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BELVEDERE BOLSTERS RESOURCES BY IMPOSING EXCESSIVE FINES

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The constitutional prohibition against excessive fines is one of the most deeply rooted, fundamental protections an individual possesses against the government. This right ranks among the most noble and established freedoms and liberties possessed by individuals as pronounced in the Magna Carta in 1215. Indeed, it was adopted in 1791 as part of the Eighth Amendment to our nation's Constitution. The right enjoyed by all free persons against excessive fines prevents overzealous government from depriving a person of his or her livelihood.

Unfortunately, the City of Belvedere in Marin County, California doesn't honor its citizens' right to be free from excessive fines. On October 13, 2004, the City imposed the maximum authorized penalty of \$105,710 upon Wendell and Claire Marie Laidley for construction delays caused by defective materials and workmanship on the Laidleys' new home.

The City's construction time limit ordinance required the Laidleys to complete construction within 18 months or be penalized. The Laidleys bore no responsibility for the delays they were forced to incur as a result of the improvidence of independent third parties. The Laidleys could neither control nor prevent the construction delays occasioned by defective materials and workmanship.

On May 16, 2002, the Laidleys obtained a construction permit from the City allowing the construction of a new single-family home. The construction plans for their new residential home included the installation of zinc roofing. Zinc roofing is superior to other roofing materials due to its durability and resistance to corrosion and weather effects. The roofing material was shipped from Portland, Oregon and was handled and installed by a licensed San Francisco-based firm retained as a subcontractor on the project. The roofing was ordered, received and installed in a timely manner.

However, after most of the roofing had been completely installed, significant defects in the zinc roofing materials began to appear. These defects consisted of numerous white rust deposits and other visible signs of corrosion. The rust deposits and overall poor quality of the roofing materials were attributed to defective manufacturing and subsequent handling and installation by the subcontractor.

Because the defects began to appear only after the roofing had been substantially installed, the task of replacing the roofing material became a complicated affair. Despite prudent and repeated attempts at replacing the roofing materials in a timely fashion, the Laidleys were unable to complete construction according to the

original schedule. Under the Belvedere ordinance, time limits and penalties are determined according to the cost of the proposed construction project.

On February 7, 2005, the City affirmed the imposition and total amount of the penalty assessed against the Laidleys. The City concluded that defective materials and/or workmanship are foreseeable events and thus were not beyond the Laidleys' control. Accordingly, the City determined that the Laidleys were responsible for the construction delays and that the penalties thus were appropriate.

On May 6, 2005, the Laidleys filed a Petition for Writ of Administrative Mandamus with the Superior Court for Marin County challenging the validity of the ordinance and the penalties assessed against them under its provisions. At a hearing on March 17, 2006, the trial court, although conceding the harshness of the ordinance, determined that the ordinance was constitutional and the penalty proper. The Laidleys filed an appeal to the Court of Appeal, First Appellate District, on June 7, 2006.

On appeal the Laidleys will be entitled to a *de novo* [fresh look] standard of review in interpreting the City's ordinance. No weight is given to the City's or trial court's interpretation.

The subject ordinance allows an individual against whom a penalty has been assessed to challenge that penalty and obtain relief therefrom in situations where "the applicant was unable to comply with the construction time limit for reasons beyond the control of the applicant . . ." The ordinance then proceeds to define certain instances either within or without the meaning of the phrase "reasons beyond the control of the applicant." The City concluded that delays caused by defective materials and/or workmanship were not beyond the Laidleys' control, despite the failure of the ordinance to identify such causes among those specifically enumerated as not being "beyond the control of the applicant."

Because the imposition of any penalty against the Laidleys ultimately depends upon whether or not the construction delays were "beyond the control of the applicant," the Court must first determine this threshold issue by interpreting the precise meaning of that phrase.

The Laidleys argue that the ordinance does not authorize the penalty imposed. The California courts have held that "[p]enalties are never favored by courts of law or equity, and statutes imposing penalties or creating forfeitures must be strictly construed . . . Every intendment and presumption is against the person seeking to enforce the penalty or forfeiture provided by such statute."

The well-settled rule that statutes imposing penalties shall be strictly construed is guided by the notion that "courts will usually give such a construction to statutes providing for forfeiture as will be consistent with justice and the dictates of reason." The penalty imposed on the Laidleys in the present case does not comport with these notions of justice and reason, and for that reason the ordinance should be strictly construed against such imposition.

The terms of the ordinance contemplate some element of culpability and responsibility for failure to comply with the ordinance. By its own plain terms, the ordinance provides relief for delays caused by "reasons beyond the control of the present applicant." The ordinance further provides: "For purposes of this Section, reasons beyond the control of the applicant . . . **shall include, but not be limited to**, labor stoppages, acts of war or terrorism, and natural disasters . . . [R]easons beyond control of the applicant . . . **shall not include** delays caused by the winter rainy season; the use of custom and/or imported materials; the use of highly specialized subcontractors; significant, numerous, and/or late design changes; access difficulties associated with the site; or by failure of materials suppliers to provide said materials in a timely manner."

The Laidleys argue that by its plain terms, the ordinance does not include defective materials and/or workmanship as among those reasons not beyond the applicant's control. While the zinc roofing was imported from Portland, Oregon, the fact that it was imported was not the cause of the delay. The Laidleys could neither control nor foresee the improvidence of the manufacturer and/or roofing subcontractor. It is pertinent that the Laidleys had hired a recognized architect and general contractor and that the project was on schedule until the roof was nearly completed.

It is well settled that "[i]t is a basic element of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." The vagueness doctrine prohibits government from "trap[ping] the innocent by not providing fair warning" and thus requires that the legislature establish clear guidelines for enforcement.

The courts accordingly hold that a statute "should be sufficiently certain so that a person may know what is prohibited thereby and what may be done without violating its provisions, but it cannot be held void for uncertainty if any reasonable and practical construction can be given to its language." The City's attempts at interpreting its already vague ordinance fail to provide any more certainty to its application. The City's interpretation of the ordinance to exclude all foreseeable occurrences only serves to exacerbate the ordinance's vagueness problems.

In addition to due process guarantees, both the state and federal constitutions further prevent government from imposing excessive fines. The Due Process Clause of the Fourteenth Amendment to the Federal Constitution makes the Eighth Amendment's prohibition against excessive fines and cruel and unusual punishments applicable to the states.

Whether a fine or penalty is unconstitutionally excessive requires an inquiry into the alleged offense. The United States Supreme Court requires that the penalty not be "grossly disproportional" to

the gravity of the offense. For the City to insist, as it does, that a penalty totaling over \$100,000 can stand where the alleged perpetrator bears no culpability is absurd.

In this respect, the constitutional inquiry also involves comparison of the penalty to similar situations in other communities. Extensive research into this inquiry has turned up only one other comparable law, which is that enacted by the City of Atherton in San Mateo County, California. On June 21, 2006, Atherton adopted an ordinance authorizing a maximum penalty of \$250,000 against an individual who exceeds the construction time limit prescribed. It is significant to note that the City of Belvedere has now amended its ordinance to impose a maximum penalty of \$200,000.

In view of the historical precedents prohibiting excessive fines and forfeitures, it is strange that such ordinances have been adopted by two California cities. Perhaps this relates to the fact that the funds go into the cities' general funds. In fact, during the short time the Belvedere ordinance has been in effect it has generated over \$927,994 in income for the City. This equals 8.1% of the City's total general revenue.

Hopefully, the California courts soon will take note of the dangerous precedents urged in the cities of Belvedere and Atherton and will require those communities to obtain funding from sources other than unconstitutional exactions imposed on their citizens.

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