

— Oregon Municipal Handbook —

CHAPTER 23: LICENSING AND REGULATION

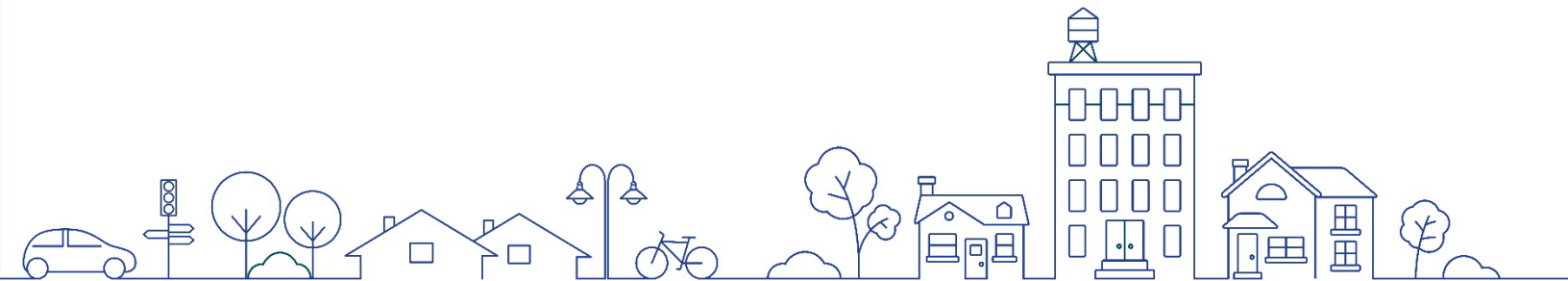


Table of Contents

Businesses Typically Regulated.....	3
Temporary Businesses	3
Mobile Businesses	3
Towing Companies	4
Secondhand Stores	4
Pawnshops	4
Payday Lenders.....	5
Taxi Services and Ride-Sharing Programs	5
Large Outdoor Gatherings	5
Business and Fire Alarm Systems.....	6
Rental Housing.....	6
Door-to-Door Solicitation.....	6
Businesses Pre-Empted from Local Regulation.....	7
Liquor.....	7
Insurance.....	7
Pari-Mutuel Betting and Gambling.....	7
Regulation of Social Gaming is NOT Preempted.....	7
Items Commonly Included Within Business Regulation Ordinances.....	8
Exemptions	8
Fees	8
Criteria for Approval, Suspension, Revocation, and Denial.....	9
Approval, Suspension, Revocation, and Denial Procedures.....	9
Fines.....	9
Franchises	10

Chapter 23: Licensing and Regulation

Oregon cities license business for both regulatory and revenue purposes. The authority to regulate derives from the city's police power. Regulatory licenses are usually granted for short periods of time (usually one year). This chapter of the handbook addresses regulatory licensing programs.

Businesses Typically Regulated

Regulatory licensing programs are directed toward a variety of community objectives. Many cities use business licensing as an additional means to enforce general local ordinances such as land use and building regulations. In this usage, various city departments routinely check license applications and renewals for compliance with zoning, sanitation, or other requirements, and those requirements also may be enforced through license revocation proceedings.

Licenses may also be utilized to raise revenue, to regulate business, or both. Additionally, cities may intend to protect the health, safety, and welfare of the general public. Cities have various methods of licensing and regulating businesses within the city limits. These methods include: requiring all businesses to have a general business license; requiring certain types of businesses to have specialized licenses in addition to a general license; requiring only specific types of businesses to have a license; and requiring any business not otherwise licensed to obtain a general business license. Most commonly regulated businesses included marijuana, transient lodging, and franchise agreements. These specific business types will be discussed in more detail in another chapter.

Temporary Businesses

Temporary businesses may include seasonal businesses such as Christmas tree lots and Fourth of July firework stands. Temporary businesses may also include amusements. Cities may choose to regulate such businesses to address public safety and nuisance concerns. Temporary business permits should include the location of operations, the location of electrical hookups, furniture, solid waste containers or similar fixtures and documentation showing consent of the property owner; and consent for inspections of the premises. Additional requirements may include restricted hours of operation, that temporary operations may only be located on property zoned for commercial use, and that electrical hookups comply with applicable electrical standards. Generally, temporary licenses are valid for a specific time period appropriate for the operations of the business such as 60 days to four months, depending on the type of operation.

Mobile Businesses

Mobile businesses may be regulated similarly to temporary businesses. Requirements may include that the business permits include location of all electrical hookups, solid waste containers or similar fixtures, and documentation showing consent of any property owners where the mobile business is stationed if it will be at a fixed location. Additional requirement may include that the

mobile business may not occupy or block the public right-of-way nor be stationed in a location that blocks vision clearance or fire lanes.

Towing Companies

Generally, cities do not require a towing license if a request to tow is made by the vehicle owner. However, if a towing company wishes to tow from a private parking facility without the vehicle owner's consent, the city may require the tow company to be licensed. Regulations in addition to those set by state law¹ may include maximum amounts of fees charged to vehicle owners for the mileage, storage, and release of vehicles. If a city chooses to set maximum rates that may be charged for towing services, the city must take into consideration the size of the vehicle towed and the distance traveled by the towing company.² The city must also establish a process by which the city will receive and respond to complaints relating to the violations of any maximum rates.³

Secondhand Stores

Secondhand stores typically sell goods such as vintage and used clothing and antiques. Secondhand stores may also act on consignments. Federal law prohibits secondhand stores from selling or giving away products that no longer meet legal safety requirements or that have been recalled.⁴ Local regulations generally are directed at detecting stolen merchandise through required record keeping. Cities may require that secondhand store owners report certain types of purchases and sales. This system of reporting may assist law enforcement with identifying stolen property. In addition to reporting, a city may require that certain items such as bedding, and children's items be sanitized prior to sale.

Pawnshops

Unlike other secondhand stores, pawnshops act more like a loan broker. Pawnshops offer loans to individuals secured by an item of value. If the person fails to pay back the loan, the pawnshop will sell the item to recuperate the cost of the loan. People pawn valuables such as jewelry, gold, equipment, musical instruments, and electronics. Due to their nature as a financial-orientated business, pawnshops are subjected to additional regulation. Regulations serve to promote financial disclosure, prevent money laundering, and to ensure fair dealing. There are several federal regulations that pawnbrokers are subject to including the Truth in Lending Act⁵, the Fair Credit Reporting Act⁶, and others. All pawnbrokers are required to hold a license from the Oregon Department of Consumer and Business Services in order to engage or continue in the business.⁷ In order to secure a proper license, pawnbrokers are required to hold a bond in a sum

¹ ORS chapter 98 and ORS 822.200 to 822.235.

² ORS 98.859(2).

³ ORS 98.859(3).

⁴ 15 USC §§ 2051-2089 (West 2018).

⁵ Pub L 90-321, 82 Stat 146.

⁶ Pub L 91-508, 84 Stat 1114.

⁷ ORS 726.040.

of \$25,000, or hold a proper letter of credit in the amount of \$25,000, and pay an annual fee.⁸ Much like the regulation of secondhand stores, the local regulation of pawnshops are directed to prevent criminal activity.

Payday Lenders

Payday lenders are defined under state law as “a lender that is engaged in the business of making loans, at least 10 percent of which are payday loans.”⁹ Payday lenders are highly regulated under state law but that does not preclude cities from placing stricter regulation standards. State law provides that payday loans may not be more than \$50,000 and only includes loans with terms for up to 60 days.¹⁰ In addition, the rate of interest may not exceed 36 percent per annum, charge during the term of a payday loan more than one origination fee of \$10 per \$100 of the loan amount or \$30, whichever is less; make or renew a loan for a term of less than 31 days; include certain clauses in the loan contract; renew an existing loan more than two times; or make a new loan within seven days after the date on which the consumer fully repays a previous loan.¹¹

Taxi Services and Ride-Sharing Programs

Local regulation of taxi services, ride-sharing, and other vehicles for hire has been specifically permitted by state statute.¹² Cities are empowered to regulate entry into the business of providing vehicle for hire services; requiring a license or permit as a condition of operation; controlling the maximum rates charged and the manner in which rates are calculated; regulating routes for such vehicles; establish safety equipment and insurance requirements; and any other requirements necessary to assure safe and reliable service by such vehicles. Vehicle for hire companies and their drivers may be regulated. For example, companies may be required to hold minimum insurance limits, drivers may be required to be at least 21 years of age or older and have a clean driving history.

In past years, ride-sharing programs began operating in cities without complying with the cities’ taxi services regulations or permission. As ride-sharing programs become more popular and in demand, cities are amending their current taxi services regulations to include ordinances that accommodate the unique character of ride-share programs in balance with public safety.

Large Outdoor Gatherings

Regulations relating to large outdoor gatherings are aimed at sanitation and public safety such as requiring a minimum number of exits for enclosed assembly areas, fire protection equipment, seating, and restroom facilities. Regulations often require a special event permit and may limit the maximum number of persons who will be permitted to attend at any one time, a description

⁸ ORS 726.070; 726.125.

⁹ ORS 725A.010(7).

¹⁰ ORS 725A.010(6)(a).

¹¹ ORS 725A.064.

¹² ORS 221.495.

of all plans for ensuring safety of patrons in the event of an emergency, and a description of plans for controlling traffic and parking at the gathering site. Cities may also choose to require event sound permits.

Business and Fire Alarm Systems

Alarm systems generally take the form of security alarm systems and emergency alarm systems. Regulations address installation and maintenance practices in an effort to reduce false alarms. Cities may prohibit alarms that maybe easily accidentally triggered, systems that do not incorporate automatic silencing after a period of time, and unauthorized automatic dialer systems. Conversely, cities may impose requirements on the minimum number of emergency alarms such as smoke and carbon monoxide detection devices under their development and housing codes.

Rental Housing

Residential rental housing is regulated by the Oregon Landlord and Tenant Law.¹³ These laws address compliance with fire, health and safety regulations to ensure habitable living conditions for the community. While many cities do not choose to separately regulate residential rentals, cities do provide regulations on where rental housing may be located in their development codes. In areas of high demand and increasing rental prices, cities may be tempted to enact rent control. However, state law has preempted local governments from doing so.¹⁴

Short term rentals are generally separated into two categories: transient occupancy – those that do not exceed 30 days – and are generally in a motel or motel; and vacation rental – those that do not exceed 45 days – and are generally located in a residential home, or part of a residential home. Short term rentals are generally regulated separately from residential rental housing regulations, as they are specifically exempt from the Oregon Landlord and Tenant Law.¹⁵ Cities may require a separate business license and additional information such as the address of the dwelling unit to be used as short-term rental, the owner’s name and contract information; a floor plan of the rental, submission of the transient occupancy tax; and certification of compliance with applicable safety requirements such as insurance and compliance with housing standards.

Door-to-Door Solicitation

Regulations imposed upon solicitors generally limit the hours of operations and require the solicitor to hold a general business license. In addition, cities may specifically prohibit door-to-door solicitations at premises where a sign has been posted prohibiting such activities.

¹³ ORS chapter 90.

¹⁴ ORS 91.225

¹⁵ ORS 90.110.

Businesses Pre-Empted from Local Regulation

The state Legislature has preempted local government authority to regulate certain types of businesses. In addition, a city may decide as a matter of policy to regulate only certain businesses and activities, although the state and federal constitutions establish limitations on the power of cities to discriminate in regulatory programs against businesses that do business in the city but whose headquarters are outside the city.

Liquor

Liquor sales and service licensing is regulated by the Oregon Liquor Control Commission.¹⁶ All local laws and ordinances inconsistent with state laws and regulations are preempted.

Insurance

Cities are preempted from “the field of regulating or of imposing excise, privilege, franchise, income, license, permit, registration, and similar taxes, licenses and fees upon insurers and their insurance producers and other representatives[.]”¹⁷ In addition, cities may not require additional authorization, licenses, or permit of any kind upon insurance providers in addition to those set out by the Oregon Insurance Code.¹⁸

Pari-Mutuel Betting and Gambling

Local regulation of pari-mutuel betting – a type of betting common to horse and greyhound racing – is preempted by state law and is specifically regulated by the Oregon Racing Commission.¹⁹

The Oregon Criminal Code, prohibits “gambling” throughout the state. State law defines gambling as “a contest of chance or a future contingent event not under the control or influence of a person, upon an agreement or understanding that the person or someone else will received something of value in the event of a certain outcome.”²⁰ There are many complex legal concepts surrounding what does and does not constitute gambling in the state. For example, bingo games operated by charitable or religious organizations do not constitute gambling.²¹

Regulation of Social Gaming is NOT Preempted

Of particular interest to cities is the exemption of “social games” from the definition of gambling.²² A social game is defined as “[a] game, other than a lottery, between players in a

¹⁶ ORS 471.045.

¹⁷ ORS 731.840(4).

¹⁸ ORS 731.840(4)(b).

¹⁹ ORS 462.020 and 462.100(1).

²⁰ ORS 167.117(7).

²¹ ORS 167.117(7)(d).

²² ORS 167.117(7)(c)(“‘Gambling’ does not include: * * * [s]ocial games.”)

private home where no house player, house bank or house odds exist and there is no house income from the operation of the social game.”²³ Unlike pari-mutuel betting and gambling, cities may by ordinance, authorize the playing of social games in private businesses, clubs, or places of public accommodation.²⁴ For example, a city may permit a charitable bingo game operated by a charitable or religious organization or and limit the amount of bets and awards to no more than one-dollar of other thing of value. This is a general grant of authority to cities to define what regulations they deem to be appropriate for their local communities.

Items Commonly Included Within Business Regulation Ordinances

Many cities address the following under their licensing and regulation ordinances: Fees, criteria for approval or denial, renewals, revocation and denial procedures, and fines.

Exemptions

Cities often identify the types of businesses that are exempt from licensure. These operations may include charitable operations, nonprofits, and sellers of homegrown farm products such as backyard chicken eggs. Additionally, a city or county may not impose a business license tax on or collect a business license tax from an individual licensed as a real estate broker who engages in professional real estate activity only as an agent of a principle real estate broker.²⁵

Fees

Fees are paid to the city and are often utilized to cover the administrative expense of licensing. Generally, cities provide a set fee for a general business license and may provide a separate fee schedule for specialty businesses such as lodging, food service, home-based businesses. A frequent claim raised by businesses is that a city’s license fee violated either the Equal Protection or Due Process clauses of the federal and state constitutions. These claims typically arise when cities charge difference fees to different types of businesses. The amount of fees charged should be fairly applied but cities may choose to set amounts based on nondiscriminatory standards such as the number of full time employees. It may be possible to set different fees based on certain business classifications so long as the city can discern a substantial difference between business types such as the cost of administration of a particular license. For example, a business license for an establishment that sells marijuana may have higher city administrative costs necessary for oversight versus a lessor regulated industry such as clothing boutique. The challenge with setting the license fee based on business type is with businesses that are difficult to classify or those that fall between multiple business categories. Thus, another method of setting fees – such as by number of employees, should be considered.

The amount of the fees should be high enough to reimburse administrative costs but not so high that it discourages a potential applicant from doing business within the city. When reviewing the fees imposed, the courts have looked to whether the license is imposed for revenue of regulatory

²³ ORS 167.117(21)(a).

²⁴ ORS 167.121.

²⁵ ORS 696.365.

purposes. In setting the amount of the license fee, it is important to determine whether the city is exercising its taxing authority or its police power.²⁶

Criteria for Approval, Suspension, Revocation, and Denial

Like the setting of fee schedules, the criteria for approval or denial of a business license application should be nondiscriminatory and be clearly outlined. Criteria may include whether there is prior fraudulent activity by the applicant; whether the business activity complies with city ordinances, or other state and federal laws; whether the business activity would endanger property or public health and safety; whether the applicant fails to supply the required information or submits false or misleading information; whether the applicant had a business license revoked, suspended or denied in the past.

Approval, Suspension, Revocation, and Denial Procedures

Procedures should include an investigatory phase, notice, and an appeal process. Many cities allow city law enforcement or other officials to inspect business premises to ensure that businesses are complying with city ordinances and the terms of their license. Cities may require the inspection official to obtain permission from the occupant or obtain a warrant from the court prior to inspection.

If the city wishes to take an inverse action, the business owner should be provided with adequate notice which includes the reason for the action, any applicable fines, and the procedures and deadlines for appeal.

Business owners should be provided the opportunity to appeal decisions regarding a license application denial, a license revocation, a license suspension, or a particular license fine. Some cities allow the city administrator to make the initial decision on whether to approve, suspend, revoke or denial a license. The aggrieved business owner may then submit any appeals to the city council. Many cities specify what information must be included in a written appeal request. This includes but is not limited to: the name and address of the appellant; the name and address of the business owner (if different from the appellant); the nature of the determination which is being appealed, a copy of that determination; reasons why the appellant feels the determination is incorrect; what the appellant feels the correct determination should be; and the submission of an appeal fee.

Fines

Fines may be applied upon a conviction of unlicensed business operations as well as violations of any licensure standards. The maximum amount punishable by the fine shall be clearly provided for in the municipal code.

²⁶ In *Ex Parte Fine*, 124 Or 175 (1928), the Oregon Supreme Court held that the Oregon City license fee of \$120 per vehicle for “wholesale trade vehicles) exceeded the cost of the slight amount of city regulation which the city proposed to give to vehicles. Therefore, the fee was void as a tax for other than revenue purposes.

Franchises

The franchising of certain private services is closely related to regulatory business licensing. While regulatory licenses are usually granted for a short period of time – such as one year – franchises may extend up to 20 years.²⁷ Franchises are usually created under a contract rather than under a regulatory license. The procedures and consequences of terminating a franchise before its expiration may potentially lead to a breach of contract claim as opposed to the procedures for terminating a regulatory license described above.

Cities are authorized to grant franchises to public utilities such as gas and electric providers, vehicles for hire, telecommunication providers, and solid waste collection.²⁸ The franchise agreements consist of provisions that govern how the franchisee is to operate within the boundary of the city and generally include the payment of franchise fees.

There are limits on certain franchise fees. State law limits the fee for certain telecommunications companies to seven percent of a defined base.²⁹ At the federal level, the Telecommunications Act of 1996 required that compensation from telecommunications providers be on a competitively neutral basis.³⁰ Federal law also limits cable television franchise fees to five percent of gross revenues.³¹ If the community wishes to charge a franchise fee for electric or natural gas providers, there are no state or federal limitations on the amount of the franchise fee.

In lieu of franchises, some cities have elected to establish a regulatory system using the police power to govern operations within the city including the payment of fees. State law provides that a public utility operating within a community without a franchise for more than 30 days may be required to pay a privilege tax in lieu of a franchise fee in an amount set by the council but not to exceed five percent.³²

²⁷ ORS 221.460.

²⁸ ORS 221.420 (gas and electric providers); 221.495 (vehicles for hire); 221.510 (telecommunication providers); 459A.085 (solid waste collection).

²⁹ ORS 221.515.

³⁰ 27 USC 253.

³¹ 47 USC 542

³² ORS 221.450.