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Appellate Court Records

IN THE COURT OF APPEALS OF THE STATE OF OREGON

MARK KRAMER and TODD PRAGER,

Plaintiffs-Appellants,

v.

CITY OF LAKE OSWEGO; and the STATE OF OREGON, by and through the State Land Board and the Department of State Lands,

Defendants-Respondents,

and

LAKE OSWEGO CORPORATION,

Intervenor-Defendant.

Court of Appeals No. A156284

Clackamas County Circuit Court
Case No. CV12100913

APPELLANTS' REPLY BRIEF

Appeal from the General Judgment Entered by the Clackamas County Circuit Court on February 6, 2014; Honorable Henry C. Breithaupt, Judge.

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I. REPLY ARGUMENT

A. *Reply on the First and Second Assignments of Error*

1. Oswego Lake Is Subject to Public Use Because It Is Navigable-In-Fact and Is a Meandered Lake.

Defendants argue against a partial declaration as to whether Oswego Lake ("Lake") is a public lake. But there is a justiciable controversy over that issue. The City of Lake Oswego's ("City") formal policy is that it will "[c]ooperate with the Lake Oswego Corporation to protect * * * the recreational qualities of Oswego Lake," and it maintains "private lake" signs in a City park. TCF Dkt. 45, ¶ 51, Ex. S at 7; ER 9.[1] Lake Oswego Corporation ("Lake Corp") claims to own the Lake. TCF Dkt. 45, Ex. AA at 6, 8. Even when Plaintiff Kramer gained access through a private easement, Lake Corp's marine patrol instructed him that he could not use the Lake. TCF Dkt. 126, Ex. 1 at 10-11, 17. In contrast, Plaintiffs argue the Lake is public. A declaration that the Lake is public would provide partial relief because courts presume defendants will adjust their conduct afterwards. *Chernaik v. Kitzhaber*, 263 Or App 463, 478, 328 P3d 799 (2014).

Plaintiffs preserved this argument. Plaintiffs requested, in part, a "Judgment declaring that the Lake is navigable-in-fact * * *, and that the waters of the Lake are owned by the State of Oregon and are held in trust for the preservation of the

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[1] This Court should reject the City's new litigating position that its signs merely refer to private ownership of the Lake's beds because the City cites no evidence supporting that post hoc rationalization.

public right of recreation * * *." TCF Dkt. 124, at 14; *see also id.* at 8-9 (same); TCF Dkt. 42, at 6-13 (arguing the Lake is public); *id.* at 17 (arguing "plaintiffs are entitled to a declaration the Lake's waters are held in trust for the use and enjoyment by the entire public * * *.").

That the Plaintiffs also sought declarations regarding the right of access and related injunctive relief does not nullify the request for a declaration that the Lake is public. Courts "have power to declare rights, status, and other legal relations, *whether or not further relief is* or could be *claimed*[,]" ORS 28.010 (emphasis added), and should issue declarations that "terminate the controversy *or* remove *an* uncertainty[,]" ORS 28.050 (emphasis added). *See Pendleton School Dist. v. State of Oregon,* 345 Or 596, 610-611, 200 P3d 133 (2009) ("trial court should have granted partial summary judgment for plaintiffs as to * * * part of their declaratory judgment claim").

Lake Corp points to *Berg v. Hirschy*, 206 Or App 472, 136 P3d 1182 (2006), which addressed a legal malpractice claim that was not justiciable prior to the time the plaintiffs incurred any damages. *Id.*, 206 Or App at 476 & n 4. But damages are not an element of Plaintiffs' claims, and any interested person may obtain a declaration of rights under a trust. ORS 28.040; *see also Brown v. Oregon State Bar*, 293 Or 446, 451, 648 P2d 1289 (1982) (declaratory relief is particularly appropriate in determining duties of public officials).

a. Oswego Lake is a public lake subject to public use under Oregon's Public Trust Doctrine.

No factual issues preclude a declaration that the Lake is public. The Lake was meandered. TCF Dkt. 44, Ex. 7. Thus, the legislature resolved the dispute: "The waters thereof are declared to be of public character." ORS 274.430(1). This is a statutory codification of Oregon's common law that meandered and navigable lakes contain public water. *See Luscher v. Reynolds,* 153 Or 625, 628-29, 632-36, 56 P2d 1158 (1936).

The legislature should be presumed to understand that the purpose of meander lines in the United States' surveys was to delineate the general boundaries of navigable waters. *Railroad Co. v. Schurmeier*, 74 US 272, 285-287, 7 Wall 272, 19 L Ed 74 (1868). On such waters, "the public * * * have an easement therein, or a right of passage, subject to the *jus publicum*, as a public highway." *Id.* 74 US at 287 (citation omitted). Meander lines cannot establish title-navigability, but Oregon's legislature lawfully declared that meandered lakes contain public water under state law.

The State suggests that ORS 274.430(1) is merely the State's claim. But the statute does not state that. Courts give effect to the literal terms of the statute, and may also consider context and any proffered legislative history. *State v. Gaines,* 346 Or 160, 166-173, 206 P3d 1042 (2009); *see also Benzinger v. Oregon Dept. of Ins. and Finance,* 107 Or App 449, 451, 812 P2d 36 (1991) (holding, "the statute

means what it says"). After declaring the waters of meandered lakes public, ORS 274.430(1) also proclaims that title to the beds is vested in the State. But that does not nullify the stand-alone sentences declaring the waters of meandered lakes are public.

Lake Corp cannot privatize the Lake by expanding its boundaries. Although only part of the Lake is meandered, "the public has the right to go where the navigable waters go * * *." *Wilbour v. Gallagher*, 77 Wash 2d 306, 315-316, 462 P2d 232, 238 (1969), *cert den*, 400 US 878 (1970); *see also Diversion Lake Club v. Heath*, 126 Tex 129, 140, 86 SW 2d 441, 446 (1935). Lakewood Bay is not a separate water body. Even the City's Resolution and Lake Corp's own rules refer to the entire Lake, including the Lakewood Bay, as "Oswego Lake." ER at 16-17; TCF Dkt. 45, Ex. AA at 19. The entire Lake is a contiguous water body, and its waters are therefore public. TCF Dkt. 45, ¶¶ 7-9.

Defendants argue the Lake must be navigable in its "natural" condition, citing *Kamm v. Normand*, 50 Or 9, 91 P 448 (1907). But *Kamm* addressed a stream made navigable by artificial releases from above, not a meandered lake. Further, the Lake's ordinary level has remained unchanged since 1928, providing a basis for its qualified navigability. *Luscher*, 153 Or at 629, 632-36; *see also Fish House, Inc. v. Clarke*, 204 NC App 130, 134-136, 693 SE2d 208, 211-212, *rev den*, 364 NC 324 (2010) ("controlling law of navigability concerning the body of water

'in its natural condition' reflects only upon the manner in which the water flows without diminution or obstruction[,]" and "any waterway, whether manmade or artificial, which is capable of navigation by watercraft constitutes 'navigable water' under the public trust doctrine"). Moreover, requiring proof of navigability prior to European settlement to establish qualified navigability would make that test no different from the test for establishing title navigability – thereby rendering Oregon's qualified navigability cases meaningless.

Defendants mistakenly contend that the Public Use Doctrine is not a component of the Public Trust Doctrine. There is no basis for the public's rights to both title-navigable and navigable-in-fact waters other than the State's sovereign control over navigable waters. *See* ORS 537.110 (public owns all waters); *see also* Plaintiffs' Op. Br. at 15-17; Law Professors' Amic. Br. at 3-11, 17-20. Plaintiffs made this same argument below. *See* TCF Dkt. 124, at 8 (alleging, in the First Claim, "Oregon's sovereign ownership of the State's waters applies to the waters of Oswego Lake"); TCF Dkt. 102, at 15-17 (arguing "Plaintiffs' First Claim for Relief for a floatage easement arises under Oregon's Public Trust Doctrine"). This Court should instruct the circuit court to issue a declaration that the entire Lake is public.[2]

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[2] Alternatively, the Court should remand the case to resolve any factual disputes over whether the Lake's waters are public.

2. Plaintiffs Possess the Right of Access to the Water From Public Parks, Subject Only to Reasonable Use Restrictions.

Defendants focus on private uplands, and thus fail to address the facts here regarding public parks. They ask this Court to rule that the public cannot "trespass" through public parks to reach public water. But that makes no sense. If the right of navigation allowed for intrusion on *private* uplands in *Weise v. Smith*, 3 Or 445, 449-451 (1869), there is no basis to deny Plaintiffs the right to use the banks of *public* uplands here. In fact, since the parks are already publicly accessible, there is no intrusion whatsoever.

The City attempts to twist *Darling v. Christensen*, 166 Or 17, 109 P2d 585 (1941), into a rule that the public may not access water from public areas other than streets terminating at water. But this argument fails because *Darling* contains no such limitation. 166 Or at 31-32; *see also Matthews v. Bay Head Improv. Assn.*, 95 NJ 306, 330-333 & n 9, 471 A2d 355, 368- 369 & n 9 (1984) (holding quasi-public entity could not bar non-residents of municipality from crossing its uplands to reach public trust area).

Further, contrary to Amicus Pacific Legal Foundation's position, no "taking" will occur through a judicial declaration that the public may access public waters because the public always possessed that right. *Stevens v. City of Cannon Beach*, 317 Or 131, 142-143, 854 P2d 449 (1993), *cert den*, 510 US 1207 (1994) (public use is a "background principle" of state law); *Public Lands Access Assn. v. Board*

of County Commnrs. of Madison County, 373 Mont 277, 298-302, 321 P3d 38, 51-53 (2014).

3. The Public Trust Doctrine Preempts the City's Prohibitions Against Public Use of the Lake Because Those Prohibitions Unreasonably Monopolize Use of the Lake And Subject It to Private Interest.

The City's actions regarding access to the waters of the Lake indisputably result in a "farming out of the privilege of navigating them to particular individuals, classes, or corporations * * * ." *Brusco Towboat v. State Land Bd.,* 284 Or 627, 647, 589 P2d 712 (1978) (internal quotation omitted). Its assertions do not withstand minimal scrutiny.

Water access at Millennium Park is similar to that at rivers where the City does not bar access. TCF Dkt. 43, ¶¶ 9-10; TCF Dkt. 45, ¶¶ 18, 32-48. Moreover, Lake Corp maintains a private dock that spans the length of the adjacent Sundeleaf Plaza. TCF Dkt. 81, ¶ 49. Use of the City's "uplands" is acceptable to reach those private docks; the same should be true for Plaintiffs' use of uplands to reach Millennium Park's public banks.

At the swim park, the City directly regulates in-water activities. It cannot justify discriminatory access privileges based on concerns with volume of usage or costs when non-discriminatory limits on the number of park entrants and reasonable fees for non-residents could easily address those concerns.

The City seeks to monopolize use of the Lake through the guise of its police

power, but ignores that as a subdivision of the State it shares in public trust responsibilities. *See* Law Professors' Amic. Br. at 29-31. The City's claim that it "is not an instrumentality of the State," City's Ans. Br. at 19, is wrong. *Stovall v. State of Oregon,* 324 Or 92, 118-119, 922 P2d 646 (1996) (rejecting argument that cities are not instrumentalities of the state). The City is also wrong to claim that a common law doctrine cannot limit its authority. The case it cites, *State v. Tyler*, 168 Or App 600, 7 P3d 624 (2000), contains no such holding. In any event, the Public Trust Doctrine is embodied in legislative enactments and policies, beginning with the Statehood Act. The "common-law court is the institution charged with the formulation and application of rules governing law in situations not covered by constitution, legislation, or rules." *Bagley v. Mt. Bachelor, Inc.*, 356 Or 543, 560 n 12, ___P3d ___ (2014) (internal quotation omitted).

The City asks the Court to ignore out-of-state decisions establishing its conduct should be viewed with considerable skepticism. City's Ans. Br. at 20. But it fails to cite any public trust authority rejecting that rule. Instead, it points to *City of Montpelier v. Barnett*, 191 Vt 441, 49 A3d 120 (2012). However, that decision *invalidated* a municipality's restrictions against public use of a pond, and only then did it state, *in dicta*, that the municipality may exclude the public from entering lands surrounding the pond. 191 Vt at 472-473, 49 A3d at 142-143. But unlike here, the pond at issue was a drinking water source, did *not* contain an exclusive

swim park, and was *not* bordered by public parks. No authority suggests a municipality may cooperate with a private entity to monopolize use of public waters.

4. The City's Lake Access Prohibitions Violate the Privileges and Immunities Clause of the Oregon Constitution.

The City is wrong to assert that an "'as applied' challenge does not mean the court evaluates the 'practical effect' of a non-discriminatory regulation * * *." City's Ans. Br. at 27. An as-applied challenge indeed means the court evaluates the practical effect of a non-discriminatory regulation, and such challenges are available under Article I, section 20. *See Zockert v. Fanning,* 310 Or 514, 523-524, 800 P2d 773 (1990) (invalidating unintended effect of legislation on indigent parents); *M&M Woodworking Co. v. State Indus. Comm'n.*, 176 Or 35, 40-46, 155 P2d 933 (1945) (enactment invalid "as applied" to plywood producers); *Tanner v. Oregon Health Sciences Univ.,* 157 Or App 502, 524, 971 P2d 435 (1998) (invalidating facially neutral classification that had "unintended side effect" on homosexual couples).

The City points to inapposite free speech cases, such as *City of Eugene v. Lincoln*, 183 Or App 36, 50 P3d 1253 (2002). Free speech requires a wholly different analysis. And *Lincoln* imposes no barriers to as-applied challenges. *See id.*, 183 Or App at 43 ("government cannot automatically confer upon itself the

authority to regulate otherwise protected speech merely by doing so under the authority of a speech-neutral law").

Reliance on *Sherwood School Dist. 88J v. Washington County Educ. Svc. Dist.*, 167 Or App 372, 6 P3d 518, *rev den*, 331 Or 361 (2000), is likewise unavailing. That case regarded geographic classifications by the *state* legislature, and is inapplicable here to a municipality's discriminatory treatment of non-local groups in a matter of state-wide concern. Moreover, Plaintiffs need not prove the City's intent because the practical effect of its policies creates privileged access. *Tanner*, 157 Or App at 524. In any event, no "psychoanalysis" is necessary, given its formal policy of cooperating with Lake Corp and its signs that declare the Lake is private.

The remaining constitutional defenses fail. Plaintiffs properly identified members of the Lake Corp and City residents as the "true classes" existing independent of the City's enactments. TCF Dkt. 124, ¶¶ 31-32, 36. Non-members and non-residents are the harmed classes. The Court "need not resort to the language of the [ordinance] to sort them out from the mass." *Zockert*, 310 Or at 523. Plaintiffs cited authority that the City is not entitled to deferential review. *See* Plaintiffs' Op. Br. at 28-30. But even if rational basis applies, the City fails to explain how the discriminatory conduct here is any different than that invalidated in other cases under the rational basis standard. *See* City's Ans. Br. at 33 n 6.

5. Lake Corp's Private Use Restrictions Are Ineffective and Provide No Basis to Exclude the Public.

Defendants argue there is no ruling on the validity of the property restrictions to review, but the circuit court expressly stated the property restrictions "are valid." ER at 44. After refusing to address Plaintiffs' arguments, the circuit court relied on the restrictions as the basis for its rulings. *See id.* (relying on the deed restriction at the swim park); *id.* at 46 (justifying the State's inaction because the land is "burdened by covenants and restrictions limiting access to the lake"); *id.* at 47 (explaining that forcing the covenants to "yield in the face of overriding public concerns * * * is for the legislature and not the courts").

The record is sufficient to reverse this legal error. Private restrictions cannot form the basis for a municipality to defy superior law. *See* Plaintiffs' Op. Br. at 33-37. Otherwise, municipalities could rely on private racial covenants to violate civil rights laws. Or they could collude with private parties to frustrate other nondiscrimination laws. Indeed, the City itself disavowed reliance on the restrictions as justification for Resolution 12-12. Tr at 307.

Lake Corp has abandoned reliance on several private use restrictions on appeal to focus solely on a purported severance of riparian rights, but only cites off-point cases where riparian rights were severed from uplands by an intervening street. *See* Lake Corp's Ans. Br. at 30-31 (citing *Oliver v. Klamath Lake Navigation Co.*, 54 Or 95, 99, 102 P 786 (1909); *Coussens v. Stevens*, 200 Or App

165, 176-77, 113 P3d 952 (2005)). It points to no authority suggesting that severance of riparian rights can eliminate public access from public parks. That result would be contrary to *Darling*, 166 Or at 31-32, and would allow for the kind of monopoly the Public Trust Doctrine prohibits.

6. The State Has Abdicated Its Trust Duties and Placed the Trust Beyond Its Control.

The State agrees that the public has the right to use the Lake, but ignores that the basis for that right is the State's sovereign control over waters. The State's inaction here is accomplishing precisely the kind of monopoly the Public Trust Doctrine proscribes. At a minimum, Plaintiffs are entitled to a declaration that the State is trustee of the Lake's waters. *Chernaik*, 263 Or at 478-479.

B. *Reply Argument on Third Assignment of Error*

Defendants have failed to rebut Plaintiffs' alternative argument that the circuit court abused its discretion in denying a clarifying amendment to the complaint. Plaintiffs' Op. Br. at 39-41. Defendants do not deny that amendments to conform to evidence are liberally granted. *See id.* Further, in the cases they cite, Oregon courts *allowed* amendments made *at the time of trial* – far later than that requested by Plaintiffs here, months before trial. *See Perdue v. Pacific Tel. & Tel. Co.*, 213 Or 596, 606-608, 326 P 2d 1026 (1958); *Forsi v. Hildahl*, 194 Or App 648, 650-653, 96 P3d 852 (2004), *rev den*, 338 Or 124 (2005).

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C. *Reply Argument to Lake Corp's Standing Argument*

Plaintiffs have standing to challenge the City's swim park rule. Standing is conferred by statute. *Kellas v. Dept. of Corrections*, 341 Or 471, 477, 145 P3d 139 (2006). Under the Declaratory Judgment Act, "*Any person* interested as through [a] * * * cestui que trust * * * may have a declaration of rights or legal relations in respect thereto * * * [t]o determine *any* question arising in the administration of the estate or trust * * *." ORS 28.040 (emphasis added). Plaintiff Kramer has standing as "any person" interested in administration of the public trust at the swim park. *See id.*; *Kellas*, 341 Or at 477 (Administrative Procedures Act provided standing to "any person").

Kramer testified that he repeatedly swam at a formerly available swim park in the Lake. TCF Dkt. 126, Ex. 1 at 5-6.[3] With regard to the City's swim park, he averred: "the City rules prohibit me from using that area of the Lake for any purpose[,]" and "I fear that if I were to enter the Lake from any City-owned property to * * * swim * * * I would be in violation of the City's Resolution or other park rules and regulations * * *." TCF Dkt. 43, at ¶¶ 12-13. Thus, his "rights, status or other legal relations are affected by the challenged" rules. *Budget Rent–A–Car v. Multnomah Co.,* 287 Or 93, 95-96, 597 P2d 1232 (1979).

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[3] Evidence beyond the pleadings is relevant because Lake Corp raised standing in an ORCP 21A(1) motion. TCF Dkt. 78; *Beck v. City of Portland,* 202 Or App 360, 364-365, 122 P3d 131 (2005).

II. CONCLUSION

The Court should reverse the circuit court's judgment and direct the circuit court to grant Plaintiffs' motion for partial summary judgment.

Respectfully submitted on January 5, 2015,

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CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS

Brief length

I certify that this brief complies with the word-count limitation of 3,300 words in ORAP 5.05(2)(b), and the word count of this brief (as described in ORAP 5.05(2)(a)) is 3,298 words.

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I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

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CERTIFICATE OF SERVICE

I hereby certify that on January 5, 2015, I served true and correct copies of the foregoing APPELLANTS' REPLY BRIEF by e-service pursuant to ORAP 16.45 and by e-mail on:

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CERTIFICATE OF FILING

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