

IN THE SUPREME COURT OF THE STATE OF OREGON

WEST LINN-WILSONVILLE SCHOOL DISTRICT 3JT, a
political subdivision of the State of Oregon,
Plaintiff-Adverse Party,

v.

THE CITY OF WEST LINN, OREGON, a municipal entity,
Defendant-Relator.

Clackamas County Circuit Court Case No. 22CV06982

Oregon Supreme Court Case No. _____

MOTION STAY – TRIAL COURT PROCEEDINGS

EMERGENCY MOTION UNDER ORAP 7.35

Mandamus Pertaining to July 31, 2024 Ruling
of the Circuit Court for Clackamas County

The Honorable Susie L. Norby, Circuit Court Judge

David H. Bowser OSB #012098
david.bowser@jordanramis.com
Christopher K. Dolan OSB #922821
chris.dolan@jordanramis.com
JORDAN RAMIS PC
1211 SW Fifth Avenue, 27th Floor
Portland, Oregon 97204
Telephone: (503) 598-7070

*Attorneys for Defendant-Relator City
of West Linn*

Jacob A. Zahniser, OSB #085210
jacob.zahniser@millernash.com
Erica A. Clausen, OSB #170902
erica.clausen@millernash.com
Ian M. Christy, OSB #160116
ian.christy@millernash.com
MILLER NASH LLP
1140 SW Washington St, Ste 700
Portland OR 97205
Telephone: 503-205-2352

*Attorneys for Plaintiff-Adverse Party
West Linn-Wilsonville School District
3JT*

I. ORAP 7.35 MOTION FOR EMERGENCY RELIEF

The City of West Linn (“Relator”) submits the following Emergency Motion to Stay (“*Motion*”) the Trial Court proceedings below pursuant to ORAP 7.35 and ORAP 11.05(2)(e). Contemporaneous with this *Motion*, Relator has filed a *Petition for Alternative Writ of Mandamus*, and supporting documents. A two-week jury trial is scheduled to commence on Monday, August 12, 2024. The mandamus petition pertains to the make-up of the jury venire.

Pursuant to ORAP 7.35(2), counsel for plaintiff-adverse party West Linn-Wilsonville School District 3JT (“Adverse Party”) has been notified of the intended filing of this *Motion* and a request for the Adverse Party’s position on the *Motion* was made. The Adverse Party opposes this *Motion*.

On July 31, 2024, the Trial Court issued a ruling excluding all residents from the City of West Linn from the jury venire. On August 6, 2024, Relator filed a motion to stay the trial proceedings in anticipation of filing of the mandamus petition filed herewith. *See Exhibit 1 attached hereto.* On August 7, 2024, the Trial Court issued a second ruling which, *inter alia*, denied Relator’s motion to stay the trial proceedings. *See Exhibit 2 attached hereto.*

The relief requested in this *Motion* seeks action by this Court no later than the morning of August 12, 2024, before the trial is set to begin.

This *Motion* is supported by the *Petition for Alternative Writ of Mandamus*, supporting *Memorandum*, and *Excerpts of Record* filed contemporaneously herewith. This *Motion* is further supported by the records and files of the Trial Court in *West Linn-Wilsonville School District 3JT v. the City of West Linn, Oregon*, Clackamas County Case No. No. 22CV06982.

DATED: August 8, 2024.

JORDAN RAMIS PC
Attorneys for Defendant-Relator City of
West Linn

By: *s/ David H. Bowser*

David H. Bowser, OSB #012098

david.bowser@jordanramis.com

Christopher K. Dolan, OSB #922821

chris.dolan@jordanramis.com

1
2
3
4
5
6
7
8
9
10
11
12

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF CLACKAMAS

WEST LINN-WILSONVILLE SCHOOL
DISTRICT 3JT, a political subdivision of the
State of Oregon,

Plaintiff,

v.

THE CITY OF WEST LINN, OREGON, a
municipal entity,

Defendant.

Case No. 22CV06982

**DEFENDANT’S MOTION FOR
RECONSIDERATION
RE: JURY VENIRE**

DEFENDANT’S MOTION TO STAY

Assigned Trial Judge: Hon. Susie L. Norby

***(EXPEDITED ORAL ARGUMENT
REQUESTED)***

UTCR 5.050 ORAL ARGUMENT REQUESTED

Pursuant to UTCR 5.05, defendant City of West Linn (“City” or “West Linn”) respectfully requests an expedited oral argument on its motions as trial in this matter is currently scheduled to begin August 12, 2024. Counsel estimates that 15 minutes will be required to hear the motions.

MOTION FOR RECONSIDERATION

On July 31, 2024, the Court issued its ruling on Plaintiff’s first Motion in Limine (“Motion No. 1”) to exclude all residents from the City from the jury venire for cause. The Court granted the City’s motion, although for reasons not advanced by the District, and which were not briefed by either party. The Court, instead, identified a “reputational issue.” Because the City did not have an opportunity to brief the merits of the District’s motion on the “reputational issue,” the City respectfully requests that the Court consider the City’s position set forth below in reconsideration of its ruling.

1 ORS 10.030(1) provides:

2 Except as otherwise specifically provided by statute, *the*
3 *opportunity for jury service may not be denied* or limited on the
4 basis of race, religion, sex, sexual orientation, gender identity,
5 national origin, age, *income*, occupation or any other factor that
6 discriminates against a cognizable group in this state.

7 (Emphasis added.) Here, the Court found in pertinent part:

8 [T]here are two municipalities in Clackamas County that are
9 reputationally predominant. Lake Oswego is one, and West Linn
10 is the other. *These two cities have the most affluent populations,*
11 *the highest property values,* and the most desirable municipal
12 amenities. Residing in one of these two cities is *a measure of*
13 *personal success*, something to brag about. *These characteristics*
14 *further distinguish West Linn’s residents from residents of less*
15 *prestigious municipalities.* The *elevated status* that people derive
16 from being part of the West Linn community typically becomes a
17 part of their identities, [and] as such would predictably skew their
18 discernment when evaluating accusations of misconduct by their
19 chosen City.

20 (Emphasis added.)

21 While the Court did not expressly indicate that the City’s residents’ “income” was the
22 basis for its ruling, by referring specifically to the City’s “affluent” residents, “highest property
23 values,” “personal success,” and contrasting them with those “less prestigious municipalities,”
24 the “income” level of the residents of the City is nonetheless inextricably connected as to *why*
25 the Court believed that the West Linn’s residents could not be impartial in this proceeding and
26 should be excluded from juror service. In effect, “income” is the foundational basis for the
27 Court’s decision. This is prohibited by ORS 10.030(1).

28 ///

29 ///

30 ///

31 ///

1 In addition, the Court made its decision in a factual vacuum based upon the lack of any
2 briefing. For example, the Court’s opinion excludes lower and middle income Oregonians from
3 participation in our judicial process. For example, according to online census data¹ regarding
4 household income, the percentage of West Linn residents making less than \$10,000 per year is
5 4.3%, while the percentage for Clackamas County is 3.3%, Oregon is 4.4%, the Portland
6 Vancouver Metro Area is 3.7%. These are comparable numbers. For \$10,000-14,999, West
7 Linn residents is 1.8%, while the percentage for Clackamas County is 2.2%, Oregon is 3.5%, the
8 Portland Vancouver Metro Area is 2.8%. These are comparable numbers. For \$15,000-19,999,
9 West Linn residents is 2.2%, while the percentage for Clackamas County is 2.3%, Oregon is
10 3.3%, the Portland Vancouver Metro Area is 2.5%. These are comparable numbers. For
11 \$35,000-39,999, West Linn residents is 2.4%, while the percentage for Clackamas County is
12 2.5%, Oregon is 3.6%, the Portland Vancouver Metro Area is 3%. These are comparable
13 numbers. For \$40,000-44,999, West Linn residents is 2.8%, while the percentage for Clackamas
14 County is 2.8%, Oregon is 3.7%, the Portland Vancouver Metro Area is 3%. These are
15 comparable numbers. For \$45,000-44,999, West Linn residents is 2.8%, while the percentage
16 for Clackamas County is 3.2%, Oregon is 3.5%, the Portland Vancouver Metro Area is 3.1%.
17 These are comparable numbers. For \$45,000-44,999, West Linn residents is 2.8%, while the
18 percentage for Clackamas County is 3.2%, Oregon is 3.5%, the Portland Vancouver Metro Area
19 is 3.1%. These are comparable numbers. For \$60,000-74,999, West Linn residents is 5.5%,
20 while the percentage for Clackamas County is 8.7%, Oregon is 9.5%, the Portland Vancouver
21 Metro Area is 8.9%. These are comparable numbers. For \$75,000-99,999, West Linn residents
22 is 9.6%, while the percentage for Clackamas County is 12.9%, Oregon is 13.4%, the Portland
23 Vancouver Metro Area is 13.3%. These are comparable numbers. The Court’s unilateral
24 designation of all of these “regular” Oregonians as “affluent” residents with the “highest
25

26

¹ <https://censusreporter.org/> (as of 8/6/24).

1 property values” who have all achieved great “personal success” has denied these regular
2 Oregonians of the opportunity to perform jury service, and is a violation of ORS 10.030(1). The
3 opinion tells these Oregonians that “you are not a peer.” West Linn is a highly economic
4 diverse municipality. Treating all West Linn citizens as if they are in the upper 1% based upon
5 “reputation,” when census data shows a much more diverse economic population, is incorrect
6 when actual data is consulted. These regular Oregonians deserve to be given the opportunity to
7 participate in our legal process. They are peers and deserve to be included in the jury pool.

8 In addition, the Court’s opinion that the City of West Linn has the most desirable
9 municipal amenities is subject to evidence to the contrary. As just a single example, the City
10 does not even have a recreation center. The City has many unfunded capital improvements.²
11 The City of West Linn has just as many economic woes as other typical Oregon municipalities.

12 With the above contrary facts set forth, the wise words of the Court of Appeals become
13 relevant to this issue:

14 While it is often said that the determination of the existence of actual
15 bias is one of fact for the discretion of the trial judge, see, e.g., *State v.*
16 *Dixon*, 5 Or.App. 113, 124, 481 P.2d 629, rev. den. (1971), cert. den.,
17 404 U.S. 1024, 92 S.Ct. 690, 30 L.Ed.2d 674 (1972), the exercise of
18 discretion must be according to legal principles. The statute speaks in
19 the negative, purportedly requiring acceptance of the juror unless the
20 court is satisfied that the juror “cannot” be impartial. A literal
21 application of the statute would reject a juror who was certainly partial
22 but allow a juror who was only probably impartial. The statute is not so
23 absolute rather the test is one of probabilities. As the Supreme Court said
24 in *Mount v. Welsh et al.*, 118 Or. 568, 578, 247 P. 815, 819 (1926):
25 “Again: The test of a juror's disqualification is the probability of interest,
26 prejudice or bias, as determined by the court's application of his judicial
knowledge to the facts of the particular case * * * .”
The probability which will require excuse of a juror for actual bias is
that his knowledge or attitude will affect the process by which he finds
the facts. As the Supreme Court said in *State v. Humphrey*, 63 Or. 540,
548, 128 P. 824, 827 (1912): “ * * * It is only when it is such a fixed
attitude of mind that it would control his actions in some appreciable
degree when he assumes the new relation of a trier of the fact involved

2

https://westlinnoregon.gov/sites/default/files/fileattachments/finance/page/7208/2024_2029_6_year_cip_-_final.pdf (as of 8/6/24).

1 in litigation that such a mental state will disqualify him. * * *

2 *Lane Cnty. v. Walker*, 30 Or App 715, 721 (1977) (Emphasis added.). Any City resident called
3 to serve as a potential juror is entitled to show that they are not of such fixed mind as to be
4 categorically excluded. The City also requests the Court consider the wise words offered by the
5 Oregon Supreme Court:

6 The rule laid down by this distinguished jurist in a trial which at the time
7 attracted universal attention has become substantially the settled law of
8 this country, and it is now generally considered that, if the juror's opinion
9 will “readily yield” to the evidence presented in the case, he is not
10 incompetent to sit upon the trial of the issue. As to when the opinion is of
11 such a character that it will not “readily yield” to the evidence produced,
12 the law in this country is in such a state of confusion that no success can
13 be hoped for in reconciling conflicting opinions or arraying the decisions
14 in logical order. Expressed in the varying terms of judicial utterances, the
opinion or impression concerning the merits of the cause on trial which
disqualifies a person called as a juror must be a “fixed,” “absolute,”
“positive,” “definite,” “decided,” “substantial,” “deliberate,”
“unconditional” opinion. The rule is almost universally laid down by these
words, or words of similar import. A “conditional,” “hypothetical,”
“contingent,” “intermediate,” “floating,” “indefinite,” “uncertain” opinion
will not do.

15 *Kumli v. S. Pac. Co.*, 21 Or 505, 507–08 (1892) (Emphasis added.). Depriving an entire
16 community of the right to jury service, and by extension, the right of the parties to have a jury of
17 their peers, is extraordinary. The City believes it is unwarranted. As the Supreme Court held
18 previously, “[t]he financial interest of a juror arising solely from status as a taxpayer or resident
19 alone normally is too remote and minute to affect his innate sense of justice and fairness to all
20 parties concerned.” *Sanders*, 294 Or. 195 at 200 (Emphasis added.). Here, there is no evidence
21 in the record supporting a conclusion to the contrary that amounts to an impermissible per se
22 exclusion of all West Linn residents based on their income and resident status.

23 Here, the reason advanced by the Court for excluding all City residents is, at best,
24 hypothetical, unsupported by the record, and contingent upon social status as determined by
25 income. That is legally insufficient to exclude all City residents. Every City resident has a right
26 to demonstrate that they are not even in that social status, or even if they are, that they are open

1 to reviewing the evidence in an impartial manner. The Court’s unilateral exclusion deprives the
2 City residents of this opportunity.

3 Based on the foregoing, the City request that the Court reconsider its ruling and allow
4 City residents to be included in the jury venire.

5 **MOTION TO STAY**

6 The City, if the motion for reconsideration is not granted, plans to file a petition for
7 mandamus with the Oregon Supreme Court and request a stay. The City, by this motion, gives
8 this Court the opportunity to reconsider this action before such is done. If the Court denies
9 reconsideration, the City respectfully requests that the Court stay this matter until the mandamus
10 process is complete. ORS 34.130(5) provides that the Court may in its discretion grant a stay for
11 a mandamus proceeding. This will avoid the risk of incurring the substantial expenses for the
12 Court and both parties of proceeding with a two week jury trial where the legality of the
13 composition of the jury pool is in question. It makes sense to not go forward until this
14 foundational issue is resolved. For the foregoing reasons, the City, if the motion to reconsider is
15 not granted or is denied, respectfully moves to stay this matter until the jury pool issue is
16 resolved.

17 DATED this 6th day of August, 2024.

18 JORDAN RAMIS PC
19 Attorneys for Defendant the City of West Linn

20
21 By: s/ David H. Bowser
22 Christopher K. Dolan, OSB #922821
23 chris.dolan@jordanramis.com
24 David H. Bowser, OSB #012098
25 david.bowser@jordanramis.com

26 Trial Attorney: David H. Bowser, OSB #012098

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on the date shown below, I served a true and correct copy of the
3 foregoing DEFENDANT’S MOTION FOR RECONSIDERATION RE: JURY VENIRE on:

4 Jacob A. Zahniser, OSB #085210
5 Erica A. Clausen, OSB #170902
6 Ian M. Christy, OSB #160116
7 Miller Nash LLP
8 1140 SW Washington St, Ste 700
9 Portland OR 97205
10 Phone 503 205-2352
11 jacob.zahniser@millernash.com
12 erica.clausen@millernash.com
13 ian.christy@millernash.com
14 cc: rayna.keller@millernash.com
15 cc: alison.donin@millernash.com
16 cc: brandon.rueda@millernash.com

17 *Of Attorneys for Plaintiff West Linn-Wilsonville*
18 *School District 3JT*

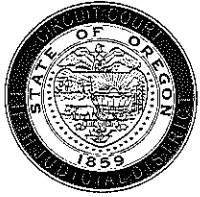
19 ***EMAIL SERVICE AGREEMENT**

- 20 by first class mail, postage prepaid.
21 by overnight mail.
22 by hand delivery.
23 by facsimile transmission.
24 by facsimile transmission and first class mail, postage prepaid.
25 by electronic transmission.
26 by electronic transmission and first class mail, postage prepaid.

DATED: August 6, 2024.

s/ David H. Bowser

Christopher K. Dolan, OSB #922821
chris.dolan@jordanramis.com
David H. Bowser, OSB #012098
david.bowser@jordanramis.com
Attorneys for Defendant the City of West
Linn



CIRCUIT COURT OF OREGON

FIFTH JUDICIAL DISTRICT
CLACKAMAS COUNTY COURTHOUSE
807 MAIN STREET, ROOM 301
OREGON CITY, OREGON 97045

Susie L. Norby
Circuit Court Judge

(503) 650-8902
FAX (503) 650-8909

August 6, 2024

Erica A. Clausen
Ian Christy
Miller Nash LLP
US Bancorp Tower
111 SW Fifth Ave., Ste. 3400
Portland, OR 97204
erica.clausen@millernash.com
ian.christy@millernash.com
Attorneys for Plaintiff West Linn-Wilsonville School District

Christopher Dolan
David H. Bowser
Jordan Ramis PC
Attorneys at Law
1211 SW Fifth Avenue, 27th Floor
Portland, Oregon 97204
chris.dolan@jordanramis.com
david.bowser@jordanramis.com
Attorneys for Defendant City of West Linn, Oregon

RE: West Linn – Wilsonville School District 3JT v. City of West Linn, Oregon
Clackamas County Circuit Court Case No. 22CV06982

Greetings:

The City filed a Motion for Reconsideration of this court's ruling to exclude West Linn residents from the jury venire. This letter explains the reconsideration given and reiterates the ruling that was made.

West Linn's strenuous defense of inclusion of West Linn residents in the jury venire underscores the basis of the ruling. West Linn argues that the ruling is a statement to West Linn residents that "you are not a peer." To the contrary, the ruling is a recognition that West Linn residents are peers to such a degree that it leaves them little room for objectivity. The City incorrectly identifies the core of the court's decision as the affluence of individual West Linn residents. That interpretation is superficial, and inaccurate. The court specifically found that: "Residing in [West Linn] is a measure of personal success, something to brag about. ... The elevated status that people derive from being part of the West Linn community typically becomes a part of their identities, and as such would predictably skew their discernment when evaluating accusations of misconduct by their chosen City." The issue is that residents identify



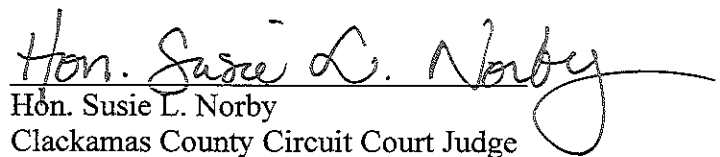
with this particular city to a heightened degree, not because of their incomes, but because the city's many fine attributes¹ inspire a level of loyalty in residents that becomes part of their identity, more so than most cities and geographical areas, creating a high probability of bias, which need not be admitted in voir dire in order to exist.

This court frequently hears attorneys use an example to explore bias with potential jurors in voir dire. They remark that if a juror is a loyal fan of a team like the Dallas Cowboys, then they "probably wouldn't be right for a jury in a case against their team." They follow that up with questions about whether the juror thinks they have a bias for one party or another. This is the specific issue that propelled the court's ruling. Based on 30+ years of personal experience in Clackamas County, and having lived in West Linn and elsewhere, my experience and common sense inform my knowledge of the attraction that people have to this particular city, and the pride that residents take in it. It is not their mere address that gave rise to the exclusion. It is the unique connection that arises in West Linn residents, that is unmatched in most other cities and geographical areas.

Even if the exclusion was connected to individual jurors' affluence, which it emphatically is not, affluence is not a protected class under the law. The City's argument that affluence creates a class that must be protected from discrimination under ORS 10.030(1) is antithetical to the concept of, and need for, true protected classes of people.

The City indicates that it believes it has standing to defend the rights of various unknown potential jurors to serve in the venire. The City further presumes that individual West Linn residents are keen for "the opportunity" to serve on this particular jury. The court doubts the probability of the former but concedes the likelihood of the latter. It is that very enthusiasm that underlies the court's decision to exclude them, in the interest of promoting fairness throughout this trial. But it is difficult to ascertain a legal path to vest a party with standing to defend the perceived desire for unknown potential jurors to perform their service.

This court has considered the arguments made in the City's Motion to Reconsider, to the extent described in this Letter Opinion. The City's request to reinstate West Linn residents as part of the jury venire is denied. Residents of the City of West Linn remain excluded from the jury venire, based on the probability of bias in favor of the City, as explained in the court's earlier opinion. The City's request to "stay this matter until the jury pool issue is resolved" by mandamus is denied. The trial will begin as scheduled, in less than a week.


Hon. Susie L. Norby
Clackamas County Circuit Court Judge

¹ There are more fine attributes than the court listed in the original Letter Opinion. West Linn is a city of beauty, located on the river, with beautiful old growth trees and enviable landscapes throughout. It has quaint shops, rolling hills, excellent schools, minimal crime and friendly neighborhoods. It is agreed that not everyone who lives in West Linn is personally affluent, but it is safe to say that everyone who lives in West Linn is proud to live there.

CERTIFICATE OF FILING AND SERVICE

I certify that I electronically filed this Motion to Stay-Trial Court Proceedings with the Appellate Court Administrator on this date.

I certify that service of a copy of this Motion to Stay-Trial Court Proceedings will be accomplished on the following participant in this case, who is a registered user of the appellate courts' eFiling system, by the appellate courts' eFiling system at the participant's email address as recorded this date in the appellate eFiling system.

Jacob A. Zahniser, OSB #085210
Erica A. Clausen, OSB #170902
Ian M. Christy, OSB #160116
Miller Nash LLP
1140 SW Washington St, Ste 700
Portland OR 97205
Phone: 503-205-2352
jacob.zahniser@millernash.com
erica.clausen@millernash.com
ian.christy@millernash.com

Of Attorneys for Plaintiff West Linn-Wilsonville School District 3JT

DATED: August 8, 2024.

JORDAN RAMIS PC
Attorneys for Defendant-Relator City of West
Linn

By: *s/ David H. Bowser*

David H. Bowser, OSB #012098
Christopher K. Dolan, OSB #922821