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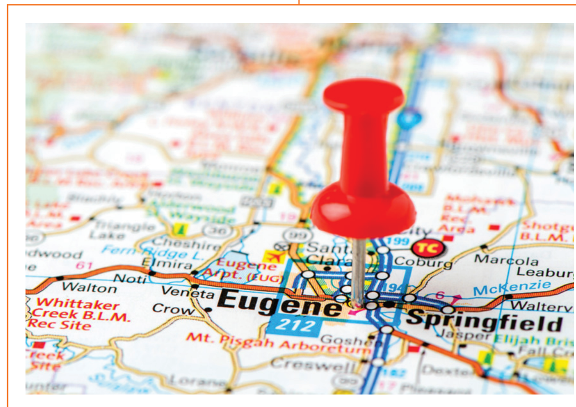
Court Upholds City Authority to Charge Internet Providers for Use of ROW

IN MAY, the Oregon Court of Appeals issued a significant decision affirming city authority to impose certain fees on internet access providers. In *City of Eugene v. Comcast of Oregon II, Inc.*, the Court of Appeals held that Eugene is not preempted by state or federal law from imposing a fee on Comcast for its internet access services, so long as the fee is for use of the city's rights of way.

The City of Eugene has two different fees applicable to telecommunications providers: (1) a license fee of seven percent of gross revenue earned in the city, which is paid by entities that construct telecommunications facilities in the city and is compensation for use of the city rights of way; and (2) a registration fee of two percent of gross revenues earned in the city, which applies to all entities that provide telecommunications services in the city, regardless of whether they own any facilities in the city rights of way. Eugene's Code defines telecommunications services to include "voice, video, or data" services, and thus includes internet access services.



Comcast refused to pay the license or registration fees on its internet access services. Among other things, Comcast argued that enforcement of the fees would violate the federal Internet Tax Freedom Act ("ITFA") and the state and federal constitutions. The Court of Appeals rejected these arguments, with one caveat as described below.

The ITFA imposes a moratorium on certain state and local taxes on internet access services. However, the term "tax" as defined in the ITFA expressly excludes "a fee imposed for a specific privilege, service, or benefit conferred." ITFA Section 1104(8)(i). Comcast argued the ITFA precludes the city from collecting the license and registration fees on its internet access services.

Both the trial court and the Court of Appeals held that because the license fee is imposed for a specific benefit—use of the rights of way—it is not a "tax" under the ITFA. The notable caveat here is both Courts held that the registration fee, which is *not* imposed for use of the rights of way, is subject to the ITFA. In short, fees on internet access providers for use of the rights of way are permissible under the ITFA; fees for providing service or that otherwise are not assessed in exchange for a specific privilege, service or benefit likely are preempted by the ITFA.

With respect to the constitutional claims, Comcast argued that the city did not collect the license fee from similarly-situated providers in violation of Article I, section 32 of the Oregon Constitution and the Equal Protection Clause of the United States Constitution. The former requires that taxation be uniform on the same class of subjects, which requires that no taxpayer is singled out for discriminatory or selective enforcement. The latter provides similar protection. Comcast claimed some internet service providers that use city rights of way were not subject to the license fee. The city countered that, at most, there was a short-term clerical error that lead to the brief omission of several entities from enforcement of the license fee.

The Court of Appeals rejected Comcast's claim, holding that Comcast did not show the city's actions amounted

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from Paul's desk…

For many of you – and hence for us here at BEH – autumn signifies election season. Candidate filings, ballot titles and explanatory statements are likely dominating many of your "to do" lists. We have found ourselves busy assisting a number of our clients with these often complex and (sometimes) politically charged matters.

In addition to the autumnal election cycle, I have noticed that local government issues are becoming more complicated and are occurring at a faster clip. Then too, there have been significant cases decided and important new rules affecting local government adopted recently, all of which we try to stay abreast of.

As always, we try to select a few of the most timely – and frankly, most interesting – cases and issues to highlight. Topics this quarter include an important new telecommunications decision involving Eugene's regulation of

E-CIGARETTES AND VAPORIZERS:

Are They Regulated By Your Code?

THE USE OF E-CIGARETTES is often referred to as "vaping," a practice that is becoming increasingly popular. According to a recent article in *USA Today*, there are 466 brands of e-cigarettes and more than 7,700 different flavors on the market. According to the same article, there has been an average of 10 new brands entering the market every month for the last two years.

An e-cigarette (or vaporizer) is a battery operated inhaler that simulates tobacco smoking by producing a water vapor that resembles smoke. To produce the vapor, the e-cigarette vaporizes a liquid solution that is usually flavored and generally contains nicotine. The liquid solution, however, does not commonly contain any form of tobacco.

Because vaping produces a cloud that resembles smoke, individuals who use e-cigarettes are often mistaken with traditional smokers, which has caused confusion among members of the public and regulators who see individuals engaging in the use of e-cigarettes in areas where smoking or the use of tobacco products is prohibited.

What regulators and members of the public may not realize is that laws that prohibit smoking in public places generally do not apply to e-cigarettes. E-cigarettes were not as popular and perhaps not even around when some of these laws were enacted. As such, no-smoking laws generally prohibit only the use of tobacco products, and because e-cigarettes do not contain tobacco, such laws typically do not apply to vaping.

There is an ongoing debate about the health effects of vaping and what effect, if any, second-hand vapor might have on others. Because of potential health concerns as well as due to the confusion vaping has caused with no-smoking laws, many jurisdictions are expanding their no-smoking laws to include vaping. In addition, many jurisdictions are reviewing and updating their personnel policies to address the use of e-cigarettes at work as such policies are likewise generally limited to the use of tobacco products.

Generally, local governments have wide discretion to update local ordinances and rules to include limits on the use of e-cigarettes. While such restrictions are often met with political opposition and threats of litigation, courts have historically upheld the ability of local governments to restrict smoking in public places, and these cases provide strong precedence for local governments to rely upon when enacting limitations on the use of e-cigarettes.

Local governments that are interested in updating their ordinances or rules should, however, keep in mind the extent to which existing collective bargaining agreements place limitations on their ability to do so. Generally speaking, smoking and similar matters of personal conduct at work are not mandatory subjects of bargaining, and as such, a collective bargaining agreement will not preclude a local government from imposing limitations on the use of e-cigarettes on public property. (See ORS 243.650(7)(g).) However, if a local government has included language related to smoking in one of its collective bargaining agreements, it may have an obligation to bargain over limitations on the use of e-cigarettes.

In today's age, laws and policies are often outdated by new technology. E-cigarettes are the latest example of such a situation, and as such, local governments should review their existing laws and policies to determine if they need to be updated to address this increasingly popular trend.

Chad Jacobs

cable services, new guidelines from the EEOC regarding pregnant employees, e-cigarettes, and the potential impacts of the "sharing economy."

We are also pleased to announce that our firm has been recognized as a Partner in Sustainability by the Oregon State Bar. We know that many of our clients are focused on sustainability, and we are proud to do our part.

As always, I welcome folks' comments on what we do and how we do it.

We remain grateful to all our clients, their staffs and elected officials for the trust and faith they show us here at BEH. I assure you, everyone here appreciates how important maintaining that trusting relationship is to the delivery of the solid thoughtful legal services our firm strives to consistently provide our clients. So from all of us, to you: Thank you.

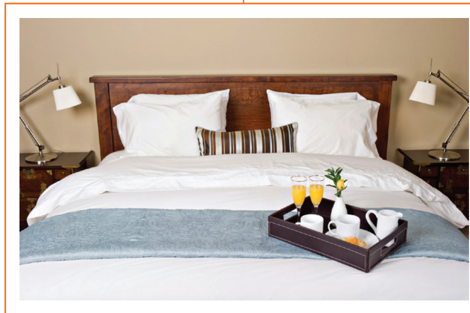
Have a wonderful fall season.

Heather Martin

SPARE ROOM FOR RENT:

The Sharing Economy at Odds with Local Lodging Laws

TECHNOLOGY HAS PUSHED the concept of a 'sharing economy' to new levels, creating potential problems for local laws that were enacted without this concept in mind. The term "sharing economy" refers to the philosophy highlighting borrowing, bartering and renting rather than buying and owning and it's on the rise all over the nation, but particularly in Portland and surrounding areas.



One company that operates under the sharing economy philosophy is Airbnb, a San Francisco-based company, which has established a major customer service center in Portland. Airbnb matches travelers seeking affordable accommodations with people who have accommodations for rent. The company, launched in 2008, operates a website that helps homeowners rent their home (or a room in their home or even a couch in their home) to travelers for a few days at a time as an alternative to commercial hotels. Word-of-mouth marketing (peer networking) and other websites such as Craigslist and CouchSurfer offer similar services.

These types of transactions often clash with local laws designed to prevent people from turning homes into places of business, and although many renters do so conscientiously, certainly some do not and this can create a dilemma for local governments. Although these alternative accommodations may be popular with travelers, as far as local governments are concerned, the practice is essentially akin to a black market operation. Few Airbnb hosts have gone through the process to legitimize their accommodations, or collected the lodging taxes that guests are required to pay when renting at a conventional establishment.

Given this state of affairs, a policy question arises: to

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EEOC ISSUE NEW GUIDANCE ON PREGNANCY DISCRIMINATION

THE EQUAL EMPLOYMENT Opportunity Commission (EEOC), in a controversial move, released updated Enforcement Guidance on Pregnancy Discrimination and Related Issues (Guidance) in mid-July. This is the first update to EEOC guidelines on pregnancy since 1983 and is in direct conflict with a recent Fourth Circuit Court of Appeals decision, *Young v. United Parcel Service, Inc.*, which the U.S. Supreme Court will consider during its next term.

As a practical matter, it is important that employers understand the Guidance which centers around the 1978 Pregnancy Discrimination Act (PDA) prohibiting discrimination against an employee on the basis of pregnancy, childbirth, or related medical conditions and requires that women affected by pregnancy, childbirth, or related medical conditions be treated the same as other persons not so affected but similar in the ability or inability to work. The new Guidance offers an expansive interpretation of the PDA and affords enhanced protections for pregnant employees. Most notably it sets forth that a pregnant employee who has similar limitations would be entitled to the same accommodation as provided for employees with disabilities, regardless of whether the pregnant employee is disabled for the purposes of the Americans with Disabilities Act (ADA). More information and a list of potential reasonable accommodations for pregnant employees can be found on-line at: *http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm*

Let us know about any interesting projects happening in or planned for your community! We'd love to feature you in our next Client Corner segment.

BEH provides this newsletter and its content solely for informational purposes. It is not intended to be and should not be construed as legal advice or as a solicitation for work or business. If you have any questions about the newsletter or its content, please contact an attorney in our office.

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

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CITY OF CORNELIUS: DOWNTOWN REVITALIZATION

CLIENT CORNER

THE CITY OF CORNELIUS, has been working hard to improve streetscapes and revitalize downtown, most notably with the improvements to Baseline Street between 10th and 19th Avenues. The project, primarily federally funded by 5.5 million dollars in Congestion Mitigation Air Quality (CMAQ) funds, is slated to be completed by the end of September 2014. The project improves sidewalks, adds curbs, completes the storm system hookup, completely rebuilds roadways, and moves underground the utilities which are currently located overhead. Oregon Department of Transportation (ODOT) has been managing the project, and reports that most of the new curbing is in place, and sidewalks are rapidly being finished on both sides of the street.

According to the City, a few more items are expected to be accomplished in the weeks to come, including pavement striping, traffic signal activation, landscape restoration, and the planting of street trees in October. Upon completion, Baseline will mirror North Adair Street, bringing a fresh look to the Main Street District in Cornelius.

Congratulations to the City for securing the funds and working so hard to update the look and feel of this beautiful community.

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to an intentional and systematic pattern of discrimination or reflected a fraudulent purpose on the city's part. This holding indicates that, while cities should make every effort to uniformly assess and collect taxes within the class of subjects designated for taxation, clerical errors or unintentional omission of certain entities from the application of the tax should not result in a constitutional violation.

A petition for reconsideration is pending. We will update you if the holding in this case is modified.

Nancy Werner

Spare Room For Rent – continued from page 3

what extent should this type of informal lodging be allowed? If ordinary people are allowed to participate in the sharing economy in this way, should local governments consider how and to what extent their limited resources should be spent addressing and/or regulating the issue?

There are a number of ways in which local governments can address unauthorized rentals within their jurisdictions. Local governments can consider allowing homeowners to collect an occupancy tax for paid guests for a limited number of days per year. In addition, people who rent their homes or rooms could be required to obtain fire, hazard, liability and general commercial liability insurance, as well as maintain guest registration records. Local governments may wish to consider tax rates and the appropriate level of regulation to ensure safety. Some local governments, such as the City of Portland, are working directly with Airbnb to address these issues, which is another possible approach.

Expending resources to regulate or ban this activity may be counterproductive given the size and popularity of these new short term rentals. Nonetheless, local governments may be able to establish parameters within which this expression of the sharing economy is allowed to lawfully exist. Our research indicates such movements are already at work in Ashland, Portland, and in various communities along the Coast.

Kristen Ketchel-Bain