SUMMER 2017

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DISRUPTIVE PROTESTS AT PUBLIC MEETINGS
A Practical Guide

REGARDLESS OF ONE'S political views, one thing is certain: the Trump administration has revitalized community activism in a manner not seen in a generation. Various issues have motivated groups and individuals to march in the streets, to create and sign online petitions, and to engage in all sorts of other types of protest activities – both in support of and in opposition to positions being taken by their government.

Although the Trump administration may have been the genesis for this new wave of protests, by no means are such activities limited to federal issues or always directed at the federal government. Rather, as is often the case, local governments serve as the front line for most types of protest activities – no matter if the issue is one of local, state or federal concern.

On occasion, these protests spill over into public meetings of a city council, county commission or district board of directors. How meetings are conducted when protests arise can make a world of difference between a peaceful outcome or arrests and litigation.

So what can elected officials and employees do to help keep meetings under control when protests arise? The following tips should help answer that question.

1. UNDERSTAND THE LAW

The attorney general has explained that "[a]ny person who fails to comply with reasonable rules of conduct or who causes a disturbance may be asked or required to leave and upon failure to do so becomes a trespasser." See *Oregon Attorney General Public Records and Meetings Manual*. However, not all protests are created equally under the law. In fact, the United States and Oregon constitutions protect the free speech rights of members of the public to attend public meetings and engage in peaceful protest activities, provided that such protests do not actually disrupt the meeting.

For example, in *Norse v. City of Santa Cruz*, 629 F3d 966, 976 (9th Cir. 2010), the Court examined the constitutionality of a city's ejection of an individual from a council meeting who was standing in the back of the room and engaged in a silent protest by giving a continuous Nazi salute. Although the court recognized that these actions were offensive to members of the council and public, the court concluded that the salute was silent and did not actually disrupt the meeting. As a result, this "protest" constituted a protected free speech activity, and it was unlawful for the city to eject the protestor.

IN THIS ISSUE:

BEERY, ELSNER & HAMMOND, LLP

PORTLAND:
1750 SW Harbor Way
Suite 380
Portland, OR 97201-5106
t 503.226.7191

www.gov-law.com

from David's desk…

"Rest is not idleness, and to lie sometimes on the grass under trees on a summer's day, listening to the murmur of the water, or watching the clouds float across the sky, is by no means a waste of time."

—Sir John Lubbock

Having endured one of the wettest winters on record in Western Oregon, I can safely speak for many of us that the arrival of summer this year has never been more welcomed. As we settle into another glorious summer in the Pacific Northwest, let's take a look back at what the winter and spring had to offer.

You may have heard that a new president took office in January. It is ok if you did not notice – the new administration has been very quiet and has not generated much media attention. Alas, I sense we will be hearing more about the administration's plans soon. For those of you in local government, keep your eyes and ears open for updates regarding "sanctuary" jurisdictions, particularly whether the Trump administration will succeed in its attempt to withhold federal funds to these cities and counties. As we discussed in a recent blog post, in April a federal court issued a

Consequently, if and when a protest arises in one of your meetings, it is imperative to be able to demonstrate that the protest activities actually disrupted the meeting before you eject anyone. To that end, the presiding officer should take the following actions: (1) announce that actions which actually disrupt the meeting will not be tolerated and those who engage in such actions will be asked to leave; (2) provide examples of the types of actions that constitute disruptions, i.e., chanting or whistling in a manner that prohibits others from speaking; (3) provide a warning to individuals who begin to engage in such activities that they must cease doing so or they will be asked to leave; and (4) work with staff and other members of the governing body to identify those who are engaging in disruptive behavior; and (5) work with staff to remove individuals who actually disrupt the meeting.

Another important risk management tool in this area is to make sure an employee is stationed at the back of the room to be able to demonstrate that the admonishments stated by the presiding officer could be heard by everyone. If necessary, this individual can provide testimony to contradict any claims that the presiding officer's warnings were not audible to the audience.

2. PLAN AHEAD

It is always a good idea to have a plan in place about what to expect and how protests will be handled. As part of this planning, it is extremely beneficial for staff (especially public safety officers) to work with protest leaders as much as possible in advance of and during a protest so that everyone has a shared understanding of what to expect and how disruptions will be handled. In today's age, most protests are organized via social media, so it is often easy to identify and reach out to leaders in advance of an organized protest. Likewise, it is often important (if space and technology are available) to plan for an overflow room that can be used if the crowd is too big for the meeting room and/or if things become too unruly that the room needs to be cleared.

3. USE SPEAKER CARDS OR SIGN-UP SHEETS

Requiring speaker cards or sign-up sheets permits the presiding officer to create a plan to better control the meeting. They also provide additional evidence as to who was authorized to speak at any given point in time, which is helpful to demonstrate whether someone was causing a disruption or simply engaging in public comment. Finally, speaker cards and sign-up sheets help provide a certain amount of order to the meeting, which can reduce tension caused by members of the audience jockeying for position to speak.

4. BE RESPECTFUL AND STAY CALM

Even if you use speaker cards or sign-up sheets, protestors often fail to follow normal procedures and seek to wreak a bit of havoc with their actions in hopes of garnering more attention to their cause. Although it is often difficult not to take the bait provided by these actions, remaining respectful and calm can go a long ways towards keeping the peace. Understanding that protests are often grounded in passionate points of view and respecting that passion, even if you disagree with the point of view, provides a bit of common ground with the protestor that can keep things calm and help diffuse an otherwise tense situation.

5. TAKE A BREAK

When things start getting a little too hot, there is nothing wrong with taking a short break to let people cool down and regroup. During the break, the presiding officer will also have an opportunity to work with staff and the public about how best to move forward. In addition, taking a break can provide an opportune time to confer with legal counsel about any concerns.

6. ADJOURN OR CONTINUE THE MEETING

If all else fails and the meeting has gotten to a point where there are public safety concerns and/or nothing can be accomplished, adjourn the meeting or continue the meeting to a certain date and time. Coming back another day with a better plan in place is sometimes necessary.

While these tips should assist if a protest arises, remember you're not alone. We here at BEH are here to help as necessary.

Chad Jacobs

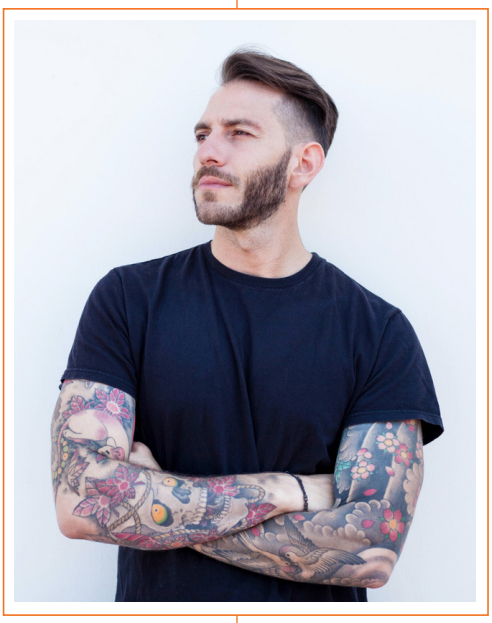
nationwide injunction stopping the administration from withholding federal funds to sanctuary jurisdictions. Look to our blog and future editions of this newsletter for updates on this issue.

The administration's approach to marijuana is another issue that is germane to many of our clients. As many of you know, Congress in recent years has prohibited the federal government from using federal funds to enforce the Controlled Substances Act against state-authorized medical marijuana programs. While there was some question whether Congress would reauthorize the legislation this year, the rider did pass in May. What is less clear is whether the Trump administration will enforce federal law relative to recreational marijuana laws. Of course, we will update you as soon as we know more.

At the time of this writing, the Oregon Legislature is still in session and wrestling with how to close an approximately $1.6 billion budget shortfall. Currently, Governor Brown is pitching a three-pronged approach to close the gap. First is the establishment of a task force to study ways to privatize services or assets in an effort to reduce unfunded PERS liabilities. Second is getting the state to be more aggressive

Tattoo Shops and Free Speech – Say What?

IN LATE MARCH, the Ninth Circuit addressed one of the most pressing issues of our time: does a tattoo artist who is required to have a conditional use permit in order to operate a tattoo shop have the legal ability to challenge that requirement for being a violation of the First Amendment? In other words, can the requirement for a conditional use permit for a tattoo shop be considered a violation of the First Amendment?



James Real wanted to open a tattoo shop in Long Beach, California, where he had been a long time resident, but that city's zoning regulations required such institutions be at least 1,000 feet from other dens of iniquity (taverns and other tattoo shops) and get a conditional use permit where the applicant would have to show the shop "will not be detrimental to the surrounding community including public health, safety or general welfare, environmental quality or quality of life."

Wow . . . what a well contained evocation of a defined public policy, eh?

Real didn't think so either and wasn't keen on having to go through the process so he challenged the City's regulations in federal court where he argued the regulations unduly restricted his First Amendment rights in two ways—by limiting areas in the City where tattooing was permitted and by requiring him to meet a pretty amorphous condition before he could ink his way to fame and fortune in his home town.

The district court said his case was not properly before it, holding that Real lacked standing (i.e., the legal right to bring the lawsuit) because he had never even applied for the conditional use permit let alone been denied.

Undeterred, Real appealed his case up to the Ninth Circuit and . . . won.

The Ninth Circuit in no uncertain terms said almost every aspect of tattooing—the tattoo itself, the tattooing process and even the tattoo business—was "expressive activity" and protected by the First Amendment. The appellate court also found Real *could* bring his challenge because where a challenged regulation is alleged to vest "unbridled discretion" in government officials, there is a high risk that censorship could follow.

Further, the conditional use permit process had no temporal limitation on when it would be granted or denied, which means it could effectively act as a "prior restraint" and thereby suppress constitutionally protected speech activity.

The Ninth Circuit remanded the case back to the district court so the city could put on its case showing the challenged regulations were not as bad as they were made out to be but rather were constitutionally copasetic.

What do we learn from this? It is important to make certain, when dealing with issuing a permit or license that could impact constitutionally protected speech activities, that the rules to be followed are specific, understandable, relevant to the underlying activity, and can be acted upon within a reasonable time period.

Real v. City of Long Beach
852 F.3d 929 (9th Cir., 2017)

Paul Elsner

in negotiating salaries with public employees. The third prong is to get more aggressive in collecting taxes owed to the state. Experts estimate that taxpayers owe between $550 million to $750 million to the state's general fund. Our clients should closely monitor these issues - particularly how the state will ultimately propose to reduce the $22 million in unfunded PERS liabilities. We will have updates as well as they become available.

For now, best wishes from us to you for a happy, healthy and dry summer!

A brief note of thanks and congratulations to ***Ashley Whittaker****, who left BEH in mid-June and is taking a job as an administrator with another well-regarded firm in Portland. Ashley was instrumental in modernizing many of BEH's systems and processes and we wish her the best.*

We would also like to congratulate ***Cherrie Houston*** *on her promotion to Firm Administrator. She will take on many of Ashley's duties and still serve as the primary staff contact for the firm's clients.*

New Guidance on Public Records Appeals

THE OREGON COURT of Appeals, in a decision issued this spring, found that a circuit court has jurisdiction to compel a public body to produce withheld public records even if the public body has not denied the request. So, how does this decision impact municipalities?

As a preliminary matter, it is helpful to review the public records laws. As we all know, "disclosure is the rule" in Oregon – which means that exemptions to the basic rule that the public has a right to examine public records are narrowly construed in favor of disclosure. *Guard Publishing Co. v. Lane County School Dist.*, 310 Or 32, 37 (1990). When a public body receives a request for disclosure, it first must determine if it believes an exemption applies. If one applies to all or part of the requested documents, the public body can assert the applicable exemption and deny the request or in most circumstances it may still release the requested record. If the public body determines no exemption applies to some or part of the request, it must produce the records.

However, responding to requests for public records can be time-consuming and expensive. To off-set these costs, the Oregon Legislature provided that a public body may establish fees reasonably calculated to reimburse the public body for the public body's actual cost of producing the public records. ORS 192.440(4)(a). A member of the public requesting records may also request that the public body waive or reduce the costs. A public body may reduce or waive the charge if it believes the public benefits from making the records available or it may deny a request for a fee waiver or reduction.

If a requester disagrees with either a public records request denial or denial of a request or waiver or reduction of fees, the requester may petition the district attorney in the public body's county to order the public body to make the records available. ORS 192.460; ORS 192.440(6).

If the district attorney denies the petition, or fails to act within seven days, the petitioner may take the issue to circuit court. ORS 192.460.

With this context in mind, in June, September and December 2012, the International Longshore and Warehouse Union (ILWU) made public records requests to the Port of Portland (Port). Because one of the requests included searching 195 boxes of documents in storage, the Port estimated that its costs for staff time to locate the records would exceed $200,000 – not including fees for legal review. The Port required ILWU to prepay the costs before it would produce the records.

The ILWU ended up petitioning the Multnomah County District Attorney (DA) to review the Port's denial of the ILWU's right to inspect the records and the Port's refusal to reduce or waive the fees. The DA denied ILWU's petition finding that the DA did not have authority to compel the Port to produce the records because there was no "actual written denial" of the request. In other words, because the Port had not denied the actual request, but rather had required ILWU to pay the costs prior to production, the DA found that he did not have the authority to order the Port to produce the records.

The matter was appealed to the Oregon Court of Appeals – which agreed with ILWU. The Court explained that if a district attorney does not make a decision on a petition – in whole or in part – within seven days, the petitioner has the right to appeal the decision to circuit court.

How this decision will affect local governments in Oregon is yet to be seen. This decision could result in additional public records litigation or a requirement from district attorneys to respond to petitions within a shorter time period than previously. Conversely, the decision could simply keep the status quo other than forcing district attorneys to make a decision on petitions. Whatever the outcome, rest assured we will be monitoring these and any other changes to the public records law.

Ashley Driscoll

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.

BEH

ATTORNEYS AT LAW

BEERY, ELSNER & HAMMOND, LLP

PORTLAND:
1750 SW Harbor Way
Suite 380
Portland, OR 97201-5106
t 503.226.7191

www.gov-law.com

Counselor Speech Incites Liability

IN 2010, a member of the City of Lebanon City Council wrote a letter to the local newspaper advising that unionized city employees should seek to "decertify [their] union captors." Although the councilor stated she was writing in personal capacity and not in her official capacity at the city, the union representing the city employees – AFSCME – filed a complaint with the Employment Relations Board (ERB) alleging the City was liable for her comments because they violated the Public Employees Collective Bargaining Act's (PECBA) prohibition against interfering, restraining, or coercing employees or because of their protected activity.

Under PECBA, it is a violation of law "for a public employer or its designated representative" to: (a) interfere with, restrain or coerce employees in or because of [employees exercising union rights], (b) dominate, interfere with or assist in the formation, existence or administration of any [union], or (c) discriminate in regard to hiring, tenure or any terms or condition of employment for the purpose of encouraging or discouraging membership in [a union]. ORS 243.672(1).

The ERB agreed with the union and the City appealed the decision to the Oregon Court of Appeals. The Court of Appeals reversed the ERB's decision and AFSCME appealed to the Oregon Supreme Court, which issued the final ruling on the matter this winter.

The Oregon Supreme Court found in favor of the union. The Court stated that PECBA should be read broadly in favor of public employee's right to organize and bargain collectively without interference from a public employer. As such, the Court held that a member of a city council – or any other governing body – could, in theory, create liability under PECBA for the public employer by making statements and taking actions that could interfere with employee's rights.

The Court articulated that if it is reasonable for a public employee to believe that an elected official is acting on behalf of the public employer, then those actions may subject the public employer to liability under PECBA. In making this determination, the court borrowed from a test used in the private sector and looked at factors such as whether the elected official "occupied a high-ranking position within" the employer, whether the elected official has "general policy-making authority" for the employer, whether the elected official has the power to hire or fire employees, whether the elected official made the statement in his or her official capacity, and finally, whether the public employer disavowed the statements.

Because the lower court and the ERB did not make any findings regarding whether a city employee would have reasonably believed the City of Lebanon councilor was acting in her official capacity (i.e., on behalf of the city) in urging those employees to decertify the union, the case was remanded back to the ERB.

The take-away from this case for public employers is that members of a governing body should be made aware that their statements and actions regarding protected union activity such as union organizing and collective bargaining – even if made in a personal capacity – can subject the public employer to liability under PECBA. Elected officials should seek legal guidance before making public statements regarding union activity.

Ashley Driscoll