman Shank is committed to continue providing excellent service to all of John’s clients and making sure they receive the service they need during this transition.

John will be greatly missed by all of us at Sussman Shank for his many years of service and contributions to the firm.
ADOPTED FAMILIES – MORRISON KIDS
December 2011

Every year during the holiday season, Sussman Shank adopts a family in need. This year, the firm helped to make the season more merry for two families who had been burdened by medical bills and hit hard by the down economy. We are grateful to give back to the community on this very personal level. It is a joy to afford hard-working and deserving families a respite from the tough times that can beset any one of us.

RALPHIEL HOUSE AND THE RONALD MCDONALD HOUSE
December 2011

The firm also contributed to the Raphael House and the Ronald McDonald House during the holiday season.

DE LA SALLE NORTH CATHOLIC HIGH SCHOOL CORPORATE INTERNSHIP
All year

Sussman Shank is partnering with the De La Salle Corporate Internship Program. The program consists of four students working one day a week, five days per month in a job-sharing team. These students have the opportunity to handle a wide range of duties throughout the firm. Through participation in the Corporate Internship Program, students receive academic credit and gain valuable real-world experience, equipping them for life beyond high school. Sussman Shank benefits as a participant in the program by reaping the benefits of increased workplace diversity, motivated student employees, mentorship, and community development.

TOOLS FOR SCHOOLS
September 2011

For the second year, Sussman Shank participated in the Tools for Schools Fundraising program benefiting Schoolhouse Supplies. Our team packed over 200 backpacks filled with school supplies to last the year for every student at Marysville School. Overall, we were part of delivering 11,706 backpacks. In 2009, Marysville School burned and it was a total loss. Since November 2009, students have been transported each day from their neighborhood in outer SE Portland up to the former Rose City School (in NE Portland). Due to budget shortfalls, Marysville school has not been rebuilt and the students and families have been dealing with quite a bit of uncertainty. Marysville is home to 436 students (K-8), of whom 82% are eligible for the reduced lunch program.

MOVEMBER
November 2011

For the third consecutive year, Sussman Shank participated in the “Movember” fundraising campaign. Throughout the month of November, over half of the men at Sussman Shank boldly bucked their razors and gloriously grew their strongest stache, all to benefit awareness for men’s health – specifically, prostate cancer. A friendly contest among male peers took place to see who could grow the best moustache. Charitable donations were solicited in support of their efforts and the firm matched all donations, raising $1,748 to benefit the campaign. Movember is the world’s largest fundraiser for men’s health issues. The funds raised in the US support prostate cancer research and other cancers that affect men.
Congratulations to our attorneys listed in 2011 Oregon Super Lawyers® and Rising Stars.

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