

June 12, 2015

TO: File / City URM Incentives Committee
FROM: Walt McMonies
RE: Legal Impediments REVISED #2
FILE NO: 710500.0001

Under the law, as it currently exists there may be impediments to seismic upgrading:

1. LL Lacks a Right of Access. Problem: Commercial and office leases may not expressly allow the landlord or his/her contractor to enter the tenant's space to make structural improvements to the Building. Solution: Legislation is needed to give the landlord such access for City imposed seismic work regardless of lease provisions to the contrary, but (a) limit access to (say) two months in any three years, (b) require the landlord to take all reasonable steps to minimize interference with tenant's business (including moving the tenant to equivalent temporary space) and (c) prevent the landlord from passing through the cost of the upgrade to tenants as a CAM charge unless such is expressly contemplated in the lease.
2. Liability for an Unsafe Building. Problem: Building owners and local governments can be held responsible by courts for non-compliance with mandatory seismic retrofit laws or for negligence in not retrofitting voluntarily in the face of long standing knowledge of an unsafe building. In California, the case of Myrick v. Mastagni held a URM building owner responsible for two deaths in Pasa Robles from the 2003 San Simeon earthquake. The jury found the owners negligent and awarded almost \$2 million to the plaintiffs, even though the building in question was not required to be upgraded for several years. Solution: Limit a landlord's liability to tenants, occupants and passers-by for damage to property or person in an earthquake so long as the landlord (a) has had the building inspected by an engineer for seismic issues, (b) has notified the tenants of the Building's known seismic deficiencies and (c) has diligently undertaken and pursued a seismic strengthening of the building consistent with City requirements.
3. Subordination to Seismic Upgrade Loan. First mortgage lenders are rarely willing to subordinate the priority of their existing loan to a new loan, except to their own new loans. Solution: Require first mortgage lenders holding commercial and apartment building loans not unreasonably to withhold consent to the seismic upgrading of the collateral buildings to City standards. Also, the landlord should be required not unreasonably to withhold consent

to subordinate it prior loan to construction financing for a seismic upgrade so long as the combined first and new construction loans do not exceed a 50% loan to value(LTV) or result in debt service coverage (DSC) of less than 1.35.

4. Zero Lot Line Limitations. Problem: Many seismic upgrade projects necessitate the contractor having access to the exterior of load bearing walls to strengthen them, but if the building is on or within (say) 10 feet of the lot line and the neighbor will not allow the contractor access onto his property or is otherwise uncooperative, it may be much more difficult and costly to strengthen the wall in question. Solution: Give the Chief Engineer at BDS the right to require the uncooperative neighbor to cooperate, so long as (a) the upgrading owner or his contractor provides property and liability insurance protecting the neighbor owner, (b) the upgrading owner and his contractor agree to and do take all reasonable steps to protect the neighbor's building and landscaping, and (c) they finish their work expeditiously.

5 Grandfather Protections. Amit and Steve Rose discussed this issue at the first meeting of the incentives committee. If an owner undertaking an installment upgrade schedule agrees to make upgrades to his/her building to then current seismic standards, what prevents the City from requiring more, later? Amit said that if the owner enters into an agreement to make the required upgrades and the City stiffens or changes a portion of the upgrade standard, the owner is protected and could not be forced to meet the higher standard. This should be memorialized in the City Code or Oregon legislation.

6. Post Disaster: Right to Rebuild, Non-Conforming Use, Expedited Permitting. Problem: Several years ago two towns were hit by devastating tornados. One town went to master plan redevelopment; one put a premium on expedited rebuilding. After a year or so so, the expedited rebuilding town was back on its feet and the master plan city was dead in the water. Resiliency post disaster will depend on creating a responsive and well trained permitting staff whose primary goal is expedited reconstruction. How expeditious the reconstruction is will depend on: (i) the number of trained permitting staff available (supplemented by out- of- state people); (ii) flexible regulations elevating reconstruction over lengthy procedural due process, (iii) converting a disaster version of LUBA into an all-powerful land use court. This change will require legislation.