When Attorney Fees Can Have a Chilling Effect on Good Faith Claims and Defenses

by Land Use Committee
Hugo Neighborhood Association & Historical Society[1]

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An award of attorney fees against citizens acting as intervenors for counties in writ of mandamus cases, where counties fail to take a final action within 150-days (ORS 215.427), and fail to challenge writ of mandamus actions, would serve to deter (i.e., have a chilling effect) other citizens from participating in good faith in mandamus actions that are necessitated by the failure of local government authorities to perform their statutory land use decisionmaking responsibilities. To take a final land use action is a determination made by counties (ORS 20.075(1), ORS 215.427(1), ORS 215.429, and ORS 215.422(1)(b), Appendix A, & Appendix B).

A county's violation of ORS 215.427 is in no way altered or obviated as the illegal conduct that gives rise to a mandamus trial is that of the county. This is especially so in cases where the principal basis for the decision to award attorney fees under ORS 20.075 is that the broader public benefit is to require counties to act according to law and to act with some dispatch. Counties should not be able to say we're supposed to act in 150-days but that's okay, the law doesn't apply to us. They should not be able to feel they can act whenever they get around to it and be safe from attorney fees. In other words, counties' violation of the statutory 150-day requirement —and not anything related to offering no defense to a writ of mandamus action by the county or intervention by an intervenor—is the reason why attorney fees should be awarded against the defendant counties and not defendant-intervenors.

The substantive fact remains that counties are the parties to these actions as they failed to perform their duty of taking final action on the land use applications within the time prescribed by law. Where the county's nonfeasance was the principal reason necessitating the action, the consideration described in ORS 20.075(1)(a) is a significant factor that weighs against an award of attorney fees from intervenors. If intervenors' conduct contributed to the need for the litigation at all, they were not the main contributors to that need, and the counties' contributing conduct was—in the statute's word—illegal.

It is our opinion that many counties have an unspoken premise that a violation of the 150-day requirement should not warrant an award of attorney fees in itself, no matter that they do not defend against writs of mandamus. Moreover, counties' failure to comply with the statute is not the only conduct that gives rise to the action, in the sense of causing the land use applicant to seek the judicial mandamus remedy rather than await any further potential untimely actions by counties. It also causes other deleterious effects, including some that fall directly on the intervenor. For example, the effect of such violations, and the resort to the mandamus process that may follow from it, is to subvert the basic land use scheme that the laws of this state established. It negates the local decisionmaking role and responsibility that the statutes envision; it excludes local citizens from participation in the decisionmaking process; it aborts the Oregon Land Use Board of Appeals (LUBA) review process that is designed to assure the correctness of land use decisions; and it subjects applicants to delay and to the need for and expense of a judicial proceeding to redress the county's unlawful dilatoriness. An award of attorney fees from intervenors should be challenged, especially when counties offer no defense against writs of mandamus, as the public

does not benefit from being excluded from local land use processes.

Where the intervenor's defenses were objectively reasonable, insofar as they contributed to a modification of the counties' approval conditions, the consideration described in ORS 20.075(1)(b) is a significant factor that weighs against an award of attorney fees from intervenors.

Where an award of attorney fees against intervenors would serve to deter other citizens from participating in good faith in mandamus actions that are necessitated by the failure of local governmental authorities to perform their statutory land use decisionmaking responsibilities, the consideration described in ORS 20.075(1)(c) is a significant factor that weighs against an award of attorney fees from intervenors.

We believe the following real life example of attorney fees from an intervenor will have a chilling effect on good faith claims and defenses of other citizens. A Josephine County citizen, Holger Sommer, was involved in a writ of mandamus proceeding in Josephine County, Oregon (*WTW Development. LLC. v. Board of County Commissioners of Josephine County, Oregon and Holger T. Sommer*. Case # 04-C V-0759). The trial on this matter was May 19, 2005. During the mandamus trial Intervenor Holger Sommer observed that with a new drainage plan he had seen for the first time that the points that he had raised in his appeal had been substantially corrected. On May 31, 2005 a motion for attorney fees was made against him under ORS 20.075(1) (Appendix B). The motion was reimbursement of attorney fees for 75 percent of the following costs: $6,932.50 and costs and disbursements of $474.02 and a prevailing party fee of $500.00 for a total of $7,906.02. On July 14, 2005 the Josephine County Circuit Court ordered the, defendant BCC responsible for 30 percent of the above fees and intevenor-defendant Holger Sommer responsible for 70 percent of the above fees.

The history of the mandamus trial is local neighbors challenging a land use decision (i.e., Josephine County's approval of "Walker Mtn. View Estates," a 51.30 acre subdivision of 19 lots along with the creation of a new rural residential road).

The local process was started with the applicant filing a land use application November 20, 2003. The application was deemed complete by the Josephine County Planning Department May 11, 2004. On May 24, 2004 a notice of public hearing for a land use request involving a 21-lot subdivision was sent out. Additional documents, evidence, exhibits and other information were submitted in support of the application after the May 24th notice. The June 14, 2004 public hearing agenda for the first time identified a changed request for approval of a tentative plan for a 19-lot subdivision. On June 14, 2004 the Josephine County Rural Planning Commission (RPC) made a decision to approve the land use request and tentative map with conditions, but without the required final drainage plan. The staff report is dated June 14, 2004, a week later than required by law. ORS 197.763(4)(b) This staff report was a cleaned up version different than mailed and used by the members of the RPC. The June 14, 2004 Staff Report, page 2, found the "*Statutory Time Limit Expires: October 15, 2004*."

A June 24, 2004 letter of transmittal from Reece & Associates, LLC to Josephine County Public Works indicated it and the drainage plan were hand delivered to Lora Glover, Planning Office, on that date. Minutes of the RPC hearing were signed by the Chair, Sunny Sundquist and the Josephine County Board of Commissioners August 9, 2004. The final land use action (i.e., findings of fact and conclusions of law document) was signed by Chair, Sunny Sundquist within the 150-day rule on August 30, 2004. The notice of the decision was mailed August 31, 2004.

Intervenor-Defendant (Holger Sommer) and other citizens paid the county's $750.00 appeal fee and appealed the RPC's decision (i.e., findings of fact

and conclusions of law document) September 10, 2004. The 150-day decision period for the county would expire a month later on October 11, 2004. The county failed to meet the 150-day deadline. Even so the applicant sent a letter October 27, 2005 to the Josephine County Planning Department that he would follow through with the local appeals process and submitted a drainage plan to the department, but it was not accepted into the record by the county. Josephine County position was that it would be the first order of business at the BCC's appeals hearing.

The County made several attempts to schedule an appeals hearing, but none of them were in compliance with the 150-day statute. For reasons known to the BCC it never held the appeals hearing and through the mandamus process it was determined that the county's nonfeasance, or illegal conduct, was the principal reason necessitating the mandamus trial. The core fact remained that Josephine County was the party who failed to perform its duty of taking final action on the land use applications within the time prescribed by law.

The county's failure negated the local decisionmaking role and responsibility that the state's land use statutes envision; it excluded local citizens from participation in the land use decisionmaking process (appeals process before the BCC); the neighbors appealing the RPC decision have still not received their $750.00 appeal fee back from the county; it aborted the LUBA review process that is designed to assure the correctness of land use decisions; and it subjected the land use applicant, WTW Development, LLC., to delay and to the need for and expense of a judicial proceeding to redress the county's unlawful dilatoriness.

The BCC for its own reasons decided December 2004 not to hear the matter scheduled for December 29, 2005. The hearing was rescheduled for February 2, 2005. On December 22, 2005 an alternate writ of mandamus was filed in Josephine County Circuit Court. Holger Sommer found out about the writ after Christmas and intervened. His original September 10, 2004 co-appellants where out of town and the Josephine Soils and Water Conservation District could not schedule a board meeting to decide to intervene or not. The defendant, Josephine County, choose to offer no defense and Sommer felt that without the required drainage plan and the potential adverse effects to the southerly neighbors he needed to intervene to protect the safety, health, and property of the neighbors. Sommer filed a motion to dismiss citing ORS 215.429(4), but it was not accepted by the court. During the May 19, 2005 mandamus trial it became obvious to Sommer that a new drainage plan now being proposed would increase the protection of the neighbors to the south of the project from flooding. After conferring with the neighbors and the Josephine County Soil and Water Conservation District, Sommer observed that the original drainage issue and lack of a drainage plan, which had been the reason of the appeal, had been mostly corrected with the new plan. He informed the court that he now was not opposed to the writ. He felt the mandamus proceeding would produce the same outcome, which could have been expected, if the land use applicant had submitted the required drainage plan at the time of the RPC's public hearing. Sommer felt that the system and process worked: although the county did not schedule the appeals hearing within the required time, substantial land issues relating to the county's comprehensive plan and rural land development code had been corrected during the mandamus trail and were made part of the conditions of the writ.

On May 31, 2005 the land use applicant's attorney asked for attorney's fees and a prevailing fee be awarded. On July 14, 2005 the Josephine County Circuit Court ordered the defendant BCC responsible for 30 percent of the above fees and intevenor-defendant Holger Sommer responsible for 70 percent of the above fees.

In summary, it is our opinion that the circuit court's decision to award attorney fees was not justified under ORS 20.075(1) and would serve to deter (i.e., have a chilling effect) other citizens from participating in good faith in mandamus actions that are necessitated by the failure of local government authorities to perform their statutory land use decisionmaking responsibilities. We conclude that the considerations that arise under paragraphs (a), (b), and (c) of the statute affirmatively militate against an award of attorney fees from intervenor.

1. The illegal conduct that gave rise to a mandamus trial is that of the Josephine County not the intervenor.

2. The intervenor was objectively reasonable as he contributed to a modification of the county's approval conditions as conditions of the writ.

3. An award of attorney fees against intervenor would serve to deter (i.e., have a chilling effect) other citizens from participating in good faith in mandamus actions that are necessitated by the failure of local governmental authorities to perform their statutory land use decisionmaking responsibilities.

The substantive fact remains that Josephine County is the defendant party to mandamus trials when it fails to perform its duty of taking final action on the land use applications within the time prescribed by law. Where Josephine County's nonfeasance was the principal reason necessitating the action, the consideration described in ORS 20.075(1)(a) is a significant factor that weighs against an award of attorney fees from intervenors. If intervenors' conduct contributed to the need for the litigation at all, they were not the main contributors to that need, and the county's contributing conduct was—in the statute's word—illegal.

If Josephine County would cease its illegal conduct there would never be an issue of attorney fees in this type of mandamus trail as this type of trial can not exist without the county's nonfeasance.

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Wayne McKy

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1. Land Use Committee, Hugo Neighborhood Association & Historical Society (*Hugo Neighborhood*)

Land Use Committee's Duties

We live in a wonderful area that is beginning to change dramatically. Together we can network and influence the changes that may occur in our neighborhood.

The *Land Use Committee*'s duties include carrying out the land use elements of the *Hugo Neighborhood*'s mission.

- *Protect citizen involvement (Oregon Statewide Goal 1)*
- *Protect our farms and forests (Oregon Statewide Goals 3 & 4)*
- *Protect our rural quality of life.*

The members of this committee will strive to become land use experts. The committee is authorized to analyze land use applications in the Hugo area and make recommendations to the *Hugo Neighborhood*'s Board which will make the policy decisions. However, most land use decisions will not actually come to the Board, since the committee is authorized by the Board to represent the *Hugo Neighborhood*. This regards all land use applications, findings, and decisions made by the Josephine County Planning Director without a hearing, including *de novo* appeal hearings of such decisions.

Land Use Mission

The *Hugo Neighborhood* has two broad missions: land use and history. Projects are usually short term and conclude when the project ends. Our community sign and educational brochure program are long-term projects reflecting both categories.

Land use projects include promoting citizen involvement, comments and/or participation with individual land use applications, protection of homes from wildfire, land use workshops, transportation impact considerations, septic system evaluations, airshed forums, protecting farms and forests, appeals of land use decisions to the Oregon Land Use Board of Appeals, aquifer investigations, and protecting our rural quality of life.

Of special interest to the *Land Use Committee* is promoting an understanding of long-term cumulative carrying capacity issues associated with Josephine County's land use findings and decisions: 1. ground water availability, 2. wildfire hazards, 3. air pollution, 4. traffic safety and congestion, 5. preserving our rural character, and 6. developing facilities and services that can be afforded.

Want More Information On The Committee?

We're not sure everyone in Hugo knows about the *Hugo Neighborhood* and what it has accomplished in the past. Certainly our growing membership and commitment promise a more community orientated rural neighborhood. Members of the *Land Use Committee* donate their time and are in control of the act of giving. On a case-by-case basis, members of the committee can be available to answer land use questions and serve as a technical resource. The intent is not what they can do for you, but what we can do to help each other.

More Information. Want more information on the *Land Use Committee*? Contact a member on how you can become involved in your community's land use projects. Your actual level of involvement as a volunteer is up to you. You would be donating your time and managing the act of giving and practicing citizenship.

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Land use publications (e.g., letters, local government land use comments, brochures, citizen issue papers, LUBA appeals, newspaper articles, etc.) of the Hugo Neighborhood Association & Historical Society (*Hugo Neighborhood*) are as much about providing information and provoking questions as they are about opinions of the *Hugo Neighborhood* concerning land use issues and concerns.

They do not provide recommendations to citizens and they are not legal advice (Web Page: http://jeffnet.org/~hugo/disclaim.htm). They do not take the place of a lawyer. If citizens use information contained in these publications, it is their personal responsibility to make sure that the facts and general information contained in them are applicable to their situation. The Hugo Neighborhood Association and Historical Society assumes no liability for information provided.

Appendix A

"**ORS 215.427** Final action on permit or zone change application required within 120 or 150 days; exceptions; refund of application fees. (1) Except as provided in subsections (3) and (4) of this section, for land within an urban growth boundary and applications for mineral aggregate extraction, the governing body of a county or its designee shall take final action on an application for a permit, limited land use decision or zone change, including resolution of all appeals under ORS 215.422, within 120 days after the application is deemed complete. The governing body of a county or its designee shall take final action on all other applications for a permit, limited land use decision or zone change, including resolution of all appeals under ORS 215.422, within 150 days after the application is deemed complete, except as provided in subsections (3) and (4) of this section."

"**ORS 215.429** Mandamus proceeding when county fails to take final action on land use application within specified time; jurisdiction; notice; peremptory writ. (1) Except when an applicant requests an extension under ORS 215.427, if the governing body of the county or its designee does not take final action on an application for a permit, limited land use decision or zone change within 120 days or 150 days, as appropriate, after the application is deemed complete, the applicant may file a petition for a writ of mandamus under ORS 34.130 in the circuit court of the county where the application was submitted to compel the governing body or its designee to issue the approval."

"ORS 215.422 Review of decision of hearings officer or other authority; notice of appeal; fees; appeal of final decision. (1)(a) A party aggrieved by the action of a hearings officer or other decision-making authority may appeal the action to the planning commission or county governing body, or both, however the governing body prescribes. The appellate authority on its own motion may review the action. The procedure and type of hearing for such an appeal or review shall be prescribed by the governing body, but shall not require the notice of appeal to be filed within less than seven days after the date the governing body mails or delivers the decision to the parties.

(b) Notwithstanding paragraph (a) of this subsection, the governing body may provide that the decision of a hearings officer or other decision-making authority is the final determination of the county.

(c) The governing body may prescribe, by ordinance or regulation, fees to defray the costs incurred in acting upon an appeal from a hearings officer, planning commission or other designated person. The amount of the fee shall be reasonable and shall be no more than the average cost of such appeals or the actual cost of the appeal, excluding the cost of preparation of a written transcript. The governing body may establish a fee for the preparation of a written transcript. The fee shall be reasonable and shall not exceed the actual cost of preparing the transcript up to $500. In lieu of a transcript prepared by the governing body and the fee therefor, the governing body shall allow any party to an appeal proceeding held on the record to prepare a transcript of relevant portions of the proceedings conducted at a lower level at the party's own expense. If an appellant prevails at a hearing or on appeal, the transcript fee shall be refunded.

(2) A party aggrieved by the final determination may have the determination reviewed in the manner provided in ORS 197.830 to 197.845."

Appendix B. ORS 20.075(1)

ORS 20.075 Factors to be considered by court in awarding attorney fees; limitation on appellate review of attorney fee award. (1) A court shall consider the following factors in determining whether to award attorney fees in any case in which an award of attorney fees is authorized by statute and in which the court has discretion to decide whether to award attorney fees:

(a) The conduct of the parties in the transactions or occurrences that gave rise to the litigation, including any conduct of a party that was reckless, willful, malicious, in bad faith or illegal.
(b) The objective reasonableness of the claims and defenses asserted by the parties.
(c) The extent to which an award of an attorney fee in the case would deter others from asserting good faith claims or defenses in similar cases.
(d) The extent to which an award of an attorney fee in the case would deter others from asserting meritless claims and defenses.
(e) The objective reasonableness of the parties and the diligence of the parties and their attorneys during the proceedings.
(f) The objective reasonableness of the parties and the diligence of the parties in pursuing settlement of the dispute.
(g) The amount that the court has awarded as a prevailing party fee under ORS 20.190.
(h) Such other factors as the court may consider appropriate under the circumstances of the case.