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Federal Cases

Eleventh Circuit Holds Sheriff's Halloween Trick-or-Treat Signs at Sex Offenders' Homes Violate First Amendment

The sheriff of Butts County, Georgia, placed signs reading "STOP!" and "No trick-or-treat at this address" at the residences of fifty-seven registered sex offenders over Halloween 2018. The sex offenders were told that because the signs legally belonged to the sheriff, they could not remove them — nor participate in Halloween (a restriction inconsistent with Georgia law). Plaintiffs sought declaratory and injunctive relief, as well as damages, for violation of their First Amendment rights. The district court granted summary judgment to the sheriff, and plaintiffs appealed.

The Eleventh Circuit applied the "compelled speech doctrine," which concerns ideological speech and purely factual, non-commercial speech that is content-based and requires strict scrutiny. Thus, the signs must be a "narrowly tailored means of serving a compelling state interest."

The court agreed that protecting children from sexual abuse was such an interest, but held that the signs were not narrowly tailored to meet that goal. The sheriff admitted there had been no showing that any registered sex offender had posed a danger to children or that the signs would prevent that danger.

The court looked to *Wooley v. Maynar*, under which the Supreme Court used the doctrine to allow a New Hampshire driver to cover up the state slogan "Live Free or Die!" on his license plate. As with the license plate slogan, the sheriff's messages bore the imprimatur of the government, stating they were "a community safety message from Butts County Sheriff Gary Long." The court concluded that the use of private property as a stationary billboard for the sheriff's ideological message

to be read by the public was a "classic example of compelled governmental speech." That doctrine did not require that a reasonable person would view the speech as "endorsed" by the landowner and the unconstitutionality was not removed by the possibility that the landowner could post his or her own sign in response — the landowner had the right not to speak at all.

The "compelled speech" doctrine is not a frequent issue in First Amendment jurisprudence; however, that is not to say it is an outlier. Compelling a landowner or tenant to publish official versions of ideology justly requires the application of extraordinary constitutional restraints.

McClendon v. Long, 22 F.4th 1330 (11th Cir. 2022).
Edward J. Sullivan

Oregon Cases

No Comparative Fault Affirmative Defense Within ORLTA

In residential landlord-tenant disputes, landlords cannot defend against habitability claims via an affirmative defense of comparative fault under ORS 31.600. In a recent ORLTA case, the refrigerator in a tenant's unit began suffering from a substantial and ongoing water leak that spread through the kitchen and living room. Both landlord and tenant contacted an appliance repair company to arrange for repairs. The landlord advised the tenant to clean up the water as it leaked to avoid a slip-and-fall hazard. But the following evening, while the tenant was walking through her home, she slipped on the water that had leaked out since the last time it had been cleaned up, suffering injuries.

The tenant sued the landlord, alleging that the landlord had failed to meet the habitability requirements described at ORS 90.320. The landlord asserted a comparative fault defense, arguing that the tenant's own negligence had caused her injuries. The trial court granted tenant's motion to strike that defense, granted the tenant's motion *in limine* to preclude the landlord from offering evidence or argument regarding comparative fault, refused to instruct the jury on comparative fault, and affirmatively instructed the jury that it was not to consider any fault on the tenant's part. After the tenant prevailed at trial, the landlord appealed.

The Oregon Court of Appeals affirmed the trial court's conclusion that comparative fault was not a defense to tenant habitability claims. The court focused on the language at ORS 90.360 that, "[e]xcept as provided in [ORS Chapter 90]," the tenant may recover damages for habitability problems. The court concluded that this language expressed a legislative intent that any limitations on a tenant's recovery of damages for habitability issues must be found within ORS Chapter 90, and not outside. Additionally, the court noted the express defenses and limitations found within Chapter 90, and found it significant that none of those included or incorporated the comparative fault defense of ORS 31.600.

The court acknowledged that the comparative fault analysis of ORS 31.600 is not limited to only actions for common-law negligence, but found that the "strict liability scheme" of ORS Chapter 90 was incompatible with the defense of comparative fault, especially considering that the legislature had tinkered with ORS 90.360 in the past to specifically add certain defenses — but not a comparative fault defense.

Thomas v. Dillon Family LP II, 319 Or. App. 429 (2022).
Troy Pickard

Oregon Court of Appeals Says City Not Precluded From Rejecting Redevelopment Application

Section 5.060 of the City of Rockaway Beach's zoning ordinance mandates a setback for all lots abutting the ocean shore. In 2008, Griffin Oak Property Investments, LLC applied for and obtained a permit from the city to build a new home on property abutting the shoreline. After consulting a survey of the property, city staff

determined that the setback required by city's zoning ordinance (RBZO § 5.060) for the property was 30.3 feet. Notwithstanding this setback requirement, Griffin Oak subsequently submitted a site plan for city approval that showed only a 20-foot setback. Despite the plan's noncompliance with RBZO § 5.060, the city approved issuance of a building permit and the house was built on the property. Although the most oceanward point of the completed house's deck was only 25.4 feet from the shoreline, the city signed off on an inspection card and sent a letter to Griffin Oak indicating that all setbacks were correct.

A decade passed, and in 2018 the deck was destabilized by wave action during a winter storm. Griffin Oak applied to the city for a zoning permit to rebuild the deck. The city failed to issue a final decision on the application within 120 days, whereupon Griffin Oak filed a mandamus proceeding in circuit court requesting that the court order the city to approve the application. The city argued that the rebuilt deck would violate the setback provision of RBZO § 5.060. The circuit court found for Griffin Oak and ordered the city to approve the application. The city appealed.

Before the Oregon Court of Appeals, the city contended first that city staff's original determination of the setback, 30.3 feet, was incorrect because it was based on an incorrect interpretation of the zoning ordinance, and that the correct measurement was in fact 60.6 feet. Second, the city argued that even if the 30.3-foot ocean setback were correct, approval of the application would still violate RBZO § 5.060 because the most oceanward point of the rebuilt deck would be closer than 30.3 feet from the shoreline.

After engaging in some lengthy statutory interpretation, the court determined that the 30.3-foot setback calculated by city staff was based on a correct application of the language of RBZO § 5.060. However, the court agreed with the city that the rebuilt deck would still violate RBZO § 5.060.

Griffin Oak argued that the city was precluded from withholding approval of its application to rebuild the deck because it had previously approved construction of the original deck in the same location and had approved the original site plan with a setback of only 20 feet. Griffin Oak relied on four theories to reach this conclusion: first, it pointed to the goalpost statute, ORS 215.427(3)(a); second, it relied on a land use–specific principle of preclusion articulated by the court of appeals in *Doney v. Clatsop County*; third, Griffin Oak argued that the deck,

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as built, qualified as a nonconforming use; and fourth, it argued that the city was estopped from taking a position inconsistent with its original approval of the deck's location.

In response to Griffin Oak's first argument, the court of appeals determined that the circuit court's reliance on the goalpost statute was misplaced. ORS 227.178(3)(a) fixes the "goalposts" — the standards and criteria that the local government can use to approve or deny the application are limited to those that were applicable at the time the application was first submitted. However, the court clarified that these "goalposts" only applied to the city's consideration of the *original* 2008 application. The goalpost statute did not apply to the 2018 application under consideration because Griffin Oak's 2018 application to rebuild the deck was distinct from its initial application for a building permit submitted 10 years earlier.

In response to the second argument, the court of appeals determined that its earlier holding in *Doney* did not preclude the city in this case from applying the zoning ordinance to reject Griffin Oak's application to rebuild the deck. The court determined that because the new decision on the rebuilding permit in Griffin Oak's case was not a continuation of proceedings on the original land use application, and because it did not involve a subsequent decision that was "ancillary" to the initial decision, *Doney* did not apply. The city was not precluded from evaluating whether the 2018 application complied with the city's zoning ordinance.

In response to Griffin Oak's nonconforming use argument, the court pointed out that to qualify as a nonconforming use under ORS 215.130(5), Griffin Oak had to show that the house and deck were originally lawful uses that were subsequently rendered unlawful by the enactment or amendment of a zoning regulation. However, the court noted that from the moment of its construction the location of the house was unlawful under the setback provision of RBZO § 5.060. Because there was never a time when the location of the house was lawful, Griffin Oak could not claim that it qualified as a nonconforming use.

Griffin Oak's final argument was that the city was estopped from taking a position inconsistent with its initial approval of the deck's location. Drawing on *Bankus v. City of Brookings*, the court ruled that the doctrine of estoppel did not apply in this case. In *Bankus*, the Oregon Supreme Court ruled that a city could not be estopped by the acts of a city official who purported to waive the provisions of a mandatory ordinance. The court noted that in this case, Rockaway Beach's zoning ordinance mandated an ocean shore setback of 30.3 feet. Applying *Bankus*, the court ruled that city staff could not bind the city to a smaller setback by incorrectly approving a site plan that did not conform to the ordinance.

The court of appeals reversed the decision of the circuit court but remanded the case back to the lower court to determine whether it could permissibly order the city to approve the application with a condition that the deck comply with the 30.3-foot setback required by RBZO § 5.060.

Griffin Oak Prop. Invest. v. City of Rockaway Beach, 318 Or. App. 777 (2022).
Chris Burrows and Sarah Stauffer Curtiss

Dry Camping, Tuff Life

A parcel of land in Klamath County had no connection to the city's sewer system and no house. The owner lived in a Tuff Shed and collected water in a gravity-fed cistern. When he applied to the county for a septic permit, an inspector cited him for prohibited discharge of wastewater. Discharge of water is regulated by OAR Chapter 340, written by the Oregon Department of Environmental Quality. OAR 340-071-0130(3) states that a person may not discharge "untreated or partially treated wastewater or septic tank effluent directly or indirectly onto the ground surface or into public waters." The landowner left the property that day, May of 2019, and thus did not further discharge any untreated wastewater to the ground. Five months later, the inspector returned to the property. Still seeing the cistern collecting water, the inspector cited the landowner again, stating, "There is no such thing as dry camping," and thus he was producing wastewater. This led to a second violation, this of OAR 340-071-0130(2), which reads, "All wastewater must be treated and dispersed in a manner approved under these rules."

The landowner contested the citation and associated fines. The county argued that the mere presence of the cistern equated to treating wastewater — after all, if the property was not connected to city water and did not have a septic system, then by common sense, any water discharge would violate the rule. And although the county did not (and could not) prove that any wastewater was discharged between May and October of 2019, the trial court found for the county (without explanation).

On appeal, the landowner argued that the county must prove the rule violation. The county renewed its argument that a property owner violates the rule by "having the ability to disperse wastewater, without the approved means to treat the same." While the court of appeals acknowledged deference to the DEQ in interpreting its own rules, the court did not find plausible that a hypothetical discharge of water could rise to the level of being a citable offense. That is, hypothetical wastewater cannot be discharged — only actual wastewater can be discharged. And absent humans, there could not be wastewater discharge in the first place.

The court also made a distinction between the regulation of wastewater and properties, noting that while DEQ probably wanted to require that all properties be connected to a city sewer system or have a septic sewer permit, the rules instead regulated wastewater discharge, not the properties themselves. It offered several ways for DEQ to amend its rules but came to the same conclusion that the landowner had argued: without proof of actual wastewater discharge, the county could not fine him.

County of Klamath v. Ricard, 317 Or. App. 608 (2022).
Judy Parker

LUBA Summaries

Solar Generation Facilities on Forest Lands, OAR 660-006-0035(3), and Fire Siting Standards

LUBA remanded a decision by Jackson County approving an application for a ten-acre solar energy generation facility on a site zoned as forest land. The hearings officer approving the application included a condition of approval that required a 100-foot fuel break to be counted toward the ten-acre area used for the solar generation facility, because the fuel break area could no longer be used for forest operations. The applicant proposed the 100-foot-wide fuel break to achieve compliance with OAR 660-006-0035(3) and Jackson County's implementing code standard. OAR 660-006-0035(3) requires dwellings and structures in forest-zoned areas be provided with fuel break areas consistent with standards promulgated by the Department of Forestry.

The petitioner's sole assignment of error asserted that the hearings officer's decision to include the 100-foot fuel break within the ten-acre area used for the solar generation was in error, because the fuel break area is not completely cleared of vegetation and is still consistent with the definition of "forest land" in state law. Thus, the fuel break area does not need to be required toward the ten-acre area used for the solar energy generation facility.

LUBA remanded the decision to the county with instructions to provide findings justifying a conclusion that the fuel break area could no longer be used for any forest purposes, could therefore not be considered as forest lands, and so must be counted toward the land area allowed for use as a solar energy generation facility.

Blackwell Creek Solar LLC v. Jackson County, LUBA No. 2021-114 (March 16, 2022).
Gordon Howard

Cases From Other Jurisdictions

California Court Enforces Decision Deadlines

A Los Angeles regional planning commission approved a conditional use permit for the sale of beer, wine, and spirits. The approval, issued on May 3, 2017, went beyond the staff-recommended hours for alcohol sales. Within a week, the Board of Supervisors initiated a review of the decision and set a hearing for August 1. After the hearing, the Board changed the hours for alcohol sales from 20 hours per day to 12. The Board indicated its "intent to approve" the application as modified, but it did not enter a final order until March 20, 2018. On May 17, 2018, Tran filed a challenge to the revised hours by Writ of Mandate in Superior Court, claiming the Board's decision was untimely and not supported by substantial evidence. Tran's primary contention was that Los Angeles County Code provided that review of such decisions "shall be rendered within 30 days of the close of the hearing." Tran also claimed there were not specific reasons given for changing the hours of operation. The writ was denied.

On appeal, the court determined that the Board violated a mandatory requirement by missing the 30-day deadline. At the time, the county code also stated that failure to act within the time limits would result in the decision being "deemed affirmed."

Thus, the planning commission decision became the decision of the county by default when the 30 days had passed. The court did not reach the alternative basis for seeking the writ, the failure to provide adequate reasons for changing the hours of operation. The court reversed the Superior Court and reinstated the planning commission decision.

Oregon has a mandamus provision for decisions that do not meet the 120- or 150-day time limitation applicable to local governments in ORS 215.429 and 227.179. Unlike the situation in California, in Oregon it is the applicant who triggers the loss of local jurisdiction. As in California, these Oregon statutes cannot be defeated by an assertion of lack of prejudice.

Tran v. County of Los Angeles, 289 Cal. Rptr. 3d 202 (Cal. App. 2021).
Edward J. Sullivan

RELU Section News

2022 RELU Annual Conference Registration Now Open

Registration is open for the 2022 Annual Conference! As a reminder, there will be a wine-tasting welcome, sponsored by the Alterman Law Group PC, on Thursday, August 11. Friday the 12th will hold a full day of CLEs, annual meeting, and hosted meals, followed by our annual family reception and beer tasting featuring Wolf Tree Brewery; we are grateful to Chenoweth Law Group for sponsoring this. The last day, Saturday, we will offer a delicious breakfast, update of land use caselaw, and mental health CLE credits. There is still time for more sponsors and advertisers! Reach out to Norma Freitas to discuss.