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Secretary of State Will No Longer Review Ballot Titles and Explanatory Statements

ORS 260.432 PROHIBITS public employees from engaging in political activities while on work time. The Secretary of State is responsible for implementing and enforcing the provisions of this statute. As part of these duties, the Secretary of State's Office offers to review materials created by local governments before publication to ensure compliance with the law.

Among other activities, ORS 260.432 prohibits public employees from drafting documents that advocate for or against ballot measures during working hours. Historically, this has meant that employees who draft or participate in the drafting of ballot titles and explanatory statements could be held in violation of ORS 260.432 if the ballot title or explanatory statement advocated for or against a measure.

Due to this concern, we at BEH have always recommended that our clients take advantage of the Secretary of State's review process before finalizing a ballot title or explanatory statement. The bad news is that the Secretary of State's Office will no longer review ballot titles and explanatory statements. The good news is that the Secretary of State will no longer take enforcement actions against public employees who participate in the drafting of ballot titles and explanatory statements that advocate for or against a measure during working hours.

As explained by the Secretary of State's Office, "[b]ecause the impartiality requirements and ballot title [and explanatory statement] challenge process[es] in ORS chapter 250 are distinct from the requirements of ORS 260.432, this office will not review ballot titles [or explanatory statements] for impartiality." In addition, the Secretary of State's Office stated, "[p]ublic employees who draft ballot titles [and explanatory statements] as part of their job duties will not be found in violation of ORS 260.432 for drafting a ballot title [or explanatory statement]."

The Secretary of State's Office will continue to review and/or take enforcement action on any other document related to elections (such as a newsletter article or other mailing).

Accordingly, we at BEH will

still advise our clients to take advantage of the Secretary of State's review procedures for other election-related documents.

In addition, it is important to remember that electors may file lawsuits to challenge ballot titles and explanatory statements that do not meet the impartiality requirements of ORS chapter 250. Therefore, it is still important to work with legal counsel when drafting such documents to ensure compliance with the law.

QUESTIONS ABOUT THIS ARTICLE?

Please contact Chad Jacobs at 503.226.7191.



Where There's Smoke, There's Not Always Fire...

FILARSKY V. DELIA (CITY OF RIALTO, CA), US SUPREME COURT, APRIL 17, 2012

THE UNITED STATES Supreme Court weighed in this year in an employment case involving a California City's decision to investigate, interview and then to examine evidence at the home of a firefighter who was absent from work for three weeks after becoming ill while working at the scene of a toxic chemical spill. The City officials in the case escaped

4th Amendment Constitutional liability – narrowly – for their actions, based on qualified immunity. The Supreme Court took the case to decide an important question for local government officials: Are public officials who do not work full time for the government nevertheless entitled to the protection of qualified

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from Pam's desk...

We are noticing – as you probably are – that the economy continues its slow but relatively steady recovery. We know all of you are busy responding (and that's a good thing)! With this edition of our newsletter, we are pleased to provide you with what we hope will be interesting news for local government.

You will find the article about *Filarsky v. Delia* and the Supreme Court decision regarding qualified immunity especially relevant as you consider personnel investigations, while our piece on *Brown v. City of Medford* recaps the Oregon Court of Appeals decision regarding a constitutional challenge to land use conditions of approval. Both articles provide food for thought in local government decision making.

Also, be sure to check out the Client Corner. It features innovations that

Where There's Smoke – continued from page 1

immunity when their actions are in fact taken for the government?

In this case, Mr. Filarsky had been denied that protection by the Ninth Circuit Court of Appeals. He was an attorney hired by the City to conduct the investigation, and did not perform work for the City on a full-time basis, although he had previously represented the City in several investigations. The Supreme Court, in an opinion by Chief Justice Roberts, held that the attorney was no different than a full-time public official for purposes of evaluating his conduct. The analysis was based on what the Court considers clear common law precedent, because the common law did not distinguish between permanent, full-time employees and those who are retained by the City for specific public purposes. As he noted, "New York City has a Department of Investigation staffed by full-time public employees who investigate city personnel, and the resources to pay for it. The City of Rialto has neither, and so must rely on the occasional services of private individuals such as Mr. Filarsky. There is no reason Rialto's internal affairs investigator should be denied the qualified immunity enjoyed by the ones who work for New York."

Also of note are underlying facts in this case since the defendants had to rely on qualified immunity to escape liability. Their conduct was held to actually violate the 4th Amendment's prohibition against unreasonable searches. Here are the facts in brief:



The City was suspicious of the firefighter's long absence from work – three weeks – and so hired a private investigator to put him under surveillance. When he was seen purchasing building materials at a home improvement store, the City officials ordered him to appear for an interview. When he denied working on his home during his time away from work, he was asked to show the unused building materials he purchased. When he refused, the investigator (attorney Filarsky) ordered the firefighter to allow entry into his home so the investigator could view the unused materials. The firefighter refused, and the investigator then asked if the firefighter would instead bring the building materials outside onto his lawn, which he finally did, resulting in termination of the investigation in the firefighter's favor.

These facts led the Supreme Court to conclude that the conduct of the City officials was, in fact, unlawful but that at the time of their actions they did not have reason to know their conduct was unlawful, the other required element for 4th Amendment liability. Justice Ginsberg, in her concurring opinion, noted that she would have sent this question back on remand.

A word to the wise: conduct of investigations that cross the line to an individual's residence are fraught with peril, despite the outcome in this case granting immunity to the City's part-time attorney investigator.

QUESTIONS ABOUT THIS ARTICLE?

Please contact Pam Beery at 503.226.7191.

CASE UPDATES FROM BEH

We are happy to report on two of our firm's recent decisions from the Court of Appeals that represent positive outcomes for local government:

COURT UPHOLDS EXTENSION OF METRO'S CONSTRUCTION EXCISE TAX

The Oregon Court of Appeals recently affirmed the validity of a 2009 ordinance enacted by Metro that lengthened the duration of a construction excise tax imposed in 2006 to provide funding for regional and local planning. The 2009 ordinance was challenged by the Homebuilders Association of Metropolitan Portland (Homebuilders) and several developers as violating Senate Bill 1036 (SB 1036) which was enacted by the state legislature in 2007. The Court of Appeals found SB 1036 was clearly intended to preempt local governments and service districts from imposing construction taxes except in limited

circumstances. In this case, because a new tax was not imposed, and there was a specific exemption for the continuance or extension of an existing tax, the 2009 ordinance did not fall within the preemption of SB 1036 and was valid.

COURT UPHOLDS ABILITY TO ADOPT HIGHER BASE FINES

Another recent Court of Appeals decision affirmed the ability of city municipal courts to adopt higher base fines than those adopted by the State Court Administrator for state violations. The case arose when defendant Randall Patrick was cited under ORS 811.111 for driving 24 miles per hour over the posted speed limit of 55 on Highway 26 in the City of North Plains. He was required to pay a fine of \$335. He appealed the ticket on several grounds, including the assertion that the Municipal Court of North Plains lacked authority to adopt a base fine schedule for state violations that differs from the state's schedule.

Developer Prevails

IN CONSTITUTIONAL CHALLENGE TO LAND USE CONDITIONS

THE OREGON COURT OF APPEALS this summer decided a case – *Brown v. City of Medford* – that is significant to local government for a couple of reasons. First, it is the first decision from the Court involving a statute that allows a land use applicant to accept a condition of approval and proceed with the development while simultaneously challenging the condition in state court. Second, the case highlights the legal standards that must be met when a city places conditions on a proposed development.

The circumstances in the case are not particularly unusual. Brown applied to the City to partition his half-acre property into two parcels. The City approved the partition on the condition that Brown dedicate a portion of the property along the rear property line for a future street – but not the street from which the two parcels would take access. The City had recently approved an application to subdivide the property behind Brown's property and required a half-street dedication. The dedication from Brown would have completed the dedication of the full right of way called for in the City's plans. Brown objected to the condition on constitutional grounds and filed suit under ORS 197.796, which allows him to accept the conditions for purposes of

moving forward with the partition while simultaneously maintaining a legal challenge to the conditions.

The trial court ruled in favor of Brown finding that there was not a nexus between the development and the boundary street condition, thereby requiring the City to compensate the owner for the dedication. On appeal, the City argued that although the developer had "accepted" the conditions in order to bring this challenge, the case was not yet ripe and should be dismissed because Brown had not yet dedicated the property. In other words, because the City had not yet taken possession of the property, there wasn't a "taking" yet. The City also argued that even if the case was not dismissed, the condition was lawful under the State and Federal constitutions and that no compensation was owed to Brown. Finally, the City argued that even if Brown was entitled to compensation, the value of the property should be based upon the date that the dedication actually occurs, not the date of the decision that imposed the condition.

The Court of Appeals rejected all three of the City's arguments. The Court concluded that ORS 197.796 was specifically written to allow developers to challenge conditions of approval after a city makes

the final decision imposing the challenged condition but before the condition is fulfilled by the developer. In addition, the Court of Appeals noted that ORS 197.796 places the burden of proof on the City to demonstrate that the challenged condition complies with the constitutional standards. In this case, the Court concluded the City failed to meet that burden of proof.

In reaching its decision, the Court of Appeals did not announce any new takings law but it did sharpen certain parts of the existing analysis. Specifically, the Court emphasized that to demonstrate a lawful nexus, a city must show that the condition is related to a policy or code provision that would have allowed the city to deny the application. The Court explained:

"The question is not whether the city can identify a connection between the condition and some legitimate public policy that the city seeks to advance . . . Rather, the issue is whether the exactions

substantially advanced the same interests that land-use authorities asserted would allow them to deny the permit altogether." Later, the court writes: "Again, the essential 'nexus' question is not whether certain governmental goals would be upheld or struck down. Rather the court must examine the nexus

between the condition imposed and the interests that the local government asserts would allow it to deny the application."

Although the Court was careful to point out this was not a new requirement or a new interpretation of existing case law, the Court's decision does suggest for the first time that a city is required to tie each condition of approval to a specific criterion in the local code in order to establish the necessary nexus. If the city cannot find that the application failed to meet a specific criterion – and thereby provide a basis for denying the application – it also cannot impose a condition of approval related to that criterion (or at least meet its burden in a challenge brought under ORS 197.769).

Finally, as to the date of valuation, the Court concluded that, in an action brought under ORS 197.796, the relevant date for valuing the property required to be dedicated is the date that the city approved the partition with the dedication condition – not the date the dedication actually occurs.

Ultimately, the case offers several lessons for cities. The first is a reminder that ORS 197.796 gives a land



Clean Water Services is providing for Washington County cities with its creation of an innovative new product that is getting international attention!

Here at BEH, we are proud to announce that we again have four attorneys named as Best Lawyers® for 2013: Pam Beery, Paul Elsner, Tom Sponsler and Chris Crean. Not surprisingly, our attorneys were named in the categories of Municipal Law, Litigation-Municipal, Land Use & Zoning Law and Litigation-Land Use & Zoning. The firm as a whole has retained its top tier rating in Municipal Law for the third year in a row. Best Lawyers® is the oldest peer-review publication in the legal profession and being listed is a mark of professional distinction. We are both proud and appreciative of this recognition and of our clients' role in helping us maintain it over the years.

CLEAN WATER SERVICES PROVIDES A NEW LOOK TO WASTE



CLEAN WATER SERVICES' Rock Creek wastewater treatment facility in Hillsboro cleans 39 million gallons of wastewater a day

from the municipalities of Hillsboro, Beaverton, Forest Grove, Cornelius, North Plains, Banks and Gaston, as well as Aloha, Bethany, Cedar Mill, and Rock Creek. If that wasn't enough, the facility is now manufacturing fertilizer.

The \$4.75 million treatment facility uses an innovative nutrient recovery process to extract approximately 1,200 tons of phosphorus from wastewater annually to produce a high-end fertilizer. The white pelletized fertilizer is sold under the brand name Crystal Green at nurseries and turf farms in the metro area, as well as by fertilizer distributors throughout North America and Europe.

A common challenge for wastewater treatment facilities such as Rock Creek is the over-accumulation of phosphorus in the equipment resulting in the formation of struvite scale, a concrete-like mineral deposit which clogs equipment adding significantly to operating and maintenance costs. The nutrient recovery process used at Rock Creek will help Clean Water Services overcome these challenges with the recovery of up to 95 per cent of the phosphorus and 20 per cent of ammonia

from the liquid wastewater stream, which will then be transformed – through a chemical reaction in fluidized bed reactors – into an environmentally friendly, slow-release fertilizer.

"This technology provides benefits to our ratepayers and the environment by extracting valuable nutrients – which would otherwise clog our pipes – to create an environmentally safe, revenue producing commercial fertilizer" explained Bill Gaffi, General Manager of Clean Water Services.

In addition to keeping the struvite scale out of the equipment, the process also prevents phosphorus and other naturally occurring chemicals from being dumped back into the Tualatin River, which assists Clean Water Services with meeting federal guidelines that place strict limits on how much of these chemicals may be released into waterways.

The project is a partnership between Clean Water Services and British Columbia based Ostara Nutrient Recovery Technologies. This is the second such partnership between the parties in Washington County. The parties first partnered with a smaller nutrient recovery system at Clean Water Services' Durham wastewater treatment plant in Tigard in June 2009. We salute this innovative initiative!

HAVE A SUBMISSION? Please contact Pam Beery at 503.226.7191.

CLIENT CORNER

For more frequent information updates, please visit our Northwest Government Law Blog: www.gov-law.com/blog

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Developer Prevails – continued from page 3

use applicant the ability to bring a constitutional takings claim, even if the city has not taken possession of the property. Second, the statute awards attorney fees to the prevailing party, which will often exceed the value of the property. Finally, a city needs to be careful when making land use decisions to ensure that every condition of approval that requires the dedication of

property to the public (right of way, stormwater swales, etc.) is expressly tied to an approval criterion and only imposes the condition if the application would not otherwise meet the criterion and could, on that basis, be denied.

QUESTIONS ABOUT THIS ARTICLE?

Please contact Chris Crean at 503.226.7191.

Updates from BEH – continued from page 2

The Court found that ORS 153.142 specifically provides that any court of this state may adopt higher base fine amounts for violations subject to the jurisdiction of the court. Further, municipal courts are courts of this state with concurrent jurisdiction with circuit courts over violations of ORS 811.111. Because the North Plains Municipal Court has concurrent jurisdiction over state violations committed within the

City of North Plains, it has the authority under ORS 153.142 to adopt a higher base fine. The Municipal Court of North Plains had, in fact, adopted such a fine schedule, and as such, the defendant was subject to that higher fine amount for his speeding violation.

QUESTIONS ABOUT THIS ARTICLE?

Please contact Heather Martin at 503.226.7191.