SUMMER 2016

GOV-LAW CONNECTION

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Cities Can Raise License Fees on Certain Utilities Operating in Rights of Way

THE OREGON SUPREME COURT issued its opinion recently in *NW Natural v. Gresham*, holding that ORS 221.450 does not impose a limit on the license fee that the City of Gresham could collect for use of the city rights of way and that Gresham had the authority to raise that fee from 5% to 7% on private utilities. However, it also found that while Gresham could collect the 7% fee from the private utility plaintiffs, NW Natural and Portland General Electric, it did not have express statutory authority to impose a higher tax on another governmental entity, third plaintiff, Rockwood Water People's Utility District (Rockwood PUD).

In 2011, each plaintiff utility was operating under a utility license with the City of Gresham (City) when the City adopted a resolution, authorized by its Code, raising its license fee from 5% to 7% primarily to avoid service reductions in the fire and police departments. After the resolution was adopted, the plaintiff utilities filed an action for a declaratory judgment that Gresham's resolution was preempted by state law, namely ORS 221.450. They argued that ORS 221.450, which allows a city to levy and collect a privilege tax from a utility if the utility is operating for a period of 30 days within the city without a franchise, limits the privilege tax to 5% of the gross revenues earned within the city. Rockwood PUD also argued that as a people's utility district, it could not be taxed more than 5% by a city without explicit statutory authority.

The trial court agreed with the plaintiffs and found that ORS 221.450 preempted the City's ability to impose a privilege tax of more than 5%; it did not reach Rockwood PUD's alternate argument. The Oregon Court of Appeals did not agree and found that the plaintiffs were operating under a franchise and as a result ORS 221.450 did not apply and thus did not limit the City's ability to charge the fee. The issue of whether Gresham had home-rule authority to enact the ordinance or whether the license fee in question was a "privilege tax" was not addressed.

As noted above, the primary issue in this case is whether ORS 221.450 preempted the city from imposing a license fee that exceeds 5% of a utility's gross revenue. The Oregon Supreme Court (Court) held that, with respect to PGE and NW Natural (the non-municipal utilities), 221.450 does not impose a limit on the license fee. The Court focused on two preliminary issues related to this argument: (1) was the license fee a "privilege tax" and (2) were the utilities operating without a franchise. The Court established that the fee at issue is the type of charge the legislature intended to be considered a "privilege tax" and that the plaintiff utilities were operating without a franchise (i.e. a license was not the same thing as a franchise).

Taking the text, context, and legislative history of ORS 221.450 into account, the Court could not conclude that the Legislature intended for the statute to be the exclusive means by which a city could charge privilege taxes or license fees for use of its rights of way and that ORS 221.450 does not preempt the a city from adopting a higher rate. Specifically, Gresham could impose the 7% license fee as applied to the private utilities.

The second argument raised by Rockwood PUD, that a municipality lacks authority to tax another municipality in the absence of express statutory authority as that action would be an impermis-

– continued on page 4

MANAGING PARTNER'S MUSINGS

from Paul's desk…

As you may know, the partners here at BEH are given a chance to write something for the newsletter and so I took a shot at writing something. I hope my musings find everyone well and enjoying summer.

When we are asked to write something for this column, it is suggested we write about what we have been pondering that may be of interest to the clients and others who get this newsletter. Well … for me … I was thinking about the firm … Beery, Elsner & Hammond, LLP … and that it is in its 18th year. Eighteen years. Wow. I never expected that. It's nice … really nice … but I didn't see that coming.

Pam Beery and I started the firm in January 1998 with a lot of hope, no clients and a nice smallish space on the Portland waterfront.

We, our friends, staff and our son did a lot in those first few lean years: put furniture together, got a really expensive telephone system, tried to figure out the fax machine, put together firm resumes, drank coffee, stayed late, paid the bills and slowly got – and more importantly, kept – local government clients as we grew from two lawyers to three, from three to four, from four to six…

The clients – all of them – have been good to us and for us. They placed their trust in our abilities to offer good legal advice and counsel and provide advice and counsel at a reasonable cost. I truly believe we do that here. That is one of our core missions. I also believe all the folks we deal with either as clients or otherwise know the firm's lawyers and staff deeply care about local government in Oregon and Washington and

Public Meetings Redux

LAST YEAR, in *Handy v. Lane County*, the Oregon Court of Appeals decided that a series of discussions among a quorum of a governing body may implicate the Oregon Public Meetings Law under some circumstances. That decision was appealed to the Oregon Supreme Court but in the meantime the Court of Appeals has issued two more decisions that begin to address some of the issues left unresolved in *Handy: Tri-Met v. Amalgamated Transit Union Local 757, and Rivas v. Board of Parole and Post-Prison Supervision*.

In *Handy*, the court held that a series of discussions between the county administrator and a quorum of the Board of County Commissioners is subject to the Public Meetings Law, specifically ORS 192.630(2), if the purpose of the discussions was to deliberate on an issue for which a decision by the public body was required. The court specifically concluded that a contemporaneous gathering by a quorum of the Board was not necessary to invoke the Public Meetings Law—a series of discussions among a quorum for the purpose of deciding on a decision, whether directly or through an intermediary (in this case the county administrator), is sufficient. Conversely, if the discussions are merely for the purpose of "information-gathering," a meeting or series of discussions on issues relevant to the public body is not subject to the law. Ultimately, the court remanded the case back to the circuit court to determine whether the discussions were "deliberation" for purposes of ORS 192.630(2).

Three months after its decision in *Handy*, the court issued a decision in *Tri-Met v. Amalgamated Transit Union Local 757*. The issue in *Tri-Met* was whether the agency's collective bargaining negotiations with the union are subject to the Public Meetings Law. Under ORS 192.660(3), labor negotiations may be held in executive session but only if both sides agree to do so in executive session and, in this case, the union declined.

Tri-Met conducts the negotiations through an eight-person team headed by its labor relations and human resources director and seven other people selected by the director. When the union declined to conduct the negotiations in executive session, Tri-Met sought a ruling that the negotiating team's discussions with the union representatives were not subject to the law. The trial court ruled in favor of Tri-Met and the union appealed.

In its decision, the Court of Appeals determined that the negotiating team was not subject to ORS 192.660(1) because its meetings are not "meetings" of the governing body of a public body. The statute defines a "meeting" as the convening of the governing body of a public body for which a quorum is required" (ORS 192.630(5)). Because the negotiating team does not have minimum number of members necessary to conduct business (i.e. a quorum), its meetings are not required to be held in public under ORS 192.630(1).

However, the court went on to conclude that just because a quorum is not necessary for the negotiating to team to conduct business, does not mean that there is no such thing as a "quorum" of the team. Relying on the dictionary, the court ruled that a quorum is simply a minimum number of members necessary for the group to conduct business, usually but not necessarily a majority. According to the court, "If Tri-Met's negotiating team is, in fact, a governing body, that number exists." Because ORS 192.630(2) prohibits a "quorum of a public body" from meeting in private to deliberate toward a decision, if the negotiating team meets the definition of a governing body, there is a minimum number of members that can be considered a quorum and a gathering of that number of members cannot meet in private to deliberate. Here it is worth noting that a "public body" includes an advisory group or other "agency" of the local government appointed to make recommendations, and "governing body" means the members of a public body who have authority to make the recommendations.

In the end, the court sent the case back to the trial court to determine whether Tri-Met's negotiating team is a governing body. If so, it is likely that its meetings must be held in public.

In *Rivas v. Board of Parole and Post-Prison Supervision*, the issue was the Parole Board's "file-pass" system for making certain decisions about individual offenders. Under the system, a staff member includes a form in the offender's file that identifies the specific issue the Board needs to decide. The file is then passed to the individual board members, who write their comments on the form and pass the file to the next Board member. The last member then returns the file to the staff, who prepares a written decision consistent with the Board's comments.

Rivas argued that the series-review was a "meeting" open to the public under ORS 192.630(1), and they Board violated ORS 192.630(2) by deliberating in private. The court rejected both claims.

The court held that the "open to the public" requirement of ORS 192.630(1) only applies to a "meeting" of the public body which, under ORS 192.630(5), means a "convening" of the public body. The court then relied on *Handy*, which determined that "convene" means "to meet in formal session" or to "assemble in a group or

– continued on page 4

SUPREME COURT GUTS RECREATIONAL IMMUNITY

LOCAL GOVERNMENTS often make significant portions of their property available to the public free of charge for recreational use. To encourage such uses of property, the Oregon Legislature provided protection from lawsuits to property owners through what is commonly known as the legal concept of recreational immunity. This spring, the Oregon Supreme Court gutted this protection when it ruled recreational immunity does not extend to city employees.

BACKGROUND

The legislature enacted the Oregon Public Use of Lands Act, ORS 105.672-105.700, to provide certain immunities to owners of property who make their land available to the public to use for recreational purposes free of charge. Specifically, the Act shields an owner of land from liability in contract or tort for any personal injury, death or property damage that arises out of the use of the owner's land for recreational purposes, when the owner either directly or indirectly permits any person to use the land for recreational purposes free of charge.

In addition, due to the Oregon Tort Claims Act, ORS 30.260-ORS 30.302, as well as other legal principles, it was presumed that the legal protections that came with recreational immunity extended to city employees. Under the OTCA, cities are required to defend and indemnify employees who are acting within the scope of their employment or duties.

THE DECISION: *JOHNSON V. GIBSON*

This case arose when Johnson, who is legally blind, was injured when she stepped into a hole while jogging in a city park. Johnson sued the city and its employees, Gibson (the city park technician primarily responsible for maintenance of the park, who created the hole that caused Johnson's injury while fixing a malfunctioning sprinkler head), and Stillson (Gibson's supervisor), for negligence.

The city claimed the employees were immune from any liability for negligence due to the recreational immunity protections provided by the Public Use of Lands Act. The Oregon Supreme Court rejected these claims, concluding that the Act did not extend to city employees, but rather was limited to the city itself as the "owner" of the park.

The court also recognized that the liability of a city as landowner was distinct from the liability of employees and agents of the city. The court expressly noted that whether a principal's immunity is personal to the principal or may extend to an agent is a matter of legislative choice subject to constitutional bounds, and that the legislature simply did not extend the Act to provide immunity to the city's employees. Thus, while the city could enjoy the benefits of recreational immunity under the Act, its employees could not. As a result, if the employee acted negligently, the city would be required to indemnify the employee for costs and expenses under the OTCA.

The court's decision could very well impact local governments' ability to continue to keep various lands open to the public for recreational use. In order to guard against similar claims in the future, insurance companies will likely raise rates as their exposure is much higher. With any luck, the Oregon Legislature will amend the Act to clearly provide the immunity to employees of the owner.

For now, local governments in Oregon should work closely with their legal counsel and risk managers to determine what can be done to provide additional protections from liability due to the loss of recreational immunity for employees. In addition, local governments are encouraged to work with their respective advocacy groups (League of Oregon Cities, Special Districts Association of Oregon, etc.) to seek a legislative fix to this decision.

David Doughman

know that we will try to do what we can to make sure that is done every day.

Pam and I really enjoyed the serendipity and natural course the firm took as it grew and matured (not without some anxious moments). What we really – really – like was and is the process of attracting – and keeping – really good, really smart (and increasingly younger) lawyers and staff who share our goals and our sensibilities about local government and the real pride that can and should be taken in representing those bodies. When new lawyers and staff came to work for us, they became "family" as they adopted and adapted the values Pam and I wanted for the firm: client-based usable advice that offered fair and honest options to the individuals charged with addressing legal and other issues facing local government.

When I turn to the lawyers and staff here, I always get a smile. They are good folk, good at what they do, enjoy this place and the work. They are wonderful colleagues and friends.

And our current lawyers – Ashley, Chad, Chris, David, Heather, Nancy and Tom – make BEH a really good place to be. With the exception of Tom Sponsler and me, they are young, smart and savvy. They give good advice and good counsel. I like that and I am very proud of all of them.

So … what does one do when the thing you helped nurture and create hits 18?

Like any good parent, you provide advice and counsel but you step back a bit and watch it grow.

Have a wonderful summer. Take care.

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.

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LABOR & EMPLOYMENT NEWS

New FLSA Overtime Rule published by the Department of Labor

THE LONG AWAITED new overtime rules related to the Fair Labor Standards Act (FLSA) have been finalized by the Department of Labor (DOL) and will become effective December 1, 2016. Under the FLSA, certain employees are classified as exempt, meaning their employers do not have to pay them overtime if their position meets certain requirements. Currently, workers who are exempt are those paid on a salary basis, earn at least $455 per week ($23,600 a year), and are employed in a bona fide executive, administrative, or professional capacity (each category has a specific definition in the regulations).

The new Final Rule is an attempt by DOL to redefine who qualifies for overtime exemptions as a white collar worker and to bring the salary level in line with today's earnings; the salary rate has been raised only one time (2004) since 1970.

The Final Rule:

- Sets the standard salary basis at $913 a week or $47,476 for a full-year worker. This figure sets the salary level at the 40th percentile of earnings of full-time salaried workers in the lowest-wage Census Region, currently the South;
- Sets the annual compensation requirement for highly compensated employees (HCE) at $134,000, an increase from $100,000. HCEs are white collar workers who fail the standard duties test but are "highly compensated" and meet a minimal duties test; and
- Establishes a mechanism whereby the salary and compensation levels will be updated every three years (beginning January 1, 2020).

It is also important to note that under the new rule, employers are allowed to use nondiscretionary bonuses and incentive payments (including commissions) to satisfy up to 10% of the new standard salary level. Previously, only the actual salary could be considered when determining whether the salary basis test was met.

Local governments should review all exempt employee salaries to ensure they are at $47,476 or above as of December 1, 2016. If not, there are several immediate options available to employers: 1) pay overtime, 2) raise salaries to the appropriate level, or 3) limit workers' hours to 40 hours a week.

License Fees – continued from page 1

sible intergovernmental tax, was found to be valid by the Court. The Court explained that the license at issue here was a "tax" rather than a "fee" because its primary purpose was not to cover the costs associated with Rockwood PUD's use of the City's streets, rather it funds core city-wide services such as police, park, and fire services.

While the City had express statutory authority to impose a "privilege tax" on a PUD, that express authority was found in ORS 221.450 which contains an explicit limitation (5%) on the amount of privilege tax that could be assessed.

On one hand, this case creates more certainty for cities who want to impose a higher license fee on private utilities operating in their rights of way. On the other, because the Court did not rule on whether a municipality has home rule authority to tax another municipality (and Gresham did not argue this point), there is no definitive answer to that question from this case. Taken together, cities should be cognizant of the difference when raising or imposing fees on different types of utilities. Further, when imposing charges on other governmental entities, how those charges are used (i.e. general public purposes vs covering the associated costs) is important in order to determine whether it is a tax or fee, and whether there are express limits on those charges under state law.

Heather Martin

Public Meetings Redux – continued from page 2

body." Accordingly, because the file-share system does not require the Parole Board to meet "in formal session or assemble as a body," it is not subject ORS 192.630(1).

The *Tri-Met* case is a reminder that, absent an express exemption, an advisory group appointed to act on a local government's behalf is subject to the Public Meetings Law, including the notice and open meeting requirements. The *Rivas* case clarified that, while a contemporaneous gathering of a public body may not be subject to the open meeting requirement of ORS 192.630(1), a private meeting of the body for the purpose of conducting business is nonetheless still prohibited under ORS 192.660(2).

Chris Crean