Laura Terway

From: Denyse MCGRIFF <guttmcg@msn.com>
Sent: Wednesday, July 31, 2019 1:27 AM
To: Laura Terway
Subject: Fee list

My suggestions for some of the fees:

Appeal: Historic Review Board- $250
Appeal: Planning Commission- $1, 000 /$1,500
Master plan- $5,000
Mailing labels $20- $25
Non-conforming use review-- $250
Conditional use permit- $1,500
Demolition- Historic Review- this should also be a disincentive- $500/ $1,000

Tree replacement- should be the same as what Public Works charges- this fee should be a disincentive to cut down trees

I may have more…

Sent from Mail for Windows 10

Kattie Riggs

From: Rachel Lyles Smith
Sent: Tuesday, July 16, 2019 9:43 PM
To: Kattie Riggs
Cc: Tony Konkol
Subject: comments for public record; 7/17/19 City Commission Mtg

Kattie,

Please enter this email into the public record for the July 17, 2019 City Commission meeting and distribute a copy of these comments to the Mayor and my fellow Commissioners. I would like to submit these comments so that the Commission may take them into consideration in my absence tomorrow night.

Item 7c. 19-432 Modification of Planning Division Fee Schedule
Following our July 9th work session, I reached out to the Finance Manager, Wyatt Parno, regarding the use of planning fees as a revenue source and their role in the City's budget. I think it is important for the public to know that the fees are used to pay staff salaries for planning services. These staff are those that are needed to review land use applications, permits, and public hearings. "We are dependent on the fees to pay for staff doing the work." These fees are not "extra revenue" that are used for discretionary items and the fees are not used to build a "slush fund" for the City's use.

However, I think it is important that the City employ a reasonable fee structure and that the fees do not become a deterrent for our residents to appeal a decision. With that said, I believe that the significant increase in the Historic Review Board appeal fee and the Planning Commission appeal fee will be a barrier to residents and their ability to appeal a decision. The appeal process is already what some would consider an "arduous process" for the average citizen, and a several thousand dollar fee is just another impediment to the public process.

Therefore, I do not support the change in the Historic Review Board (HRB) appeal fee from $50 to $6,460. I also do not support the change in the Planning Commission appeal fee from $3,763 plus attorney fees, to a flat rate of $10,477.

Because I believe it is important that I contribute to the likely discussion that will occur and provide alternative amounts to the proposed fees that I don't agree with, I propose the following:

- the HRB appeal fee should be much lower - $250, similar to the Administrative appeal.
- the Planning Commission appeal fee should be no higher than the flat fee of $3,763, but I would prefer for it to be lower ($1,500 - $2,500). For comparison, the City of Beaverton's fee is $2,134.

Item 8i. 19-440 Settlement Agreement Between Mr. Williams, Mr. O'Brien and the City of Oregon City, the Oregon City Urban Renewal Commission and the Elections Officer for the City of Oregon City
I have reviewed the staff report, the proposed settlement agreement, and the letter from Mr. Buss dated July 15, 2019. I recognize that the amount of the settlement has changed as a result of Mr. Buss's letter, but I remain committed to the settlement and believe it is in the best interest of the City to continue with this course of action and to approve the proposed settlement agreement. I appreciate Mr. Williams' and Mr. O'Brien's recognition that the Commission was attempting to settle the specified dispute prior to the recent Court of Appeals decision, and their continued desire to settle the specified dispute.

Best Regards,

Rachel Lyles Smith

I was in the audience at City Hall on July 9th while the City Commission was discussing the proposed $10,000 fee to appeal a Planning Commission decision to the City Commission. I respectfully request that these comments be placed into the record for consideration by the City Commission at its July 17th meeting on the matter.

1) Laura Terway suggested that the fee was ok because the neighborhood associations can appeal without the fee. That does not solve the problem, and creates others. It is very easy for developers to hijack a neighborhood association. My neighborhood association, the Canemah Neighborhood Association, has been taken over by development interests, led by the Baysingers. Because of that, I would never be able to challenge a development's Planning Commission approval by getting a fee waiver via the CNA. Dan Fowler rather easily hijacked the McLoughlin Neighborhood Association after it voted to appeal his Abernethy Place Hotel. He stacked the next meeting with his friends and got the vote overturned. Jim Nicita got stuck with an $8,000 appeal fee because of that. That was unfair for a number of reasons, not the least of which is that Nicita essentially subsidized the appeal of the other 13 people who originally wanted to appeal, but who either could not afford, or were afraid, to pursue the appeal: that was a rather ugly expression of raw power on Fowler's part. Years ago, the Park Place Neighborhood Association was hijacked by development interests over The Rivers Mall. A high, unaffordable appeal fee for individuals and free appeals for neighborhood associations simply serves to tear a neighborhood association apart over the fee waiver prize.

2) Some might also make excuses for the high appeal fee because there is a fee waiver for individuals provided in OCMC 17.50.290(C). But that provision does not promote fairness at all, because it is basically without any standards by which to review a fee waiver request. A rich person that that City Commission loves can get a fee waiver. A poor person that the City Commission does not like will not get a fee waiver. The provision is arbitrary and driven by politics.

3) I would like to ask Commissioners to beware of falling into a psychological trap set by the proposed $10,000 appeal fee. I recall one figure, $3,900, being floated as a possible fee after a number of Commissioners expressed concern about the $10,000. $3,900 might look good in comparison to an absurd figure of $10,000, but that is exactly the trap. $3,900 is not good. It's outrageous. I can't even remotely afford $3,900, and neither can 99.9% of the people in Oregon City. Where is the evidence that this number reflects the "actual" or "average" cost of such appeals? Why is it "reasonable," when you have West Linn charging only $400 for such appeals, and West Linn neighborhood associations can get a waiver of that small fee to boot?

4) I ask the Commission to give very close attention as to whether such high fees as the current PC to CC appeal fee, to say nothing of a $10,000 fee, is unconstitutional. For example, our state constitution Article I Section 10 says we are guaranteed justice "without purchase." The fee staff wants to impose sure seems like you will only get justice if you can purchase it. I can't get to LUBA if I don't first appeal to the

City Commission, and I can't afford to do that. Why on earth should it cost $10,000 to appeal to the City Commission when LUBA only charges $450. The City would be blocking the door to LUBA and the Court of Appeals. Rich people can afford to buy justice. I can't.

ENTERED INTO THE RECORD
DATE RECEIVED: 7/17/19
SUBMITTED BY: Barbara Renken
SUBJECT: Item # 7C

2019 On new fees

Good Evening,

Barbara Renken, resident of Park Place Neighborhood, Oregon City.

After watching the City Work Session July 9, 2019 I would like to share my thoughts on the subject of appeals and the fee schedule suggested by Staff.

First a bit of background for those new to the commission, I served for two, two year terms on the Citizens Involvement Committee, as a member and as secretary. I was also a member of the Public Involvement Plan in 2016 which was formed by Laura Terway to establish goals to create more interest, enthusiasm and involvement in local neighborhoods of Oregon City. All participating in the plan shared the uniqueness of their neighborhood and it's involvement or lack of. One thing almost every neighborhood had in common was a sense that the staff really wasn't listening to the citizens feelings, comments and concerns. There was little or no feedback from staff addressing those issues. The 'plan' moved ahead to the City Commission and was voted on. Consequently even in Park Place, participation at General Meetings has fallen off, because of this. Several times in the past, our neighborhood has had 40-50 people expressing their concerns at Planning and City Commission meetings, with little feedback unless one or two individuals contacted a staff member directly.

I really felt the Public Involvement Plan (PIP) would resolve some of those issues and was enthusiastic about it. As it turns out I was mistaken. What appears to have resulted is that the Staff is more focused on moving forward with plans as presented at CIC meetings, without citizen resolution or reconciliation and the citizens have become less involved due to lack of support for their concerns. Even CIC attendance is down. 'No One is Listening to Us'.

To charge an outrageous fee that few if any can afford to defend their right as a citizen will be yet another obstacle in gaining the confidence of the citizens. Oregon City homeowners already pay some of the highest taxes in the State. The city staff has three pages of fees already being charged for various improvements/modifications, not to mention various Bonds in the process of being paid.

I hope you're listening. You know what I'm talking about. You live here, many of the Staff do not. You are a citizen representing your fellow citizens..

Thank you,
Barbara Renken
Park Place, Oregon City

July 17, 2019

Kattie Riggs

From: Paul Edgar <pauloedgar@q.com>
Sent: Monday, July 15, 2019 8:17 AM
To: Kattie Riggs; Laura Terway
Subject: Friends of Canemah is asking for a continuance on Resolution No. 19-29

Friends of Canemah are asking for a continuance on this proposed Resolution to a future date.

We would like to invite each member of the City Commission to come to the site and let independent people take you through your own visual review of what this fence represents.

It is in violation of OCMC 17-40 Fence Standards, where a Stockade Style Fence is "Prohibited".

We want to have members of the City Commission to validate the safety consideration of "Obstruction of View" that a 6' Foot High Fence represents built approximately 12' Feet into Ganong Street ROW represents.

7b. 19-391 Resolution No. 19-29,

Revocable Long-Term Obstruction in the Right-of-Way at 302 3rd Avenue Sponsors:

Public Works Director John Lewis Staff Report Resolution No. 19-29

Photo exhibits around 302 3rd Avenue Motion Made by TAC 9-18-18

John Replinger Recommendation / MUTCD McLoughlin to Canemah Trail drawing excerpt.

Paul Edgar, Friends of Canemah

Kattie Riggs

From: James Nicita <james.nicita@gmail.com>
Sent: Wednesday, July 17, 2019 3:42 PM
To: Laura Terway; Kattie Riggs
Cc: Patti Webb; pauloedgar@q.com; Karla Laws
Subject: Fwd: Share 'PattiComments.docx'
Attachments: PattiComments.docx

Laura,

A quick follow-up to Ms. Webb's email to you. I assisted her in the preparation of her comments that are attached to her email, and that are attached to this email as well. They are intended for submittal into the record of Item No. 7c on tonight's City Commission agenda, "Modification of Planning Division Fee Schedule." File No. 19-432.

Thank you.

James Nicita
Attorney at Law
302 Bluff Street
Oregon City, OR 97045
p) 503-799-0725
e) james.nicita@gmail.com

---------- Forwarded message ---------
From: **patti webb** <pdqboxerrescue@yahoo.com>
Date: Wed, Jul 17, 2019 at 2:49 PM
Subject: Share 'PattiComments.docx'
To: lterway@orcity org <lterway@orcity.org>, pauloedgar@q.com <pauloedgar@q.com>, Jim Nicita - Home/office <james.nicita@gmail.com>, karla laws@gmail. com <karla.laws@gmail.com>

I was in the audience at City Hall on July 9th while the City Commission was discussing the proposed $10,000 fee to appeal a Planning Commission decision to the City Commission. I respectfully request that these comments be placed into the record for consideration by the City Commission at its July 17th meeting on the matter.

1) Laura Terway suggested that the fee was ok because the neighborhood associations can appeal without the fee. That does not solve the problem, and creates others. It is very easy for developers to hijack a neighborhood association. My neighborhood association, the Canemah Neighborhood Association, has been taken over by development interests, led by the Baysingers. Because of that, I would never be able to challenge a development's Planning Commission approval by getting a fee waiver via the CNA. Dan Fowler rather easily hijacked the McLoughlin Neighborhood Association after it voted to appeal his Abernethy Place Hotel. He stacked the next meeting with his friends and got the vote overturned. Jim Nicita got stuck with an $8,000 appeal fee because of that. That was unfair for a number of reasons, not the least of which is that Nicita essentially subsidized the appeal of the other 13 people who originally wanted to appeal, but who either could not afford, or were afraid, to pursue the appeal: that was a rather ugly expression of raw power on Fowler's part. Years ago, the Park Place Neighborhood Association was hijacked by development interests over The Rivers Mall. A high, unaffordable appeal fee for individuals and free appeals for neighborhood associations simply serves to tear a neighborhood association apart over the fee waiver prize.

2) Some might also make excuses for the high appeal fee because there is a fee waiver for individuals provided in OCMC 17.50.290(C). But that provision does not promote fairness at all, because it is basically without any standards by which to review a fee waiver request. A rich person that that City Commission loves can get a fee waiver. A poor person that the City Commission does not like will not get a fee waiver. The provision is arbitrary and driven by politics.

3) I would like to ask Commissioners to beware of falling into a psychological trap set by the proposed $10,000 appeal fee. I recall one figure, $3,900, being floated as a possible fee after a number of Commissioners expressed concern about the $10,000. $3,900 might look good in comparison to an absurd figure of $10,000, but that is exactly the trap. $3,900 is not good. It's outrageous. I can't even remotely afford $3,900, and neither can 99.9% of the people in Oregon City. Where is the evidence that this number reflects the "actual" or "average" cost of such appeals? Why is it "reasonable," when you have West Linn charging only $400 for such appeals, and West Linn neighborhood associations can get a waiver of that small fee to boot?

4) I ask the Commission to give very close attention as to whether such high fees as the current PC to CC appeal fee, to say nothing of a $10,000 fee, is unconstitutional. For example, our state constitution Article I Section 10 says we are guaranteed justice "without purchase." The fee staff wants to impose sure seems like you will only get justice if you can purchase it. I can't get to LUBA if I don't first appeal to the

City Commission, and I can't afford to do that. Why on earth should it cost $10,000 to appeal to the City Commission when LUBA only charges $450. The City would be blocking the door to LUBA and the Court of Appeals. Rich people can afford to buy justice. I can't.

Kattie Riggs

Subject: FW: request to submit a document

Begin forwarded message:

From: CATHY HENDRIX <cathyhendrix@msn.com>
Date: July 15, 2019 at 5:41:14 PM PDT
To: "lterway@orcity.org" <lterway@orcity.org>
Subject: request to submit a document

Hi Laura,
I am a citizen of Oregon City and I would like to submit a document into the record for the hearing this Wednesday pertaining to the fee schedule. I feel as though the new raised fees are a detriment to our rights as citizens to be able to fairly exercise our rights. Such high fees are a huge hinderance to our constitutional rights of appeal. I feel as though there should be an exception for low income people who have just as much right as the wealthier citizens to appeal decisions, but are held back because of excessive fees.
Thank you for your consideration,
Cathy Hendrix
Here is a link to the document that I would like submitted into the record:
https://lawecommons.luc.edu/cgi/viewcontent.cgi?article=1458&context=facpubs

The Constitutionality of Government Fees as Applied to the Poor - LAW eCommons

Loyola University Chicago, School of Law LAW eCommons Faculty Publications & Other Works 2013 The Constitutionality of Government Fees as Applied to the Poor

lawecommons.luc.edu

2013

The Constitutionality of Government Fees as Applied to the Poor

Henry Rose
Loyola University Chicago, School of Law, hrose@luc.edu

The Constitutionality of Government Fees as Applied to the Poor

HENRY ROSE[1]

I. INTRODUCTION 293
II. CRIMINAL CASES 294
III. NON-CRIMINAL CONTEXT 295
A. FEES FOR PARTICIPATION IN THE ELECTORAL PROCESS OR RECEIPT OF GOVERNMENT SERVICES 295
B. CIVIL LITIGATION FEES 297
C. *M.L.B. V. S.L.J.* 300
IV. POST-*M.L.B. V. S.L.J.* ANALYSIS OF GOVERNMENT FEES AS APPLIED TO THE POOR 301
V. CONCLUSION 303

In order to be married in Cook County, Illinois, a couple must obtain a marriage license from the Cook County Clerk by paying a $60 marriage license fee.[2] *The marriage license fee will not be waived even if the couple applying for the license cannot afford to pay it.*[3]

Assume a couple who desires to marry in Cook County but cannot afford to pay the marriage license fee sues the county clerk arguing that the nonwaivable fee prevents them from getting married and, therefore, violates their rights under the Fourteenth Amendment to the U.S. Constitution. What standards would the courts apply to decide this important constitutional question?

I. INTRODUCTION

The United States Supreme Court has often addressed the issue of the constitutionality of government fees that indigent people cannot afford to pay. This issue has arisen in the context of people involved in both the civil and criminal justice systems as well as government-imposed fees on partic-

1. Henry Rose is a Professor of Law at Loyola University Chicago School of Law, 25 E. Pearson, Chicago, IL 60611-2055, (312) 915-7840, hrose@luc.edu. Professor Rose expresses appreciation to Lindsey Johnson and Fred LeBaron for research assistance and to Heather Figus and Angelina McDaniel for production assistance.

2. *Applying for a Marriage License*, COOK COUNTY CLERK, http://www.cookcountyclerk.com/vitalrecords/marriagelicenses (last visited Jan. 16, 2013).

3. Interview with Kevin Crutcher, Employee, Cook County Clerk (Sept. 6, 2011).

ipation in the electoral process and on the receipt of government services. The most recent decision of the Supreme Court addressing this issue, *M.L.B. v. S.L.J.*,[4] resulted in a lack of clarity about the constitutional standards to be applied to this issue.[5]

The purposes of this Article are to explore the history of United States Supreme Court decisions addressing the issue of the constitutionality of government fees as they apply to indigent persons and to analyze the coherence of the constitutional doctrine that arises from these decisions. The principle focus of the Article will be on how this issue is resolved outside of the criminal justice context. This Article will conclude with suggestions as to how the courts can provide more constitutional clarity to the resolution of this issue in the future.

II. CRIMINAL CASES

The first Supreme Court decision to address the constitutionality of a government fee as applied to the poor was *Griffin v. Illinois*.[6] In *Griffin*, two defendants were tried together and convicted of armed robbery.[7] In order to pursue an appeal of their convictions, the defendants needed to obtain a transcript of the trial proceedings, but they could not afford to pay for it.[8] The defendants' request for a free transcript was denied by the trial court.[9] The defendants argued the failure of the state to provide a free transcript prevented them from seeking appellate review of their convictions and, therefore, violated their due process and equal protection rights under the Fourteenth Amendment to the U.S. Constitution.[10]

Justice Black, writing for three other justices in *Griffin*, framed the issue broadly: "Providing equal justice for poor and rich, weak and powerful alike is an age-old problem. People have never ceased to hope and strive to move closer to that goal."[11] Black traced the goal of equal justice in the administration of criminal laws back to the Magna Carta in 1215.[12]

Black concluded that preventing poor defendants from seeking appellate review of their convictions because they could not afford to pay for transcripts violates due process and equal protection because the defendants

4. M.L.B. v. S.L.J., 519 U.S. 102 (1996).
5. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 755 (8th ed. 2010).
6. Griffin v. Illinois, 351 U.S. 12 (1956).
7. *Id.* at 13.
8. *Id.* at 13-14.
9. *Id.* at 15.
10. *Id.* at 14-15.
11. *Griffin*, 351 U.S. at 16.
12. *Id.* at 16-17.

are discriminated against on account of their poverty.[13] He stated, "Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts."[14]

Justice Frankfurter concurred with Justice Black that the defendants' constitutional rights had been violated.[15] However, Frankfurter asserted that the constitutional right at issue in this case was "equal protection of the laws."[16]

In later cases, the Supreme Court extended *Griffin* to require the waiver of court-filing fees for indigent criminal defendants in other contexts: paying state supreme court docket and filing fees[17] and paying filing fees for habeas corpus petitions.[18] *Griffin* also led to the holding that a state must provide an attorney to an indigent criminal defendant seeking to appeal a conviction as a matter of right.[19] In addition, *Griffin* underlaid the Supreme Court's decision that a criminal defendant who is convicted of a crime cannot be incarcerated beyond the statutory maximum time due to the inability of the defendant to pay a court-imposed fine and court costs.[20]

The Supreme Court has also determined that, unlike some rights of criminal defendants,[21] *Griffin* applies to criminal defendants who are not incarcerated as a result of their criminal convictions. In *Mayer v. City of Chicago*, the Supreme Court extended *Griffin* to require a free appellate transcript for an indigent defendant who had been convicted of violating two city ordinances even though the violations were only punishable by a fine and not by incarceration.[22]

III. NON-CRIMINAL CONTEXT

A. FEES FOR PARTICIPATION IN THE ELECTORAL PROCESS OR RECEIPT OF GOVERNMENT SERVICES

The first time the Supreme Court addressed the constitutionality of a government-imposed fee outside the criminal law context was in *Harper v.*

13. *Id.* at 18.
14. *Id.* at 19.
15. *Id.* at 20.
16. *Griffin*, 351 U.S. at 25.
17. Burns v. Ohio, 360 U.S. 252, 258 (1959).
18. Smith v. Bennett, 365 U.S. 708, 714 (1961).
19. Douglas v. California, 372 U.S. 353, 357-58 (1963).
20. Williams v. Illinois, 399 U.S. 235, 243-44 (1970).
21. For example, no indigent person can be incarcerated after conviction of a crime unless he was offered trial counsel at a state's expense. Argensinger v. Hamlin, 407 U.S. 25, 37 (1972). However, if an indigent person convicted of a crime is not sentenced to a term of imprisonment, the failure of the state to provide counsel at trial is not a constitutional defect. Scott v. Illinois, 440 U.S. 367, 373-74 (1979).
22. Mayer v. City of Chicago, 404 U.S. 189, 198 (1971).

Virginia State Board of Elections.[23] In *Harper*, the State of Virginia imposed a $1.50 poll tax on residents who desired to vote in state elections.[24] The constitutionality of the poll tax was challenged by some Virginians who could not or did not pay it.[25] The Supreme Court held that such a poll tax violated the Equal Protection Clause of the Fourteenth Amendment "whenever it makes the affluence of the voter or payment of any fee an electoral standard."[26] The Court considered the right to vote a fundamental right and any classification that restrained it "must be closely scrutinized and carefully confined."[27] The Virginia poll tax was found to violate equal protection.[28]

The Supreme Court addressed the constitutionality of another government fee that individuals could not afford to pay in *Bullock v. Carter*.[29] In *Bullock*, the plaintiffs sought to be candidates in various county primary elections in Texas but could not afford to pay the candidate filing fees (ranging from $1,000 to $6,300).[30] As a result, they were denied places on the ballot.[31] The plaintiffs challenged, on equal protection grounds, the requirement in Texas that payment of a filing fee is a prerequisite to a candidate's participation in a primary election.[32] The Court recognized the burden of denying candidates a place on the ballot based on their inability to pay a filing fee fell more heavily on potential candidates and voters based on their economic status.[33] As a result, the Court applied strict scrutiny in its equal protection analysis of the fees.[34] The Court concluded that Texas failed to establish the filing fees were necessary to achieve otherwise legitimate objectives and, therefore, they violated equal protection of the laws.[35]

In *Lubin v. Panish*, another case involving access to the ballot, an indigent person challenged a California statute that imposed a $701.60 filing fee to place his name on the ballot in a primary election for county office.[36] The plaintiff was denied nominating papers for the county office because he was unable to pay the filing fee.[37] The Court held that an electoral system

23. Harper v. Va. State Bd. of Elections, 383 U.S. 663 (1966).
24. *Id.* at 668.
25. *Id.*
26. *Id.* at 666.
27. *Id.* at 667.
28. *Harper*, 383 U.S. at 670.
29. Bullock v. Carter, 405 U.S. 134 (1972).
30. *Id.* at 135-36.
31. *Id.* at 136.
32. *Id.* at 141.
33. *Id.* at 144.
34. *Bullock*, 405 U.S. at 144.
35. *Id.* at 149.
36. Lubin v. Panish, 415 U.S. 709 (1974).
37. *Id.* at 711.

that bars a candidate from the ballot solely because he cannot pay a filing fee violates equal protection.[38]

The only Supreme Court decision that addresses a government-imposed fee for the receipt of government services that an indigent person could not pay is *Kadrmas v. Dickinson Public Schools*.[39] In *Kadrmas*, a rural public school district in North Dakota imposed an annual fee of $97 for a child to ride the school district's buses to and from school.[40] The Kadrmas family, who lived sixteen miles from their child's school, could not afford to pay the school bus fee, and the school district buses stopped picking up the Kadrmas' child.[41] Mrs. Kadrmas and her child sued the school district, contending the school bus fee violated their equal protection rights.[42] The Supreme Court concluded that strict scrutiny review was not appropriate because the poor are not a suspect class, and education is not a fundamental right.[43] The Supreme Court held there was a rational basis for the school bus fee because requiring that all children ride free would create a disincentive for a school district to choose to provide bus service at all and, therefore, equal protection was satisfied.[44]

B. CIVIL LITIGATION FEES

In several cases, the Supreme Court has addressed the constitutionality of fees in civil litigation that poor people could not afford to pay. The first case in which this issue was addressed was *Boddie v. Connecticut*.[45] In *Boddie*, welfare recipients filed a class action challenging the state statutory requirement that court fees totaling between $60 and $95 must be paid by plaintiffs before their divorce cases would be heard in Connecticut state courts.[46] The Supreme Court found the marital relationship involves interests that are of basic importance in our society and that the only forum authorized to terminate a marriage are state courts.[47] Given these two factors, the Court held the imposition of fees on the filing of divorce cases violated due process because the fees preempted the plaintiffs' right to dissolve their marriages by the only means the state provided for doing so.[48]

---

38. *Id.* at 718.
39. Kadrmas v. Dickinson Pub. Schs., 487 U.S. 450 (1988).
40. *Id.* at 454.
41. *Id.* at 454-55.
42. *Id.* at 455.
43. *Id.* at 458.
44. *Kadrmas*, 487 U.S. at 461-62.
45. Boddie v. Connecticut, 401 U.S. 371 (1971).
46. *Id.* at 372.
47. *Id.* at 376.
48. *Id.* at 383.

In *United States v. Kras*, the Supreme Court addressed the constitutionality of a $50 filing fee that had to be paid before a petitioner could be discharged in bankruptcy.[49] The petitioner in *Kras* was unable to pay the fee due to his family's impecunious circumstances and, as a result, his bankruptcy discharge was not approved.[50] The Supreme Court distinguished *Kras* from *Boddie*, finding no constitutional interest involved in a discharge in bankruptcy and also finding the bankruptcy process was not the only method available to a debtor to adjust the legal relationship with his creditors.[51] The Court found neither a fundamental right to be involved in a bankruptcy petition[52] nor any suspect class to be affected by the bankruptcy process.[53] Instead, the Court found bankruptcy legislation to be in the area of economics and social welfare, requiring only a rational justification to satisfy equal protection.[54] The Court concluded that there is a rational basis for the bankruptcy filing fees in that they further Congress's objective that the bankruptcy system be self-sustaining and paid for by those who use it rather than by tax revenues drawn from the public.[55]

The logic of *Kras* was followed by the Supreme Court in *Ortwein v. Schwab*.[56] In *Ortwein*, two welfare recipients in Oregon brought appeals to the Oregon Court of Appeals seeking judicial review of administrative decisions of state welfare officials that reduced their welfare benefits.[57] All appellants in the Oregon Court of Appeals were required to pay a $25 filing fee, and both of these appellants were unable to pay the fee.[58] The appellants challenged the imposition of the filing fees on both due process and equal protection grounds.[59] The Supreme Court found that *Kras*, rather than *Boddie*, applied because increased welfare payments do not have the constitutional significance of the marital interests involved in *Boddie*, and the administrative hearings conducted by the state welfare department provided

49. United States v. Kras, 409 U.S. 434 (1973).
50. *Id.* at 438-39.
51. *Id.* at 443-44.
52. *Id.* at 444-45. The author agrees with Justice Marshall, who asserted in his dissent in *Kras* that any indigent person who seeks adjudication of his claim of right under law should have a right of access to the courts because the courts are the exclusive forum for the authoritative resolution of such claims. *Kras*, 409 U.S. at 462-63 (Marshall, J., dissenting). *See also* Gary S. Goodpaster, *The Integration of Equal Protection, Due Process Standards, and the Indigent's Right of Free Access to the Courts*, 56 IOWA L. REV. 223, 225 (1970); Frank I. Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights—Part II*, 1974 DUKE L.J. 527, 567 (1974).
53. *Kras*, 409 U.S. at 445.
54. *Id.*
55. *Id.* at 447.
56. Ortwein v. Schwab, 410 U.S. 656 (1973).
57. *Id.* at 656-57.
58. *Id.* at 658.
59. *Id.* at 656.

the appellants with due process.[60] As in *Kras*, the Court found that welfare benefits are in the area of social welfare, and the applicable equal protection standard is rational justification.[61] The Court concluded the filing fees are imposed to generate revenue to offset the expenses of operating the Oregon court system and, therefore, there was a rational basis for the filing fees that satisfied equal protection.[62]

Little v. Streater involved a due process challenge to a Connecticut statute that provided that, in paternity actions, the cost of blood grouping tests are to be borne by the party requesting them.[63] The appellant was a man against whom a paternity action was brought in Connecticut state court.[64] He requested blood grouping tests be done on the mother and child at state expense because he was indigent; the trial court authorized the tests but denied his request that the state pay for them.[65] The tests were not done and, after trial, the appellant was found to be the child's father and was ordered to pay child support as well as the mother's expenses and attorney's fees.[66] The appellant contended that due process was violated when the trial court denied his request, based on indigency, that the state pay for the blood grouping tests.[67] The Supreme Court acknowledged that blood grouping tests can provide strong exculpatory evidence that a man is not the father of a child.[68] The Court also recognized that Connecticut was a state actor in the paternity case because the child's mother was receiving welfare benefits from the state, and any child support would be paid to the state.[69] Finally, although a paternity action is a civil action, the Court found it has "'quasi-criminal' overtones" because a man found to be a father of a child in a paternity action can be imprisoned if he fails to comply with a child support order entered by the trial court.[70] The Court considered the three factors announced in *Mathews v. Eldridge*[71] to determine whether due process required the blood grouping tests be paid by the state.[72] After considering the

60. *Id.* at 659-60.
61. *Ortwein*, 410 U.S. at 660.
62. *Id.*
63. Little v. Streater, 452 U.S. 1 (1981).
64. *Id.* at 3.
65. *Id.* at 3-4.
66. *Id.* at 4.
67. *Id.* at 5.
68. *Little*, 452 U.S. at 6-8.
69. *Id.* at 9.
70. *Id.* at 10.
71. Mathews v. Eldridge, 424 U.S. 319 (1976). The *Mathews* Court held that in deciding procedural due process issues, courts should evaluate the private interests at stake, the government interests, and the risk of error in the extant procedures as well as the probable value of additional procedures. *Id.* at 334-35.
72. *Little*, 452 U.S. at 13.

Mathews factors, the Court concluded that the due process rights of the indigent appellant were violated when the Connecticut trial court failed to order blood grouping tests at the state's expense.[73]

C. *M.L.B. V. S.L.J.*

The Supreme Court's most recent case involving a government-imposed fee that an indigent person could not pay is *M.L.B. v. S.L.J.*[74] In *M.L.B.*, a mother was sued by the father of her children for termination of her parental rights in Mississippi state court.[75] After trial, the state court judge entered a decree terminating all of the mother's parental rights.[76] The mother desired to appeal the trial court decision, but her appeal was dismissed because she could not afford to pay a $2,352.36 record preparation fee.[77] The mother appealed to the U.S. Supreme Court, contending the denial of her right to appeal within the Mississippi court system violated her right to due process and equal protection of the laws.[78]

The Supreme Court in *M.L.B.* recognized that "providing equal justice for poor and rich" is an "age-old problem."[79] The Court examined the *Griffin* line of cases that guaranteed criminal defendants waiver of fees on appeals of convictions that were a matter of right.[80] This line of cases included *Mayer v. Chicago*,[81] in which appeal costs were waived by the Court for an indigent criminal defendant who was convicted of violating city ordinances that did not involve incarceration as a penalty.[82] The Court followed *Mayer* and held that the mother in *M.L.B.* was constitutionally entitled to appeal the decree terminating her parental rights without paying a fee to produce a record.[83] The Court was strongly influenced by the fact that the lower court's decision permanently terminated M.L.B.'s relationship with her children, and the relationship between a parent and child is constitutionally protected from unwarranted governmental intrusion.[84]

The Court's reasoning in *M.L.B.* is perplexing in several respects. The *M.L.B.* Court relied on the *Griffin-Mayer* line of cases, involving the rights of criminal defendants, even though the Supreme Court has stated that the

73. *Id.* at 16-17.
74. M.L.B. v. S.L.J., 519 U.S. 102 (1996).
75. *Id.* at 107.
76. *Id.* at 107-08.
77. *Id.* at 106.
78. *Id.* at 109.
79. *M.L.B.*, 519 U.S. at 110 (quoting Griffin v. Illinois, 351 U.S. 12, 16 (1956)).
80. *Id.* at 110-13.
81. Mayer v. City of Chicago, 404 U.S. 189 (1971).
82. *M.L.B.*, 519 U.S. at 111-12.
83. *Id.* at 107, 111, 120-23, 125, 128.
84. *Id.* at 116.

principles announced in these cases should only be applied in criminal cases and not more generally.[85] Thus, the *Griffin-Mayer* line of cases has limited applicability outside of a criminal context to a civil case involving the termination of parental rights.

The Court in *M.L.B.* also recognized the *Griffin-Mayer* line of cases reflects both due process and equal protection concerns.[86] However, the *Griffin-Mayer* line of cases does not follow the traditional principles of equal protection[87] and procedural due process[88] that are normally applied in non-criminal cases. The *M.L.B.* Court concluded the equal protection concern is paramount because it focuses on "fencing out would-be appellants based solely on their ability to pay core costs."[89] The *M.L.B.* Court adopted a balancing test to decide the issue before it: "[W]e inspect the character and intensity of the individual interest at stake, on the one hand, and the State's justification for its exaction, on the other."[90] However, this balancing test is not consistent with the normal equal protection analysis that the Court has developed in other non-criminal cases.[91] Moreover, the precedent that the Court in *M.L.B.* found most persuasive, *Mayer v. Chicago*, rejected a balancing of the indigent accused's interests with the state's interests.[92]

IV. POST-*M.L.B. V. S.L.J.* ANALYSIS OF GOVERNMENT FEES AS APPLIED TO THE POOR

In *M.L.B. v. S.L.J.*, the Supreme Court took a wrong turn in several respects. It should not have followed constitutional doctrine developed in the unique criminal law context and applied it in a civil law case. It also should not have applied a balancing test to resolve an important constitutional issue when the application of traditional equal protection doctrine would have yielded the same result.

---

85. Maher v. Roe, 432 U.S. 464, 471 n.6 (1977).

86. *M.L.B.*, 519 U.S. at 120.

87. In a non-criminal context, equal protection analysis focuses on several levels of scrutiny of governmental classifications depending upon the suspectness of the groups affected by the classification and whether a fundamental interest is burdened by the classification. *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439-42 (1985).

88. In a non-criminal context, procedural due process analysis focuses on the private interests at stake, the governmental interests, and the risk of error in extant procedures as well as the probable value of additional procedures. Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976).

89. *M.L.B.*, 519 U.S. at 120.

90. *Id.* at 120-21.

91. *See supra* note 87.

92. Mayer v. City of Chicago, 404 U.S. 189, 196-97 (1971). Justice Brennan, writing for the majority in *Mayer*, stated that the *Griffin* principle does not involve a balancing test but rather "is a flat prohibition against pricing indigent defendants out of as effective an appeal as would be available to others able to pay their own way." *Id.*

The preference the Court in *M.L.B.* stated for equal protection analysis of government fees was appropriate because it focuses on denying people government services based on an inability to pay a fee. It is long established that government actions that are neutral on their face may violate equal protection if their application disadvantages a specific group.[93] Thus, challenges on equal protection grounds to government fees that indigent people cannot afford to pay are challenges to the fees in their application and not on their face. Had traditional equal protection doctrine been applied in *M.L.B.*, Mississippi would have been required to justify its mandatory record preparation fee by establishing that it was necessary to satisfy a compelling governmental interest because the child-parent relationship involves a constitutionally protected interest. It is unlikely that Mississippi could have met this standard.[94]

Some constitutional law scholars have suggested the decision in *M.L.B.* may represent a trend in Supreme Court decisions to apply a "balancing test" to equal protection cases involving fundamental interests.[95] If this suggestion is true, it would be an unfortunate development in equal protection doctrine because it would represent a diminution in the level of scrutiny that courts apply to government classifications that burden fundamental rights.[96]

Traditional equal protection analysis of government classifications is an effective and sensible way for courts to review government fees that indigent people cannot afford to pay. If the fee burdens no fundamental interest, the courts will find equal protection to be satisfied so long as the fee is rationally related to a legitimate governmental interest.[97] On the other hand, if the fee does burden a fundamental interest, the fee will only be upheld if it is narrowly tailored to serve a compelling governmental interest.[98]

---

93. Yick Wo v. Hopkins, 118 U.S. 356, 373-74 (1886).

94. The Court in *M.L.B.* recognized that Mississippi's interest in the mandatory record preparation fee is financial: offsetting the cost of its court system. *M.L.B.*, 519 U.S. at 122. However, the Court also considered that waiving the fee would not create an undue burden on the state because there are so few appeals of parental termination decisions in Mississippi. *Id.* Moreover, while the Court recognized that imposing fees to defray the costs of government ordinarily provides a rational basis under equal protection, it is not a sufficient justification for a government fee that impinges a fundamental right. *Id.* at 123-24.

95. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 735-55 (8th ed. 2010).

96. Under traditional equal protection scrutiny, courts apply strict scrutiny to government classifications that burden fundamental rights requiring the government to establish that they are suitably tailored to serve a compelling government interest. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985).

97. *City of Cleburne*, 473 U.S. at 440.

98. *Id.*

A couple who desires to marry in Cook County, Illinois, but cannot afford to pay the $60 marriage license fee and, as a result, are denied a marriage license could challenge the denial in court on equal protection grounds. Since marriage involves constitutionally protected interests,[99] the courts should provide strict scrutiny and require Cook County to establish that the marriage license fee is necessary to satisfy a compelling government interest. It is unlikely that Cook County could meet this burden, and the courts would likely conclude that the marriage license fee is unconstitutional as applied to the poor.

If Cook County, Illinois, requires residents to pay a fee to play golf on a county golf course and a resident cannot afford the fee, the fee could also be challenged on equal protection grounds. However, since playing golf does not involve a constitutionally protected interest, courts would only require that the fee be rationally related to a legitimate government interest. Raising revenue to fund county government would undoubtedly constitute a rational basis that satisfies equal protection.

There may be one circumstance in which due process might invalidate a government fee when equal protection would not. If an indigent person has been involuntarily summoned to court as a defendant in a civil case and a government fee in the case prevents the defendant from mounting a defense, due process may invalidate the fee even if no fundamental interest is at stake. If the defendant could convince the court that weighing the factors announced in *Mathews v. Eldridge*[100] led to the conclusion that the fee barrier prevented the defendant from receiving a meaningful opportunity to be heard in the case, then due process would be violated.[101]

V. CONCLUSION

An important constitutional issue is, when does the Fourteenth Amendment require that government fees be waived for indigent persons who cannot afford to pay them? The Supreme Court has addressed this issue in many contexts. As a result of its most recent decision on this issue, *M.L.B.*, the constitutional standards for deciding this issue are uncertain. The author believes that, in the large majority of cases that raise this issue, the multiple levels of scrutiny involved in traditional equal protection anal-

99. *M.L.B.*, 519 U.S. at 116.

100. Mathews v. Eldridge, 424 U.S. 319 (1976).

101. This scenario tracks *Little v. Streator*, 452 U.S. 1 (1981). In *Little*, the defendant was sued in a paternity case in which he denied being the father of the child. The defendant could not afford to pay for blood grouping tests that might establish that he is not the father. After considering the *Mathews* factors, the Court in *Little* held that it violated due process for the state to not pay for the tests because, without them, the defendant was denied a meaningful opportunity to be heard. *Little*, 452 U.S. at 16; *Mathews*, 424 U.S. 319.

ysis will coherently resolve the issue for the poor and for the government entities who seek to charge them a fee.

Kattie Riggs

Subject: Appeal fees — File No. 19-432. Agenda Item 7c, City Commission meeting July 17, 2019.

From: Elizabeth Lindsey <eaglsing@gmail.com>
Sent: Wednesday, July 17, 2019 2:39 PM
To: Laura Terway <lterway@orcity.org>; Kattie Riggs <kriggs@orcity.org>
Subject: Re: Appeal fees — File No. 19-432. Agenda Item 7c, City Commission meeting July 17, 2019.

Laura and the Oregon City Commission,

Not knowing if you will approve the continuance that would allow my thorough participation, I offer this comment:

An accessible appeal process complies with Statewide Planning Goal 1 concerning citizen involvement. The appeal fee should not be above $100 to permit citizen access to the process. The existing filing fee is already ridiculously high and is an extremely burdensome and effectlvely is a barrier blocking citizen involvement. To raise the fee higher moves in the direction of blocking even the bit of remaining citizen involvement.
The city should recognize that citizen involvement is desirable as it brings diverse view points, important to the city, into the process. Citizens are sensitive to conditions in the city. The staff should want the citizen perspective represented in the process.
For the staff to continue to propose more and more severe citizen-excluding fees suggests the the staff is not working with the citizens' interests in mind and puts into question whether the staff themselves are misdirected and need to re-sensitize themselves to who they are working for or they should be replaced by staff who do have the citizens' interests in mind.

Elizabeth Graser-Lindsey

On Wed, Jul 17, 2019 at 12:38 AM Elizabeth Lindsey <eaglsing@gmail.com> wrote:

> Dear Ms. Terway,
>
> I write respectfully to request a continuance if the above-referenced hearing. My daughter is getting married this weekend, and in the crush of wedding preparations I can neither attend the Wednesday meeting nor research and prepare meaningful written comments by then. I would be able to do so for the following meeting.
> Elizabeth Graser-Lindsey

Kattie Riggs

Subject: increase in appeals fees

From: Laura Terway <lterway@orcity.org>
Begin forwarded message:

> **From:** Janine Offuttt <j9hypnoziz@yahoo.com>
> **Date:** July 17, 2019 at 9:16:51 AM PDT
> **To:** "lterway@orcity.org" <lterway@orcity.org>
> **Cc:** "dholladay@orcity.org" <dholladay@orcity.org>, "rsmith@orcity.org" <rsmith@orcity.org>, "dmcgriff@orcity.org" <dmcgriff@orcity.org>, "fodonnell@orcity.org" <fodonnell@orcity.org>, "rlsmith@orcity.org" <rlsmith@orcity.org>
> **Subject: increase in appeals fees**
>
> It has come to my attention that the city commission is considering increasing the fee required to appeal a Planning Commission decision to $10,000. That's an exorbitant amount of money for the average citizen to come up with.
> I myself considered appealing the decision regarding the Abernethy Place Hotel, but was put off by the already excessive fees.
> Look around at neighboring communities: West Linn charges $400 for an appeal.
> Milwaukee charges $1,000 ... both are enough to discourage nuisance appeals, without being prohibitive.
> Setting the appeals fee at $10,000 certainly looks like an effort to obstruct citizen input. Yet Oregon's constitution supports an individual's right to appeal, and of course, Oregon City should as well. (Article I Section 10 of our state Constitution says that justice shall be administered "without purchase." There is a Court of Appeals case pertaining to the "justice without purchase" clause that addresses similar local appeal fees.)
> This is an issue of basic fairness.
>
> sincerely, D. Janine Offutt

Oregon City
City Commission Meeting of
July 17, 2019

Testimony of: Christine Kosinski, Unincorporated Clackamas County

RE: Agenda Item 7C – 19-432, Resolution 19-B "Modification of Planning Division Fee Schedule"

I would like to comment on your proposed changes to the 2019 Planning Fee Schedule for the following items.....

Appeal – Historic Review Board	$6,460
Appeal – PC Decision	$10, 477

I find these to be horribly high and I wonder if these fees were put at this level to keep the people away from bringing their concerns up to the City? If that is true, then you are impeding the ability of your people to bring their concerns to the attention of their government. This is not allowed by Oregon State Goal I, which clearly states, "The City is to develop a a citizen involvement program that insures, and will provide, for widespread citizen involvement in all phases of the planning process."

In 2004, when I began to speak in front of the City, meetings were held at the old City Hall. In the Commission Chambers, a sign board was hung which stated " Government is of the people, by the people and for the people and shall not perish from the earth." This is missing from the new City Hall and I am hoping the City will once again display these words which were penned by Abraham Lincoln in the Declaration of Independence.

If the above fees were raised to such high limits with the thought that this will keep the people away, then you are fooling yourselves because a government that exists to rule in this way will surely cease to exist and it will perish. Government is the Servant of the people, not the other way around.