

Agenda Item C Staff Report - Attachment 1:

Supreme Court Media Release for Aug. 1, 2019 Decisions

SUPREME COURT

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Cases decided August 1, 2019.

Friends of the Columbia Gorge, et al. v. Energy Facility Siting Council, et al., (EFSC 52017) (S065478)

On judicial review from a final order of the Energy Facility Siting Council. The rules approved by the Energy Facility Siting Council through Permanent Administrative Orders EFSC 4-2017 and EFSC 5-2017 are invalid. Opinion of the Court by Justice Thomas A. Balmer. Justice Rives Kistler retired December 31, 2018, and did not participate in the decision of this case.

Today, the Oregon Supreme Court invalidated rules adopted by the council governing the process for amending site certificates. Petitioners argued that rules were invalid because the council failed to comply with required rulemaking procedures and because the rules exceeded the council's statutory authority. The Court agreed with some, but not all, of petitioners' arguments.

As an initial matter, the parties disputed what standard this court applies when deciding whether to invalidate rules based on a petitioner's procedural objections under ORS 183.335. The council argued for a substantial-compliance standard under ORS 183.335(11)(a), while petitioners' argued for a strict-compliance standard ORS 183.400(4)(c). The Court agreed with the council's position and noted that it had previously applied the substantial-compliance standard in *Don't Waste Oregon Com. v. Energy Facility Siting*, 320 Or 132, 881 P2d 119 (1994).

Petitioners argued that the council failed to satisfy three procedural requirements. First, petitioners argued that the council violated ORS 183.335(3)(e)(C) by failing to respond to petitioners' comments recommending other options for achieving the substantive goals of the rulemaking. The Court rejected that argument, holding that ORS 183.335(3)(e)(C) requires an agency to maintain a record of the agency's responses to certain comments, but the statute does not require the agency to create a response if the agency has not already done so. Second, petitioners argued that the council violated ORS

183.335(2)(d) by failing to provide copies of the rules that they proposed to adopt, amend, or repeal that show all proposed changes to the existing rules. The council had satisfied that requirement with regard to its first notice of intended action, but petitioners maintained that the council's later notices failed to satisfy that requirement. The court held that, to invalidate rules based on the argument that subsequent notices failed to comply with ORS 183.335(2)(d), a petitioner must establish that the agency's earlier notice failed to provide adequate notice of the rules adopted, amended, or repealed by the agency. Because petitioners did not argue that the first notice failed to provide adequate notice of the council's rulemaking, the Court rejected petitioners' challenge. Third, petitioners argued that the council violated ORS 183.335(3)(d) by failing to provide a statement identifying how the council will subsequently determine whether the new rules are accomplishing the stated objectives of the rulemaking. The council argued that it satisfied that statute when, at a rulemaking hearing, council members discussed potential options for tracking whether the rules are accomplishing their objectives. The Court agreed with petitioners and rejected the council's argument. The Court held that oral statements discussing how an agency might determine whether rules are accomplishing their objective are insufficient to substantially comply with ORS 183.335(3)(d). Because the council failed to substantially comply with ORS 183.335(3)(d), the Court held that the council's new rules were invalid.

Petitioners also raised two substantive objections to the new rules. The Court addressed petitioners' substantive objections to provide appropriate direction to the parties for any future rulemaking regarding the site certificate amendment process. First, petitioners argued that the rules delegated nondelegable authority to staff to determine whether a site certificate amendment should receive a public hearing and whether any member of the public may request a contested case proceeding. The Court rejected that argument. The Court noted that, in contrast to the detailed statutory procedures governing site certificate applications, the legislature imposed virtually no statutory procedural requirements governing site certificate amendments. Instead, the legislature allowed the council to develop that process largely as it has seen fit. The Court therefore held that the council did not exceed its statutory authority when it permitted its staff to determine, with respect to a request to amend a site certificate, whether there would be a public hearing and whether the public could request a contested case hearing. Second, petitioners argued that the council adopted rules that improperly limit judicial review of requests for amendment that do not receive contested case proceedings. The new rules stated that the right to seek judicial review was limited to those who provided comments during the council's consideration of an application and only as to issues on which they provided comment. The Court agreed with petitioners' challenge to those rules. The Court noted that, although a statute imposed a similar limit to the judicial review of orders that result from contested case proceedings, no such statutory limit applied to the judicial review of orders that did not receive contested case proceedings. As a result, the Court held that the council exceeded its statutory authority by adopting rules that limited the scope of judicial review of an order amending a site certificate.

Mark Kramer v. City of Lake Oswego, (CV 2100913) (CA A156284) (SC S0605014)

On review from the Court of Appeals in an appeal from the Clackamas County Circuit Court, Henry C. Breithaupt, Judge pro tempore. 285 Or App 181, 395 P3d 592 (2017). The decision of the Court of Appeals is reversed in part and affirmed in part. The judgment of the trial court is remanded for entry of a declaratory judgment in favor of defendants on plaintiffs' first and third claims for relief, and the judgment is reversed and remanded for further proceedings to resolve part of plaintiffs' second claim for relief – which seeks a declaration that the waterfront resolution exceeds the city's authority as limited by the public trust doctrine. Opinion of the Court by Justice Meagan A. Flynn. Justice Rives Kistler retired on December 31, 2018, and did not participate in the decision of this case.

Today, in a unanimous decision, the Oregon Supreme Court held that the public trust doctrine includes a right of access to public water from abutting public upland. Any rules interfering with the exercise of that right must be "objectively reasonable in light of the purpose of the trust and the circumstances of each case." The Court assumed -- without deciding -- that Oswego Lake is subject to the public trust doctrine and held that genuine issues of material fact preclude a determination on summary judgment that the City of Lake Oswego's prohibition on the public's entry into Oswego Lake from the abutting public waterfront parks satisfies the test of "objectively reasonable in light of the purpose of the trust and the circumstances of each case." The Court also determined that the city's restrictions on entry to Oswego Lake from the waterfront, public parks and the city's exclusion of non-residents from entry to the city-owned swim park do not violate the Equal Privileges and Immunities guarantee of the Oregon Constitution, Article I, section 20.

The City of Lake Oswego has several public waterfront parks abutting Oswego Lake, and the city passed a resolution prohibiting entry into the lake from those parks. The city also operates a small swim park along the lake that may only be used by Lake Oswego residents. Plaintiffs sought a declaration that the public trust and public use doctrines ensure the right to access Oswego Lake, either from the city's waterfront public parks or through its swim park, and thus that the city's policies restricting that access are invalid. Plaintiffs also argued that the city's waterfront and swim park restrictions violate the Equal Privileges and Immunities guarantee of Article I, section 20, of the Oregon Constitution. The trial court granted summary judgment in favor of defendants, and the Court of Appeals affirmed. On review, defendants asked the Court to assume that the lake is subject to the public trust and public use doctrines but to nevertheless affirm the grant of summary judgment to defendants.

First, the Court determined that the public use doctrine does not include a right to access public water from abutting land. However, under the public trust doctrine,

the state holds title to the submerged and submersible land underlying the navigable waters in trust for the benefit of the public, and the public's right to use that water overlying that state-owned land does include the right to access the water from abutting public upland. And, any restriction on the exercise of that right must be "objectively reasonable in light of the purpose of the trust and the circumstances of each case." Moreover, the Court determined that the city, because it derives its power from the state, cannot implement restrictions that the state could not enact. Applying that conclusion to this case -- and assuming that plaintiffs can prove Oswego Lake is among those navigable waters that are subject to the public trust doctrine -- the Court determined that the validity of the waterfront park restriction depended upon an underlying factual issue of whether the city's restriction on entry into the water from the waterfront parks was objectively reasonable under the circumstances. But the newly announced rule that the public has a right to access public water from land open to the public does not implicate the residents-only swim park, because the upland is closed to the general public.

Second, the Court determined that neither the waterfront resolution nor the residents-only swim park policy violate the Equal Privileges and Immunities guarantee of Article I, section 20. As for the waterfront resolution, the Court reasoned that, because access is prohibited for all persons, the government has not granted any privilege, and thus the restriction does not implicate Article I, section 20. As for the swim park restriction, the Court determined that the appropriate question was to ask whether the residents-only policy bore a rational relationship to the city's purpose in managing the swim park. The Court concluded that operating the swim park for the benefit of city residents is a legitimate exercise of the city's authority. The Court also concluded that, given that the swim park provides no access to the open water of the lake and is more like a city-created swimming facility, and given the evidence that the small size of the park limits the number of people that can use the park at one time, the city's identified goal of ensuring that the park is available for the use of city residents bears a reasonable relationship to the stated purpose of managing the park for the benefit of city residents.

Troubled Asset Solutions, LLC v. Eddie Wilcher, (CC C142009EV, C145657CV) (CA A158440) (SC S066097)

On review from the Court of Appeals in an appeal from the Washington County Circuit Court, D. Charles Bailey, Judge. 291 Or App 522, 422 P3d 314 (2018). The decision of the Court of Appeals is reversed in part. The case is remanded to the Court of Appeals for further proceedings. Opinion of the Court by Justice Thomas A. Balmer.

Today, the Oregon Supreme Court reaffirmed that the "absence of gross negligence" element in reformation incorporates equitable considerations, including the

degree of prejudice to the other party, and upheld the trial court's determination that Troubled Asset Solutions (TAS) had shown an absence of gross negligence.

Wilcher signed a promissory note payable to TAS's predecessor in interest and a trust deed to secure that note. Both documents listed as collateral certain property owned by Wilcher personally, and Wilcher signed the promissory note as a guarantor in his individual capacity. However, the trust deed -- which was prepared by TAS's predecessor in interest -- did not list Wilcher as a grantor of property that was collateral for the loan, and Wilcher signed it only as a member of Sierra Development, LLC, the company receiving the loan. Litigation between Wilcher and TAS culminated in a proceeding in the Washington County Circuit Court, where the court reformed the trust deed to list Wilcher, personally, as a grantor.

Wilcher then appealed, arguing that TAS had failed to show any of the three elements necessary for reformation: an antecedent agreement, a mutual mistake, and an absence of gross negligence. The Court of Appeals agreed with Wilcher that TAS had failed to show that its predecessor in interest had not been grossly negligent in preparing the trust deed, and that therefore the trial court erred in reforming the deed.

In a unanimous opinion written by Justice Thomas A. Balmer, the Supreme Court reversed the decision of the Court of Appeals. The Court explained that its prior cases made clear that the "gross negligence" element of reformation does not simply refer to "heightened negligence" but rather incorporates a balancing of the equities. Whether a particular action is grossly negligent so as to bar reformation will turn not only on the level of carelessness of the party, but also on whether the parties acted in good faith and whether another party would be prejudiced. In addition, the Court emphasized the deference due to the trial court's factual findings, where the Court of Appeals did not engage in *de novo* review. The Court concluded that the Court of Appeals had erred by failing to consider the equities and that, because of an absence of prejudice and the trial court's other findings, TAS had shown an absence of gross negligence. The Court also held that, under the appropriate standard of review, the trial court's findings on the existence of an antecedent agreement and mutual mistake should be upheld as well. Finally, the Court considered TAS's suggestion that the term "gross negligence" should be abandoned, but held that, in light of the century of case law interpreting and applying the standard, the current framework provided sufficient guidance.

State of Oregon v. Robert Paul Langley, Jr., (CC88C21624) (SC S062353)

On petition for reconsideration of the former opinion of the Court. 363 Or 482, 424 P3d 688 (2018). The petition for reconsideration is allowed. The former opinion is modified and adhered to as modified. Opinion of the Court by Justice Lynn R. Nakamoto. Justice Thomas A. Balmer and Justice Rebecca A. Duncan did not participate in the consideration or decision of this case.

Today, the Oregon Supreme Court allowed a petition for reconsideration of the Court's decision in *State v. Robert Paul Langley, Jr.*, 363 Or 482, 424 P3d 688 (2018), to correct factual errors appearing in the Court's opinion. The correction of those errors did not alter the Court's ultimate decision.

In seeking reconsideration, defendant raised multiple issues concerning aspects of the Court's decision, among them, challenges to three statements in the opinion describing certain events before defendant's penalty-phase retrial. First, the Court held that defendant correctly noted that the circuit court's presiding judge had not filed a notice assigning the trial judge for defendant's penalty-phase retrial, as described in the opinion. Second, the Court held that, because the record did not establish that the presiding judge had personally assigned the trial judge to defendant's case, the Court had incorrectly described a subsequent conversation between the two jurists as having been "part of the case assignment process[.]" As a result, the Court disavowed its previous descriptions and modified its opinion to remove references to the presiding judge's involvement in the assignment. Third, defendant correctly noted that there was a disputed issue of fact regarding the date that defendant's lawyer had filed recusal motions. As a result, the Court held that it had inaccurately stated that the filing had occurred on a specified date and modified the text of its opinion to provide that defendant's recusal motions contained time stamps by the circuit court clerk's office with that date.

The Court concluded that those changes did not affect its determination of the legal issues, and the Court considered and rejected without discussion the other issues defendant raised. The Court adhered to its former opinion as modified. In addition, the Court denied a motion by defendant seeking to have his case remanded to the trial court for additional evidentiary hearings.

State of Oregon v. Yevgeniy Pavlovich Savinskiy, (CC 121059) (CA A154791) (SC S065257)

On petition for reconsideration of the former opinion of the Court. 364 Or 802, 441 P3d 557 (2019). The petition for reconsideration is allowed. The former opinion is modified and adhered to as modified. Opinion of the Court by Justice Meagan A. Flynn.

The Court allowed the state's petition for reconsideration to clarify its disposition as to defendant's original charges. The opinion is unchanged except that there is a new disposition clarifying the ambiguity:

"Accordingly, the decision of the Court of Appeals is reversed as to defendant's convictions for conspiracy to commit murder and assault (Counts 17-19), but is otherwise affirmed. The judgment of the trial court is affirmed in part and reversed in part, and the case is remanded to the trial court for further proceedings."