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GOV-LAW CONNECTION

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Zoning to Protect Manufactured Home Parks: Can It Be Done Without Incurring Legal Liability?

TWO CITY ORDINANCES that were designed to protect existing manufactured home parks from redevelopment – and hence to help assure they would continue to provide affordable housing options in the City of Tumwater – were recently upheld by the Ninth Circuit Court of Appeals after the City won a summary judgment motion in the lower court. Although the case turned on a lack of proof of any real harm demonstrated by the owners of the parks who challenged the zoning ordinances, it seems to breathe new life into a zoning tool that many had thought no longer available under current law.

Because they cost less than traditional homes (even less than rental housing in some circumstances), manufactured homes are an attractive option for lower-income residents. However, this category of housing is, frankly, immobile today due to the high cost of moving a dwelling and the shortage of available locations to site them. Such residents can ill afford to move. As such, the conversion of a manufactured home park into a typical subdivision is particularly devastating for residents of such parks. Many states, including Oregon and Washington, have enacted some protections for existing parks, but these restrictions are largely procedural, typically requiring a certain amount of notice to homeowners.

In a bold step to protect six of its ten existing manufactured home parks, the City of Tumwater enacted new zoning designations titled, "Manufactured Home Parks" and applied the designation to the six parks. Before the enactment of the ordinances, the zoning code permitted a wide range of uses on the properties; under the new zoning restrictions, only limited uses are allowed unless the property owner qualifies for an exception based on economic hardship. As stated in the explanation adopted by the City, the clear intent of the ordinances was in fact to prevent the conversion and redevelopment of the six affected parks.

Plaintiffs, the owners of the parks and a statewide association of manufactured housing interests, sued the City, alleging that the ordinances violated the federal and state constitutions. Admittedly, park owners often count on the future potential for conversion when they purchase these parks; in the meantime, the parks represent a return on investment in the form of rents received from the owners of the dwellings. These future planned conversions are effectively foiled by Tumwater's ordinances. In determining that the ordinances did not violate either the federal or the state constitutions, the appellate court held that the plaintiffs still held on to their primary expectation of continued use and revenue; albeit their future plans to convert the parks were no longer viable. Such expected future financial benefit did not give rise to a claim against the City. Since the appraised values of the parks were shown to have been diminished by less than 15% in each case, the ordinances did not effect a "taking" of the property in question.

The Court noted further that the use restrictions inherent in the City's ordinances were "the essence of zoning" and did not destroy one or more of the fundamental attributes of property ownership (the so-called "bundle of sticks"). The City had a valid public purpose in the preservation of this type of affordable housing, and while the burden of this effort falls in a concentrated way on these property owners, the burden was not so great as to create liability for the City.

Local governments may take heart from this clear re-affirmation of local zoning authority by the Ninth Circuit Court of Appeals; but caution is still the order of the day with respect to drafting and enacting these types of regulations. The Court noted in passing that if it had been presented with better facts and data with respect to the economic impact of the City's new zoning laws, the outcome might well have been different. As low income housing options become more difficult to find in an increasingly dense urban environment, tools to encourage retention and creation of needed housing will continue to be needed – and may be challenged if their impact on specific property owners is deemed too great.

Laurel Park Community, LLC v. City of Tumwater, 698 F3d 1180 (CA9, Wash. 2012)

QUESTIONS ABOUT THIS ARTICLE?
Please contact Pam Beery at 503.226.7191.

MANAGING PARTNER'S MUSINGS

from Pam's desk…

With all that it portends for rebirth and growth, spring seems to be making an early appearance in the Pacific Northwest this year. Broadly, our local commercial economy seems to reflect the season with indicators of recovery in building and jobs. However, for our local government clients it is the season of defining budgets and prioritizing multiple demands with limited resources. This issue of our newsletter will hopefully highlight some areas of law that may be meaningful to you as you continue your planning process for 2013.

We are excited to let you know that we are updating our technology to offer video conferencing options from our Portland office. We hope to have our new, state-of-the-art equipment installed by June of this year. We are looking forward to making this technology available to reduce our clients' costs for legal services.

Current Land Use Cases
AT US SUPREME COURT

THE CURRENT United States Supreme Court term includes two land use cases of interest to local government. The first (*Koontz v. St. Johns River Water District*) addresses the question of whether a requirement to spend money on off-site improvements can be considered a "taking" of private property under the 5th Amendment to the U.S. Constitution and current Supreme Court case law. It also asks whether a decision to simply deny a land use application can be considered a "taking" if the reason for denial is the applicant's refusal to agree to an unconstitutional condition. The second case (*Arkansas Game & Fish Commission v. United States*) considers whether the release of water from a dam for flood control purposes can be considered a taking if the release temporarily floods and causes damage to downstream property.

In *Koontz*, the property owner owns a 14-acre parcel zoned for commercial use. Only 1.4 acres of the property are considered buildable, the remainder (12.6 acres) is in a wetland and riparian protection zone. The owner applied to develop 3.7 acres of the property and the St. Johns River Water District agreed, provided he dedicated the remainder as a conservation easement and performed certain off-site mitigation to other wetland areas. Alternatively, the agency said he could reduce the development to one acre and dedicate the conservation easement but would not be required to conduct any off-site mitigation. Koontz refused to either reduce the size of the development or perform the off-site mitigation, and the agency denied the permit. Koontz then sued the agency, arguing that the decision to deny the development permit because he refused to perform the off-site mitigation violated the 5th Amendment as interpreted by the court in *Nollan v. California Coastal Commission* and *Dolan v. City of Tigard*.

The case was argued in January and the Court has yet to issue a decision. However, at oral argument the Court expressed skepticism that the decision to deny the permit falls under the 5th Amendment because no property was taken as a result of the decision. The property owner still owns all of the property he owned before the case began. The Court was equally skeptical that a requirement to expend money on off-site mitigation falls under the 5th Amendment absent a requirement to dedicate an interest in the property. Here, the proposed mitigation site was already owned by the public and no further dedication was required from Koontz.

The case is similar to the recent Oregon case *West Linn Corporate Park v. City of West Linn*, in which both the Oregon Supreme Court and the federal ninth Circuit Court of Appeals held that the 5th Amendment does not apply outside the context of a requirement to dedicate private property for a public purpose. In *West Linn Corporate Park*, the city required the developer to make improvements to an intersection for which the city already owned the right-of-way. Both the state Supreme court and the federal appellate court held that the 5th Amendment protects a person's interest in *real property* from government interference; it does not apply to other private interests. While there may be other constitutional provisions that protect a person from a condition the person believes is unreasonable, it is not the 5th Amendment.

A decision in *Koontz* is expected in June.

The other case is *Arkansas Fish & Game Commission v. United States*. Between 1993 and 2000, the U.S. Corp of Engineers released larger than usual amounts of water from a dam for flood control purposes. Each time, the water temporarily flooded and caused damage to a tree-growing operation on property owned by the State of Arkansas and managed by its Fish & Game Commission. The lower court held that because the flooding was only temporary, it did not constitute a taking of the property. In a unanimous decision issued in December 2012, the U.S. Supreme Court rejected that conclusion, holding that even the temporary occupation of property can be a taking. According to the Court, what matters is not the duration of the flooding but an analysis of various factors to determine if damage was done and whether it was severe enough to constitute the seizure of the property for a public purpose. Some of the factors identified by the Court include how long the seizure and damage last, whether the seizure was intended or a "foreseeable result" of the government's action, the nature of the property involved, and what the owner's expectations were for the land. The Court's decision sends the case back to the trial court for further consideration of the specific facts of the case under the factors set forth by the Court.

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

FMLA Final Rule and New Poster/Form Requirements

EFFECTIVE MARCH 8, 2013

ON FEBRUARY 6, 2013, the U.S. Department of Labor's Wage and Hour Division (DOL) published its Final Rule on changes to the Family Medical Leave Act (FMLA), including regulations concerning military caregiver leave for veterans, qualifying exigency leave for parental care, and special leave calculation methods for flight crew employees. DOL has provided a summary of the differences between the current regulations and the new 2013 regulations which can be found at their website: http://www.dol.gov/whd/fmla/2013rule/comparison.htm.

We want to make you aware that beginning March 8, 2013, the Final Rule also requires employers to use the new FMLA poster that all covered employers under FMLA are required to display and to keep displayed. The updated poster which can be found at the link listed below, summarizes the major provisions of the Act and tells employees how to file a complaint. In the event covered employers use the optional-use forms (i.e., certification of an employee's serious health condition, notice of eligibility, etc.) provided on the DOL website, the updated forms provided under the link below should also be used beginning March 8, 2013 as they reflect the new requirements under the Final Rule.

POSTER: http://www.dol.gov/whd/regs/compliance/posters/fmla.htm

FORMS: http://www.dol.gov/whd/fmla/2013rule/militaryForms.htm

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

Spring Might Bring Sunshine

BUT IT WILL ALSO BRING FREE SPEECH ISSUES

AS SPRING and eventually sunshine return to the northwest, many local jurisdictions will once again see their parks, plazas and other public spaces being used for community events. Some of these events will be run by the local government that owns the park, plaza or other public space, while many other of these events will be sponsored and run by private organizations. No matter who is responsible for putting together and running the event, one thing is likely to occur – individuals will attend in order to exercise their rights to free speech guaranteed by the Oregon and United States constitutions.

Initiative petition signature gatherers, protestors and individuals engaged in various forms of religious speech are attracted to almost every community event. Often, these speech activities are not consistent with and sometimes even interfere with the message or purpose of the event. In such circumstances, questions often arise as to whether staff responsible for managing the property or local police officers may remove the free speech participants. The answers to these questions, however, are not always obvious.

In considering these situations, it is important as a first step to recognize that Article I, section 8 of the Oregon Constitution and the 1st Amendment to the United States Constitution provide broad protections to individuals engaged in free speech activities on property that is open for public use and is owned by the government. For example, throughout history it has been commonplace to find soapbox preachers, noisy protestors and political activists in parks, on sidewalks and in town plazas (areas often referred to as traditional public fora), and courts rely upon these constitutional protections to ensure that these practices continue. Thus, it is always best to start from the premise that speech should be allowed to occur in these areas.

However, this premise does not mean that local governments may never impede upon someone's ability to engage in free speech activities. When a private organization rents a traditional public forum or receives permission to exclusively use such property under some type of permit, a local government may, at the private organization's request, remove individuals from the event as long as the event is not otherwise open to the public at large. For example, an organization sponsoring a secured, ticketed event in a public plaza is not required to permit everyone and anyone into their event to engage in free speech activities. In these invitee only situations, the local government, at the request of the event's sponsor, may preclude individuals from engaging in free speech activities.

– continued on page 4

As usual, in this edition we endeavor to provide information about cases of interest on both the federal and local levels. We include a brief update on the Final Rule for the Family Medical Leave Act (FMLA) and provide resources on where to find a summary of changes and new forms and posters. Another article includes land use highlights about two "takings" cases heard at the U.S. Supreme Court. On the local government front, we revisit free speech issues in public forums as it relates to spring and summer events planning. You might also be interested in the Ninth Circuit Court of Appeals decision about the City of Tumwater's zoning ordinances designed to protect existing manufactured home parks from redevelopment.

Finally, we are pleased to spotlight the City of Hillsboro's GoPoint initiative that has qualified the City as a finalist in the national Mayors Challenge competition. Check out the Client Corner!

HILLSBORO: GOPOINT GOES FORWARD

THE CITY OF HILLSBORO recently participated in the Bloomberg Philanthropies Mayors Challenge, a competition designed to inspire America's mayors to generate innovative ideas that solve major challenges and improve city life. One of 305 cities to submit an application, the City of Hillsboro made it into the Top 20, competing against the likes of Chicago, Houston, and Boston. While not ultimately prevailing, Hillsboro intends to move forward with its project even without the prize money to help fund it.

Hillsboro's idea is called GoPoint. According to a statement by Mayor Jerry Willey, "GoPoint will help create a balanced suburban transportation system by branding, promoting and managing a network of mobility hubs that use technology to integrate public and private transportation options."

He goes on to describe how the GoPoint program will orchestrate a full range of transportation options to fill gaps where the primary non-car option – transit – leaves off. It will use existing and emerging transportation technologies and services to create an accessible and coordinated mobility system.

Peter Brandom, Hillsboro's Sustainability manager and spokesman for the project, said in an informational video, "Envision a network that provides easy, real-time access to carpool, vanpool, bikeshare, carshare and other transportation options in the community using the internet, smart phones and on-site kiosks. Travelers will be able to quickly and confidently make the right choice for their trip to a given location knowing the information is accurate and current because it provides instant access to information at a time and place that is convenient for the user."

By partnering with TriMet on the project design and harnessing the power of technology, Hillsboro hopes to use GoPoint to combine public and private transportation options to increase the ease with which people can get around. The city plans to also utilize its award-winning Intermodal Transportation facility and network of electric plug-in stations which service electric cars.

Our congratulations to the City of Hillsboro for its innovative idea and for scoring as the second smallest city to have made the finalist pool!

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

Free Speech Issues – continued from page 3

Conversely, local governments may not preclude individuals from engaging in free speech activities at private events when those events are open to the public at large. Courts have ruled that although a private organization has rented or otherwise received a permit to use an area does not preclude the use of that area for free speech activities when the private organization is holding an event open to the public. This is true in Oregon even when the speech in question is offensive or provocative and may provoke a response from others in attendance.

Notwithstanding these court rulings, local governments may place reasonable time, place and manner restrictions on free speech activities even when a private event is open to the public at large or when the event is being run by the local government itself. Thus, for instance, if an individual who is engaged in free speech activities is impeding the flow of pedestrian traffic in a manner that is causing a safety concern, the local government may require the individual to move to another area provided that the alternate area still permits the individual to be able to reach his or her intended audience.

Whether and to what extent local governments may preclude individuals from engaging in free speech activities at community events is often reliant upon the facts of each situation. To that end, our local government clients are encouraged to seek legal advice about these issues as they arise.

QUESTIONS ABOUT THIS ARTICLE?
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