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GOV-LAW CONNECTION

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Ninth Circuit Decision Offers More Guidance on How to Manage "Unruly" Audience Members

IN THE LAST FEW YEARS, several First Amendment cases have addressed a city council's ability to deal with disruptive audience members. A recent Ninth Circuit Court of Appeals case addressed this issue again in *Acosta v. City of Costa Mesa*, holding that the City's ordinance was overbroad in that it prohibited expression that did not equate to an actual disturbance.

Acosta brought action against the City of Costa Mesa, California, after he was removed from a City Council meeting for being disruptive. The City was discussing entering into an agreement with Immigration and Customs Enforcement that would designate City police officers as immigration officers and authorize them to enforce federal immigration laws in the City. Acosta was involved in an organization that represented the rights of undocumented and immigrant workers and spoke out against the City entering into such an agreement during the public comment portion of a City Council meeting.

During his remarks, Acosta asked those who agreed with his viewpoint to stand. The Mayor interrupted Acosta and said, "No, we're not going to do that." Acosta ignored the Mayor and demanded the audience to stand a total of three times – eventually twenty to thirty people stood and began clapping. The Mayor abruptly recessed the meeting and while he and the Council departed, Acosta continued to speak. After refusing requests of police to remove himself from the podium, police officers physically forced Acosta from the podium. Acosta filed suit against the City making multiple claims; the crux of Acosta's claim was that the City ordinance (enforced by the police officers at the City Council meeting) unconstitutionally restricted his speech.

Interestingly in another case, *Norse v. City of Santa Cruz*, a 2010 Ninth Circuit case that we also reported on, the Court held that a city council meeting is a limited public forum and audience members can be removed for "actually disturbing or impeding a meeting." Thus, a council can regulate time, place and manner of speech in a limited public forum and even the content of speech so long as it is reasonable and viewpoint neutral. By contrast, the ordinance at issue in *Acosta* made it a misdemeanor for members of the public who speak at City Council meetings to engage in "disorderly, insolent, or disruptive behavior."

Acosta argued that the ordinance unconstitutionally prohibited speech because it included expression that did not equate to an actual disturbance. The Court analyzed the ordinance, particularly the meaning of "insolent," which it noted is defined as "proud, disdainful, haughty, arrogant...." This type of expressive activity, the Court concluded, could and would likely result in behavior that falls below the threshold of an *actual* disruption. Consequently, the Court held that the ordinance was unconstitutionally overbroad on its face because it included non-disruptive protected speech or expressive conduct. However, the Court also concluded that "insolent" could be severed from the ordinance so that the remaining ordinance could be saved from complete invalidation.

The key lesson in this case is that local governments may establish rules for how to handle unruly audience members, so long as the rules do not prohibit or restrict speech or expression that does not equate to an *actual* disturbance. In doing so, the rules can proscribe activity that actually interrupts, delays, or disturbs the meeting, but does not broadly prohibit expression merely because it is insolent. As with any type of rule or policy impacting speech and expression, we recommend working with your legal counsel to help carefully draft such rules and to avoid the pitfalls that can result in costly litigation.

Acosta v. City of Costa Mesa (9th Cir., 2012)

QUESTIONS ABOUT THIS ARTICLE?
Please contact Heather Martin at 503.226.7191.

MANAGING PARTNER'S MUSINGS

from Pam's desk…

The holidays are behind us and it is time to look forward to 2013 and the various projects we hope to launch, move forward or complete in the new year. Many of you are engaged with your governing bodies in goal setting and budgeting. Here at BEH we are happy to be marking another milestone this year – we are proud to celebrate 15 years in business, serving the interests of local government since January 1998.

In other news of the firm, we are pleased to announce our new Eastsound, Washington, office. Adina Cunningham, formerly in private practice in Eastsound, joined BEH but will continue to practice in Washington. Many of her clients will move with her to BEH where her practice will continue to focus on municipal law, land use and employment law.

Oregon Court of Appeals:

PLANNING FOR A PROJECT DOES NOT CREATE A REGULATORY TAKING

THE OREGON COURT OF APPEALS recently decided a case on the question of whether the effects of *preliminary planning* can create a "taking" of the property. While it decided the case on a different basis, the Court reaffirmed the rule that government legislation alone does not "take" property unless the legislation amounts to a "substantial interference" with the property, such that it deprives the owner "all substantially beneficial use of the property."

In *Hall v. ODOT*, ODOT began developing plans for an I-5 interchange in Linn County that would have closed access to owner Hall's property. However, when ODOT opened public hearings on the proposal, it proved unpopular and ODOT withdrew the plan. Instead, the agency began a new planning process, which was ongoing when the property owner filed the lawsuit.

In his lawsuit, the owner claimed the property was worth $4,000,000.00 and that ODOT's closure plan, along with public comments about subsequent condemnation of his property, "blighted" the property and reduced its value by $5,353,000.00. The jury agreed with the owner and awarded him $3,378,750.00 in damages, plus $467,222.87 in attorney fees.

On appeal, ODOT argued that legislation (whether statute, agency rule, ordinance, or similar regulation) cannot take a person's property unless it substantially interferes with the property in a way that deprives the owner of substantially all beneficial use of the property. The owner did not disagree with this analysis, but instead argued that ODOT's planning effort was not motivated by public safety concerns, but rather by malice toward the owner. According to the owner, the question of ODOT's motives was presented to the jury, which found in favor of the owner.

Ultimately, the Court ruled in ODOT's favor on two grounds. First, the Court reviewed the jury instructions and determined that the jury was never asked to decide ODOT's motives. Instead, the jury was asked whether ODOT's planning activities substantially interfered with the owner's use of his land and, if so, whether that interference reduced the fair market value of the property. Based on these instructions, the Court found that it "[could not] infer from the verdict that the jury made any decision one way or another regarding ODOT's intent." Accordingly, ODOT's intent – whether malicious or otherwise – could not provide a basis for the jury verdict.

Second, the Court found that even if ODOT was pursuing a vendetta against the property owner, that fact alone would defeat a takings claim. In Oregon, government can take private property only for a public use and then only if it pays for the property. Here, according to the property owner, ODOT was not trying to take the property for public use but, rather, to punish the owner.

Because the property owner effectively conceded that ODOT was not taking the property for public use, the Court ruled his taking claim was invalid and reversed the trial court decision.

The case is useful for local governments for two reasons. First, it reaffirms the rule that legislative decisions will constitute a taking only if they deprive the affected property of "all substantial beneficial use."

Second, it directly addresses the not-uncommon scenario in which a property owner claims that a government decision to propose and adopt certain land use legislation is just a subterfuge and the government's real motive is to pick on the owner. From the reasoning and decision in this case, it appears the courts will not have much patience for such claims.

Hall v. ODOT (October 2012).

QUESTIONS ABOUT THIS ARTICLE?
Please contact Chris Crean at 503.226.7191.

TASERS AND DEADLY FORCE

What Local Police Need to Know

THE USE OF TASERS by police as an alternative to other types of weapons has become commonplace in many local jurisdictions over the last ten years. Recent uses of Tasers to subdue suspects have, however, resulted in deaths. One such case resulted in litigation by the family of a deceased suspect against a manufacturer of the Taser weapon.

In *Rosa v. Taser International*, police officers in Del Rey Oaks, California, were called on a neighborhood noise complaint because an individual who "look[ed] pretty disturbed" was "walking up and down the street yelling 'Mario' and … some other stuff." An officer responded to the noise complaint and found the suspect still in the street. The suspect continued to act irritably after being confronted by the officer and hit the officer's vehicle with his hand several times. Eventually seven officers arrived on the scene, which resulted in the situation deteriorating rapidly. The

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Prevailing Wage Laws

HELPFUL HINTS FOR BOLI DETERMINATION REQUESTS

FOR MANY LOCAL governments, public-private partnership projects are on the rise. As a result, it is not always readily apparent whether the state's prevailing wage rate (PWR) law applies to construction of these projects. To ensure that private developments are not subject to PWR, a determination letter can be obtained from the Oregon Bureau of Labor and Industries (BOLI).

While drafting the determination letter, it is important to keep these helpful hints in mind:

1: **Involve All Parties –** Prepare a determination letter with input from ALL relevant parties. It is important to define expectations for the project up front and getting input from all parties at the outset can manage those expectations and will result in a more complete and accurate determination letter.

2: **Project Facts –** Include all relevant project facts with citations to appropriate supporting documents. This includes:
- Name and address of the project
- Ownership information including past, present and future owners of the property at issue with dates of ownership changes
- Complete funding information for the project

3: **Monetary Breakdowns –** In addition to a disposition and development agreement and/or relevant purchase and sale agreements, include breakdowns of project funds that do and do not qualify as "funds of a public agency."

4: **Organize –** Break your request to BOLI down into several distinct sections: project background, project facts, roles and contributions of each relevant party and legal analysis.

5: **Focus on the private development** and not the public parts of the project where prevailing wage was already paid or has already been determined to apply.

6: **Use past BOLI letters as guidance –** find examples that are similar to the project at hand and use a solid legal analysis.

Often these simple preliminary steps will alleviate problems as you begin your project. And as always, consult with your attorney as you work on these ventures.

QUESTIONS ABOUT THIS ARTICLE?
Please contact Heather Martin at 503.226.7191.

Destroying Seized Property?

NINTH CIRCUIT SAYS NOT SO FAST...

AS PART OF its efforts to clean up city streets, the City of Los Angeles seized property belonging to homeless individuals that had been temporarily left unattended on city sidewalks. Los Angeles employees then immediately destroyed the seized property. Nine homeless individuals who had their personal possessions seized while they were away from the affected sites sued the City.

A federal judge found in favor of the homeless individuals and issued an injunction that prohibited the City from (1) seizing property of homeless individuals absent an objectively reasonable belief that it is abandoned, presents an immediate threat to public health or safety, or is evidence of a crime, or contraband, and (2) absent an immediate threat to public health or safety, destroying seized property without maintaining it in a secure location for a period of at least 90 days. The City was also required to leave notice in a prominent place for any property seized with the belief that it was abandoned, which must include information regarding where the property is stored and when it may be claimed by the rightful owner.

On September 5, 2012, the Ninth Circuit Court of Appeals, the federal appellate circuit to which Oregon belongs, upheld the injunction issued by the trial court. The Ninth Circuit determined that homeless individuals have a constitutionally protected possessory interest in their property and that the unreasonable seizure of such property violated the Fourth Amendment to the United States Constitution. The Court compared the seizure and destruction of the homeless individuals' family photographs, identification papers, portable electronics and other property to an illegally parked car or a dog that was temporarily left alone outside a store and determined that such property may not be unreasonably seized. The Court also held that the City's failure to provide the homeless individuals with notice and an opportunity to be heard before their possessions were destroyed violated the due process clause of the Fourteenth Amendment to the United States Constitution.

The Ninth Circuit's decision provides important notice to local governments regarding seizure of property of any kind. An unreasonable seizure of property or

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Licensed to practice in Washington and Hawaii, Adina will also soon be a member of the Oregon State Bar. We are excited to put Adina's in-depth knowledge of municipal issues to work on behalf of our valued Oregon and Washington clients and to welcome new Washington local government clients to BEH.

With this issue of our newsletter, we again offer updates on recent legal developments that we hope will be of interest. In addition to BOLI helpful hints, hot topics right now include cautions about the city council's ability to deal with "unruly" audience members, police officers' use of Tasers and local government's seizure and disposal of personal property. We hope these timely articles will be of value to you in your work.

FRIDAY HARBOR...BEH'S NEWEST CLIENT

CLIENT CORNER

WE ARE EXCITED to welcome the Town of Friday Harbor, Washington, to our community of clients. Friday Harbor is located on San Juan Island in San Juan County, Washington, on one of four islands served by the Washington State Ferry System. It is the seat of San Juan County's government, and is the only incorporated town in the county, which is comprised of five main islands in a chain of 172 islands.

Incorporated in 1909, today the Town is a popular vacation destination in the San Juan Islands. The Town boasts a lively artistic community with shopping for clothing, jewelry, paintings and sculpture by local artisans. For vacationers interested in recreational activities and sight-seeing, whale watching, sailing, kayaking, fishing and exploring, the islands are a magnet.

In 2010, Friday Harbor annexed 22 acres to allow the siting of the first critical access hospital in San Juan County, developed as Peace Island Medical Center. Without a critical access hospital, all of the County's over 15,000 residents must be flown off the islands to the Washington mainland to receive critical care. The hospital will offer expanded clinic services, 24/7 emergency care, cancer care treatment, and expanded inpatient care.

Friday Harbor's Community Development Department has worked closely with PeaceHealth to ensure that zoning, siting, and environmental concerns are addressed. After years of planning, agreements, and development, the Hospital opened its doors in November, 2012. Friday Harbor is ranked as one of the "healthiest" cities in which to live in Washington State. That said, the Hospital is welcomed by Town residents and visitors alike.

HAVE A SUBMISSION? Please contact Pam Beery at 503.226.7191.

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

Tasers and Deadly Force – continued from page 2

suspect attempted to flee, breaking at least one fence in the process.

The pursuit ended when the suspect jumped over a three-foot fence, assumed a batter's stance, and began swinging a piece of two-by-four lumber. Unable to convince the suspect to comply with verbal commands and concerned for his safety, one officer deployed his Taser in "probe mode." The suspect then tumbled down an embankment, ending the shock from the Taser. A second officer then deployed his Taser depressing the trigger an additional six or seven times. Seeing that the suspect continued to struggle, another officer deployed his own Taser, cycling it three times before the suspect finally hit the ground

The suspect continued to resist as yet another officer attempted to place him in handcuffs. It took the efforts of six officers to subdue the suspect, and in order finally to take him into custody, an officer once again applied a Taser, this time in "drive-stun mode." Once in custody, the suspect was placed on his side on the ground, his lips turned blue and his breathing became erratic. The suspect soon stopped breathing entirely, and despite the officers' attempts at resuscitation, he was pronounced dead after his arrival at the hospital.

The suspect's family sued the manufacturer of the Taser used by the police officers, asserting that the suspect died because the manufacturer had provided an inadequate warning of the dangers of the product to the officers who used it. The trial court ruled in favor of the manufacturer because the risk of the Taser causing trauma that could result in death was not knowable at the time of the incident. The Ninth Circuit Court of Appeals, the federal circuit to which Oregon belongs, upheld the trial court's ruling.

Although this case was not brought against the City of Del Rey Oaks, it is nonetheless important for local governments because it provides a caution to police officers that repeated exposure to Tasers may constitute deadly force. Accordingly, should a police officer apply a Taser that results in the death of a suspect, the officer or his or her employer may be liable to the suspect's estate and cannot rely upon qualified immunity as a defense.

Rosa v. TASER International (9th Cir 2012).

QUESTIONS ABOUT THIS ARTICLE?
Please contact Chad Jacobs at 503.226.7191.

Prevailing Wage Laws – continued from page 3

destruction of such property without notice and an opportunity to be heard may result in costly litigation and monetary damages. It is important to assure that all staff in law enforcement and code enforcement are well trained in these protocols and that clear policies are in place to reduce the risk of costly claims.

Lavan, et al. v. City of Los Angeles (9th Cir 2012).

QUESTIONS ABOUT THIS ARTICLE?
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