Multnomah County Oregon

Board of Commissioners & Agenda

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BOARD OF COMMISSIONERS

Diane Linn, Chair
501 SE Hawthorne Boulevard, Suite 600
Portland, Or 97214
Phone: (503) 988-3308 FAX (503) 988-3093
Email: mult.chair@co.multnomah.or.us

Maria Rojo de Steffey, Commission Dist. 1
501 SE Hawthorne Boulevard, Suite 600
Portland, Or 97214
Phone: (503) 988-5220 FAX (503) 988-5440
Email: district1@co.multnomah.or.us

Serena Cruz, Commission Dist. 2
501 SE Hawthorne Boulevard, Suite 600
Portland, Or 97214
Phone: (503) 988-5219 FAX (503) 988-5440
Email: serena@co.multnomah.or.us

Lisa Naito, Commission Dist. 3
501 SE Hawthorne Boulevard, Suite 600
Portland, Or 97214
Phone: (503) 988-5217 FAX (503) 988-5262
Email: district3@co.multnomah.or.us

Lonnie Roberts, Commission Dist. 4
501 SE Hawthorne Boulevard, Suite 600
Portland, Or 97214
Phone: (503) 988-5213 FAX (503) 988-5262
Email: lonnie.j.roberts@co.multnomah.or.us

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APRIL 27 & 29, 2004 BOARD MEETINGS

FASTLOOK AGENDA ITEMS OF INTEREST

Thursday meetings of the Multnomah County Board of Commissioners are cable-cast live and taped and may be seen by Cable subscribers in Multnomah County at the following times:

Thursday, 9:30 AM, (LIVE) Channel 30
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Saturday, 10:00 AM, Channel 30
Sunday, 11:00 AM, Channel 30
Produced through Multnomah Community Television
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Tuesday, April 27, 2004 - 9:30 AM
Multnomah Building, Sixth Floor Commissioners Conference Room 635
501 SE Hawthorne Boulevard, Portland

EXECUTIVE SESSION

E-1 The Multnomah County Board of Commissioners Will Meet in Executive Session Pursuant to ORS 192.660(1)(h). Only Representatives of the News Media and Designated Staff are allowed to Attend. Representatives of the News Media and All Other Attendees are Specifically Directed Not to Disclose Information that is the Subject of the Executive Session. No Final Decision will be made in the Executive Session. Presented by Agnes Sowle. 30 MINUTES REQUESTED.

Tuesday, April 27, 2004 - 10:00 AM
Multnomah Building, First Floor Commissioners Boardroom 100
501 SE Hawthorne Boulevard, Portland

BOARD BRIEFINGS

B-1 Capital Budget: Transportation, Facilities and Other Programs. Presented by Dave Boyer, Doug Butler, Mike Harrington, Jay Heidenrich, Robert Maestre and Stan Ghezzi. 90 MINUTES REQUESTED.

B-2 Updates on Special Needs Housing and Homelessness Efforts. Presented by Diane Luther. 15 MINUTES REQUESTED.

Thursday, April 29, 2004 - 9:30 AM
Multnomah Building, First Floor Commissioners Boardroom 100
501 SE Hawthorne Boulevard, Portland

REGULAR MEETING

CONSENT CALENDAR - 9:30 AM
DEPARTMENT OF BUSINESS AND COMMUNITY SERVICES

C-1 Government Revenue Contract (190 Agreement) 0310535 with the State of Oregon Department of Transportation to administer a Grant Award to the

County from the Transportation and Growth Management Program of ODOT and the Department of Land and Conservation Development

C-2 Government Expenditure Contract (190 Agreement) 4600004689 with Portland State University to Test Deck Panels to be Installed on the Broadway Bridge

C-3 Government Revenue Agreement 0410571 with the State of Oregon for FEMA Reimbursement of Eligible Costs to Multnomah County for Costs Incurred by the County as a Result of the Severe Winter Storm December 26, 2003, through January 14, 2004

REGULAR AGENDA - 9:30 AM
PUBLIC COMMENT - 9:30 AM

Opportunity for Public Comment on non-agenda matters. Testimony is limited to three minutes per person. Fill out a speaker form available in the Boardroom and turn it into the Board Clerk.

DEPARTMENT OF BUSINESS AND COMMUNITY SERVICES - 9:30 AM

R-1 Presentation of Employee Service Awards Honoring 117 Multnomah County Employees with 5 to 35 Years of Service

R-2 First Reading of a Proposed ORDINANCE Amending MCC § 37.0560 with Respect to Issuing Permits and Allowing Issuance of a Permit When Necessary to Protect Public Safety

R-3 First Reading of a Proposed ORDINANCE Amending MCC § 38.0560 for the Columbia River Gorge National Scenic Area with Respect to Issuing Permits and Allowing Issuance of a Permit When Necessary to Protect Public Safety

NON-DEPARTMENTAL - 10:00 AM

R-4 RESOLUTION Authorizing Private Sale by Contract of Certain Tax Foreclosed Property to C&M MOTORS, BMW AND MERCEDES-BENZ, LLC and Deed to Purchaser at Contract Completion

COMMISSION ON CHILDREN, FAMILIES AND COMMUNITY - 10:15 AM

R-5 NOTICE OF INTENT to Apply for Child Abuse Prevention and Treatment Grant from the Oregon Department of Human Services

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Thursday, April 29, 2004 - 10:20 AM
(OR IMMEDIATELY FOLLOWING REGULAR MEETING)
Multnomah Building, First Floor Commissioners Boardroom 100
501 SE Hawthorne Boulevard, Portland

BOARD BRIEFING

B-3 Health Department Reconfiguration of Clinical Services. Presented by Lillian Shirley, Vanetta Abdellatif and Dr. Patsy Kullberg. 90 MINUTES REQUESTED.

MULTNOMAH COUNTY 2004-2005 BUDGET WORK SESSIONS AND HEARINGS

(Unless otherwise noted, all sessions will be held in the Multnomah Building Commissioners Boardroom 100, 501 SE Hawthorne, Portland)

Cable coverage of the May 6 through June 10, 2004 budget work sessions, hearings and Thursday Board meetings are produced through Multnomah Community Television. Call 503-491-7636, ext. 332 for further info or log onto http://www.mctv.org for the program guide/playback schedule. The sessions, hearings and Board meetings are available via media streaming at http://www.co.multnomah.or.us/cc/live_broadcast.shtml. Contact Board Clerk Deb Bogstad 503-988-3277 for further information.

Thu, May 6 **9:30 a.m.**	**Chair's 2004-2005 Executive Budget Message** **Public Hearing/Consideration of Resolution Approving Executive Budget for Submission to Tax Supervising and Conservation Commission**
Tue, May 11 **9:00 a.m. - 12:00 p.m.**	Financial Overview Central CBAC/CIC Presentation Non-Departmental
Tue, May 11 **1:00 p.m. - 4:00 p.m.**	Budget Work Session Health Department of County Human Services Office of School and Community Partnerships
Tue, May 11 **6:00 p.m. - 8:00 p.m.**	**Public Hearing on the 2004-2005 Multnomah County Budget - North Portland Library Conference Room, 512 N Killingsworth, Portland**
Thu, May 13 **9:30 a.m.**	**Public Hearing/Consideration of Approval of the 2004-2005 Dunthorpe Riverdale Sanitary Service District No. 1 and the 2004-2005 Mid County Street Lighting Service District No. 14 Proposed Budgets for Submittal to Tax Supervising and Conservation Commission** **Multnomah County Personal Income Tax Update**

MULTNOMAH COUNTY 2004-2005
BUDGET WORK SESSIONS AND HEARINGS

(Unless otherwise noted, all sessions will be held in the Multnomah Building Commissioners Boardroom 100, 501 SE Hawthorne, Portland)

Tue, May 18 **9:00 a.m. - 12:00 p.m.**	Budget Work Session Department of Community Justice District Attorney Sheriff's Office
Tue, May 18 **1:30 p.m. - 5:00 p.m.**	Budget Work Session Library Business Services Community Services Finance, Budget, Assessment and Taxation
Thu, May 20 **9:30 a.m.**	**Public Hearing and Resolution Adopting the 2004-2005 Mt. Hood Cable Regulatory Commission Budget**
Tue, May 25 **9:00 a.m. - 12:00 p.m.**	Budget Work Session Amendments
Tue, May 25 **1:30 p.m. - 4:00 p.m.**	Budget Work Session - if Needed Amendments
Tue, May 25 **6:00 p.m. - 8:00 p.m.**	**Public Hearing on the 2004-2005 Multnomah County Budget - Multnomah County East Building, Sharron Kelley Conference Room, 600 NE 8th, Gresham**
Tue, June 1 **9:00 a.m. - 12:00 p.m.**	Budget Work Session Amendments

MULTNOMAH COUNTY 2004-2005
BUDGET WORK SESSIONS AND HEARINGS

(Unless otherwise noted, all sessions will be held in the Multnomah Building Commissioners Boardroom 100, 501 SE Hawthorne, Portland)

Tue, June 1 **1:30 p.m. - 4:00 p.m.**	Budget Work Session - if Needed Amendments
Tue, June 1 **6:00 p.m. - 8:00 p.m.**	**Public Hearing on the 2004-2005 Multnomah County Budget - Multnomah Building, Commissioners Boardroom 100, 501 SE Hawthorne, Portland**
Tue, June 8 **9:00 a.m. - 12:00 p.m.**	Budget Work Session Amendments
Tue, June 8 **1:30 p.m. - 5:00 p.m.**	Budget Work Session - if Needed Amendments
Wed, June 9 **9:00 a.m. - 10:15 a.m.**	Budget Work Session Amendments
Wed, June 9 **10:30 a.m. - 11:30 a.m.**	**Tax Supervising and Conservation Commission Public Hearings on the Multnomah County 2002-2003 Supplemental Budget; and the 2004-2005 Budget - Multnomah Building, Commissioners Boardroom 100, 501 SE Hawthorne, Portland**
Wed, June 9 **1:30 p.m. - 5:00 p.m.**	Budget Work Session - if Needed Amendments

MULTNOMAH COUNTY 2004-2005 BUDGET WORK SESSIONS AND HEARINGS

(Unless otherwise noted, all sessions will be held in the Multnomah Building Commissioners Boardroom 100, 501 SE Hawthorne, Portland)

Thu, June 10 **9:30 a.m.**	**Public Hearing and Resolution Adopting the 2004-2005 Budget for Multnomah County Pursuant to ORS 294** **Public Hearing and Resolution Adopting the 2004-2005 Budget for Dunthorpe Riverdale Sanitary Service District No. 1** **Public Hearing and Resolution Adopting the 2004-2005 Budget for Mid County Street Lighting Service District No. 14 and Making Appropriations**

AGENDA PLACEMENT REQUEST

BUD MOD #:

Board Clerk Use Only:

Meeting Date: April 27, 2004
Agenda Item #: E-1
Est. Start Time: 9:30 AM
Date Submitted: 04/21/04

Requested Date: April 27, 2004 **Time Requested:** 30 mins

Department: Non-Departmental **Division:** County Attorney

Contact/s: Agnes Sowle

Phone: 503 988-3138 **Ext.:** 83138 **I/O Address:** 503/500

Presenters: County Attorney Agnes Sowle

Agenda Title: The Multnomah County Board of Commissioners Will Meet in Executive Session Pursuant to ORS 192.660(1)(h). Only Representatives of the News Media and Designated Staff are allowed to Attend. Representatives of the News Media and All Other Attendees are Specifically Directed Not to Disclose Information that is the Subject of the Executive Session. No Final Decision will be made in the Executive Session.

NOTE: If Ordinance, Resolution, Order or Proclamation, provide exact title. For all other submissions, provide clearly written title.

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1. **What action are you requesting from the Board? What is the department/agency recommendation?**

   No action, informational only.

2. **Please provide sufficient background information for the Board and the public to understand this issue.**

3. **Explain the fiscal impact (current year and ongoing).**

   NOTE: If a Budget Modification or a Contingency Request attach a Budget Modification Expense & Revenues Worksheet and/or a Budget Modification Personnel Worksheet.

If a budget modification, explain:

- ❖ What revenue is being changed and why?
- ❖ What budgets are increased/decreased?
- ❖ What do the changes accomplish?
- ❖ Do any personnel actions result from this budget modification? Explain.
- ❖ Is the revenue one-time-only in nature?
- ❖ If a grant, what period does the grant cover?
- ❖ When the grant expires, what are funding plans?

NOTE: Attach Bud Mod spreadsheet (FORM FROM BUDGET)

If a contingency request, explain:

- ❖ Why was the expenditure not included in the annual budget process?
- ❖ What efforts have been made to identify funds from other sources within the Department/Agency to cover this expenditure?
- ❖ Why are no other department/agency fund sources available?
- ❖ Describe any new revenue this expenditure will produce, any cost savings that will result, and any anticipated payback to the contingency account.
- ❖ Has this request been made before? When? What was the outcome?

If grant application/notice of intent, explain:

- ❖ Who is the granting agency?
- ❖ Specify grant requirements and goals.
- ❖ Explain grant funding detail – is this a one time only or long term commitment?
- ❖ What are the estimated filing timelines?
- ❖ If a grant, what period does the grant cover?
- ❖ When the grant expires, what are funding plans?
- ❖ How will the county indirect and departmental overhead costs be covered?

4. Explain any legal and/or policy issues involved.

5. Explain any citizen and/or other government participation that has or will take place.

Required Signatures:

Department/Agency Director:_____ Date: 03/29/04

Budget Analyst
By:_____ Date:

Dept/Countywide HR
By:_____ Date:

OREGON
CIVIL RIGHTS
NEWSLETTER

Published by the Oregon State Bar Civil Rights Section *April 2004*

Same-Sex Marriage in Oregon

Steven E. Herron
Garrett, Hemann, Robertson, Jennings, Comstock & Trethewy, P.C.

On March 3, 2004, Multnomah County Commission Chairwoman Diane Linn authorized county staff to begin issuing marriage licenses to same-sex couples. In doing so, she shepherded the county into a national spotlight that had intensified over the preceding weeks as officials and citizens wrangled over the issue in various localities around the country.

Then, despite Governor Ted Kulongoski's and Attorney General Hardy Meyers's urging that other counties not follow suit, Benton County surprised many observers by deciding two weeks later on a 2–1 vote to also begin issuing marriage licenses to same-sex couples. Within days, Benton County agreed to suspend issuing the licenses to same-sex couples (electing to stop issuing marriage licenses altogether), but Multnomah County has continued issuing the licenses. A brokered lawsuit has been filed in Multnomah County Circuit Court by the ACLU, which is intended to expeditiously posit the legality of same-sex marriage (more accurately, the constitutionality of its prohibition) before the Oregon Supreme Court.

Proponents have called gay and lesbian rights the final frontier in civil rights litigation. Activists for lesbian, gay, bisexual, and transgendered (LGBT) individuals' rights, however, are themselves divided over how sexual orientation should be viewed and protected—as a classification merely subject to equal protection, neither more or less protected than any other true class, or as a suspicious classification entitled to stricter protection than that afforded an ordinary true class. And within the discussion about heightened protection, there are multiple views on whether the legal rationale for characterizing sexual orientation as a suspect classification should be based on the immutability of sexual orientation (a hotly debated proposition), on historical discrimination against LGBT individuals, or on some other basis. Irrespective of one's personal beliefs or opinions on the matter, it is clear that the battle over the legal status and rights of LGBT individuals is rapidly moving from infancy to adolescence. The emergence of same-sex marriage as a national issue has put LGBT civil rights squarely into the political consciousness of "middle-class America."

The Current Controversy

Interestingly, Multnomah County, the governor's office (through the attorney general's office) and legislative counsel have all thoroughly analyzed the issue of same-sex marriage in Oregon and have reached similar conclusions. The earliest opinion to be made public was issued on March 2 by Multnomah County Attorney Agnes Sowle; it addressed whether the county's denial of marriage licenses to same-sex couples was permissible. In her analysis, Multnomah County counsel concluded that (1) Oregon's statutes governing marriage are ambiguous as to whether civil marriage requires partners to be of the opposite sex, (2) even if Oregon statutes allow marriage only between partners of the opposite sex, such a statutory limitation is unconstitutional, and (3) the county is obligated to act in accordance with the constitution, even if a statute prohibits the contemplated act.

Before issuing her opinion, the county counsel asked Charles Hinkle of Stoel Rives LLP to review it. Mr. Hinkle agreed that the Oregon Constitution prohibits denying a marriage license based solely on the gender of the person whom the recipient intends to marry, and that Multnomah County and its officials are obligated to act in accordance with the constitution, even in the face of a statute to the contrary.

On March 8, Legislative Counsel Gregory Chaimov issued an opinion to Senator Kate Brown, Democratic leader of the state Senate, indicating that it was his opinion that state law requires a county clerk to license the marriage of a same-sex couple. Legislative counsel stated that although the legislature had authorized marriage only between persons of the opposite

CONTINUED ON PAGE 3

◆ In This Issue

Supreme Court Update

Matthew Duckworth
Busse & Hunt

Richard R. Meneghello
Fisher & Phillips LLP

Decided

***General Dynamics Land Systems, Inc. v. Cline*, No. 02-1080 (Feb 24, 2004)**

The Court held that the Age Discrimination in Employment Act (ADEA) does not prohibit employers from favoring older employees over younger ones. In a 6–3 decision, the Court upheld a collective bargaining agreement that eliminated the employer's obligation to provide health benefits to subsequently retired employees, except to then-current employees age 50 or older. (Oregon attorneys are reminded, however, that Oregon's state statute [ORS 659A.030] prohibits discrimination because of age if the employee is 18 or older, offering more protection than the federal statute.)

***Illinois v. Lidster*, No. 02-1060 (Jan 13, 2004)**

By a 6–3 vote, the Court held that a highway checkpoint set up to obtain information from motorists about a deadly hit-and-run accident that occurred about a week earlier at the same location and time of night was reasonable under the Fourth Amendment.

***Locke v. Davey*, No. 02-1315 (Feb 25, 2004)**

The Court held 7–2 that the state of Washington's prohibition against pursuing a devotional theology degree from its otherwise-inclusive scholarship aid program does not violate the First Amendment's free exercise clause.

***McDonnell v. Federal Election Comm'n*, No. 02-1674 (Dec 10, 2003)**

The Court held first that, in evaluating the Bipartisan Campaign Reform Act of 2002, which amended the Federal Election Campaign Act of 1971, campaign contribution limits are subject to "closely drawn" scrutiny, rather than strict scrutiny. Under this standard, the Court upheld a majority of the prohibitions under the 2002 statute's two principal, complementary features—Congress's effort to plug the soft-money loophole and its regulation of electioneering communications.

Certiorari Granted

***Hamdi v. Rumsfeld*, No. 03-6696 (Jan 9, 2004)**

The Court will consider the legality of the military's detention of a presumed American citizen who was captured in Afghanistan during combat operations, and was determined by the military to be an "enemy combatant" who should be detained in connection with the ongoing hostilities in Afghanistan.

***Roper v. Simmons*, No. 03-633 (Jan 26, 2004)**

The Court will review an opinion from the Supreme Court of Missouri holding that, under the "evolving standards of decency" test, imposing the death penalty on a defendant who was under 18 at the time of the crime violates the Eighth Amendment's prohibition on cruel and unusual punishment.

***Rumsfeld v. Padilla*, No. 03-1027 (Feb 20, 2004)**

The Court will decide whether the president has the authority, as commander in chief and in light of Congress's authorization for use of military force, to seize and detain a U.S. citizen captured within the U.S. based on the president's determination that he is an "enemy combatant" who is closely associated with al Qaeda and has engaged in hostile and war-like acts.

Matthew Duckworth is an associate of Busse & Hunt, which represents employees in employment cases, concentrating in civil rights, discrimination, harassment, wrongful discharge, defamation, and fraud.

Richard R. Meneghello is a partner with the Portland office of Fisher & Phillips LLP, one of the largest national law firms representing employers in labor and employment law matters.

OREGON CIVIL RIGHTS NEWSLETTER

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The *Oregon Civil Rights Newsletter* is published by the Civil Rights Section of the Oregon State Bar
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The purpose of this publication is to provide information on current developments in civil rights and constitutional law. Readers are advised to verify sources and authorities.

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sex, marriage is a fundamental right in Oregon, and discrimination between classes of citizens is subject to particularly exacting scrutiny. He concluded that application of the marriage statutes discriminatorily on the basis of sexual orientation is unconstitutional. Legislative counsel did not express an opinion on the appropriateness or necessity of a public official's defying a statute when the statute has not yet been adjudicated unconstitutional.

On March 12, Attorney General Hardy Meyers issued an opinion to Governor Ted Kulongoski indicating that (1) state statutes currently prohibit issuing marriage licenses to same-sex couples, (2) it is likely that the Oregon Supreme Court would find that withholding from same-sex couples the legal rights, benefits, and obligations currently granted to married opposite-sex couples is unconstitutional, and (3) because of uncertainties about the analysis that the Oregon Supreme Court would adopt, it would be "unwise" to change current state practices (i.e., it would be unwise to issue marriage licenses to same-sex couples). The attorney general specifically declined to opine whether a "civil union" system would satisfy Oregon's constitutional requirements.

Prevailing Legal Analysis

Legal analysis of same-sex marriage in Oregon has unfolded as follows.

STATUTORY ANALYSIS

ORS 106.010 defines marriage as "a civil contract entered into in person by males at least 17 years of age and females at least 17 years of age, who are otherwise capable, and solemnized in accordance with ORS 106.150." On the one hand, the statute uses the preposition "by" instead of "between,"[1] from which some people infer that same-sex marriage is permissible. Furthermore, ORS 106.150 requires that the two individuals declare that they take each other as "husband and wife,"[2] but does not specifically state that "husbands" and "wives" must be male and female, respectively.

On the other hand, as those terms are commonly understood, ORS 106.150 and the other domestic relations statutes imply that only partners of the opposite sex may marry. Additionally, Oregon courts have described marriage as "a civil contract . . . between a man and a woman"[3] and have concluded that because of the construction of ORS 106.010, "[h]omosexual couples may not marry."[4]

Legislative counsel and the attorney general both concluded that Oregon's marriage statutes prohibit issuing marriage licenses to same-sex couples, and Multnomah County counsel did not express an opinion either way. All three agreed, however, that constitutional analysis of the actual or *arguendo* prohibition would dispositively govern.

CONSTITUTIONAL ANALYSIS

Article I, §20, of the Oregon Constitution provides that "[n]o law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens." One of the first two steps in analyzing constitutionality under article I, §20, is to determine whether the activity at issue is a "privilege or immunity." All three analysts concluded that marriage was, indeed, a privilege of the sort protected by article I, §20: Multnomah County counsel and the attorney general both provided examples of benefits and privileges that flow from being married (e.g., spousal immunity under the evidence code, spousal inheritance and intestate succession rights, decedent's surviving spouse's wrongful death rights, support rights upon dissolution, etc.). Legislative counsel more forcefully characterized marriage as "more than a privilege: it is a 'fundamental right.'"[5]

The second threshold determination is whether the group disparately affected is a "true class" for purposes of article I, §20. A "true class" is one based on some distinction not created by the legislation itself. Two classification bases have been suggested in the analysis of same-sex marriage: gender and sexual orientation. Gender has already been recognized as a "true class" by the Oregon Supreme Court,[6] and the analysts unanimously concluded that sexual orientation would likewise be found to constitute a "true class." Consequently, all three analysts determined that prohibitions on same-sex marriage would be subject to review against the applicable standard of article I, §20.

The third step in analyzing the constitutionality of prohibitions on same-sex marriage is determining the standard to be applied. In cases involving impingement on the privileges or immunities of a classification of individuals when the very distinction of the class is inherently suspicious, the impingement is subject to "particularly exacting scrutiny," and discriminatory treatment may be justified only by "genuine differences between the disparately treated class and those to whom the privileges and immunities are granted."[7] Both Multnomah County counsel and legislative counsel opined that sexual orientation was a suspicious classification, and that discrimination in the issuance of marriage licenses based on sexual orientation would not survive particularly exacting scrutiny because the difference in treatment could not be justified as flowing from intrinsic differences between same-sex couples and opposite-sex couples.

The attorney general stated that although the Oregon Court of Appeals had held sexual orientation to be a suspicious classification in *Tanner v. Oregon Health Sciences University*, 157 Or App 502 (1998), the Oregon Supreme Court had not yet addressed the question, and the attorney general was unwilling to speculate whether the supreme court would share the court of appeals' conclusion. The attorney general spent considerable time

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analyzing whether the "immutability" of a characteristic was necessary for a classification to be deemed suspicious, and whether the court would be willing to recognize a suspicious classification based on societal discrimination.[8] The attorney general pointed out that the court of appeals' analysis of the issue—which reviewed several supreme court opinions—depended largely on dicta to reach its conclusions.

The attorney general did indicate, however, that the disparate treatment of same-sex couples applying for marriage licenses could also be scrutinized as "gender" discrimination. Although he was unwilling to speculate whether the supreme court would opt to apply a gender-classification analysis, he speculated that if the court did, there was a high likelihood that it would find the disparate treatment unconstitutional.

Legislative counsel and the attorney general went on to analyze whether, if the court held that sexual orientation was not a suspicious classification and that the disparate treatment was not based on gender, the discrimination would satisfy the "rational basis" test, the test applied when the "true class" being treated disparately is not a "suspect class." Legislative counsel unequivocally concluded that prohibiting the issuance of marriage licenses to same-sex couples would not satisfy the rational basis test, citing determinations to that effect in Vermont and Massachusetts,[9] and quoting *Heisler v. Heisler*, 152 Or 691, 694 (1936), which characterized the principal reason for regulating marriage as follows: "[t]he interest of the state in the [civil] contract [of marriage] is that the race may be perpetuated in an orderly manner, and children raised in such surroundings as to make them desirable future citizens."

Legislative counsel opined that the state would be "unable to satisfy the courts that same-sex couples cannot participate in an orderly perpetuation of the species or raise desirable future citizens" because "the link between heterosexual relations and childbearing is no longer exclusive" and "Oregon's courts reject the suggestion that opposite-sex couples are better or more appropriate parents than same-sex couples." (Citations omitted.)

The attorney general also recognized difficulty in the argument that a rational basis exists for disparate treatment based on sexual orientation, noting that the legislature has placed no limits on the ability of same-sex couples to have and raise children, and characterizing the connection between the limitation on marital status and the procreation of children as "strained at best." The attorney general was much less willing to view the matter as settled, however, citing not only the Vermont and Massachusetts cases, but also an Arizona case that held just the opposite—that Arizona's prohibition against same-sex marriage rationally furthered a legitimate state interest, that of encouraging procreating and child rearing within the marital relationship.[10]

The attorney general indicated that he was "far less comfortable" with the conclusion that the court would invalidate the prohibition of same-sex marriage on a rational basis analysis. He opined that it was much more likely that the court would find that the classification in the statute implicated a suspect classification and resolve the question on that ground.

MUNICIPAL DISREGARD OF STATE STATUTES

The area of greatest analytical divergence was whether a municipality or state agency should disregard a state marriage statute that presumably prohibits same-sex marriage before the statute's constitutionality is adjudicated. Both Multnomah County counsel and the attorney general expressed an opinion on this subject.

Citing *Cooper v. Eugene School District 4J*, 301 Or 358 (1986), Multnomah County counsel explained that a government actor's "duty to act in compliance with the Constitution applies even when a court has not yet found a particular statute or government action unconstitutional." Based on her unequivocal opinion that article I, §20, prohibits denying licenses to same-sex couples, Multnomah County counsel concluded that the county was obligated to either cease issuing licenses to any couples (the route Benton County elected to take) or continue issuing licenses to both opposite-sex and same-sex applicants (the route Multnomah County has continued to take).

In his review of Multnomah County counsel's opinion, Charles Hinkle agreed that because article I, §20, prohibits license denial, Multnomah County could not deny marriage licenses to same-sex couples while issuing them to opposite-sex couples.

The attorney general did not analyze whether a municipality or state agency has an obligation to disregard a statute before its constitutionality is adjudicated. Instead, he stated that "because of the uncertainties about Article I, Section 20 analysis that the Oregon Supreme Court would bring to bear on the question, it would be unwise to change current state practices until, and unless, a decision by the Supreme Court makes clear what, if any changes are required." The attorney general did not address the *Cooper* rationale at all, and although he stated that it was unclear whether the court would find sexual orientation a suspicious classification, apply gender-based discrimination analysis, or find a rational basis for disparate treatment, he did not discuss how the court's analysis might affect a municipality's or agency's obligation to have acted constitutionally.

It is clear that a holding that validates the constitutionality of disparate

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treatment would absolve a municipality or agency of exposure for refusing to issue marriage licenses to same-sex couples. Not clear at all is whether an analysis that invalidates the refusal to issue licenses would also absolve the municipality or agency of potential liability for violating civil rights.

RECONCILING THE ANALYSIS WITH *TANNER*

The current analysis of same-sex marriage rights cannot be examined without at least a cursory acknowledgment of the irreconcilable foundational holding in *Tanner v. Oregon Health Sciences University*, 157 Or App 502 (1998), specifically that same-sex domestic partners were entitled to insurance benefits because disparate treatment based on marital status unconstitutionally discriminated against same-sex couples, as marriage "for gay and lesbian couples, ... [is] a legal impossibility."

In 1998 the Oregon Court of Appeals issued its opinion in *Tanner*, a case of first impression addressing the health insurance benefits of same-sex domestic partners. In *Tanner*, three nursing professionals sought employer-provided health insurance benefits for their same-sex domestic partners, benefits that their heterosexual married counterparts received. OHSU denied benefits to all three—the benefits manager refused to process the applications on the ground that the domestic partners of employees did not meet the State Employees' Benefits Board eligibility criteria.

The plaintiffs appealed to SEBB itself, which upheld OHSU's denial of benefits, and the plaintiffs then filed suit in state court. In their complaint, the plaintiffs alleged that the SEBB denials violated ORS 659.030(1)(b)—Oregon's civil rights statute prohibiting employer discrimination based on sex and marital status—and the equal privileges and immunities clause in article I, §20, of the Oregon Constitution.

With respect to the constitutional claim, the court had "no difficulty concluding that plaintiffs are members of a suspect class," holding that "[s]exual orientation, like gender, race, alienage, and religious affiliation is widely regarded as defining a distinct, socially recognized group of citizens, and certainly it is beyond dispute that homosexuals in our society have been and continue to be the subject of adverse social and political stereotyping and prejudice."

The court went on to hold that denying health insurance benefits to same-sex domestic partners on the ground that they were not married was unconstitutional because same-sex couples were prohibited from marrying under state law and there was no rational basis for the disparate treatment. Interestingly, the court restricted its review to whether the denial of benefits was constitutional without examining the threshold issue of whether the statutes purportedly prohibiting same-sex couples from marrying were themselves unconstitutional.

In the course of the debate over same-sex marriage, one prominent politician has asserted that the court's analysis in *Tanner* was correct, that same-sex couples do not have the right to marry, and that if any provision is made for same-sex couples to enjoy some form of domestic partnership rights, it should be created through a separate civil-union statutory process.

The fallacy of that argument is that in *Tanner* the court did not address the constitutionality of the statutes governing marriage. The court held as a foundational matter that marriage was not available to same-sex couples, and analyzed the unavailability of health insurance benefits to unmarried domestic partners on that premise. That a court, particularly a higher court, might subsequently find that foundational assumption incorrect and render an opinion that alters the analysis of the issue is neither unusual nor troubling.

Conclusion

For better or for worse, Oregon is now (and for the foreseeable future will continue to be) on the crest of the national debate surrounding LGBT rights and same-sex marriage. Whether denying marriage licenses to same-sex couples is found to lack a sufficiently rational basis or to disparately affect a suspicious classification without sufficient justification, it seems likely that the denial will be held unconstitutional under article I, §20, of the Oregon Constitution. ◆

Steven E. Herron is of counsel with Garrett, Hemann, Robertson, Jennings, Comstock & Trethewy of Salem, Oregon, and represents public employers in labor and employment matters.

Endnotes

1. Unlike many other states, Oregon has not adopted statutory language that expressly defines marriage as being "between one man and one woman," and it can be argued that this omission is both deliberate and substantive.

2. Other statutes, in both the Marriage and Dissolution/Annulment/Separation chapters of the Oregon Revised Statutes, also refer to "husband" and "wife."

3. *Heisler v. Heisler*, 152 Or 691, 693 (1936).

4. *Tanner v. OHSU*, 157 Or App 502, 525 (1998).

5. Citing *McGinley & McGinley*, 172 Or App 717, 731 (2001).

6. *Hewitt v. Saif*, 294 Or 33 (1982).

7. *Tanner, supra*, 157 Or App at 523–524.

8. The attorney general stated that the only time the Oregon Supreme Court has actually held a classification to be suspicious, the case involved the "immutable" characteristic of gender, and then, in a footnote, the attorney general acknowledged that "[i]n light of modern surgical and therapeutic techniques, . . . it is debatable whether . . . the description of gender as 'immutable' is accurate."

9. *Baker v. State of Vermont*, 170 Vt 194 (1999); *Goodridge v. Dept. of Public Health*, 440 Mass 309 (2003).

10. *Standhardt v. Arizona*, 410 Ariz Adv Rep 25 (2003).

National Developments in LGBT Rights

Steven E. Herron
Garrett, Hemann, Robertson, Jennings, Comstock & Trethewy, P.C.

In 2003 the U.S. Supreme Court rendered a decision that many commentators believe has potential for far-reaching ramifications concerning the rights of lesbian, gay, bisexual, and transgendered (LGBT) people. In *Lawrence v. Texas*, 539 US 558, 123 S Ct 2472, 156 L Ed 2d 508 (2003), the Court expressly overruled an earlier sodomy decision and issued an opinion that marked a dramatic shift in legal analysis of LGBT relationships and rights. Not insignificantly, it mirrored our general societal evolution toward the viewpoint that sexual orientation is more about "who you are" than "what you do," and reflected the emerging understanding of sexual orientation as a fundamental element of an individual's identity, rather than a "lifestyle choice" defined by the activity of sexual contact. This discussion of the *Lawrence* decision provides some context in which to consider the rights of same-sex couples.

Supreme Court Decisions Before *Lawrence*

During the 1970s and 1980s, as sexual orientation became a more visible issue in American society, and as communities struggled to comprehend the emergence of AIDS,[1] attention to and litigation over issues that had bearing on sexual orientation increased. The seminal U.S. Supreme Court case for 17 years was *Bowers v. Hardwick*, 478 US 186, 106 S Ct 2841, 92 L Ed 2d 140 (1986), a case out of Georgia involving a statute that criminalized sodomy (defined as sexual contact between the genitals of one person and the mouth or anus of another). In *Bowers*, the Court held that the federal constitution did not "confer a fundamental right upon homosexuals to engage in sodomy."

The first major case signaling embryonic tide-reversal at the U.S. Supreme Court was *Romer v. Evans*, 517 US 620, 116 S Ct 1620, 134 L Ed 2d 855 (1996), in which the Court found that a Colorado constitutional referendum violated the United States Constitution on the ground that it violated gays' and lesbians' equal protection rights. Colorado's "Amendment 2" prohibited all legislative, executive, or judicial action at any level of state or local government designed to protect people of "homosexual, lesbian or bisexual orientation." A state trial court enjoined implementation of Amendment 2, and the matter was appealed to the Colorado Supreme Court, which found the amendment subject to "strict scrutiny" under the Fourteenth Amendment to the U.S. Constitution for violating the "fundamental right of gays and lesbians to participate in the political process."

On remand, the trial court held that there was no "compelling state interest" served by the amendment; the Colorado Supreme Court affirmed. The matter came before the U.S. Supreme Court because the lower holdings depended on interpretations of the federal Constitution, and the Court affirmed the Colorado Supreme Court's holding, but for different reasons.

In *Romer*, the U. S. Supreme Court elected not to recognize a fundamental right at issue, or to subject the amendment to strict scrutiny. Instead, the Court chose to articulate that, because the amendment did not meet even the most deferential test for equal protection validity ("rational basis"), it could be declared unconstitutional without the Court's having to decide whether there was any fundamental liberty or privacy right at stake, or a suspicious classification warranting strict scrutiny. Although the Court's decision represented a retreat from the position the Colorado Supreme Court had taken, it *was* important for its reaffirmation that gays and lesbians are a discrete class. More important, it stated that the adoption of a state constitutional provision that prohibited the enactment of civil rights laws protecting gays and lesbians bore no rational relation to any legitimate governmental interest. The Court said:

> In the ordinary case, a law will be sustained if it can be said to advance a legitimate governmental interest, even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous. . . . By requiring that the classification bear a rational relationship to an independent and legitimate legislative end, we ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law. . . .
>
> Amendment 2 confounds this normal process of judicial review. It is at once too narrow and too broad. It identifies persons by a single trait and then denies them protection across the board. The resulting disqualification of a class of persons from the right to seek specific protection from the law is unprecedented in our jurisprudence. . . .
>
> It is not within our constitutional tradition to enact laws of this sort. [Citations omitted.][2]

Lawrence v. Texas

In 2003 the U.S. Supreme Court issued its decision in *Lawrence v. Texas*, striking down a Texas law that prohibited sodomy between partners of the same sex, expressly overruling its 1986 *Bowers* opinion, and marking a dramatic shift in the way same-sex relationships would be characterized. The significance of the Court's decision cannot be overstated: for the first time, the U.S. Supreme Court explicitly addressed substantive due process liberty rights in a case addressing gay and lesbian individuals' personally intimate relationships vis-à-vis their privacy rights. Analysis of substantive due process liberty rights, specifically the right to privacy, has evolved primarily out of procreation

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cases, specifically cases concerning contraception. Although in *Lawrence* the Court did not go so far as to declare same-sex sexual relations to be a fundamental right, for the first time it used language and concepts from due process liberty analysis in examining the interests at stake in same-sex relationships.

The first notable holding in *Lawrence* is the Court's explicit rejection of the foundational holdings of *Bowers*. The Court expressly overruled *Bowers:*

> The central holding of *Bowers* has been brought in question by this case, and it should be addressed. Its continuance as precedent demeans the lives of homosexual persons.
>
> . . . .
>
> . . . In the United States, criticism of *Bowers* has been substantial and continuing, disapproving of its reasoning in all respects, not just as to its historical assumptions. . . .
>
> . . . .
>
> *Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled.[3]

In analyzing and rejecting the foundational reasoning of *Bowers*, the Court said:

> The Court began its substantive discussion in *Bowers* as follows: "The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy [. . .]" That statement, we now conclude, discloses the Court's own failure to appreciate the extent of the liberty at stake. To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse. The laws involved in *Bowers* and here are, to be sure, statutes that purport to do no more than prohibit a particular sexual act. Their penalties and purposes, though, have more far-reaching consequences, touching upon the most private conduct, sexual behavior, and in the most private of places, the home. The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals.
>
> This, as a general rule, should counsel against attempts by the State, or a court, to define the meaning of the relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects. It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.[4]

The Court also endorsed Justice Stevens's dissenting opinion analysis in *Bowers*, stating that it "should have been controlling in *Bowers* and should control here":

> Our prior cases make two propositions abundantly clear. First, the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation[5] from constitutional attack. Second, individual decisions by married persons concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of "liberty" protected by the Due Process Clause of the Fourteenth Amendment. Moreover, this protection extends to intimate choices by unmarried as well as married persons.[6]

Another notable feature of *Lawrence* is that in analyzing whether the Texas law violated plaintiffs' due process rights, the Court cited, quoted from, and analogized to a long-evolving line of reproductive rights and contraception cases—notable for their focus on individual liberty interests. Beginning in the 1960s and 1970s, the Supreme Court issued a series of decisions holding that regulations and prohibitions on birth control for consenting adults constituted invalid infringements on an individual's right of privacy, striking down laws that prohibited the use of contraceptives by married couples (*Griswold v. Connecticut*, 381 US 479, 85 S Ct 1678, 14 L Ed 2d 510 (1965)), prohibited the distribution of contraceptives to unmarried individuals (*Eisenstadt v. Baird*, 405 US 438, 92 S Ct 1029, 31 L Ed 2d 349 (1972)), prohibited abortion (*Roe v. Wade*, 410 US 113, 93 S Ct 705, 35 L Ed 2d 147 (1973)), and prohibited the distribution of contraceptives to individuals under 16 years of age (*Carey v. Population Services Int'l*, 431 US 678, 97 S Ct 2010, 52 L Ed 2d 675 (1977)).

These decisions refined the notion that there are unenumerated privacy rights within the "plethora" of liberty rights encompassed by substantive due process. Analysis of substantive due process generally parallels equal protection analysis, with the infringed right categorized as either a "fundamental right" (entitled to "strict scrutiny" for a "compelling state interest") or a nonfundamental right (entitled only to review for a "rational basis" for the infringement).

The Court in *Lawrence* neither explicitly declared same-sex sexual relations to be a fundamental right for LGBT individuals, nor explicitly applied the standard of strict scrutiny in its analysis of the Texas law. The Court did, however, explicitly state that "liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct," and cited *Planned Parenthood*

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of Southeastern Pa. v. Casey, 505 US 833, 112 S Ct 2791, 120 L Ed 2d 674 (1992) as follows:

> In explaining the respect the Constitution demands for the autonomy of the person in making these choices, we stated as follows: "These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State." *Ibid.* Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do.[7]

Although states' rights to impinge on individuals' liberties have been upheld on a showing of adequate government interest, the analysis in the reproductive rights and contraception cases has reinforced the idea that relationships, and the conduct individuals engage in to express themselves within those relationships, are fundamental rights squarely within the purview of strict scrutiny.

The last notable characteristic of *Lawrence* is that in conducting its analysis, the Court deliberately declined to decide the case on equal protection grounds, stating that "the instant case requires us to address whether *Bowers* itself has continuing validity. Were we to hold the statute invalid under the Equal Protection Clause, some might question whether a prohibition would be valid if drawn differently, say, to prohibit the conduct both between same-sex and different-sex participants."[8] It is a fundamental practice for appellate courts to decide cases on the "easiest" basis, that is, to take the route that involves creating the least new law and provides the least opportunity for expanding rights. When a court deliberately chooses to depart from that practice, and elects instead to decide a case on a basis that involves overruling precedent or substantially expanding recognized rights, there is an implied message regarding the court's disposition and sentiment on the subject that is expanded.

It should be noted, however, that consistent with the absence of an explicit declaration of a "fundamental right" or the application of a "strict scrutiny" standard, the Court emphasized the "liberty" nature of the rights addressed. The Court emphasized that it was recognizing areas of individual privacy entitled to significant protection from government intrusion and regulation. This recognition is distinct from the recognition of affirmative rights, such as obligations by government to redress past wrongs or provide opportunities beyond those enjoyed by individuals not in the classification.

Many view this distinction as a distinction without a difference, driven by some combination of political expediency (an attempt by the Court to frame LGBT rights specifically enough so that lower courts have an idea what the Court wants them to do, but vaguely enough so that the media have a difficult time couching the decision in inflammatory terms) and the application of judicial restraint (not expressly addressing a question not before the Court—"freedom from" liberty interests were all that were, after all, ultimately on the line in a case striking an anti-sodomy law). Once a liberty interest is recognized, the application of that right in a "freedom to" partake in benefits is merely a small step past recognition of the "freedom from" liberty interest. ✦

Steven E. Herron is of counsel with Garrett, Hemann, Robertson, Jennings, Comstock & Trethewy of Salem, Oregon, and represents public employers in labor and employment matters.

Endnotes

1. For a critical examination of the nation's struggle to appreciate and respond to the AIDS epidemic, this author recommends the movie *The Band Played On.*
2. *Romer, supra,* 517 US at 632–633.
3. *Lawrence, supra,* 123 S Ct at 2482–2484.
4. *Lawrence, supra,* 123 S Ct at 2478.
5. Marriage between individuals of different races.
6. *Lawrence, supra,* 123 S Ct at 2483, citing *Bowers, supra,* 478 US at 216.
7. *Lawrence, supra,* 123 S Ct at 2481–2482.
8. *Lawrence, supra,* 123 S Ct at 2482.

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