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**WHY DEVELOPERS MUST LICENSE WITH THE CCB
(And What Happens When They Don't)**

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You are a developer. You buy land, improve it, and sell it, anticipating a profit or compensation of some kind. You have always called yourself a developer. Even your letterhead uses the term developer.

You are not a contractor. At least, you have never considered yourself a contractor. You have never rented a piece of machinery, purchased materials or tools, or paid a laborer. You have never created a critical path schedule or managed the subcontractors working on your projects. You sign AIA standard-form contracts, but always in the signature block labeled "owner." No one would consider you a contractor. Or would they?

One day, while visiting one of your commercial development projects, an investigator from the CCB approaches you and introduces himself. At first, you are pleased to meet him, because you think he is checking up on the many contractors working on your project. But then he starts asking you questions—strange questions.

He asks whether you are licensed with the CCB as a contractor. You respond, "No, I am not a contractor."

The next question is whether you intend to sell the development for compensation. You answer, "Yes, I certainly hope so."

Finally, he asks whether you are arranging to construct or improve the property on which you are standing. You respond, "Well, I'm a developer, so I guess I am arranging to improve the property."

If you would answer the questions in the same way, here is some news for you - you are about to be issued a penalty by the CCB for failure to license. Unfortunately, there is more news for you: The penalty from the CCB is not your biggest problem.

Are You Just a Developer or Also a Contractor?

Chapter 701 of the Oregon Revised Statutes broadly defines a contractor as: *a person who, for compensation or with the intent to sell, arranges or undertakes or offers to undertake or submits a bid to construct, alter, repair, add to, subtract from, improve, inspect, move, wreck or demolish, for another, any building, highway, road, railroad, excavation or other structure, 2 project, development or improvement attached to real*

estate or to do any part thereof. 'Contractor' includes general contractors, residential-only contractors and specialty contractors as defined in this section. ORS 701.005(2)

Under this definition, all developers who intend to sell their development are considered contractors for purposes of the contractor licensing requirement in ORS 701.055. With this definition in mind, let's continue the discussion between you and the CCB investigator.

After asking for your mailing address, the CCB investigator scribbles some notes and begins to walk away. But you possess keen senses, and you sense trouble. Mindful of the broad definition of contractor, you ask the investigator to wait just a minute.

"I think one of my answers wasn't clear," you say. "I really don't arrange or undertake to construct or improve real property. I pay a licensed general contractor to perform those services for me." Ah, a loophole, you think to yourself. You add, "Why do *I* need to be licensed when I am hiring someone who *is already* licensed? I am not improving the land myself; my contractor is doing it for me."

The CCB investigator has been around the block. He has heard this argument before and responds briskly. "Why? I'll tell you why. Because you have been charged with a responsibility to the purchasers of your development to properly construct and deliver an improvement meeting all of the industry standards and building codes that exist to ensure their safety and well-being."

Wow, this guy is tough, and he's not even finished. "Moreover, why are you, a developer, any different than a general contractor who subcontracts 100 percent of the work to subcontractors? Every general contractor in Oregon could argue that he need not be licensed because each of his subcontractors is licensed. As a consumer of general contractor services, wouldn't you be troubled by hiring an unlicensed general contractor?"

Even a defiant developer like you realizes that the CCB investigator has a point. Whether or not you wear a hardhat and a tool belt, you are a provider of construction services—a middle man of sorts—to the ultimate consumer of construction services. That consumer could be a homeowner, condominium owner, or, in this case, a commercial enterprise. These consumers rely on you—in the same way you rely on your general contractors—to know your business, to be properly insured and bonded, and to deliver what you promised and what the law requires.

At this point, you both realize that you could argue all day over the language of the statutes and rules. You offer a parting plea: "It simply isn't fair to penalize me, a developer, for not being licensed as a contractor. I had no former notice of your strict interpretation of the law, and will have to pay a lawyer to resist any penalty the CCB may levy."

The CCB investigator responds, “I am only doing my job. My directive is clear; developers must be licensed. I must protect those who cannot protect themselves; I must protect the consumer.”

The Real Dilemma

You wait for the CCB penalty notice in the mail. In the meantime, you close on the sale of your completed project. The CCB investigator’s final statement still haunts you. “Protect the consumer.” But before the penalty notice arrives, you become aware of more devastating news, *much* more devastating news. The general contractor has informed you that all of the windows in your newly completed building are leaking. The leaks are causing serious water damage and potentially toxic mold. It will take \$5 million to repair the defects and damages. You tell the general contractor to fix the problems and fix them fast. But the general contractor came prepared for this discussion, and he responds.

“I’ve reviewed this matter with my attorney, and he tells me that, because you are not a licensed developer, you cannot file a claim with the CCB against my subcontractors or me in court or in arbitration under ORS 701.065, which prohibits claims by unlicensed contractors.”

“Also, my own CCB license lapsed for several months during this project. Even if I wanted to help you, I may not be able to file legal action against my subcontractors for the money necessary to fix the problem.”

“I suggest you check your insurance to see if your limits are adequate to cover the projected \$5 million cost of repairing the damage and replacing the windows.”

You quickly call your insurance broker, who tells you that your limits are only \$1 million. Knowing that you could never possibly make up the \$4 million difference, you come to the realization that bankruptcy may be your only option. You then come to another realization: The new owner (*e.g.*, the consumer of construction services) has purchased a development with a \$5 million flaw and only a \$1 million insurance plan. Because neither you nor the general contractor could pursue the subcontractors and their insurance carriers, there will never be enough money to fix the problem. How ironic, you think. The CCB rules requiring me to get a license, for the purpose of protecting consumers, may actually lead to a contrary result. The consumer—it seems—has been seriously damaged by the very rules meant to protect it. Or has it?

The Solution

Before October 1, 2003, the consumer could have been harmed (and some were) under the circumstances described above. After October 1, 2003, the consumer is safe. Why, you ask? Because the legislature made some sensible changes to ORS chapter 701 that became effective on October 1, 2003.

First, the term developer is now expressly included in ORS 701.005(7) as a separate class of contractor entity that must be licensed with the CCB. You will be considered a developer under the new statute if you (1) own the property at issue, (2) hire contractors to oversee construction work on the property, (3) intend to sell the property, and (4) do

not self-perform any work on the property. If you self-perform any actual construction work (as opposed to hiring general contractors for this purpose), then you must license as a contractor.

Second, and perhaps more importantly, any failure of a developer, contractor, or subcontractor to be licensed will no longer preclude that entity from suing other parties for construction defects.

This exception to the bar on claims applies only in the context of construction defect lawsuits [ORS 701.065(2) (d)]. The obvious purpose of this important change is to protect consumers from the unintended situation discussed above.

Third, given the earlier confusion over the licensing requirement, the legislature adopted a grace period (found in the note at the end of the statute) that allowed unlicensed developers to file suits to collect compensation for work performed in whole or in part before April 1, 2004. After this date, you must be licensed in order to file suits to collect compensation (ORS 701.065).

Conclusion

You and the CCB investigator can now shake hands and agree on two simple truths. Developers must be licensed with the CCB. Lack of a license may prevent you from collecting your pay, but it will no longer prevent you from suing those responsible for construction and design defects.

The world makes sense again.