

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF LINCOLN
225 W. Olive St. Newport Oregon 97365

Case No: 22CV38244

Peter Briggs; Richard E. Cave; Jane C.
Gibbons; Craig McLanahan; Katherine Guptill;
Ken Guptill; Julie D. Reading; Jane M.
Fitzpatrick; Mitchell Moore; Gary Weske;
Linda Fender; Darrell Fender; Douglas
Palmer; Jayne Palmer; Olena Strozhenko;
Nadine Scott; Jerry Merritt; Lorin J. Lynch;
Zane Kesey; Anthony D Schaueremann

Plaintiff

OPINION AND ORDER

v.

LINCOLN COUNTY; CURTIS LANDERS,
LINCOLN COUNTY SHERIFF

Defendant

This case came before the Court on Cross Motions for Summary Judgment from Plaintiff and Defense. Initial Argument was heard on August 16, 2023. On December 4, 2023, after notice by the parties of time under advisement, the Court updated the parties on the status of rulings and scheduled additional briefing and follow up argument for December 22, 2023. The court having reviewed the record, heard the argument of the parties, and considered the issues hereby finds as follows:

FACTS

In 2016, Lincoln County adopted through Ordinance 487, a business licensing program for Short Term Residential Rentals (“STRs”). Beginning in 2019, Lincoln County began the process of updating its STR licensing program, resulting in Ordinances 490, 509, and 523 (“The Ordinances”) that make substantial changes to the licensing program. During that time, Lincoln County also passed multiple Resolutions suspending the issuance of additional STR licenses (“The Resolutions”). Finally, Order 01-23-037 was issued in February 2023 which set subarea boundaries for STRs in Lincoln County and limited the number of licenses available within each subarea.

Plaintiffs are residents and property owners within Lincoln County who have operated STRs prior to and during the STR program adoption. The STR licensing changes may impact Plaintiff’s ability to operate STRs and their property values.

The Complaint filed in this case has been amended multiple times. There are additional factual allegations in the Second Amended Complaint, but as will be discussed, they are irrelevant to the court’s opinion which focuses on the four “Claims for Relief” alleged in the Second Amended Complaint.

STANDARD FOR RELIEF

The court shall grant the motion if the pleadings, depositions, affidavits, declarations, and admissions on file show that there is no genuine issue as to any material fact and that the moving party is entitled to prevail as a matter of law. No genuine issue as to a material fact exists if, based on the record before the court viewed in a manner most favorable to the adverse party, no objectively reasonable juror could return a verdict for the adverse party on the matter that is the subject of the motion for summary judgment. ORCP 47(C)

ANALYSIS

1) First Claim of Relief

The court grants summary judgment for the defendant on the First Claim for Relief in the Second Amended Complaint. Each paragraph in the Plaintiff's First Claim for Relief except 77(e) and 78(e) relies upon a finding that either 1) the ordinances in question are land use regulations, or, alternatively, 2) that ORS 215.130(5) applies to ordinances that are not land use regulations. Paragraphs 77(e) and 78(e) demand relief because the Ordinances are unconstitutionally vague.

This Court lacks jurisdiction to review land use decisions.

The Land Use Board of Appeals, ("LUBA") has exclusive jurisdiction to review any land use decision or limited land use decision of a local government. ORS 197.825. If any of the ordinances are land use decisions, then this court lacks jurisdiction to review the ordinances.

If the ordinances are not zoning ordinances, then ORS 215.223 does not apply by its own plain language. ORS 215.223(1). If the ordinances do not relate to comprehensive plans, land use planning, or zoning then the notice provisions of ORS 215.503 do not apply to those ordinances.

There is no genuine issue of material fact to be decided in order to resolve the claims, and the defense is entitled to judgment as a matter of law. This court only has jurisdiction to hear the claims if the ordinances are not land use decisions, but if the ordinances are not land use decisions, then the statutes upon which the claims rest do not apply to those ordinances.

ORS 215.130(5) applies only to land use decisions.

The Circuit Court has jurisdiction to decide the question: Does ORS 215.130(5) prohibit an ordinance that is not a land use regulation from discontinuing a "lawful use" under that statute?

Morgan v. Jackson County, 290 Or App 111 (2018) discusses "lawful use" as used in ORS 215.130(5) means "lawful use of any building, structure or land" and discusses that the text of section 5 itself refers to the "time of the enactment or amendment of any zoning ordinance or regulation." If the ordinances here are licensing ordinances, not zoning ordinances or land use

regulations, then as in Morgan, ORS 215.130(5) would not protect any pre-existing use prior to their enactment.

The ordinances in this case, however, are distinguishable in one facet from those in Morgan. Morgan specifically discusses that:

Such business or occupational licensing does not seek to regulate *where*, in particular, dealership activity may be located, and such occupational licensing does not regulate the “use of a building, structure or land” in any way generally comparable to zoning or land use regulation. Instead, occupational licensing is a system of regulation of businesses, professions, or occupations for the protection of the public in general. *Cf. Coffey v. Board of Geologist Examiners*, 348 Or. 494, 504-05, 235 P.3d 678 (2010) (referring to OAR 809-020-0001 to 809-020-0030 as describing several goals for professional geologists, *e.g.*, honesty, integrity, and protection of the public health and welfare). Generally, business or occupational licensing is a system that does not regulate with regard to particular locations in the use of real properties. As such, licensing of motor vehicle dealers is not the sort of “law” that is at issue when ORS 215.130(5) refers to “lawful use of any building, structure or land.”

Id. at 118.

In this case, Lincoln County uses their ordinance in a way that *does* regulate where activity can be located. It certainly can and has been argued that the County is using the ordinance to accomplish the same or similar goals as could be addressed through a land use regulation. The protections in ORS 215.130(5), however, only apply if the ordinance is a zoning or land use regulation. The question of whether the ordinance *is* a land use regulation, however, is a question within the exclusive jurisdiction of LUBA, and this court does not have jurisdiction to decide the issue.

“Unconstitutional Vagueness,” and Article I Sections 20 and 21 of the Oregon Constitution

[T]o say that a law is unconstitutionally ‘vague’ can refer to any of three different problems. First, a statute may be so vaguely crafted as to permit arbitrary or unequal application and uncontrolled discretion, in violation of Article I, sections 20 and 21, of the Oregon Constitution. Second, a statute may create an ‘unlawful delegation issue’ under the Due Process Clause of the Fourteenth Amendment in that it contains no identifiable standards or employs standards that rely on the ‘shifting and subjective judgments of the persons who are charged with enforcing it.’ Third, a statute may be so poorly written as to fail to provide ‘fair warning’ of the conduct that it prohibits, in violation of the Due Process Clause.

Richardson v. Driver and Motor Vehicle Services Div., 213 Or. App 18 (2007).

The plaintiff brings several claims of unconstitutional vagueness. In argument, the plaintiff conceded, and the parties agreed, that no claims were brought under the United States Constitution, and that only claims under the Oregon State Constitution were being brought.

Many of the Oregon cases discussing “vagueness,” particularly in the criminal context, combine their vagueness analysis of the State and Federal Constitutions. Richardson and its developed line of cases make clear that claims of “unlawful delegation” and “fair notice” as “vagueness issues” are Due Process issues, not claims arising from Article 1, section 20 of the Oregon Constitution. As such, Plaintiff’s claims based on “vagueness” as lack of fair notice or an unlawful delegation of authority under the Oregon Constitution fail as a matter of law.

The remaining issue of vagueness under the Oregon Constitution is whether the ordinances here are so vaguely crafted as to permit arbitrary or unequal application and uncontrolled discretion, in violation of Article I, section 20 of the Oregon Constitution.

In the context of a vagueness challenge to a criminal law under Article I, section 20, the inquiry is whether the enactment at issue “creat [es] a serious danger of unequal application” of the enactment. *Cornell/Pinnell*, 304 Or. at 32, 741 P.2d 501; *see also Graves*, 299 Or. at 195, 700 P.2d 244 (Article I, section 20, is implicated “when vague laws give unbridled discretion to judges and jurors to decide what is prohibited in a given case, for this results in the unequal application of criminal laws”). This court has not articulated the extent—if any—to which the standard for analyzing an arguably vague civil law for haphazard and standardless administration, such as ORS 30.866(1), might be different from the standard applicable to criminal laws.

Delgado v. Souders, 334 Or. 122 (2002).

Moreover, the challenge to the statute is facial.

For a statute to be facially unconstitutional, it must be unconstitutional in all circumstances, *i.e.*, there can be no reasonably likely circumstances in which application of the statute would pass constitutional muster. *See, e.g., State v. Chakerian*, 325 Or. 370, 381, 938 P.2d 756 (1997) (for a statute to be deemed to be impermissibly vague, it must be shown to be “vague in all of its possible applications”) (quoting *State v. Robertson*, 293 Or. 402, 411 n. 8, 649 P.2d 569 (1982))

State v. Sutherland, 329 Or. 359 (1999) (additional citations omitted).

The Court will address the vagueness of the provisions raised by the Plaintiff in turn.

(A) LCC 4.420(1) -- “Citation for operation without a license shall disqualify dwelling unit owners from obtaining a future license in accordance with this chapter.”

Notwithstanding any Due Process issues that may arise in its enforcement, this provision is not facially vague. The provision clearly states the standard of enforcement and the consequences of violating that standard.

(B) LCC 4.420(4)-(5) – “Maps and Caps”

These provisions are not unconstitutionally vague in establishing that subareas will exist, how licensees will qualify for licenses in the subarea, and how the Licensing Authority will issue licenses to those on the waitlist.

(C) LCC 4.440(6)(b) Operating Standards

This provision, requiring and discussing the Oregon Department of Environmental Quality-authorized Existing System Evaluation Report is certainly a complex provision. The provision also requires compliance with standards outside of the LCC and refers to plans that are to be developed and adopted by the county. The provision, however, does not create a serious danger of unequal application. The standards, or the requirements for the standards, are set out and mandated to be provided to the public.

(D) LCC 4.440(7)(b) – Events such as weddings, rehearsal dinners and similar activities are prohibited.

“Event” means, in addition to other uses:

- i) something that happens,
- ii) a noteworthy happening,
- iii) a social occasion or activity,
- iv) an adverse or damaging medical occurrence,
- v) any of the contests in a program of sports,

“Event.” Merriam-Webster.com Dictionary, Merriam-Webster, <https://www.merriam-webster.com/dictionary/event>. Accessed 28 Dec. 2023.

“Wedding” means:

- i) a marriage ceremony usually with its accompanying festivities,
- ii) an act, process, or instance of joining in close association,
- iii) a wedding anniversary or its celebration

“Wedding.” Merriam-Webster.com Dictionary, Merriam-Webster, <https://www.merriam-webster.com/dictionary/event>. Accessed 28 Dec. 2023.

“Rehearsal Dinner” means:

- i) a formal meal after a wedding rehearsal for the people participating in a wedding ceremony.

“Rehearsal Dinner.” Merriam-Webster.com Dictionary, Merriam-Webster, <https://www.merriam-webster.com/dictionary/event>. Accessed 28 Dec. 2023.

The court’s review of this provision is very narrow. No challenge is brought to this provision under the first amendment, for example. No challenge is brought under the federal constitution which would require fair notice to the person to be charged and fined for violating this section. In addition, because what is brought is a facial challenge, the issue is not whether the ordinance could be, or was, unconstitutionally applied, but whether the ordinance is vague in all its applications.

Would a judge applying the standard set forth have “unbridled discretion” in deciding what was prohibited under the ordinance? The court finds that a judge would, and this provision of Ordinance #523 is unconstitutionally vague. Removing the limiting language from the prohibition would leave the court with no guidance with regard to what was prohibited. “Event” in that context could literally mean any activity conducted on a property. Adding in the limiting language of “Weddings” and “Rehearsal Dinners” improves the analysis, but does not cure the defect. The limiting language would guide a court to the “noteworthy happening” or “social occasion or activity” definition. Most weddings are not sporting events, and not all weddings result in a damaging medical occurrence.

A court is then left to construe which “noteworthy happenings” or “social occasions or activities” are prohibited. Many of those who visit Lincoln County consider the trip itself to be a “noteworthy happening.” The views from our vacation rentals grace the pages of social media endlessly. Moreover, often the act of vacationing itself is a “social occasion or activity.” Even the most qualified group of jurists could not enforce a consistent definition of which activities constitute “noteworthy happenings.” Moreover, certainly not all “social occasions or activities” could be banned. Is engaging in a rousing game of “Monopoly” with the children inside the scope of the ordinance? It is certainly a social activity.

No group of jurists could apply a consistent standard even including the limiting language provided by the county. The question becomes “What do weddings and rehearsal dinners have in common?” Food is sometimes served in weddings, and by definition at rehearsal dinners. Certainly, consuming food on the property is not banned. But is the prohibition on “noteworthy happenings involving food.” Does that eliminate birthday parties? Can someone celebrate their birthday alone? Given that both examples of prohibited activity involve weddings, it would seem a straightforward analysis that anniversary dinners would be prohibited. But perhaps the distinction becomes greyer when “dating anniversaries” are considered. Would the signing of a domestic partnership agreement qualify if no ceremony were performed?

The court is not persuaded by the county’s argument that the ordinance is mere “economic regulation” and as such the court should not engage in a rigorous analysis of the ordinance. Although plaintiff has made no claims that the ordinance implicates a constitutionally protected interest, the prohibition is certainly not “just an economic regulation.” In its most limited reading, the provision prohibits only a religious celebration in a typical venue often selected for religious celebration.

Finally, the court is not persuaded that the ordinance can be legally salvaged by reading it to encompass the goals of the STR regulation and thus be limited to “Weddings, Rehearsal Dinners, and other events that lead to an unreasonable increase in excessive noise, spilled garbage, shortages of parking, and overcrowded accommodations.” To do so the court would create terms in the ordinance that do not exist there. During argument the County encouraged the court to consider that, even if weddings were occurring, unless they caused public inconvenience they would not be reported and therefore not be charged. The ordinance does not restrict a court enforcing it in that fashion. At trial for violation of LCC 4.440(7)(b) there would be no affirmative defense for not exceeding parking recommendations and cleaning up any rice thrown. The idea that enforceability of the statute would be determined only by the standards or prejudices of those choosing to report violations only further demonstrates the serious danger of unequal application of the ordinance.

The court finds that LCC 4.440(7)(b) providing “Events such as weddings, rehearsal dinners and similar activities are prohibited” is unconstitutionally vague under Article 20 of the Oregon Constitution.

(E) LCC 4.445(3), (4)

The court evaluates LCC 4.445(3), (4) for vagueness under Article 1, sections 20 and 21 of the Oregon Constitution.

Article 1, section 21 provides, in relevant part, “nor shall any law be passed, the taking effect of which shall be made to depend upon any authority, except as provided in this Constitution...” “The test for determining whether a particular enactment is an unlawful delegation of legislative authority or a lawful delegation of factfinding power is whether the enactment is complete when it leaves the legislative halls. A legislative enactment is complete if it contains a full expression of legislative policy and sufficient procedural safeguards to protect against arbitrary application.” State v. Self, 75 Or.App. 230 (1985).

State v. Davilla, 234 Or.App. 637 (2010) is instructive in this context. In Davilla, the Court of Appeals upheld the Legislative Assembly’s delegation of authority to construct the sentencing guidelines to the State Sentencing Guidelines Board. The Court in Davilla explained:

The constitutional prohibition on delegation of legislative powers is not absolute. The legislature may delegate authority to other bodies to adopt rules that define or implement broad statutory standards. Whether the legislature unconstitutionally delegates its authority in any particular instance, therefore, depends on the presence or absence of adequate legislative standards and whether the legislative policy has been followed.

We determine that the legislature’s delegation of authority to develop sentencing guidelines as an administrative rule by the board was constitutionally permissible. The legislature provided standards directing the board's development of the guidelines in Oregon Laws 1987, chapter 619, section 2(2).

Furthermore, the legislature ensured that its policy directives would be, in fact, followed by the board in defining and implementing the legislature’s broad statutory standards: The legislature reserved the power to disapprove the guidelines before the guidelines would go into effect by requiring the board to submit them to the legislature prior to their effective date. In fact, on its first review of the sentencing guidelines developed by the board, the legislature approved them—and the definition of aggravating factors specified therein—and thereby certified that the guidelines, and the delineation of aggravating factors contained therein, served the requisite legislative standards that they were intended to address.

Id at 645-46 (internal citations omitted).

LCC 4.445(3) is not a complete enactment. Notwithstanding the fact that there is a fully developed enforcement procedure for the code in LCC Chapter 10, Section 4.445 creates a new “informal” procedure. A “Hearings Officer” is appointed by the county after a complaint is received, but no standards are included for who is qualified to be appointed as a hearings officer. The Hearings Officer is directed to hold an informal hearing, but the rules to govern that hearing are not defined. The Hearings Officer is directed to issue a final written decision on whether or not a violation has occurred and what action should be taken if there is a violation, but no standards are provided to the Hearings Officer to circumscribe what actions may be ordered. Moreover, authority is delegated to the County Counsel’s Office to adopt procedures for the hearing, including report requirements, fees, hearing procedures and notice, evidentiary requirements, standard of review and decision, and enforcement options for this administrative process. No guidelines are given to the Office to guide that process. Fees and enforcement are contemplated, but no guidance or standards are given for imposition of such enforcement mechanisms.

The court’s review of this provision is for the purpose of this opinion is significantly narrowed. It is not clear to the court that the County has the power to delegate the creation of a quasi-judicial process to the County Attorney's Office. It is also concerning that there may be severe Due Process issues created by allowing the "prosecutor" in a "formal proceeding" to create the foundational, procedural and evidentiary rules for an "informal proceeding" that a future defendant may be required to pass through prior to being charged “formally.” These issues, however, are not raised before this court.

What is before is whether this grant of authority is unconstitutionally vague. If the County is able to legally delegate that function to the County Attorney's office, such delegation would have to be a complete legislative enactment that contains a full expression of legislative policy and sufficient procedural safeguards to protect against arbitrary application. This ordinance provision fails in this regard. Although Ordinance #523 and the Short Term Rental code does provide policy considerations considered in its adoption, the same is not included for the creation of an informal judicial-like procedure. What LCC 4.445(3) doesn’t do is illustrated perfectly by what LCC Chapter 10 *does* do, when it creates an appropriate enforcement mechanism for the Lincoln County Code. The County's response at argument was that all those details are provided by the Oregon Administrative Procedure's Act (“APA”). But the APA does not apply to agencies created by County Ordinance by its terms. ORS 183.310(1).

The Court finds LCC 445(3) to be an unconstitutional delegation of power to the County Counsel’s Office under Article 1, Section 21 of the Oregon State Constitution. Moreover, the court finds that the lack of ascertainable standards for the informal hearing procedure, its consequences, and its participants creates a serious danger of unequal application of the law, and therefore the court finds the section to be unconstitutionally vague under Article 1, Section 20 of the Oregon State Constitution.

2) Second Claim of Relief

The Oregon Court of Appeals has held the following regarding severability:

Oregon courts have long recognized the principle that an unconstitutional part of a statute or ordinance may be excised without destroying a separable part. For acts of the Legislative Assembly, this principle has been codified at ORS 174.040.

ORS 174.040 provides:

It shall be considered that it is the legislative intent, in the enactment of any statute, that if any part of the statute is held unconstitutional, the remaining parts shall remain in force unless:

- (1) The statute provides otherwise;
- (2) The remaining parts are so essentially and inseparably connected with and dependent upon the unconstitutional part that it is apparent that the remaining parts would not have been enacted without the unconstitutional part; or
- (3) The remaining parts, standing alone, are incomplete and incapable of being executed in accordance with the legislative intent.

In *Dollarhide*, the court held that “[t]he same analysis should be employed to determine whether part of an ordinance, if held to be unconstitutional, should be severed from the remaining parts.” 300 Or. at 504, 714 P.2d 220

Clear Channel Outdoor, Inc. v. City of Portland, 243 Or.App. 133 (2011)
(additional internal citations and quotations omitted).

The two sections of Ordinance #523 which have been invalidated are not so essentially and inseparably connected with and dependent upon the unconstitutional part that it is apparent that the remaining parts would not have been enacted without the unconstitutional part. Moreover, the Code has a severability clause in LCC 4.460 which indicates the intent that any invalidation of a section of code shall not affect the validity of the remaining portions.

The “Events” clause, while contained in a provision discussing maximum occupancy did not, as previously discussed, have any effect on the determination of occupancy and was in fact a stand alone provision unrelated to occupancy. The “Informal Proceeding” was an additional enforcement mechanism in addition to the formal enforcement proceeding included in the statute. The remaining sections of the ordinances remain valid and enforceable.

3) Third Claim of Relief

For the reasons stated in this opinion, the Lincoln County Sheriff’s Office is enjoined from enforcing the provisions of Ordinance #523 declared unconstitutional by this order.

The Court so orders, and, this case is scheduled for status conference on January 8, 2024 at 11:30am in Courtroom 302.

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A handwritten signature in black ink that reads "Joseph C. Allison". The signature is written in a cursive style with a large initial "J".

Circuit Court Judge Pro Tem Joseph C. Allison