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## CONNECTION

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### IN THIS ISSUE:

Limitations on the Regulation of Drones by Local Government Jurisdictions  
*Page 1*

Oregon Court of Appeals Rules Portland's Art Tax Is Not a Poll Tax  
*Page 2*

Smile! You're on Body Camera!  
*Page 3*

New Whistleblower Protections  
*Page 3*

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## Limitations on the Regulation of Drones by Local Government Jurisdictions

**UNMANNED AIRCRAFT SYSTEMS**, commonly known as "drones," are regulated by the FAA. Increasingly, states and local governments are looking into the possibility of imposing additional regulations on the operation of drones to protect the general public from potential adverse consequences from the operation of drones within their own jurisdictions. Although the FAA has largely occupied the field of the drone regulation, it has not *completely* closed the door on states and local governments imposing some additional, limited regulations within their own jurisdictions not inconsistent with Federal law. To that end, the FAA's Office of Chief Counsel issued a Fact Sheet on December 17, 2015. It states, "State and local restrictions affecting [drone] operations should be consistent with the extensive federal statutory and regulatory framework pertaining to control of the airspace, flight management and efficiency, air traffic control, aviation safety, navigational facilities, and the regulation of aircraft noise at its source." However, as discussed below, in Oregon all of that remaining limited authority has been preempted by the State. An outline of how the dual Federal/State regulatory framework is evolving is provided below.

### FEDERAL FRAMEWORK

Under Federal law, Congress has vested in the FAA regulatory control of airspace use, air traffic control, safety (including safe flying altitudes), navigational facilities, aircraft identification and

noise. The FAA has adopted safety regulations for drones which, among other things, require the registration of all drones with the FAA. According to the FAA Fact Sheet, "Because Federal registration is the exclusive means for registering [drones] for purposes of operating an aircraft in navigable airspace, no state or local government may impose an additional registration requirement on the operation of UAS in navigable airspace without first obtaining FAA

approval." From the Federal government's perspective, it is imperative to keep the regulatory framework crystal clear in order to minimize confusion and to facilitate the FAA's ability to effectively assure safety. As the FAA's Fact Sheet states:

*"Substantial air safety issues are raised when*



*state or local governments attempt to regulate the operation or flight of aircraft. If one or two municipalities enacted ordinances regulating [drones] in the navigable airspace and a significant number of municipalities followed suit, fractionalized control of the navigable airspace could result. In turn, this 'patchwork quilt' of differing restrictions could severely limit the flexibility of FAA in controlling the airspace and flight patterns, and ensuring safety and an efficient air traffic flow. A navigable airspace free from inconsistent state and local restrictions is essential to the maintenance of a safe and sound air transportation system."*

Thus, while the FAA allows that there is some regulatory daylight where states and local governments can operate consistently with the

## from David's desk...

As we head into 2017, it is a good time to look back on 2016 here at Beery, Elsner & Hammond.

In July, Paul Elsner, one of the founding partners of the firm along with his wife Pam Beery, dissociated as a partner and became "of counsel" to the firm. Paul will remain integral to the firm's efforts, and plans on working a pretty full schedule for the near future (save for many Fridays). Chad and I are grateful for Paul's leadership and trust over the years and for the fact that he will remain active in providing excellent service and legal advice to BEH's clients.

In August, BEH welcomed back Spencer Parsons to the fold. Spencer began his legal career with the firm in 2003. He subsequently moved with his family to Ojai, California, but years later returned to Portland. As spring arrived, it became clear that we needed another hand on deck here at BEH. After reconnecting with Spencer, we offered him a position and we are ever so happy he accepted. He is a pleasure to work with, has a healthy sense of humor and is a great lawyer. Spencer focuses on land use, real estate and public contracting issues.

## OREGON COURT OF APPEALS RULES PORTLAND'S ART TAX IS NOT A POLL TAX

**ON JUNE 8, 2016**, the Oregon Court of Appeals issued its opinion in *Wittemyer v. City of Portland*, upholding the City of Portland's "art tax" against a constitutional challenge from a Portland tax payer.

### BACKGROUND

In 2012, Portland voters approved a local income tax to fund arts education in school districts within Portland. The measure provides that "[a] tax of \$35 is imposed on the income of each income earning resident of the City of Portland, Oregon who is at least eighteen years old. No tax will be imposed on filer(s) within any household that is at or below the federal poverty guidelines established by the federal Department of Health and Human Services for that tax year." Portland collects the tax each year and distributes it to Portland Public, David Douglas, Centennial, Parkrose, Reynolds and Riverdale school districts to supplement those schools' art education budgets.

In 1910, Oregon voters approved an amendment to the Oregon Constitution at Article IX, section 1a. It stated that "[n]o poll or head tax shall be levied or collected in Oregon."

Mr. Wittemyer claimed that Portland's art tax constituted a "poll tax" and, therefore, the Oregon Constitution prohibited it. The Multnomah County Circuit Court ruled in favor of Portland, concluding the art tax was not a poll tax, and Mr. Wittemyer appealed.

### ANALYSIS

The question for the court of appeals was purely a question of law: what type of tax did Oregon voters intend to prohibit in 1910 and does Portland's art tax fall within the scope of the prohibition?

The court noted there was very little Oregon case law interpreting or analyzing Article IX, section 1a. As such, the court looked to the legislative history of the 1910 Oregon initiative, as well how other U.S. courts analyzed similar poll tax prohibitions.

Ultimately, the court found that "as of 1910, a 'poll or head tax' was a tax in a single, fixed amount imposed per capita, sometimes subject

to limited exclusions, *without reference to an individual's income or property.*"

Portland imposes the tax on "income-earning" residents (who are 18 years of age or older), which the measure defines to mean at least \$1,000 per year. However, the tax is subject to a number of exceptions based upon the source and amount of such income. For instance, the court found that the following residents are not subject to the Arts Tax:

- (1) a person who earns \$900 in annual wages;
- (2) a person who receives total annual 'income' (in the generic sense) of \$1,500, of which \$999 is wages and \$501 is PERS benefits;
- (3) a person who receives annual PERS benefits of \$75,000 but less than \$1,000 of income from other, non-exempt sources;
- and (4) a person who earns annual wages exceeding \$1,000 but is a member of a household which is at or below

federal poverty guidelines.

Therefore, the court held that Portland's art tax does not violate the Oregon Constitution's prohibition against poll taxes. To constitute a poll tax, the tax must: (1) impose

a uniform, fixed amount; and (2) must be imposed on each tax payer without regard to the ability of the resident to pay the tax. Both attributes must be present in order to qualify as an unconstitutional poll tax. Because Portland's tax exempted certain residents based upon the level and source of their income, the tax was constitutional.

### IMPACT TO CITIES

While local income taxes are not common, this case gives Oregon cities another tool to impose a modest income tax on certain tax payers. With Oregon school districts still operating on shoestring budgets, and with property tax reform uncertain at best, Oregon cities could consider a similar local income tax that would supplement the budgets of their local school districts.

David Doughman





# Smile! You're on Body Camera!

**THE ACQUISITION AND USE** of body cameras for police officers is becoming increasingly common in Oregon and throughout the United States. Many believe body cameras will result in fewer use-of-force incidents and simultaneously increase police accountability. However, agencies must confront a number of issues when they consider the use of body cameras. These include cost, community concerns, officer concerns and access to the resulting videos.



Historically, Oregon law enforcement agencies were implementing body camera programs without any state laws or regulations to guide them. This changed in 2015 when the Oregon

Legislature passed and the governor signed HB 2571. Oregon law now requires agencies that use body cameras to enact local policies relating to their use and deployment. One of the big issues concerns an agency's duty to retain and preserve footage. Under HB 2571, footage must be retained for at least 180 days but no more than 30 months, unless the footage is related to an ongoing criminal case or court proceeding.

The law also requires an officer to activate a camera when she has a reasonable suspicion that a person is committing a crime or infraction, and to keep it recording until the officer ends the

— continued on page 4

*This month, we celebrated Tom Sponsler's impending retirement from the practice of law. For more than 30 years, Tom has capably represented local governments throughout Oregon. Prior to joining BEH in 2004, Tom served as Multnomah County Attorney and before that served as Gresham City Attorney. He authored the 2004 Model City Charter, published by the League of Oregon Cities, which now serves as the basis for many modern charters in the state. He was actively involved in the Oregon Legal Institute, serving as its president for many years, and also served as the Oregon chair of the International Municipal Lawyers' Association. Tom is a friend and mentor to me who will be missed. On behalf of all of us, we wish him and Virginia our best and trust they will get to see their granddaughter even more now!*

*As ever, change is the only constant. Despite these changes at the firm, we are certain we will continue to provide unparalleled legal services to local governments throughout the Pacific Northwest. To our friends and clients, we hope you had a good holiday season and have a happy and healthy 2017.*

# New Whistleblower Protections

**IN THE WAKE** of the scandal surrounding former Governor Kitzhaber's resignation in 2015, the Oregon Legislature passed HB 4067 during their 2016 session which adds additional state law protections for whistleblowers. The lawmaker who introduced the legislation, Rep. Knute Buehler, was concerned over investigations into Department of Administrative Services employee Michael Rodgers for his role in leaking state emails to the Willamette Week newspaper. While the new law does not allow public agency employees to release information to the press, it does create additional protections for public agency and nonprofit whistleblowers.

One of the major changes is that it allows public and nonprofit employees to report violations of federal, state, or local laws to a state or federal regulatory agency (outside their own agency), a law enforcement agency, a manager employed by the public agency or nonprofit, or an attorney. The new law gives those whistleblowing employees an affirmative defense to a civil or

criminal charge related to the disclosure of information that might otherwise be exempt from disclosure.

Another important provision of HB 4067 that local governments need to be aware of is a requirement that public employers establish and implement a policy regarding whistleblowing employees that incorporates the changes in the law, and which policy needs to be disseminated to each employee. For most employers, the easiest way to do this is to update their employee handbooks which presumably

already contain language on whistleblowers and the protections they are already afforded under the law. Those whistleblowing provisions should be updated with the new rights and remedies under the law as a result of HB 4067.

The new provisions went into effect January 1, 2017.

Heather Martin



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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federal regulations, that available regulatory area is very, very limited in scope. As explained below, in Oregon that limited area has been entirely coopted by state government, leaving no regulatory authority to local jurisdictions.

**STATE FRAMEWORK**

Pursuant to ORS 837.385, the State has expressly preempted local governments from regulating the "ownership or operation" of drones. Therefore, essentially all drone regulation in Oregon that does not come from the FAA comes from the Oregon Department of Aviation (ODA), with no regulatory authority left to local governments.

The State has revised existing laws and adopted new ones in response to the rapidly increasing popularity of the operation of drones in Oregon. Under revisions to the laws, it is now a misdemeanor for anyone to operate a "weaponized" drone or to otherwise operate a drone in a manner so that it functions as a weapon. It is also unlawful to cause a drone to direct a laser at flying aircraft, prevent the takeoff or landing of an aircraft or crash into a flying aircraft. There are also new requirements for collection of data by public bodies operating drones, as well as requirements that the data is made available to the public. Finally, the Legislature has made it unlawful to operate drones over "critical infrastructure facilities" (including water, electrical and communications facilities, among others), or for a drone to make

contact with such a critical infrastructure facility. The applicable statutory provisions for drones are in ORS Chapter 837 (together with other statutes applicable to aircraft), and the applicable administrative rules are at OAR Chapter 738.

The ODA requires public bodies operating drones to register with the State after first registering with the FAA. The public entity registration requirement dovetails with the new statutory provisions pertaining to the collection, storage and availability of collected data, referenced above.

Under this evolving regulatory regime, local governments operating drones find themselves facing new regulations regarding the operation of drones, and new regulations addressing the collection of data (and making that data available to the public). At the same time, under ORS 837.385, the State has restricted local governments from regulating the "ownership or operation" of drones.

**CONCLUSION**

This regulatory framework may, and likely will, undergo more changes over time. However, regulation of drones will likely remain predominantly the purview of the Federal government, with the very limited remaining regulatory authority vested in the State.

Spencer Parsons



interaction. A local policy may permit exceptions to allow an officer to stop recording in certain circumstances. The exceptions may include when an officer interviews a victim of certain crimes or talks to a confidential informant. In addition, Oregon law prohibits agencies from using footage in certain ways to attempt to identify suspects.

With respect to public records issues, the law provides an exception to disclosure in certain instances. It allows disclosure of body camera footage if the requestor identifies the time and date of the event in question. The law also requires that before disclosure, the agency must obscure the faces of all persons appearing in the video, including the officer or other officers present at the event. Many vendors of body cameras apparently offer this service as part of the package they provide to agencies.

Alternatively, there are third-parties that could modify the video to comply with this aspect of the law. It is not clear how costly this process is; however, as with other costs a public agency incurs in responding to public record requests, the law permits the agency to pass this cost on to the requesting party.

Agencies that are considering implementing a body camera program are encouraged to discuss the process with other agencies that have already done so. It is also important to discuss the implementation of a program with the local officers' association. Finally, any agency that does decide to implement a body camera program must take steps to develop a local policy in accordance with HB 2571.

David Doughman



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