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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

MASONRY BUILDING OWNERS OF OREGON,	)	
et al.,	)	
	)	
Plaintiffs,	)	3:18-cv-02194-AC
	)	
vs.	)	April 3, 2019
	)	
MAYOR TED WHEELER, et al.,	)	portland, Oregon
	)	
Defendants.	)	

(Telephone Conference)

TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE JOHN V. ACOSTA

UNITED STATES DISTRICT COURT JUDGE

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APPEARANCES

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INDEX

Telephone conference hearing

4

1 (April 3, 2019)

2 P R O C E E D I N G S

3 (In chambers:)

4 THE COURT: Let me just explain the logistics. I'm  
5 in Eugene right now. My law clerk on the case, Leanne Jabs,  
6 and the court reporter are in my office in Portland. So when  
7 we have a court reporter, when you speak, please identify  
8 yourself so the transcript is clear who is speaking.

9 Mr. Garcia, you said there was one other person to  
10 join?

11 MR. GARCIA: That's correct. Karen Moynahan will be  
12 joining.

13 THE COURT: Who just joined?

14 MR. MOYNAHAN: Karen Moynahan, Your Honor.

15 THE COURT: Thank you, Ms. Moynahan. This is  
16 Judge Acosta.

17 On the phone already are Mr. Garcia, Mr. Swift,  
18 Mr. Christopher, and Mr. Stuckey.

19 I'm in Eugene. My law clerk on the case,  
20 Leanne Jabs, and the court reporter are in Portland in my  
21 office. We have a court reporter, so please be sure to speak  
22 clearly -- all of you -- and not too fast and identify  
23 yourselves when you are speaking so we have a clear transcript.

24 All right. I'm going to start us off by summarizing  
25 the purpose of this hearing.

1           As the parties know, on February 14 I entered a  
2 temporary injunction with respect to the then-existing  
3 ordinance regarding unreinforced masonry buildings. The  
4 purpose of the injunction was to allow the City to make  
5 intended changes to the ordinance to address, to the extent  
6 possible, perhaps entirely, the issues raised by the plaintiffs  
7 in this lawsuit, which seeks to enjoin the ordinance's  
8 operation permanently. That ordinance in fact was passed, the  
9 revised ordinance. And we do have a hearing date for the  
10 plaintiffs' motion for a permanent injunction.

11           What brings us here today is a letter that the City  
12 distributed to building owners of unreinforced masonry  
13 buildings. The letter went out very recently. According to  
14 the plaintiffs, it provided information to those owners about  
15 obligations under the ordinance that the plaintiffs claim are  
16 enjoined as part of the Court's temporary injunction.

17           All right. I have read the City's letter and the  
18 plaintiff's response and the documents that the plaintiff  
19 included as examples of notices that went out to the building  
20 owners.

21           Ms. Moynahan, will it be you for the City?

22           MR. MOYNAHAN: Yes, Your Honor.

23           THE COURT: Mr. Swift, who will it be for the  
24 plaintiffs?

25           MS. SWIFT: Me, Your Honor, Mr. Swift.

1 THE COURT: All right. Thank you.

2 Well, the transcript of the hearing is important to  
3 the issue, but in particular in paragraph No. 3 of my temporary  
4 injunction, I specifically said that the City may not take any  
5 action on reliance on the ordinance, including but not limited  
6 to informing owners of URM buildings that they must comply with  
7 the ordinance. That would include, in my view, the information  
8 that was included in the letters and notices sent by the City  
9 to the building owners.

10 Ms. Moynahan, I have to tell you that I'm at a loss  
11 to understand why some decision-maker or decision-makers at the  
12 City believed this was a good idea. At a minimum I would have  
13 expected that counsel would have contacted plaintiffs' counsel  
14 and ultimately the Court to ensure that sending these notices  
15 out was not inconsistent with and in compliance with my order.  
16 I really don't understand why someone at the City's office  
17 thought this was a good idea.

18 MS. SWIFT: Your Honor, this is Mr. Swift. I want to  
19 break in for a moment.

20 I want to make clear that the third enclosure that we  
21 included in our letter is a January letter that went out  
22 previously and is referenced in the recent March letter. So  
23 the two communications that went out recently are the first  
24 page of those enclosures, which is a letter, and the second  
25 page of those enclosures, which is an email.

1 THE COURT: Yes. All right. Thank you.

2 MR. MOYNAHAN: May I proceed, Your Honor?

3 THE COURT: Go ahead.

4 MR. MOYNAHAN: Thank you.

5 Thank you, Mr. Swift, for clarifying that, because my  
6 perception when I read your letter was actually that this was  
7 being included as an example of something that violated the  
8 injunction, and I certainly would agree with the January letter  
9 not being in compliance, but, of course, that predated the  
10 injunction.

11 Your Honor, quite plainly, the attorneys in our  
12 office weren't aware that the letter was going on March 21st.  
13 They had seen an earlier draft that was drafted just after the  
14 hearing that we had earlier in March, and we were not aware  
15 this letter was going out. My apologies. That is absolutely  
16 on the attorneys -- myself, Denis Vannier, and Tony Garcia. We  
17 lacked the client control, and I do apologize for that.

18 If I may, Your Honor, a couple of comments. One, I  
19 think had we been involved in the letter, it would have been  
20 more clearly in compliance with Your Honor's order.  
21 Nonetheless, I do feel having looked at this several times,  
22 Your Honor certainly stated that we couldn't inform owners that  
23 they were not in compliance.

24 I know this is splitting hairs, but the letter  
25 doesn't tell the owners that they are not in compliance. We

1 don't state that "You're going to be fined if you are not in  
2 compliance."

3           What we did fail to do was state that there is a  
4 temporary injunction. The only area where this is alluded to  
5 is if the recipient goes to the website, the top of the banner  
6 says that there is a temporary injunction in place.

7           THE COURT: There is no banner in the letter, as you  
8 know. I will say that when I read the letter and the other  
9 forms of notice, one of the first thoughts that came to mind is  
10 I don't think any city lawyer has looked at this; or if they  
11 did, the client made the decision to go ahead anyway.

12           Having been in the public sector, as a lawyer for a  
13 public entity, I am fully aware that the legal answer or advice  
14 is not always the answer or advice that carries the day on any  
15 particular point when it comes to decision-making.

16           So before we move on to the more substantive part of  
17 your comment, I want to say this: I don't know who at the City  
18 did this, and I'm not asking you to find out and tell me. But  
19 you better tell them that if anything like this happens again,  
20 they are going to be in contempt, and I'm going to be very  
21 unhappy. This has created, in part, the problems we sought to  
22 avoid when we had our hearing in February.

23           There is going to be a considerable amount of  
24 confusion, and the fact that this letter specifically mentions  
25 the lawsuit, but quite glaringly omits reference to an



1 injunction makes me think that somebody was doing their best to  
2 get around my order.

3           This better not happen again, and anybody in the  
4 Bureau of Development or anyplace else in the City with respect  
5 to this ordinance, they better consult you and the lawyers on  
6 this case before they even pick up a piece of paper.

7           Now, I don't agree that these notices are in  
8 compliance with my order. At a minimum owners are left with  
9 the impression that they have to start telling tenants, and  
10 including in lease applications, the URM notification language.  
11 And even if I am wrong about that -- and I'm looking right at  
12 the letter -- it is confusing. So the question is how to  
13 remedy it.

14           Mr. Swift's letter at the very end, page 3, the last  
15 paragraph, mentions additional follow-up communications to  
16 provide accurate information about the injunction. So here is  
17 what I am thinking should be done. Then, Ms. Moynahan, you can  
18 comment, and, Ms. Swift, you will be able to comment as well.

19           Every person who received one of these notices should  
20 be notified that, until further notice, there is a temporary  
21 injunction on the ordinance and any requirement to comply with  
22 it. That notice should be sent to the same list of people who  
23 received the notices that went out previously and that we are  
24 talking about here, and the language of the letter should be  
25 crystal clear: No obligation to comply.

1 I'm hesitant to say "until further order of the  
2 Court," but it might be appropriate to mention that the parties  
3 will be notified when the Court has ruled on the ordinance and  
4 whether the ordinance or any part of it will go into effect.

5 Ms. Moynahan, your thoughts.

6 MR. MOYNAHAN: I completely agree, Your Honor.

7 THE COURT: Mr. Swift.

8 MS. SWIFT: I agree, Your Honor. I would also note  
9 that the letter states that there will be updates from the City  
10 about any future changes or occurrences. In this case, I would  
11 ask also, in addition to notifying everyone who received these  
12 notices, that if the parties could communicate about the  
13 subsequent letters that go out in the event that any orders or  
14 future action is taken in this case.

15 THE COURT: That was my thought as well. So here is  
16 what I would -- here is what I'm asking. Ms. Moynahan, I would  
17 like you to draft, I'm going to call it a correction letter.  
18 Provide it to Mr. Swift so that all the lawyers in the case can  
19 look at the language and agree that it is appropriate for the  
20 purpose stated.

21 If the two of you agree, then unless there is  
22 something that particularly concerns me, I will simply say that  
23 that is consistent with the order, and you won't need to wait  
24 much -- you won't need to wait to hear from me, because if the  
25 two of you agree, then I'm pretty certain that it is

1 appropriate to send out. Once the final form is agreed upon,  
2 it needs to go out immediately. There will be no delays or in  
3 any other way a postponement of sending out the notices.

4           Also, Mr. Swift has a good idea, and, Ms. Moynahan,  
5 you probably think it is a good idea, if only because it  
6 protects your clients' position going forward. Counsel should  
7 confer on any additional information that is sent out by the  
8 City about this ordinance or any part of it. Again, if the  
9 lawyers agree, no problem. If the lawyers disagree, then you  
10 can contact me, and I will sort it out.

11           Ms. Moynahan, I want to point out for the record that  
12 I very much appreciate your candor in explaining how this  
13 letter came to be. It goes a long way with me and your  
14 credibility with the Court.

15           Mr. Swift, your letter was professional and clear,  
16 and I appreciate that the tone was firm, but it was not  
17 accusatory or acrimonious. So those are all good signs as far  
18 as I'm concerned. Thank you very much, both of you.

19           MR. MOYNAHAN: Thank you, Your Honor.

20           I have to be completely clear with you, because I  
21 want to maybe sure this point is understood. There was a much  
22 earlier draft of this letter that Mr. Garcia had seen, but it  
23 was not the same version that was actually submitted, and  
24 Mr. Garcia didn't know that that was going out. I just don't  
25 want there to be any misunderstanding about that.

1 THE COURT: I did hear you the first time. I  
2 appreciate that.

3 MR. MOYNAHAN: Okay.

4 THE COURT: All right. I think that covers that.

5 Ms. Moynahan, is there anything else you think we  
6 should cover, or you think was not entirely clear?

7 MR. MOYNAHAN: No, Your Honor. Thank you.

8 THE COURT: Mr. Swift.

9 MR. GARCIA: This is Mr. Garcia. May I be heard?

10 THE COURT: Yes. Go ahead.

11 MR. GARCIA: I just want to get a clarification from  
12 you, Your Honor, on conferring before any additional  
13 information is provided. So BDS has a consumer phone line  
14 where they received calls, and they are receiving calls  
15 multiple times almost every day regarding the URM ordinance,  
16 and they continue to tell people there is an injunction.  
17 However, if they want to provide more information, I'm not sure  
18 how we can do that unless we just -- unless I'm to advise my  
19 client that they just not provide any information at all.  
20 Otherwise, I don't know how we would be able to confer with  
21 plaintiffs' counsel for every call --

22 THE COURT: Sure.

23 MR. GARCIA: -- or is that not subject to this order?

24 THE COURT: No. It absolutely is. I appreciate that  
25 you raised it and also the practical difficulties of orally

1 responding to these questions multiple times a day. I know  
2 from my experience, particularly, again, when I was in-house in  
3 the public sector, there is a big difference between what we,  
4 as lawyers, understand and know to say and what someone who is  
5 an employee in the field and not a lawyer knows what to say.

6           It is not fair to expect those who answer the phone  
7 to be able to respond on the fly. So my suggestion is that the  
8 lawyers for both sides come up with a script for the  
9 call takers at the City to refer to. It doesn't have to be  
10 lengthy, and it shouldn't be complicated. And it should mirror  
11 as much as possible the notices that are going out to the  
12 buildings owners.

13           But it should be clear that there is an injunction  
14 and that the ordinance is not in effect until the Court  
15 resolves the dispute. And when it does, the owners will be  
16 notified.

17           Mr. Garcia, does that address your concern?

18           MR. GARCIA: It does. I have one additional one  
19 regarding the website. I want to make sure whether there is  
20 any expectation that any changes be made. To help the Court  
21 kind of know the process, there is a database, and my client  
22 would very much like to continue to have the database up and  
23 open, which they have during this time so that individuals are  
24 able to see the listings as well as when they are removed from  
25 that database.

1           So would the database that the BDS maintains on that  
2 website that has that banner, is the banner sufficient enough  
3 by identifying the injunction or should that be removed?

4           THE COURT: The same information that goes out in the  
5 letter and that is provided to the call takers in the script  
6 should also be on the website at the very top of the database.

7           MR. GARCIA: Okay.

8           THE COURT: You can leave the banner there. But the  
9 other information should be there, because my guess is if only  
10 the banner remains, there will still be questions.

11           I know from experience that you can tell someone  
12 something more than once, and they still might not either  
13 understand it or read it. So as many different places as we  
14 can convey the message, the better. And that's all we can do.  
15 If people still have questions, I guess they can call the line  
16 and the call takers can repeat the message.

17           But my goal is to avoid inconsistent responses for  
18 various parts of the City or the information that the City is  
19 providing because we want to minimize, if not eliminate  
20 confusion.

21           Mr. Swift, your thoughts.

22           MS. SWIFT: We are happy to cooperate with the City  
23 on preparing these documents and making sure they are clear.  
24 We thank you for taking that step. I think that should  
25 hopefully make sure that any information that's going out is

1 consistent.

2 THE COURT: All right. As soon as you have an  
3 agreed-upon format for the correction letter, email it directly  
4 to me with a copy to yourselves, of course, so that everybody  
5 has the same information. I will look at it right away, and I  
6 will let you know if it is appropriate. If it is, it goes. If  
7 it is not, I can tell you in the way that I think, or the way I  
8 think it needs to be edited. I suspect that won't happen, but  
9 I will get to it right away.

10 MR. MOYNAHAN: Thank you very much for your time  
11 Your Honor. I appreciate it.

12 MS. MOYNAHAN: Thank you, Your Honor.

13 THE COURT: Thank you, everyone, for being available  
14 on short notice. With that, we're adjourned.

15 Good-bye.

16 (End of proceedings.)

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I certify, by signing below, that the foregoing is a correct transcript of the record of proceedings in the above-entitled cause. A transcript without an original signature, conformed signature, or digitally signed signature is not certified.

11

12

/s/ Dennis W. Apodaca  
DENNIS W. APODACA, RDR, RMR, FCRR, CRR  
Official Court Reporter

April 5, 2019  
DATE

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