

The Bundle of Sticks: Property Law for Affordable Housing Developers

April 28, 3:30 – 5pm

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What You'll Learn



BUNDLE OF
STICKS



SECURITY &
PRIORITY



FUNDING
SOURCES



NEGOTIATION
STRATEGIES

Three Sources of Property Law

- Case Law Made by Judges
Found in court rulings and opinions
- Statutory Law Made by Legislators and
Agencies
Codified in Oregon Revised
Statutes (ORS), or
Oregon Administrative Rules (OAR)
- Common Law Historical Origins
Found in Treatises



What Is Ownership of the Fee Estate?

- The fee estate represents the fullest ownership interest in real property, historically symbolized by transfer of a bundle of individual sticks
- Each stick symbolizes a distinct property right including possession, control, exclusion, enjoyment, disposition (transfers of rights), and modification/development capabilities
- Rights can be separated and transferred individually to different parties while retaining the fee estate
- Understanding this divisibility is essential for analyzing development transactions, structuring financing, and resolving priority issues

Right to Convey/Transfer

Transfer to successors, heirs, assigns

Right to Mortgage

Pledge property as security; to put a lien on it

Right to Exclude Others

Prevent others from entering or using

Right to Possession

Physical occupancy and control

Easements

Grant narrow right to enter and use property

Development

Modify and improve the property

Executory

Make binding decisions about future use

Declarant Rights; Covenant Holder

Development rights, easements, reserved rights (like inspection and entry); covenant enforcement

Core Property Rights in Fee Estate

- Each right functions independently and can be transferred or retained separately through various legal instruments
- The fee owner maintains the core fee estate but may transfer specific real property rights via mortgages/deeds of trust, easements, and declarations of covenants (CCRs to HOA; Affordable Housing Covenants established with homebuyer to restrict resale, etc.
- Multiple parties can hold different rights in the same property, or portions/iterations of a fee owner's specific right, creating complex overlapping interests

All of the core rights are transferable 'real property'⁷

Role of transferee of each category of rights

- **Fee Owner:**

Retains foundational estate with reversionary rights after transferring specific sticks

- **Lender---mortgagee ; holder of security interest**

Holds security interest with foreclosure rights via mortgage

- **Easement Holder:**

Possesses narrow right to use the property of another (YOURS), such as access, utilities or view protection

- **Special Declarant Rights**

Holds residual rights (some statutory/some reserved) to control HOA, to add land to project, to development easements, to inspect, to view records

- **Homeowners Association:**

Exercises executory control, owns common tracts, and right to assesses for common expenses; exercises enforcement authority over property use

Multiple, simultaneous interests held by multiple successors/transferees

Homebuyers:

- **Tenant/Ground Lessee/Fee Estate in House**

Holds leasehold estate: right of possession/occupancy and exclusion and if expressly granted, development

- Holds right to locate their house on the lot (to possess the land for the lease term), and
- Holds fee ownership of house structure, while
- Ground Lessor/Landlord holds **reversionary interest** (all tenant rights flow back to lessor at each of lease term)

- **Affordability Covenant Holder**

Holds the affordability restrictions established in ground lease (or in a stand-alone declaration of restrictions—condos); may enforce and collect fees and holds repurchase option

- Often called “Program Manager”
- Usually is fee owner/LIFT Borrower

Different Legal Instruments Transfer Different Rights

- Each legal instrument removes specific rights from the fee owner's bundle and conveys them to another party; all **CONVEY** a real property interest, most are also **CONTRACTS**
 - All instruments signed by two parties are contracts, but other instruments of conveyance (signed by only one party) may also be contracts because statutes impose promises on the party not signing---example: a warranty deed)
- The original bundle separates as development progresses, with mortgages for financing, easements for utilities and access, and covenants for community standards
- Fee owner retains reversionary rights and any 'sticks' not explicitly transferred, maintaining ultimate control over property despite multiple encumbrances
- Understanding instrument hierarchy and priority helps developers structure deals, and ensure marketable title at project completion
- Other grants may 'layer' financing/capital and require additional affordability covenants be recorded against the project

GOLDEN RULE OF PRIORITY: FIRST IN TIME, FIRST IN RIGHT

Fee Estate Vesting Deed

Conveys title to developer

Mortgage/Deed of Trust

Lender receives security interest; right to foreclose

Easement Agreement/Plats

Public utility or neighbor receives entry and use rights

Declaration of CCRs

HOA receives executory rights; ownership of tracts

Ground Lease for Lot

Homebuyer receives leasehold estate in lot;
Establishes affordable housing covenants

Warranty Deed for Home

Homebuyer receives fee title to house structure

Timeline for Development for Planned Community-Subdivision: LIFT Funded

Community Development Framework

Land Trust Practitioners

Development Timeline Overview

- **Become an Owner**
Acquire Fee Estate
- **Become a Borrower: Get Grants and Financing**
LIFT Loan – Pledge Property as Collateral
- **Become a Developer: PreConstruction**
Acquire Entitlements/Grant Easements/Divide Land
- **Build!**
- **Become a Declarant**
Declaration of CCRs/Form HOA
- **Sell Homes; Become Ground Lessor and an Eligible Covenant Holder**
Home Sales - Ground Lease with Restriction & Convey Fee

- **Land Acquisition:** establishes foundational property rights; comprehensive title review tells you what property rights and restrictions affect the land already
- **Project Capital:** Structure financing, grant mortgages and establish lender priority positions; LIFT Loan will , and other grants may, blanket the property with affordability restrictions at this point
- **Entitlements and Easements:** negotiates easements (granting and obtaining over nearby property), covenants, and utility agreements while obtaining land use and permit approvals
- **CCRs & HOA:** Record declaration of covenants, conditions and restrictions and Bylaws to form governance frameworks for homeowner association
- **Home Sales:** Convey leasehold estate restricted for sustainable affordability via ground lease of lot; convey fee title to home via warranty deed

Phase 1 - Fee Estate Acquisition Process Become an Owner

1 Title Review

Comprehensive examination of all existing property interests and encumbrances

2 Survey Verification

Physical boundary confirmation and identification of easements or encroachments—get an “ALTA Survey”

3 Evaluate Servitudes: Easements and Restrictions

Identify all parties with existing rights or interests in the property:
-Any single family dwelling, set back, height or other deed restrictions that
Could curtail development?

Purchase and Sale Agreement

Negotiate terms and execute purchase and sale agreement with seller

Phase 1 - Acquire Fee Estate

Complete title review: read exception documents in title report

Due Diligence: Phase 1 Environmental and ALTA Survey

Evaluate prior third-party rights and their enforceability and impact

- Fee estate represents fullest ownership with extensive ownership rights including possession and control
- Title examination and surveys identify third-party uses of and rights to the property before commitment to prevent conflicts with development plans
- Terminate or relocate prior easements if problematic; remove or give easements for encroachments; evaluate enforceability and impact of prior deed restrictions

Phase 1 – Land Acquisition: Become an Owner

Due Diligence

Preliminary Land Use Consulting

concurrent interests

Closing

- Key Activities: Purchase Contract Execution, Environmental assessment completion, zoning verification, utility availability confirmation, and Title insurance procurement
- Deliverables: Preliminary title report, ALTA survey, Phase I environmental assessment, zoning compliance letter, and executed purchase and sale agreement
- Responsible Parties: Real estate attorney manages title review, licensed surveyor conducts boundary verification and prior easements' locations, environmental consultant completes assessments, and developer explores zoning and potential for exactions by planning department in exchange for entitlements and permits
- Critical Success Factors: Early identification of title defects: meaningful title insurance; clear communication with neighbors and public utilities; contingency planning for discovered issues, and evaluation of all existing property rights that burden or benefit the property

Phase 2 – Become a Borrower

LIFT Loan & Financing Mortgage Property

LIFT
Loan
App

Early
Recording of
Affordability
Instrument

Establish
lender
priority

- Borrower (Mortgagor/Trustor) grants Lender security interest (Mortgagee) with foreclosure rights while retaining owner property rights
- Start with the end in mind---consider FannieMae Selling Guide: preserve marketable title for homebuyers and protect homebuyers from enforcement by Lenders of developer's obligations
- Intercreditor and Priority and Subordination Agreements prevent future Lender (Mortgagee) enforcement priority disputes

LIFT Loan Financing Process

1

Loan Application

Submit LIFT (Local Innovation and Fast Tract funding) application to respond to NOFA (Notice of Finance Availability); apply for supplemental grants and construction loan



2

Underwriting

Lenders evaluates project feasibility, borrower capacity, and collateral value



3

Intercreditor Agreements; Master Form Ground Lease (with affordability covenants)

Establish priority positions among multiple lenders and interest holders; record master (dummy) ground lease for property records under developer's name (no legal description of property)



4

Loan Closing

Execute mortgage instruments and record security instruments; record regulatory/operating agreements with affordability restrictions on project

Phase 2 Financing Activities & Deliverables

Layered Financing and Grants

Lender coordination: negotiation of intercreditor and subordination agreements to establish priority of rights and remedies amongst lenders

Priority Position

Establishment required; protect future homeowner's rights that will come later in time

Key Activities

LIFT loan application prep, lender due diligence, appraisal management, subordination negotiation, mortgage documentation

Deliverables

Recorded deed of trust (Oregon's preferred form of mortgage/security instrument), subordination agreements, title policy with proper endorsements

Responsible Parties

LIFT loan officer, real estate attorney, appraiser, title company to coordinate closing and provide lenders' title policies

Critical Success Factors

Sufficient capital and documentation of lenders' priority of rights and remedies

Phase 3 – Developer-Acquire Entitlements/Grant Easements/Divide Land (Green)

- Planning phase focuses on negotiating conditional use approvals, plat approvals, easements, covenants, and utility agreements
- Easements that burden the project grants land use rights to others, requiring early negotiation to avoid construction delays
- Development phase involves recording land division plat and Declaration of CCRs

Zoning and Conditional Use Approvals

Obtain density, use, and dimensional approvals from planning authority

Subdivision Platting

Record final plat dividing property into individual lots

Utility Easements

Grant access rights to service providers for infrastructure—public utility easements are “in gross” easements that benefit the holder not nearby property; private utility easements are appurtenant (run with) benefitted contiguous land

Access Easements

Establish roadway and pathway rights for property access—easements that benefit the project

Environmental Permits

Secure wetland, storm water, and habitat compliance approvals

Phase 3 Activities & Deliverables

Multiple regulatory approvals required: planning, permitting, surveying, Environmental; compliance with Planned Community Act

Working with the neighbors essential

Comprehensive entitlement process

- **Key Activities** :Preliminary and final plat preparation, public hearing participation, easement negotiation with utilities and neighbors, covenant drafting, and regulatory compliance certification
- **Deliverables**: Recorded subdivision plat (with CCRs, typically), approved conditional uses, negotiated public improvements and other exactions, executed utility and access easement agreements, environmental permits, and land use and conditional use approvals with jurisdiction
- **Responsible Parties**: Land use consultant manages approvals, architect and civil engineer prepares site plans, surveyor provides boundary data and drafts land division plat, environmental consultant secures permits, developer coordinates engagement
- **Critical Success Factors**: Comprehensive due diligence, early utility engagement, proactive community communication, design flexibility for modifications, and clear documentation of granted and acquired easements



Covenants Phase-Become a Declarant - Declaration of CCRs & Form HOA

- HOA Declaration of CCRs exercises executory rights over use and collective costs, balancing community standards with homeowner rights
- Covenant frameworks balance community standards, Planned Community Act requirements, and buyer expectations while maintaining marketable title
- Ground Lease includes affordability restrictions that permanently restrict rentals, maximum resale prices, and transfers while homeowners retain possession and quiet enjoyment rights

Covenants Phase: Activities & Deliverables

Third-party beneficiary enforcement

Equity limitation provisions

Program compliance monitoring

- **Key Activities:**

Master declaration of covenants drafting, HOA articles of incorporation filing, HOA bylaws adoption, board of directors election, affordability covenant recording, and lender subordination agreement execution

- **Deliverables:**

Recorded master declaration of CCRs, recorded affordability covenants, HOA incorporation documents, adopted bylaws and governance policies, initial board resolutions, and subordination agreements from all lenders

- **Responsible Parties:**

Real estate attorney drafts all governance documents, HOA formation specialist coordinates incorporation, initial board members establish operational policies, and program manager serves as affordability covenant holder

- **Critical Success Factors:**

Use Grounded Solutions form for tradition home lending opportunities; clear resale formula (allowed by Fannie Mae); homeowner education on rights and restrictions, program manager capacity for enforcement and board training on program administration

Home Sales Process with Split Ownership

- 1 Buyer Qualification:** Income verification and program eligibility determination
- 2 Purchase and Sale Agreement:** Negotiate home purchase price within affordability limits in LIFT and grant other funding / grant covenants
- 3 Ground Lease Leasehold Conveyance:** Transfer possession stick for 99-year renewable term
- 4 Fee Conveyance:** Transfer home structure fee while retaining land ownership (in fee) by warranty deed (grantor is developer / project owner)

Home Sales – Become Lessor and Eligible Covenant Holder: Ground Lease & House Deed

**Leasehold Estate: possession
Exclusion, executory, financing/
(mortgaging leasehold)**

Retained Fee Estate

In land, affordability controls; lessor
reversionary rights in ground lease

Split

ownership implementation

- Closing transfers possession to lot and fee title in house while developer retains affordability covenants holder rights, and compliance monitoring, fee title to land and reversionary rights to *everything* (house ownership reverts, too) at end of lease term or earlier termination
- Homeowners receive possession, controlled transfer, mortgage rights, and limited equity accumulation
- Ground lease terms align with lender requirements for conventional financing approval

Selling Phase Activities & Deliverables

99-year

Ground Lease terms

Sustainable Affordability

Affordability Covenants in Ground Lease with Homebuyers

Ongoing

Affordability Program administration

Key Activities

Homebuyer income qualification and counseling, home lender pre-approval coordination, purchase agreement negotiation within affordability limits, seller disclosures, ground lease and deed preparation, closing coordination with title company, and post-closing compliance monitoring setup

Deliverables

Recorded warranty deed for home structure, recorded 99-year ground lease, executed affordability covenant acknowledgment, lender-approved mortgage on leasehold interest, title insurance policies for both interests, and program compliance monitoring agreement

Responsible Parties

Program manager qualifies buyers and administers program, real estate attorney prepares split ownership documents, homebuyer lender approves financing structure, title company handles dual recording, and closing escrow agent coordinates transaction execution and recording Short Form Land Lease, Warranty Deed to home, Deed of Trust/ Security for Lender

Timeline

Varies per home sale from buyer qualification through closing, with ongoing sales activity as homes complete construction and buyers qualify for program participation

Budget Considerations

Legal fees for dual conveyance structure, title insurance for split ownership, buyer counseling and qualification costs, closing coordination fees, and program monitoring system implementation

Critical Success Factors

Use FannieMae approved master form ground lease (Grounded Solutions 2011)—consider FannieMae formal preapprovals, clear buyer understanding of split ownership, efficient qualification and approval processes, coordination of construction completion with buyer readiness, and robust post-closing monitoring to ensure ongoing affordability compliance and covenant enforcement



Program Overview

Planned Community with common property (ORS 94), Subdivision plat with common tracts, Ground Leases with Permanent restrictions

- Developer/LIFT Borrower/Covenant Holder enters ground lease with each buyer (they are "in privity")
- Each homeowner receives specific rights through ground lease of lot and deed of home: possession, right to mortgage, with limited equity accumulation
- Developer/LIFT Borrower/Covenant Holder retains rights through purchase options, resale controls, and compliance monitoring rights
- Structure balances homeownership benefits with permanent affordability for community benefit

Start with the end in mind: home sales

Mortgage fee
estate; not
homeowners'
future interests

Be mindful of
FannieMae

Hierarchy/Priority

Real Estate Golden Rule: First in Time; First in Right

- Identify all existing encumbrances and easements on property before acquisition through comprehensive title review, ALTA survey, and talking to the neighbors
- Structure financing to accommodate multiple lender interests and LIFT priority, without creating unmarketable title conditions
- Negotiate easements and access rights early to avoid construction delays and neighbor disputes; protect project's necessary easements from foreclosure by making sure LIFT Loan documents include recognition agreements for Homeowners' possession and lease terms
 - FannieMae requires 'blanket encumbrances' held by governmental agencies on the fee estate to include promises that homeowner leases will be honored if fee estate is foreclosed
- Design covenant frameworks that balance wealth building and sustainable affordability
- Attach FannieMae Form 2100 to every ground lease with homeowners
 - FannieMae requires the right to foreclose on the HOME (not the lot) and the leasehold estate free of affordability restrictions
 - Form 2100 modifies the ground lease to meet this requirement
- Maintain clear documentation of all stick transfers and stakeholder agreements to ensure clean title

Common Pitfalls and Solutions

- **Undiscovered easements and deed restrictions** may emerge after acquisition and design, creating building and utility placement conflicts and creating long-term exposure of the homeowners to enforcement with liability for the developer for damages (usually not covered by title policy if problematic easements or deed restrictions are called out as exceptions to coverage.
 - READ YOUR TITLE REPORT AND EXCEPTION DOCS
- **Mortgage priority over necessary project easements:** foreclosure on the LIFT borrower's fee estate must not extinguish Declaration of CCRs or necessary project easements---look for 'recognition' provisions---watch other grants that require additional liens/security interest
 - ENSURE TERMS OF GRANTS AND THEIR ENFORCEMENT PROVISIONS AND SECURITY INSTRUMENTS DO NOT CLOUD TITLE FOR HOME SALES
- **HOAs:** remember to convey common area tracts to HOA before turnover; ensure the common area tracts will be released from LIFT Loan documents' encumbrances (it is illegal under PCA to convey common property to an HOA encumbered by developer-created blanket encumbrances)
 - AS INTERIM DIRECTOR YOU ARE A FIDUCIARY FOR FUTURE OWNERS
- **Ground lease terms** conflict with buyer financing requirements, as conventional lenders may refuse loans on leasehold estates without specific terms, riders, and renewal provisions
 - USE GROUNDED SOLUTIONS-BASED FORM OF GROUND LEASES WITH BUYERS, WHICH AVOIDS UNDERWRITING

LIFT Loan; other grants

LIFT: Sustainable
affordability
covenants
included in
operating
agreement

Third-party
beneficiaries of AHC =
Lenders

Enforcement structure—keep remedies
away from future homebuyers

Equity/Appreciation
Limitations in ground lease
bind homebuyers

Affordability preservation

- Developer/LIFT Borrower agrees to encumber the FEE ESTATE for 40 years with permanent affordability restrictions on project requiring sales and future transfers to 80% AMI and owner-occupancy; encumbrance of Operating Agreement and Deed of Trust do not affect Homeowners interests
- LIFT Borrower must enforce affordability restrictions; therefore, enter restrictive covenants with homebuyers (in the ground lease of the lot)
- Program manager/ground lessor serves as eligible covenant holder
 - Eligible covenant holders under ORS must be organized as Oregon public benefit nonprofit corporation with charitable purposes
 - Third party beneficiary: OHCS, possibly other grant/funding providers, can be granted right to directly enforce against homeowners in the ground lease
- This structure preserves home affordability for low and moderate income households denied access due to limited resources
- Other grants and construction loans may 'layer' financing/capital and require additional affordability covenants be recorded (blanketed) against the project *before construction*

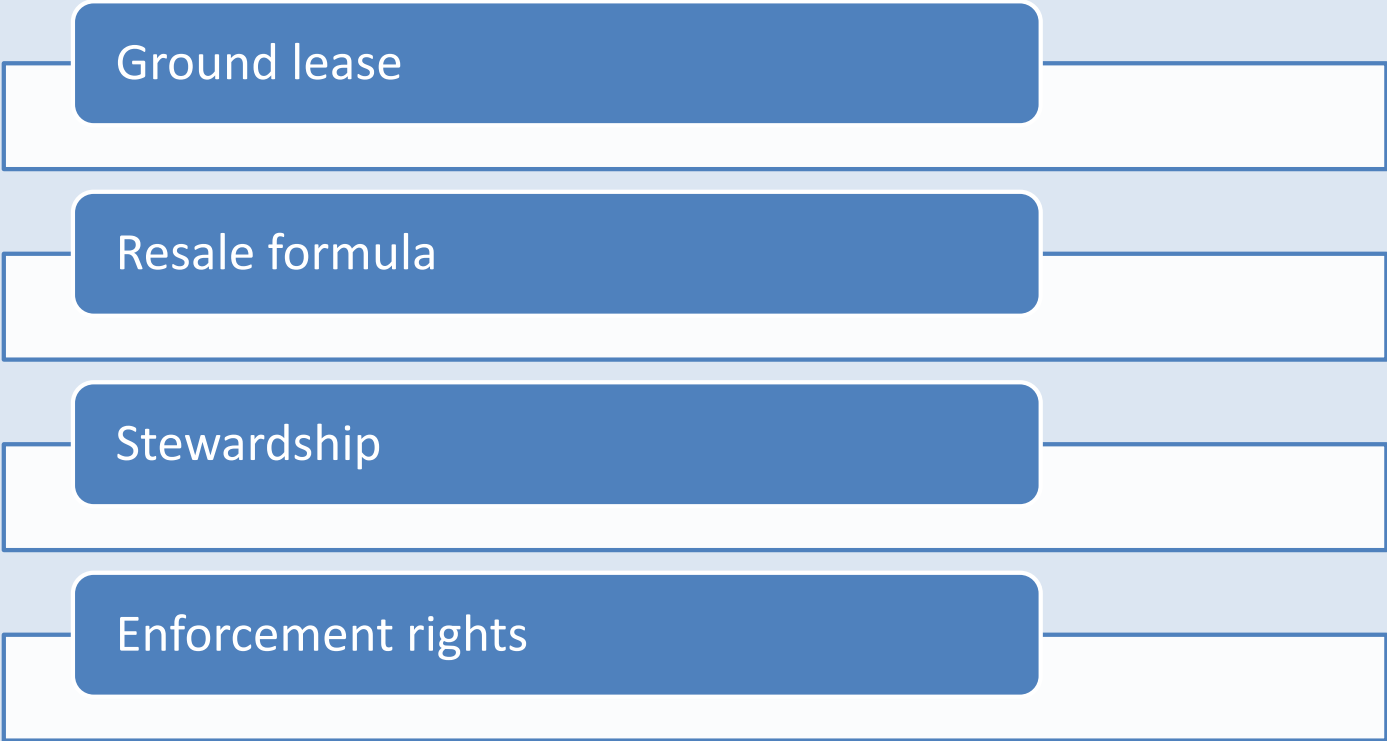
Managing Competing Priorities with Layered Funding

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Bundle of Rights



The diagram illustrates the 'Bundle of Rights' concept. It features a light blue background with a central white rectangular area. Within this area, four horizontal bars are stacked vertically. Each bar is composed of a blue segment on the left and a white segment on the right. The blue segments contain the text 'Ground lease', 'Resale formula', 'Stewardship', and 'Enforcement rights' from top to bottom. The white segments are empty. The entire diagram is framed by a thin blue border.

Ground lease

Resale formula

Stewardship

Enforcement rights

Not all rights are negotiable.

Layered Funding Reality



Let's Build the Funding Stack



Funding Comparison

Source	Security	Term	Concern
LIFT	Operating Agreement/Deed of Trust/Promissory Note	40 yrs	First Mortgage Loan/Default
CDBG	Covenant/Deed of Trust	15-25 yrs	Priority conflict
SHOP	Lien	5–15 yrs	Priority conflict
TIF	Repayment	Varies	Timing

Priority of Recording

Deed to the Land

Special LIFT Deed of Trust

City Affordability Covenant

County Affordability Covenant

Ground lease

Buyer Deed

Buyers Deed of trust

Where Things Can Go Wrong

- Deed Restrictions that run with the land
- Deeds of Trust on the entire property that will not be released upon sale of homes
- Reversionary interest
- Affordability Covenant that is not eliminated in foreclosure
- When everybody wants priority



Negotiation Tips

01

Start early

02

Document
priorities

03

Use
agreements

04

Protect
mission &
Homeowner

Key Takeaways



Complex but
manageable



Priorities conflict



Protect mission



Communicate