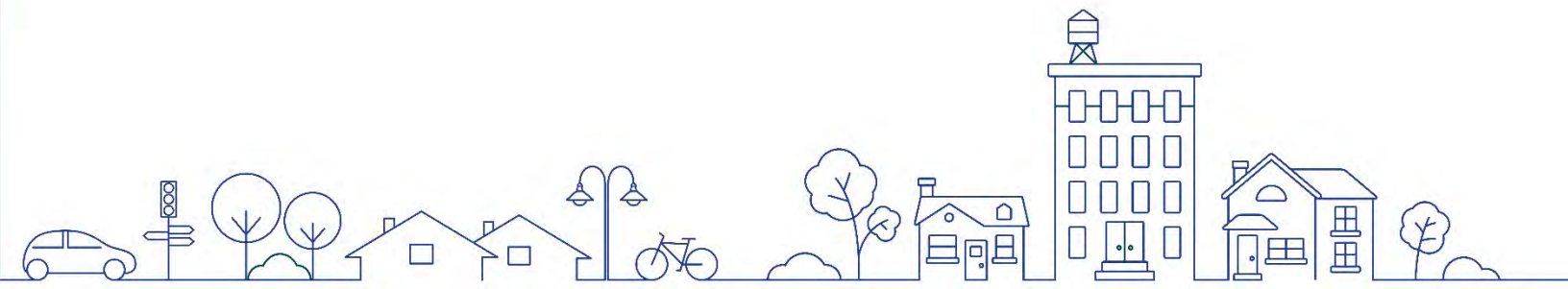
Oregon Municipal Handbook

CHAPTER 1:
NATURE OF CITIES



League of Oregon Cities

Published by the League of Oregon Cities
September 2020 /Last updated August 2024

Table of Contents

Chapter 1: Nature of Cities

The purpose of all government, as noted by James Madison, is to provide its people with the opportunity to live in "safety and happiness."[1] The provision of this safety and happiness is oftentimes most directly provided by local governments—from cities and counties to special purpose units, local governments in Oregon strive daily to meet the immediate needs of citizens.

Of course, local governments operate within a much broader governmental framework. Beyond each is an elaborate system of state and federal programs that serve communities too, just at a distance. These three tiers of government form a loose hierarchy of public service; it is divided horizontally—between executives, legislatures, and judiciaries—and also vertically.[2] Between the federal government and the state, this separation is known as federalism.[3] Between the state and local governments, the separation is called home rule.[4] When conflicts arise among these moving parts, they arise as part of a centuries-old tradition in this country.[5] Dividing power *among* government units— not just within *a* government—is a longstanding feature of the United States.[6] Together, these governments provide layers of elected officials who serve the needs and guard the interests of citizens.[7]

This chapter begins in Part I with a brief overview of local governments. In Oregon, local governments come in a wide variety. There are 36 counties, 241 cities, 197 school districts, and at least seven regional governments.[8] The most numerous are the 1,000 or so special districts that operate in communities across the state, providing essential services like surface water drainage, fire protection, sanitation, and domestic water supply.[9] The chapter then turns the focus to cities, addressing (1) the process of forming a city and (2) how to change that form. Part II covers the

[1] THE FEDERALIST NO. 43 (James Madison).
[2] *See* Robert H. Thomas, *Sublimating Municipal Home Rule and Separation of Powers in Knick v. Township of Scott*, 47 FORDHAM URB. L.J. 509, 538-40 (2020) (noting the "vertical separation of powers" between federal, state, and local governments and that the "overwhelming" majority of states can be characterized as "Cooley rule" or "home rule" states, where "a locality's law may be superior to conflicting state law.").
[3] *See* Brian Galligan, *Comparative Federalism*, in THE OXFORD HANDBOOK OF POLITICAL INSTITUTIONS 263 (Sarah A. Binder et al. eds., 2008).
[4] Thomas, *supra* at 539.
[5] Galligan, *supra* at 264.
[6] *Id.* (noting that U.S. federalism was "a major innovation … in institutional design [and] popular government.").
[7] *Id.*; *see also* Brian P. Keenan, *Subdivisions, Standing and the Supremacy Clause: Can A Political Subdivision Sue Its Parent State Under Federal Law?*, 103 MICH. L. REV. 1899, 1900 (2005) (noting that municipal governments "offer a miniature version of federalism on the state level, dividing the power of the state and placing many important decisions in the hands of representatives closer to the people.").
[8] *Local Government*, OR. BLUE BOOK, https://sos.oregon.gov/blue-book/Pages/local.aspx (last accessed June 12, 2024).
[9] *See* ORS 198.010.

incorporation process and Part III explores major and minor boundary changes, from annexation all the way through disincorporation.

I. Units of Local Government

Local governments owe their existence to state law, either in the Oregon Constitution or in provisions of the Oregon Revised Statutes (ORS).[10] Unlike state governments, which possess a reservoir of authority that is separate from the federal government, local governments derive any and all their authority from the state government.[11] Legally, without these authorizations, local governments would not exist.

Local governments in Oregon are both government bodies and public corporations.[12] Beyond that, these governments fall into one of two basic categories: general purpose and special purpose units.[13] General purpose units, namely cities and counties, possess general authority over matters that affect the well-being of the public within their jurisdiction.[14] Special purpose units, by contrast, perform specific public functions and possess authority only in connection with that function.[15] In Oregon, these units include the many special districts and school districts across the state.[16] A third category, regional governments, includes one special district—the Metropolitan Service District (Metro)—and several councils of governments (COGs) that assist local governments in providing certain services.[17]

The Oregon Constitution prohibits the state Legislature from creating local governments by "special law," meaning that the Oregon Legislature cannot create *single* governments.[18] Under this provision, a municipal corporation means any "corporation as a form of organizing municipal authority and services"[19] Yet the constitution expressly authorizes the creation of municipal corporations by "general law," or laws that apply generally to the entire state.[20] Accordingly, the Legislature has enacted many statewide processes for the formation of cities,

[10] Eugene McQuillin, 1 The Law of Municipal Corporations § 3:2 (3d ed.).
[11] *Id.*; *see also* US Const, Amend X.
[12] *See* Blue v. City of Union, 159 Or 5, 12-13 (1938).
[13] McQuillin, 1 The Law of Municipal Corporations, § 2:33 (3d ed.).
[14] *Id.*
[15] *Id.*
[16] For the limited authority of school boards, *see* ORS 332.072. For that of special districts, *see, e.g.,* ORS 261.305.
[17] *See* ORS 198.010(6); *Regional Governments*, Oregon Blue Book, https://sos.oregon.gov/blue-book/Pages/local/other-regional.aspx (last accessed June 12, 2024).
[18] Or Const, Art XI, § 2.
[19] *Id.*
[20] *Id.*

counties, and special districts.[21] School districts, defined as "bodies corporate" and "local governments" under state law, exist as part of a statewide education system."[22]

The following is an overview of the local governments in Oregon today.

A. Cities

Cities possess general authority over local matters pursuant to the Oregon Constitution.[23] To exist in legal form, a city must first be incorporated.[24] Once incorporated, a city acts pursuant to a local charter, essentially a "city constitution."[25] Cities may adopt a charter of their own or use terms provided under state law. Currently, all 241 cities in Oregon have their own charters.[26] With a charter in place, cities govern through orders, resolutions, and ordinances adopted by a city council or commission. Cities administer policies through hired staff, the leader of which generally is a city manager or city administrator; although, in smaller cities, oftentimes the administration of a city is delegated to a city recorder or an appointed council member.

All cities are both government and corporate bodies.[27] As such, cities carry out functions that resemble both types of entities. The authority for cities to carry out these functions is limited in two fundamental ways. First, cities are restricted by the subject matter of their actions. This means that cities may perform government or corporate acts only if the acts address a matter of local concern, and only if the act is permitted under its own laws and state and federal law.[28] Second, cities are restricted by geography.[29] A city may exercise government authority only within that city's boundaries, unless the state grants additional authority.[30] When it comes to corporate acts, however, cities are *not* restricted to the city's boundaries.[31]

---

[21] *See generally* ORS Ch 203, 201, and 198, respectively.
[22] *See generally* ORS Ch 332; *see also* ORS 294.004(1).
[23] *See generally* Or Const, Art XI, § 2; *see also* Or Const, Art IV, § 1(5).
[24] *See* ORS 221.020.
[25] *See Brown v. City of Eugene*, 250 Or App 132, 136 (2012).
[26] *See* Or Const, Art. XI, § 2; *see generally* ORS 221.901 to 221.928.
[27] *See* Blue v. City of Union, 159 Or at 12-13 (1938) (noting that "municipal corporations act in a dual capacity and their functions are two-fold: The one, political and governmental, the other private, propriety, corporate.").
[28] MCQUILLIN, 5 THE LAW OF MUNICIPAL CORPORATIONS, §§ 15:17, 15:19 (3d ed.).
[29] State *ex rel. Mullins v. Port of Astoria*, 79 Or 1, 17-20 (1916).
[30] *Id.*
[31] *See DeFazio v. Wash. Pub. Power Supply Sys.*, 296 Or 550, 582 (1984).

i. Government Bodies

When a city seeks to regulate conduct or take coercive action through taxation, eminent domain, or otherwise, the city is acting in its government capacity.[32] As general purpose units, cities are authorized to use government powers generally on all matters of local concern.[33]

For the most part, a city may only exercise government powers within its boundaries, unless it is granted additional authority by the state.[34] A city's exercise of government authority within its boundaries is referred to as **intramural authority**.[35] Within its boundaries—and subject to conflicting state and federal law— a city may exercise its power on any matter of local concern and in any manner.[36] Many cities adopt local licensing or permitting programs on subjects like business and free speech activities.[37] They adopt ordinances proscribing nuisances and criminal behavior.[38] And they enforce laws in municipal court.[39] Intramural authority means general power to meet the public's needs. The limit is the city limit.

Beyond this intramural authority, every city possesses *some* power in areas outside its boundaries; this is known as **extramural authority**.[40] The key to understanding this power is knowing that it is a separate grant of authority under state law.[41] When a city takes coercive action outside of its boundaries, it is not acting pursuant to its home rule authority under the Oregon Constitution. Rather, it is acting at the will of the Legislature or state voters.[42] One example of extramural authority is annexation.[43] Grants of this authority must be "clearly expressed."[44]

ii. Corporate Bodies

Not every action a city takes is a use of government power. Many of the day-to-day actions taken by cities are instead corporate functions.[45] For instance, cities may enter contracts,

---

[32] *Id.* (noting that a city cannot "assert *coercive authority* over persons or property outside its boundaries," but that this restriction "has little relevance to a city's contracts [or] consensual transactions.").
[33] *Port of Astoria*, 79 Or at 18.
[34] *DeFazio*, 296 Or at 582.
[35] *Port of Astoria*, 79 Or at 17-20.
[36] *Id.*
[37] *See, e.g.*, SALEM, OR., CODE § 30.001 (2020); *see also* PORTLAND, OR. CODE § 31.40.010 (2020).
[38] *See, e.g.*, HERMISTON, OR. CODE §§ 130.01-130.31 (2000 & Supp. 2020).
[39] *See, e.g.*, BEND, OR., CHARTER Ch. 5, § 25 (1995).
[40] *Port of Astoria*, 79 Or at 17-20.
[41] *Id.*
[42] *Id.*
[43] *See Thurber v. McMinnville*, 63 Or 410, 414 (1912), *abrogated on other grounds by* St*ate ex rel. Heinig v. Milwaukie*, 231 Or 473 (1962).
[44] *See Richards et al. v. City of Portland et. al*, 121 Or 340, 345 (1927).
[45] *See Blue v. City of Union*, 159 Or 5, 12-13 (1938) (noting that "municipal corporations act in a dual capacity and their functions are two-fold: The one, political and governmental, the other private, propriety, corporate.").

buy and sell property, employ staff, and even conduct municipal enterprises. In this context, the breakdown between intramural and extramural authority becomes far less relevant.[46] Oregon courts routinely recognize the right of cities to conduct these types of activities outside the local boundaries.[47] Generally, where a city is not exercising government power and is instead acting like any public corporation, no separate grant of authority under state law is required to carry out extraterritorial activities.[48]

Even so, cities still must adhere to subject matter restrictions. Any action by a city must address a matter of local concern.[49] The action must also comply with its own laws, federal law, and state law.[50] As a general purpose corporation, a city can promote local interests through any reasonable contract, land sale, or enterprise that is in connection with a public need.[51] Among the more notable actions taken by cities are a railroad, operated by the City of Prineville, and a telecommunications network, operated by the cities of Monmouth and Independence.[52] A number of other cities provide utility services like electricity and water.[53]

B. Counties

Like cities, counties are general purpose units with general authority over local matters.[54] The majority operate as "statutory home rule" counties under ORS Chapter 203.[55] Unlike cities, only a quarter of counties operate pursuant to home rule charters.[56] Most counties are governed by a board of commissioners, though some less populated counties are run by county courts.[57]

All but three of Oregon's 36 counties were formed before 1910, when Oregon voters approved Article XI, Section 2, of the Oregon Constitution and prohibited the creation of new counties by special acts of the Legislature.[58] In lieu of this, state law provides general procedures

---

[46] *See DeFazio v. Wash. Pub. Power Supply Sys*., 296 Or 550, 582 (1984) (finding "the concept of 'extramural power'" has little relevance to a city's contracts or other consensual transactions in goods or services.").
[47] *Id.*
[48] *Id.* (but noting that "exercise of eminent domain outside city limits would be an exercise of extramural power.").
[49] *See, e.g. Churchill v. Grants Pass*, 70 Or 283, 288-89 (1914) (holding that a railroad, either "within the boundaries of such municipality or not," must be for "the general welfare convenience, health, or comfort of its citizens.").
[50] MCQUILLIN, 5 THE LAW OF MUNICIPAL CORPORATIONS, §§ 15:17, 15:19 (3d ed.).
[51] *See, e.g., Churchill*, 70 Or at 288.
[52] *Prineville Railway*, CITY OF PRINEVILLE, https://www.cityofprineville.com/railway (last accessed June 12, 2024); *About Us*, MINET, https://minetfiber.com/what-we-are (last accessed June 12, 2024).
[53] *The Early Years: 1886-1920*, McMinnville Water & Light, https://www.mc-power.com/about-us/ (last accessed June 12, 2024).
[54] *See* ORS 203.035 (providing that counties govern over all "matters of county concern").
[55] *See GTE Northwest Inc. v. Or. Pub. Util. Com'n*, 179 Or App 46, 49 (2002).
[56] *County Government in Oregon*, OR. BLUE BOOK, https://sos.oregon.gov/blue-book/Pages/local/counties/about.aspx (last accessed June 12, 2024).
[57] *Id.*
[58] *Oregon Counties*, ASS'N OF OREGON CTYS., http://oregoncounties.org/counties/oregon-counties/ (see the accompanying interactive graphic) (last accessed June 12, 2024); *see also* Or Const Art XI, § 2.

for the creation of additional counties and boundary changes.[59] Jefferson and Deschutes Counties each were created through local elections in 1914 and 1916, respectively.[60]

In several different capacities, Oregon's counties serve as subdivisions of the state. Counties perform significant state-level functions; for instance, most counties operate as the local public health authority for its region, assisting the Oregon Health Authority to respond to public health concerns.[61] Counties staff local offices of the Oregon Department of Corrections, the Oregon Youth Authority, and the Oregon Department of Veterans' Affairs, and play an important role in assisting state officials to prepare for and respond to emergencies.[62] Meanwhile, county district attorney's offices prosecute all state crimes; while district attorneys are state officials whose salaries are paid for by the state, their staff are employed by counties.[63]

Outside of these roles, counties function like cities in that they are general purpose units of government with the power to tax, take property, and regulate conduct for the health, safety, and well-being of its residents.[64] This authority extends only so far as the county boundaries.[65] Likewise, counties are public corporations with the power to form contracts, buy and sell property, and conduct enterprises that generally serve the interests of county residents.[66] A county's authority is subject to state and federal law and any self-imposed local laws.[67]

C. School Districts

School districts are unlike cities or counties in that they are a special purpose unit of government tasked with "educating children residing in the district," as opposed to all general matters of local concern.[68] Article 8, Section 3, of the Oregon Constitution requires the state to create a statewide system of "Common schools," and school districts are part of this system.[69]

---

[59] *See generally* ORS Chapter 202.
[60] *See Barber v. Johnson*, 86 Or 390, 395 (1917); *see also* State *ex rel. Stadig v. Deschutes Cty.*, 88 Or 661, 662 (1918).
[61] *See* ORS 431.405 to 431.550.
[62] For the Oregon Department of Corrections, *see* ORS Ch 423; for the Oregon Youth Authority, *see* ORS Ch 420A; and for the Oregon Department of Veterans' Affairs, *see* ORS Ch 406. More so than cities, counties also coordinate with the Oregon Office of Emergency Management through local agencies. *See* ORS 401.305 (providing that all counties "*shall* establish an emergency management agency," while all cities or tribes "*may* … establish…" agencies. (emphases added)).
[63] *Oregon's 36 District Attorneys*, OR. BLUE BOOK, https://sos.oregon.gov/blue-book/Pages/state/executive /district-attorneys.aspx (last accessed June 12, 2024); *see also* ORS 8.760.
[64] *See 1000 Friends of Oregon v. Wasco Cty. Court*, 304 Or 76, 82 (1987) (noting county is "general-purpose.").
[65] *See GTE Northwest Inc. v. Oregon Public Utility Com'n*, 179 Or App 46, 59-62 (2002).
[66] *Id.* at 62 (upholding a county telecommunications service that operated outside the county's boundaries because doing so served residents' interests and because the county did not compel anyone outside its boundaries to use it.).
[67] MCQUILLIN, 5 THE LAW OF MUNICIPAL CORPORATIONS, §§ 15:17, 15:19 (3d ed.).
[68] *See* ORS 332.072.
[69] Or Const, Art VIII, § 3.

Furthermore, school districts are not governed by local charters and cannot be formed through citizen initiatives (though residents may petition for mergers or boundary changes).[70] The number, size, and boundaries of school districts are decided instead by district boundary boards, a role performed by counties on behalf of the state.[71] The duties and powers of school districts are all prescribed by state laws and regulations.[72] Thus, in some ways, school districts function less like municipal corporations and more like state agencies.

School districts are local governments in other ways, however. First, the governing body is elected. Every school district is governed by a district school board, which are public bodies composed of volunteer elected officials who serve four-year terms and reside and vote in the district.[73] Second, school districts possess important government powers like the power to levy taxes, the power to seize property, and the power to regulate activities on district property.[74] Third, school districts are "bodies corporate" with the power to buy or sell property, take out loans, enter into contracts, and "transact all business coming within the jurisdiction of the district."[75]

D. Special Districts

More numerous than school districts are the hundreds of special districts serving communities across the state. These districts are governed generally by ORS Chapter 198 but also by their "principal acts," which are spread across two dozen or so other ORS chapters.[76] Special districts include, for instance, the following: people's utility district under ORS Chapter 261; a domestic water supply district under ORS Chapter 264; a port district under ORS Chapter 777; and county service districts under ORS Chapter 451.[77] Other districts relate to the following: mass transit; irrigation; regional air quality control; fire protection; hospitals; sanitation; cemeteries; parks and recreation; special roads and road assessments; highway lighting; health; vector control; water improvement; weather modification; geothermal heating; transportation; chemical control; weed control; emergency communications; diking; and soil and water conservation.

Everything about special districts—from how they are structured to what powers they have—depends on the interplay between ORS Chapter 198 and their principal acts, i.e., the laws that authorize their existence. A good example of this is how special districts are formed.

---

[70] *See* ORS 330.092 to ORS 330.095.
[71] *See* ORS 330.080.
[72] *See generally* ORS Ch 332.
[73] ORS 332.018.
[74] *See* ORS 328.213; *see also* ORS 332.182; *see also* ORS 332.445.
[75] ORS 332.072.
[76] *See generally* ORS Chapter 198.
[77] ORS 198.010. Note that county service districts are unique in that they are not wholly independent from the county that operates them. ORS 451.485.

Generally, citizens petition to form special districts under a process defined by statute.[78] For some districts, that process is found under the District Boundary Procedure Act.[79] Yet for others, formation and modification are issues controlled by the district's principal act.[80] Similarly, ORS Chapter 198 provides processes for filling vacancies on a district's governing body, compensating officials, and adopting ordinances and other regulations. Each of these processes applies to a different subset of special districts.[81]

Like school districts, special districts are special purpose units of government that are formed for a particular need or service.[82] Generally, a special district possesses taxing and regulatory power if it acts within its boundaries, and within the grant of authority in its principal act or in ORS Chapter 198.[83] Unlike school districts, special districts are funded more by local taxes than by state revenue. Special districts also are public corporations and may enter contracts, buy or sell property, and transact other business as long as every action is related to its limited municipal function.[84]

E. Regional Governments

Finally, city officials may from time to time encounter what are commonly known as regional governments. The most established of these is Metro, which is authorized under ORS Chapter 268 and is classified as a special district government.[85] Metro operates under a charter based in Article XI, Section 14, of the Constitution and has jurisdiction over all "matters of metropolitan concern" as described in the district's charter.[86] In and around Portland, Metro coordinates urban development and transportation, and operates a regional waste system.[87]

Outside of Metro, there are several other regional councils of government (COGs).[88] These councils are more aptly described as government groups than as governments in their own right. COGs are formed through intergovernmental agreements under ORS Chapter 190 and in

[78] *See, e.g.*, ORS 198.748.
[79] *Id.*
[80] *See, e.g.*, ORS 261.105
[81] *See generally* ORS Chapter 198.
[82] *See, e.g.*, ORS 261.305. The enumerated powers of people's utility districts, which generally relate to providing and distributing "a supply of water[,] … waterpower and electric energy, or electric energy generated from any utility." *Id.*
[83] *Id.*
[84] *See, e.g.*, ORS 261.215 (declaring the corporate status of people's utility districts and authorizing the use of certain "corporate powers" enumerated in the act.).
[85] *See generally* ORS Chapter 268; *see also* ORS 198.010(6).
[86] Or Const, Art XI, § 14; OR. METRO CHARTER Ch. 2, § 4 (2015), https://www.oregonmetro.gov/sites/default/files/2015/01/12/Metro%20Charter%202015.pdf (last accessed June 12, 2024).
[87] *Regional Leadership*, METRO, https://www.oregonmetro.gov/regional-leadership/what-metro (last accessed June 12, 2024).
[88] *Regional Governments*, OR. BLUE BOOK, https://sos.oregon.gov/blue-book/Pages/local/other-regional.aspx (last accessed June 12, 2024).

this way, they are identical to the League of Oregon Cities (LOC).[89] Unlike the LOC, and in a manner similar to Metro, COGs work with cities and other local governments to provide regional public services. Examples include business loan programs, economic development, senior and disability services, and regional planning.[90] COGs enable governments to take on programs or projects that otherwise might be too costly or complex.[91] While COGs might contract with local governments to provide services, they are not municipalities Therefore, they possess no coercive authority—taxing, regulations, etc.—and may only provide services that its member governments are authorized to provide.[92] COGs operate through boards of elected officials selected from its member governments and derive revenue through dues and fee-for-service agreements.[93]

II. Forming a City

Throughout history, and in theory, three methods of incorporation have been available to Oregon communities looking to incorporate as cities. Among them, one method is barred by the Oregon Constitution and another has never been attempted—only contemplated.[94] This leaves the statutory procedure under the Oregon Incorporation Act of 1893, codified at ORS 221.010 to ORS 221.110, which will be the focus here.

The Incorporation Act carries two threshold requirements. First, at least 150 people must reside in the proposed area.[95] Second, the area cannot be within "an incorporated city."[96] The general requirements of incorporation fall into four categories: (1) filing a proposed petition, (2) conducting a petition drive, (3) obtaining county approval, and (4) succeeding in an election. The exact requirements differ depending on the community's proximity to existing cities and whether the area is located in a populous county. Finally, incorporation triggers other legal requirements that demand the attention of the new city. Petitioners should be aware of these requirements prior to filing the petition. The following paragraphs explore the major categories and concerns of incorporation.

---

[89] *See* Lane Council of Governments, *https://www.lcog.org/about/page/who-we-are* (last accessed June 12, 2024).
[90] *Id.*
[91] *Id.*
[92] *Id.*
[93] *Id.*
[94] Or Const, Art XI, § 2, prohibits the state from incorporating cities by special act. The provision also grants "cities" the power to adopt a home rule charter. Arguably, an unincorporated community becomes a city through the process of drafting and adopting a home rule charter; if so, communities could simply adopt a charter and skip the process of becoming a city under state law. For more analysis, *see* League of Or. Cities, Incorporating a City in Oregon, https://www.orcities.org/download_file/383/1852 (last accessed August 30, 2024).
[95] ORS 221.020.
[96] *Id.*, The Incorporation Act does not define the term "incorporated city." State regulations acknowledge the possibility for communities within the urban growth boundary of a city to incorporate; *see* OAR 660-014-0010(1).

A. Filing a Proposed Petition

The process of incorporating a city begins by filing a **prospective petition** and an **economic feasibility statement** with the county clerk.[97] The prospective petition is a form prescribed by the Oregon Secretary of State and requires the name of the city, the names and addresses of no more than three chief petitioners, and the proposed permanent tax rate for the city.[98] A **map** that shows the boundaries of the proposed city must be attached to the form.[99]

The economic feasibility statement requires considerably more work by the community. It details the services and functions of the proposed city, the relationship of those services to existing public services in the area, and the first and third-year budgets of the prospective city that prove "economic feasibility."[100] Generally, a community's ability to provide this statement results from a broader feasibility study that addresses the economic characteristics of the area and the tax rate and boundaries of existing taxing districts, among other issues. For information on how to conduct a feasibility study, consult the LOC City Incorporation Guide.[101]

Once the chief petitioners file the prospective petition and economic feasibility statement with the county clerk, the clerk authorizes the circulation of the petition and sends two copies to the board of commissioners for the county.

i. Additional Requirements

The initial filing must comply with several other provisions in addition to these basic requirements. As a general rule, areas that fall just outside an existing city generally face stricter requirements for incorporation than more isolated areas. One example of this is rural unincorporated communities, which are subject to a much more rigorous filing process. Another example is areas within an urban growth boundary (UGB), which

Petition for Incorporation in a Non-Urbanized Area

A Petition for Incorporation must include:

- Name and residence of no more than three persons who are to be the chief petitioners;
- Name of the proposed city;
- Proposed permanent rate limit for operating taxes, expressed in dollars per thousand dollars of assessed value;
- A map indicating the exterior boundaries of the proposed city (not to exceed 14 inches by 17 inches); and
- If the proposed city is to be located in a jurisdiction governed by a local government boundary commission, the Petition must further include the economic feasibility analysis required by ORS 199.476(1).

The Petition must also comply with land use regulations. If the area to be incorporated encompasses a special district(s), it should state whether it proposes to extinguish the special district(s).

[97] ORS 221.031.
[98] *See* Form SEL 701, https://sos.oregon.gov/elections/Documents/SEL701.pdf (last accessed June 12, 2024).
[99] ORS 221.031(3)(d).
[100] ORS 221.035.
[101] LEAGUE OF OR. CITIES, INCORPORATION GUIDE https://www.orcities.org/download_file/1067/1852 (last accessed August 30, 2024).

must comply with the existing city's local comprehensive plan. That said, planning laws apply to all incorporation petitions, not just those within a UGB. For areas not within a UGB, the petition must comply with statewide planning goals. Finally, if the proposed area falls within the jurisdiction of a local government boundary commission, then other filing requirements exist.

a. Urbanized Areas

Additional requirements exist for communities in "urbanized areas," or areas that are outside UGB but within three miles of a city.[102] To be incorporated, these areas must be within a previously designated "rural unincorporated community," and the lands bordering the proposed city must be subject to use exemptions for agriculture or forestland.[103] For qualifying communities, the initial filing must include a separate **affidavit** and a **detailed economic feasibility statement**.[104]

The affidavit must be filed by a chief petitioner vowing that at least ten percent (10%) of the registered electors already support incorporation and that discussions have taken place with each neighboring city "concerning the effects of the proposed incorporation."[105] These discussions are important because a city may later petition the county to reject the proposal if it finds the incorporation would adversely impact its interests.[106]

The economic feasibility statement, meanwhile, must contain at least three additional pieces of information. First, the statement must commit the proposed city to providing urban services in a manner that is both cost-efficient and adequate for current and future needs. Second, the statement must contain a proposed permanent rate limit for operating taxes. Third, the statement must commit the proposed city to planning for residential development at or above the same urban density planned for an already existing city located in the county. This comparison city must have a similar geographic area within the urban growth boundary.[107]

In some cases, a proposed city must also "demonstrate" that it can meet these standards by completing a public facility plan and a transportation system plan.[108] If so, petitioners may satisfy the standards by entering into service agreements with other cities or districts.[109]

---

[102] ORS 221.034(2).
[103] *Id.*
[104] *Id.*
[105] *Id.*
[106] ORS 221.034(3).
[107] ORS 221.034(2).
[108] *Id.*
[109] *Id.*

b. Land Use Regulations

Under Oregon law, the incorporation of any city results in a land use decision that is subject to statewide planning regulations. Specifically, the county order approving an incorporation petition as an election ballot measure is a "land use decision [that] must comply with applicable Statewide Planning Goals."[110] Or, if the area proposed for incorporation is within the urban growth boundary of a city, then the incorporation proposed by the petitioners must also comply with local planning regulations, i.e., the existing city's local comprehensive plan, that is required by state land use laws.[111] Failure to comply with the relevant land use rules can lead to legal disputes with interested parties in the Oregon Land Use Board of Appeals.[112] For these reasons, communities must be aware of land use laws before seeking incorporation.

c. Local Government Boundary Commissions

A local government boundary commission is a commission with authority to review major or minor boundary changes, including incorporation.[113] Counties are authorized to create these commissions, which technically are state agencies, under ORS Chapter 199.[114] In counties where a local boundary commission has jurisdiction, the chief petitioners must include with the initial filing the **economic feasibility analysis** and **estimated tax rate** required under ORS 199.476.[115] The information must then be reviewed and approved by the local government boundary commission before the county clerk can authorize the petition for circulation.[116]

ii. Future Considerations

Before filing a petition for incorporation, several other considerations warrant the attention of petitioners. Unlike the items above, these are not legal prerequisites to filing a petition, but they are concerns that carry severe consequences if not addressed early in the incorporation process. First, a new city in a county of more than 100,000 people must provide four major services within three years of incorporation to receive crucial state shared revenue. Second, and somewhat related, is the relationship that a new city has with existing—often overlapping—special districts. Third, all new cities must comply with local budgeting laws. Fourth, returning to the subject of land use law, all new cities must prepare local land use rules

[110] OAR 660-014-0010(2)(a).
[111] OAR 660-014-0010(2)(c). Once incorporated, a city develops its own local comprehensive plan for the area; *See* ORS 197.757.
[112] ORS 197.825.
[113] ORS 199.415(11). Incorporation is a "major boundary change," as is merger, consolidation, and disincorporation.
[114] ORS 199.430.
[115] ORS 221.031.
[116] *Id.*

within four years of incorporation. A full list of considerations is available in the LOC's City Incorporation Guide.[117]

a. Areas Within a County of More than 100,000 People

Beginning with its fourth year, a city in a county with more than 100,000 people must provide at least four of the following services to continue to be eligible for state shared revenues: police protection; fire protection; street construction, maintenance and lighting; sanitary sewers; storm sewers; planning, zoning and subdivision control; one or more utility service.[118] Nothing is required at the time of incorporation, but communities should be aware of this requirement and factor it into the feasibility study. Some of these services might already be provided by a local special district, which underscores the importance of the next subsection.

b. Special Districts

Unlike some cities, neighboring or overlapping special districts are not legally entitled to receive any consultation from a community seeking to incorporate. Consulting special districts is a practical requirement, however, to avoid future complications and promote cooperation among local governments. For the following reasons, filing the incorporation petition is a crucial opportunity for a community to establish a working relationship with special districts in its area.

First, incorporating an area that includes a special district may have immediate legal consequences. If the entire area of a district is within the boundaries of a new city, then that district will cease to exist and the new city will assume the assets, liabilities, obligations and functions of the district.[119] Such a district may continue to exist and operate within the city's boundaries, but only if this arrangement is proposed in the petition to voters.[120] Given that terminating a district may be undesirable for the district or the new city, and that this outcome is avoidable with the proper preparations, early communication is encouraged between petitioners and districts.

Conversely, if the city only partially overlaps with a district's boundaries, then that district continues to operate in the area if and until the city completes a separate process to withdraw the district from the area.[121] This process includes notice and meeting requirements; anticipating these requirements will mean for a smoother transition for the city and district.[122]

---

[117] LEAGUE OF OREGON CITIES, INCORPORATION GUIDE, https://www.orcities.org/download_file/1067/1852F (last accessed August 30, 2024).
[118] ORS 221.760.
[119] ORS 222.510.
[120] *Id*.
[121] ORS 222.520.
[122] ORS 222.524; ORS 222.460(2).

Second, all new cities must enter into coordination agreements with each special district that provides an urban service within its urban growth boundary.[123] For purposes of this planning requirement, "urban services" means sanitary sewers, water, fire protection, parks, open space, recreation, streets, roads, and mass transit.[124] New cities must enter into these coordination agreements before the second periodic review of the city's comprehensive plan.[125]

Finally, proposed incorporations of cities within the boundaries of the Metro, a regional government and special district, may face additional requirements.

c. Budgeting Laws

ORS Chapter 294 provides a stringent set of budgeting laws for local governments. Beginning in most instances with the fiscal year following incorporation, the expenditure of any money by a city, even in its first months of existence, must be made pursuant to a legal budget.[126] While the economic feasibility statement required for an incorporation petition will outline *proposed* budgets for the first and third years of city operations, the budgets still must be approved by the new city's council. The process of approving a budget involves a series of committee, notice, and meeting requirements. Petitioners should know of these requirements and may refer to the Oregon Property Tax Division's "Local Budgeting Manual."[127]

d. Comprehensive Planning

As noted above, compliance with state land use regulations begins with the incorporation petition, but it does not end there. Upon incorporation, cities acquire a responsibility to develop their own land use rules through a local comprehensive plan.

ORS Chapters 197 and 227 govern the new city's land use planning responsibilities. Within four full years of its existence, a new city must prepare, adopt, and gain state approval of a comprehensive plan consistent with the statewide goals adopted by the Oregon Land Conservation and Development Commission (LCDC).[128] LCDC administrative rules apply the statewide goals to incorporation and require adoption of a comprehensive plan for the new city.[129] The plan must be coordinated with the county and acknowledged by the LCDC before it is official. The typical plan contains a map indicating preferred land uses, a series of goals and policies defining those uses, and references to the data on which the plan is based.

---

[123] ORS 195.020.
[124] ORS 195.065.
[125] ORS 195.085.
[126] ORS 294.338(1), (10).
[127] https://www.oregon.gov/dor/programs/property/pages/local-budget.aspx (last accessed June 12, 2024).
[128] ORS 197.757; ORS 197.251.
[129] (OAR, Chapter 660, Division 14).

B. Signatures, County Review, and Election

The incorporation process moves quickly following the filing of the proposed petition and the required supporting documents. Upon receiving all of the necessary paperwork, the clerk for the county will immediately file the petition and "authorize the circulation of the petition."[130] Petitioners for incorporation then face four additional hurdles: (1) collecting enough signatures; (2) obtaining county approval for the incorporation; (3) winning in the election; and finally (4) withstanding challenges filed against the incorporation, if any.[131]

i. Collecting Signatures

The Incorporation Act requires the petition to be signed by at least twenty percent (20%) of the eligible voters in the area proposed to be incorporated, or only ten (10%) if the area is within a county of more than 300,000 people.[132] At present, there are five such counties: Clackamas, Lane, Marion, Multnomah, and Washington counties.[133] These signatures must be gathered within six months of filing the proposed petition or else they will not count.[134] In addition, the signatures must be collected on a sheet prescribed by the secretary of state and each sheet must be accompanied by a full and correct copy of the petition for incorporation.[135] Once all of the needed signatures have been collected, the petitioners return to the county to file the petition and signatures with the county court or the county board of commissioners.[136]

ii. County Approval

Upon receiving the petition, the county's governing body sets a time and place for a hearing on the petition and delivers notice through publications and public places.[137] This hearing serves two purposes. First, it provides an opportunity for interested parties to appear and present objections to the incorporation or the proposed tax rate. Second, the governing body must determine that all property within the proposed boundaries would be "benefited" by the city.[138]

The standard for determining whether an area would be "benefited" by incorporation is not clearly set by statute.[139] The Oregon Supreme Court has described the "ambiguity regarding the powers vested in the county" in this hearing.[140] That said, a few rules are clear. First, the county may, but is not required, to expand the boundaries of the proposed city to include areas it

---

[130] ORS 221.031(2).
[131] *See* ORS 221.031(4); ORS 221.040; ORS 221.050.
[132] ORS 221.040(1).
[133] *County Populations*. OR. BLUE BOOK, https://sos.oregon.gov/blue-book/Pages/local/county-population.aspx (last accessed June 12, 2024).
[134] ORS 221.040(1).
[135] *See* Form SEL 702 https://sos.oregon.gov/elections/Documents/SEL702.pdf (last accessed June 12, 2024); *see also* ORS 221.031(4).
[136] ORS 221.040(1).
[137] *Id.*
[138] ORS 221.040(2).
[139] *See McManus v. Skoko*, 255 Or 374, 378 (1970).
[140] *Id.*

finds would be benefited by the new city.[141] However, the county *must* limit the boundaries of the new city to exclude property owners who would *not* be benefited. Second, the Supreme Court held in *McManus v. Skoko* that the county cannot go so far as to find no property would be benefited by a proposed incorporation, thereby rejecting any possibility of incorporation for the community.[142]

The *McManus* Court found that the purpose of the hearing is to alter boundaries, not to reject incorporation.[143] Third, any ruling by the county in this hearing is a quasi-judicial decision, not a legislative decision.[144] As such, the county's governing body is serving as an impartial decision-maker rather than as a political body; the county must make its decision based on evidence, and the petitioners are entitled to certain due process rights in the proceeding.[145]

Despite the *McManus* ruling, there remains one way that a county can reject a petition for incorporation. If the proposed area is a rural unincorporated community and a neighboring city objects to the incorporation, then the county has clear grounds to deny the incorporation effort.[146] If it does, then it must clearly acknowledge this as the reason in its findings and the decision may be appealed to the Land Use Board of Appeals (LUBA).[147]

Conversely, a county order *approving* the incorporation petition for an election may also be appealed to LUBA. As noted above, this order qualifies as a land use decision and therefore is subject to LUBA appeal.[148] Successful appeals will invalidate the outcome of the election.[149]

iii. Election

The county's governing body, upon approving the petition in its original or altered form, must issue an order for an election to be held on the matter of incorporation. The election must be held at least 90 days after the issuance of the order.[150]

In the election, eligible voters within the boundaries of the proposed city are presented with two questions. First, voters must decide if the proposed city should be incorporated or not. Second, if so, the voters must select candidates who will serve on the inaugural city council.

The vote on incorporation carries a unique threshold requirement. To succeed, the vote on incorporation must show that a majority of the votes approve of the idea and that at least fifty

---

[141] ORS 221.040(2).
[142] *McManus*, 255 Or at 378-80.
[143] *Id.*
[144] *See 1000 Friends of Oregon v. Wasco Cty Court*, 304 Or 76, 80 (1987) (citing criteria in *Strawberry Hill 4 Wheelers v. Benton Bounty Bd. of Comm.*, 287 Or 591, 593 (1979)).
[145] *Id.*
[146] ORS 221.034(3).
[147] ORS 221.034(5).
[148] *1000 Friends of Oregon*, 304 Or at 78.
[149] *Id.*
[150] ORS 221.040(3).

percent (50%) of the registered voters in the area participated in the election. But this requirement is waived if the vote on incorporation is held in May or November of any year. [151] If the electorate votes for incorporation of the new city, then the date of incorporation is the date of the election and the costs of the election come out of the general fund of the new city. If the electorate votes down the idea, then all expenses of the election are paid out of the general fund of the county.[152]

The vote on council candidates must result in the election of five council members. Under the Incorporation Act, a city council is a five-person body. To be on the ballot, candidates must file a declaration of candidacy with at least 25 signatures of eligible voters in the area, or else just ten percent (10%) of the voters in the area if that number is less than 25 people.[153] Of the candidates, the two that receive the highest number of votes will hold office until the second general election following incorporation; the remaining three will hold office until the next general election.[154]

Newly incorporated cities operate, at least initially, pursuant to a government structure under the Incorporation Act.[155] This law governs the city's politics unless or until the city supersedes it with the creation of a home rule charter. At present, all 241 incorporated cities in Oregon operate under charters enacted under Article XI, Section 3, of the state constitution. More information on how cities can be structured is available in Chapter II.

ELECTION OF FIRST CITY COUNCIL

1) There will be no nominating or primary election for the nomination of city council candidates.
2) Notwithstanding ORS 249.037, nominating petitions and declarations of candidacy shall be filed with the County Clerk no sooner than the 100th day and no later than the 70th day before the date of the election.
3) At the time of a candidacy declaration, a filing fee of $25 is to be paid.
4) Nominating petitions must contain at least 25 signatures of electors in the proposed area for incorporation or 10% of the electors, whichever is less.

iv. Challenges

In the event the incorporation of a city is challenged within two years of incorporation, as an improper land use decision or otherwise, state law provides a process for how shared revenue is to be distributed. If the respective court or state agency determines that the incorporation was invalid, moneys that would have otherwise been payable to the city as state shared revenue—such as tax revenue from cigarette, liquor, and

[151] ORS 221.050(4)-(5).
[152] ORS 221.061(2).
[153] ORS 221.050(2).
[154] ORS 221.090(1).
[155] ORS 221.110.

marijuana laws and street and highway funds—are instead deposited with the State Treasurer, with the State Treasurer placing these monies in an escrow account. If the new city successfully appeals the decision, then the funds ultimately are distributed to the city. If the new city fails to appeal or fails in its appeal, then the city's state shared revenue is instead distributed to all cities throughout the state based on population.[156]

Theoretically, another challenge to incorporation might come in the form of a nearby city or special district attempting to annex parts of the area before incorporation can take place. This would not be a direct challenge to incorporation but rather a preemptive one. State law addresses this and forbids any attempts at annexation during the pendency of an incorporation petition. As soon as petitioners complete their initial filing of a prospective petition, no city or district may commence annexation proceedings until the petition is rejected by the county or by voters.[157]

III. Boundary Changes

Once a city is incorporated, different state laws govern how the nature of a city can be altered through annexation, withdrawal, merger, consolidation, or disincorporation. On these topics, cities may be subject to local laws as well, like an ordinance or a home rule charter. Cities need to be aware of their own laws before attempting any of these processes. The following section is limited to state law requirements and reviews the five boundary changes that a city may undergo. Two of them—annexation and withdrawal—modify a city's existing boundaries and are considered "minor" boundary changes.[158] The remaining three—merger, consolidation, and disincorporation—are "major" boundary changes that dissolve a city (or cities) as part of their respective processes.[159]

Note that some of these changes require involvement of a local government boundary commission, if a city is subject to one's jurisdiction. Prior to acting in any of the following ways, a city should confirm whether a commission operates in its area. Also, Metro has jurisdiction over boundary changes within its district.[160]

A. Minor Changes: Annexation and Withdrawal

Both annexation and withdrawal modify an existing city's boundaries. Annexation is the process of extending city boundaries. The opposite action, withdrawal, retracts city boundaries by removing territory from the city. These processes are similar in effect, but also different in one fundamental way. A city's power to annex territory is an exercise of extramural authority

[156] ORS 221.785.
[157] ORS 221.032.
[158] ORS 199.415(12).
[159] ORS 199.415(11).
[160] ORS 268.347(1).

that flows entirely from state law, not a home rule charter.[161] A city's right of withdrawal, however, is recognized as a matter of intramural authority.[162] While Oregon courts have upheld the right of cities to remove property from its boundaries, it is unclear if cities may exercise this right in a manner other than the withdrawal process under state law. For the purposes of this Handbook, the following section is limited to relevant requirements under state law.

i. Annexation

Annexation is the process through which a city extends its boundaries to new territory. Any decision to annex land must comply with a state process because a city has no inherent authority to expand its boundaries.[163] With a few exceptions, ORS Chapter 222 leaves it to each city or the city's voters to decide whether to annex new territory.[164] State law instead restricts what territory can be annexed and how. In other words, state law controls (1) the annexation procedure and (2) the type of territory that may be annexed.[165] Finally, many cities require a local election to decide when and where the city will annex new territory.[166] ORS Chapter 222 avoids conflicts with these local laws in all but one provision.[167]

a. Territory to be Annexed

By law, only certain territories may be annexed into a city. Two main restrictions apply. First, a city may only annex territory that is "contiguous" to the city.[168] Second, a city may only annex territory if it is "reasonable" to do so.[169] The latter standard originated in case law and is applied on a case-by-case basis, taking into consideration land use laws, the city's projected growth, and the city's ability to provide urban services to the area, among other factors.[170]

The contiguity requirement is found under ORS Chapter 222, which authorizes a city to annex new territory only if it "is contiguous to the city or separated from it only by a public right of way or a stream, bay, lake, or other body of water."[171] This requirement does not necessarily mean that *most* of the territory must be contiguous to the city. Taken literally, this provision only requires some connection to the city, either by a narrow strip of land or even an annexed right-of-way running back to it.[172] Courts applying the "reasonableness" standard likewise have held on

---

[161] *See Schmidt v. City of Cornelius*, 211 Or 505, 517 (1957). The LOC maintains that the decision to annex is an expression of intramural authority. As such, local processes of deciding whether to annex territory are not subject to state preemption.
[162] *Id.*
[163] *Id.*; *see also City of Corvallis v. State*, 304 Or App 171, 175 (2020) (noting "annexation is an extramural act.").
[164] *See* ORS 222.111(5), which generally requires a city election; *see also* ORS 222.120, which, in the absence of a city election, grants discretion to the city's governing body to decide whether to annex a territory or not.
[165] *See generally* ORS 222.111.
[166] *City of Corvallis*, 304 Or App at 177.
[167] *See, e.g.*, ORS 222.915; ORS 222.750(7).
[168] ORS 222.111(1).
[169] *See Morsman v. City of Madras*, 191 Or App 149, 153-54 (2003).
[170] *Id.*
[171] ORS 222.111(1).
[172] *See Dep't of Land Conservation & Dev. (DLCD) v. City of St. Helens*, 138 Or App 222, 228 (1995).

many occasions that so-called "cherry stem" annexations are proper.[173] As one court noted, an irregularly shaped annexation is not "per se unreasonable," suggesting that other factors weigh more on the reasonableness of annexation than the adjacency of the property to the city.[174]

By and large, the most significant factor for the "reasonableness" of an annexation is whether it complies with land use law.[175] Therefore, a city preparing to annex new territory must be aware of any applicable statewide planning goals or local comprehensive plans.

b. Annexation procedure

For the most part, annexation may be initiated in one of two ways: (1) through a petition by territory residents, or (2) through a motion of the city council.[176] The general rule is that whenever a proposal for annexation is raised, a city must submit the proposal to the voters of the territory and the voters of the city.[177] This rule is subject to many exceptions, which are addressed below. However, if no exceptions apply and elections are held in both the city and territory, then these two elections must occur within one year of each other.[178] The votes may happen simultaneously in the same election as long as the proposals appear on the ballot separately.[179]

To promote annexation, any proposal may include a special rate of taxation for the new territory that is a ratio of the highest rate of taxation applicable to property within the city.[180] Proposals submitted by petition may include a special rate with a term of up to ten years; those submitted by the city may have a term of up to 20 years.[181] The special rate may increase from fiscal year to fiscal year pursuant to a proposed schedule, but in no event can it exceed the rate of taxation on which the rate ratio is based.[182] If the annexation is approved, then the city cannot tax the annexed territory at any other rate than the special rate for the term that it is in effect.[183]

Not all annexations require elections in both the city and the territory. First, city elections are not required as long as a public hearing is held on the issue and the election is not mandatory under the city's charter.[184] Second, a territory election is not required if an adequate number of landowners in the territory consent to annexation.[185] Third, under certain circumstances, neither a city or territory election is required, though the annexation itself might be.[186] In other words,

---

[173] *Id.*; *see also Morsman*, 191 Or App 149 at 153-54.
[174] *Morsman*, 191 Or App 149 at 153.
[175] *Id.* at 153-54.
[176] ORS 222.111(2).
[177] ORS 222.111(5)
[178] ORS 222.111(6)
[179] ORS 222.111(7).
[180] ORS 222.111(3)
[181] *Id.*
[182] *Id.*
[183] *Id.*
[184] ORS 222.120(1).
[185] ORS 222.125; ORS 222.127; and ORS 222.170.
[186] ORS 222.127; ORS 222.750; and ORS 222.855.

some provisions waive all election requirements for annexation and then require cities to take on new territory.[187]

1. Annexation without City Elections

Public hearings under ORS 222.120 eliminate the need for a city election on annexation, unless a city charter provision expressly requires otherwise. In lieu of an election, this provision permits a city to hold a public hearing before the council on the matter of annexation. The meeting must be noticed at least once a week for two consecutive weeks and must provide an opportunity for voters in the city to "appear and be heard" on the issue.[188] Once this takes place, the city may declare annexation of a territory on condition that other requirements are satisfied.[189]

This exception has limits. First, at least some city charters require that all annexations be put to a vote before city voters.[190] ORS 222.120 avoids preempting these laws by stating that a public hearing is permitted only if an election is not "expressly required…by the city charter."[191]

Second, an election may be unavoidable on the annexation issue—even for cities that do not expressly require one—if a referendum is called following the public hearing. Under ORS 222.120, any ordinance on annexation in lieu of a city election is subject to referendum.[192] A successful referendum petition will nullify the effect of the public hearing and put the matter up for an election.[193]

2. Annexation without Territory Elections

Just as public hearings may eliminate the need for a city election, the written consent to annexation by territory landowners may eliminate the need for a territory election. Generally, landowners may consent to annexation either by filing statements of consent with the city or by entering into annexation

An election on annexation is not required in the territory when:

(1)

222.170(1) -- Landowners consent by a triple majority.

(2)

222.170(2) -- Landowners and registered electors consent by a double majority.

(3)

222.125 -- Landowners consent unanimously and at least half the registered electors do also.

(4)

222.127 -- All landowners file a petition and the territory meets certain criteria.

(5)

222.750 -- The territory meets the criteria for an "island."

(6)

222.855 -- Oregon Health Authority finds that the territory represents a "danger to public health."

[187] *Id.*
[188] ORS 222.120(2)
[189] ORS 222.120(4).
[190] *See City of Corvallis v. State*, 304 Or App 171, 177 (2020).
[191] ORS 222.120(1).
[192] ORS 222.120(4)(6)
[193] *Id.*

contracts with the city. ORS Chapter 222 provides multiple standards of consent that, if met, eliminate the need for an election.

First, a territory election is not necessary under state law if a so-called "triple majority" of territory residents consent to annexation.[194] The term "triple majority" refers to there being support for annexation among **(1)** more than half of the landowners in the territory **(2)** who also own more than half of the total land in the territory, **(3)** the assessed value of which is more than half of the assessed value of all real property in the territory.[195] Oregon courts have upheld this form of annexation, despite the possibility that the landowners themselves may not be registered as voters or even residing in the territory to be annexed.[196] In *Morsman*, the court found this law does not discriminate against a suspect class, that there is no fundamental right under the U.S. Constitution to vote on annexation, and that the state has an interest in eliminating the burden of an election where it is already clear annexation is favored by many property owners.[197]

Second, an election is unnecessary if instead a "double majority" of residents consent to annexation.[198] A "double majority" consists of **(1)** more than half of the registered voters in the territory and **(2)** the owners of more than half of the land, whether or not they are the same individuals.[199] As long as a majority of each class file statements of consent, then an election on annexation need not be held.[200]

A statement of consent filed with a city is a public record and only is valid for one year, unless a longer period of time is expressly stated in writing.[201] As noted above, consent may also take the form of an **annexation contract**, or an agreement between a city and a landowner that guarantees city services in return for the landowner's "consent to eventual annexation."[202] Unlike statements of consent, annexation contracts must be recorded and are binding on any successors in interest in the property.[203]

Significantly, neither one of these processes eliminates the need for the annexing city to hold a city election, or else a public hearing under ORS 221.120 if permitted by local law. [204] As an additional requirement, both the double and triple majority provisions require that landowners file their statements of consent prior to the city election, or else the public hearing if permitted by local law.[205] This distinction is important because other landlord consent provisions under ORS Chapter 222 *do* waive the requirement for city elections as well as territory elections.

---

[194] *See* ORS 222.170(1); *see also Morsman v. City of Madras*, 196 Or App 67, 70 (2004).
[195] ORS 222.170(1).
[196] *Morsman v. City of Madras*, 203 Or App 546, 556-563 (2006).
[197] *Id.*
[198] ORS 222.170(2).
[199] *Id.*
[200] *Id.*
[201] ORS 222.173.
[202] ORS 222.115.
[203] *Id.*
[204] ORS 222.170(1)(2).
[205] *Id.*

3. Annexation without Any Election

A final category of provisions under ORS Chapter 222 features those that eliminate election requirements for both the city and the territory. Like the public hearing exception above, most of these provisions include a carve-out for ordinances or charters that do require elections on annexation.[206] That said, one provision applies regardless of local law.[207]

Unanimous Landowner Consent

No election is required under state law in the city or in the territory proposed to be annexed if 100% of the landowners in the affected territory consent to annexation and other conditions are met.[208] There are two such provisions: ORS 222.125 and ORS 222.127. Purportedly, these laws apply regardless of contrary provisions under local law, such as a charter that requires a local vote on annexation.[209]

Under ORS 222.125, cities "need not" hold an election in the territory or in their jurisdiction if all of the landowners and at least 50% of the electors in the territory consent to annexation.[210] If these conditions are met, cities may declare annexation through a resolution or ordinance, showing the boundaries of the annexed area with an attached legal description.[211]

Under ORS 222.127, no elections are permitted and cities must annex the proposed territory if they receive a petition signed by every landowner in a territory and a number of other conditions are met.[212] This law preempts any local ordinance or charter that requires a city election.[213] Annexation is required only if the territory is within the city's urban growth boundary, is or will be subject to the city's acknowledged comprehensive plan upon annexation, and is compliant with all other local ordinances.[214] The territory also must be contiguous.[215]

The state enacted this law in 2016 as SB 1573.[216] To date, no court has addressed whether this law violates the home rule provisions of the Oregon Constitution.[217] Arguably, cities or else its voters have a right to select when to extend the city's boundaries.[218] The decision to annex, not the annexation itself, might be a matter of local concern that blocks state preemption.[219] In *City of Corvallis v. State*, the court of appeals avoided ruling on this

---

[206] *See* ORS 222.915; *see also* ORS 222.750(7).
[207] ORS 222.127.
[208] ORS 222.125, ORS 222.127
[209] *Id.*
[210] ORS 222.125.
[211] *Id.*
[212] ORS 222.127(2).
[213] *Id.*
[214] *Id.*
[215] *Id.*
[216] *See City of Corvallis v. State*, 304 Or App 171, 176 (2020); *see also* https://olis.oregonlegislature.gov/liz/2016R1/Measures/Overview/SB1573 (last accessed June 13, 2024).
[217] *Id.* at 187 n.9.
[218] *See Mid-County Future Alts. Comm. v. City of Portland*, 310 Or 152, 163-64 (1990) (stating that "[t]here still is room to argue … that the borders of a municipal corporation are an integral part of the corporate charter which cannot be altered by the legislature.").
[219] *Id.*

question.[220] The court upheld ORS 222.127 as applied to Corvallis and Philomath because the city charters permit annexation without a local election whenever they are "mandated by state law."[221] Of course, some city charters do require an election for all annexations, even those mandated by state law.[222] The decision in *City of Corvallis v. State* does not resolve the conflict between ORS 222.127 and those charters.

Island Territories

No election is required for the annexation of so-called "island" territories that are entirely surrounded by a city's boundaries.[223] Under ORS 222.750, a city may annex such a territory after one public hearing upon notice to every landowner in the territory.[224] However, this provision does not waive the requirement for an election that is required by a city's charter or ordinance.[225] Moreover, if local law does require a city election, then ORS 222.750 requires that election be open to the residents of the island territory as well as the city.[226]

"Island" territories are territories that are (1) completely within the corporate boundaries of a city or (2) completely surrounded by the annexing city and other natural or artificial boundaries, such as other cities, a large body of water, and Interstate 5.[227] Ironically, the provision does not apply to literal islands, i.e., territory that is completely surrounded by water.[228]

If a city seeks to annex an "island" territory under ORS 222.750, the city must annex the entire territory.[229] Annexing a portion of the territory is not permitted because the provision authorizes annexation of "*such* territory," not any part of it.[230]

Health Hazard Abatement

Finally, under the Health Hazard Abatement Law, no elections are permitted and a city must annex a territory if the Oregon Health Authority (OHA) finds that a public health danger within the territory can be abated through annexation.[231] Just like ORS 222.750, this law does not apply "if the charter or ordinances of the city conflict with or are inconsistent with" the provision.[232] Thus, if local law does require an election on all annexations, this will take precedence.[233]

---

[220] *City of Corvallis*, 304 Or App at 181-82.
[221] *Id.* at 182.
[222] *Id.* at 177.
[223] ORS 222.750(2); *see also Morsman v. City of Madras*, 203 Or App 546, 560 (2006).
[224] ORS 222.750(2).
[225] ORS 222.750(7).
[226] ORS 222.750(8).
[227] ORS 222.750(2).
[228] ORS 222.750(3).
[229] *See Costco Wholesale Corp v. City of Beaverton*, 343 Or 18, 25 (2007).
[230] *Id.*
[231] ORS 222.840 to ORS 222.915.
[232] ORS 222.915.
[233] *But see Pieper v. Health Division*, 288 Or 551, 557 (1980) (finding that a city charter that did not require city elections when the annexation is "mandated by state law" was not inconsistent with this law). In addition to the city of Corvallis, the city of Klamath Falls was involved in a series of cases regarding its use of this annexation process. *See, e.g., West Side Sanitary Dist. V. Health Div. of Dep't of Human Res.*, 289 Or 417, 419 n.1 (1980).

This law lists three examples of dangers to public health, but the list is not exclusive: (1) impure or inadequate domestic water, (2) inadequate sewage or garbage disposal, and (3) inadequate drainage of surface water.[234] The proposed territory must also be "otherwise eligible" for annexation and must be within the urban growth boundary of the city.[235]

Annexations under this provision begin in one of three ways. First, the city itself can initiate the proposal by adopting a resolution calling for an OHA investigation into whether a public health danger exists in the proposed territory.[236] Second, the local public health authority—generally the county—can initiate an OHA investigation in the same manner as the city.[237] Third, at least 40% of residents in a territory may petition the local public health authority to initiate the OHA investigation.[238]

Next, OHA must hold a public hearing in the affected territory and hear any person who may be impacted by annexation, including city residents.[239] Within 60 days of the hearing, OHA then must issue findings on whether a public health danger exists and provide an opportunity for additional oral or written arguments.[240] Within 30 days of the final additional hearing, if any, the OHA director must file a certified copy of the findings with the city or else issue an order that no public health danger exists.[241] At this time, OHA may reduce the boundaries of the territory that has been proposed for annexation.[242]

If a city receives from OHA a certified copy of findings that a public health danger exists, then the city must adopt an ordinance that annexes the territory.[243] This ordinance, as well as any final order from OHA, is subject to judicial review.[244]

ii. Withdrawal

Withdrawal is the process of detaching territory from a city's jurisdiction.[245] Previously laws referred to this boundary change as "disconnection."[246] Like annexation, this process is a minor boundary change; it retracts the boundaries of a city but otherwise leaves the city intact.[247] That said, withdrawal can be a significant land use decision.[248] Ultimately, if an area is withdrawn from the city, then from the date of withdrawal it becomes free from assessments and taxes by the city; however, it remains subject to any bonds or indebtedness.[249]

---

[234] ORS 222.850(5).
[235] ORS 222.850(1).
[236] ORS 222.855.
[237] ORS 222.905(1).
[238] ORS 222.905(2).
[239] ORS 222.875(1).
[240] *Id*.
[241] ORS 222.880(1).
[242] ORS 222.880(3)
[243] ORS 222.900(1).
[244] ORS 222.896.
[245] ORS 222.460(1).
[246] *See Schmidt v. City of Cornelius*, 211 Or 505, 509-10 (1957).
[247] ORS 199.415(12).
[248] *See Cogan v. City of Beaverton*, 226 Or App 381, 385 (2009).
[249] ORS 222.460(10).

The withdrawal process under state law is relatively straightforward. As noted above, the Oregon Supreme Court expressly recognizes withdrawal as an exercise of intramural authority by cities; this authority flows from the right to amend a local charter under the home rule provisions of the Oregon Constitution.[250] Theoretically, cities therefore have authority to adopt a withdrawal process under local law, though it is unclear what interest the state might have in maintaining a uniform process for withdrawal. This section will focus exclusively on the state's withdrawal process under ORS 222.460.

Withdrawals may only be proposed by a resolution of a city's governing body.[251] The resolution must state the name of the city and the city's intent to withdraw, describe the boundaries of the territory to be withdrawn, and include a cadastral map of the area prepared by the county assessor.[252] No later than 30 days after adopting this resolution, the city must hold a properly noticed public meeting for the purpose of receiving testimony.[253] The city may choose to alter the withdrawal proposal based on this hearing.[254] Once the hearing is held, the city must then prepare an order for a second meeting—a final hearing—that must take place no later than 50 days and no earlier than 20 days from the date of the order.[255]

The order must declare that **written requests** may be submitted prior to the final hearing by registered electors in the territory proposed to be withdrawn from the city.[256] If the city receives written requests from 100 of these electors, or at least 15% of these electors, then the city must hold an election on the withdrawal.[257] alternatively, if insufficient requests are filed, then the city is authorized to declare the territory detached from the city without holding an election. If an election is necessary, a majority of the votes cast in the affected territory need to support the proposed withdrawal.[258]

B. Major Changes: Merger, Consolidation, and Disincorporation

State law provides the processes for merger, consolidation, and disincorporation of cities. In a merger, one or more cities go out of existence and the belonging territory becomes part of an existing city. In a consolidation, one or more cities — or adjacent unincorporated territories — combine to form a new city. Disincorporation involves just one city terminating its existence.

---

[250] *Schmidt*, 211 Or at 517 (holding that cities cannot annex territory without a grant of extramural authority but that cities "may exercise their home rule powers and *exclude* territory previously included within their limits." (emphasis in original)).
[251] ORS 222.460(2).
[252] ORS 222.460(3).
[253] ORS 222.460(4).
[254] ORS 222.460(5).
[255] *Id.*
[256] *Id.*
[257] ORS 222.460(6)-(8).
[258] *Id.*

Unless expressly permitted by state law, local laws have no bearing on these procedures. The power to surrender a city charter is not among the powers granted to cities by the home rule provisions of the Oregon Constitution.[259] Accordingly, the power of a city to give up its charter—if it is has this power at all—must flow from extramural authority granted to it by the state.[260] While the Oregon Constitution prohibits the state from repealing the charter of any one city, i.e. by special laws, the state may establish any number of processes for repealing a charter under general law.[261] These are those processes.

Note that a report of any major boundary change by a city must be filed with the county clerk and assessor within ten days of the change.[262]

i. Merger

State law permits the merger of a city into an adjoining city upon an election.[263] The Oregon Constitution expressly authorizes the state to establish this process, but with the added condition that "a majority of the electors of each of the incorporated cities…" support the merger.[264] To be eligible, the merging cities also must be "adjoining."[265] State law defines "adjoining" as sharing a river as a common boundary or possessing boundaries that are within 1,500 feet from each other at the nearest point.[266] State law also requires a written agreement prior to a merger that addresses each city's unfunded liabilities or surpluses, if any, in the Public Employees Retirement System (PERS).[267] Examples of merger include the cities of Empire and Eastside, which merged into Coos Bay on separate occasions, and the city of West Salem, which merged into Salem in 1949.[268]

For a city to merge into an existing city and surrender its charter, the question of merger must first be raised by a petition. Generally, this petition must comply with state laws governing prospective petitions for local initiatives and referendums.[269] However, a city may have its own process for local initiatives and referendums pursuant to Article IV, Section 1 of the Oregon Constitution.[270] Regardless, merger petitions cannot be submitted more than once in a 12-month

---

[259] *See* Or Const, Art XI, § 2, which provides that a city may adopt or amend a charter, but not repeal it.
[260] *See McKeon v. City of Portland*, 61 Or 385, 389 (1912) (finding that while voters have "the power to enact or amend the [charter] giving it a legal entity, but they have no power to repeal that instrument.").
[261] *Id*.
[262] ORS 222.010(1).
[263] ORS 222.610; *see also* Or Const, Art XI, § 2a.
[264] Or Const, Art XI, § 2a
[265] *Id*.
[266] *Id*.
[267] ORS 222.045.
[268] ANDIE E. JENSEN & THE COOS HISTORICAL & MARITIME MUSEUM, IMAGES OF AMERICA COOS BAY 14 (Arcadia Publishing, 2012); *West Salem was once its own city*, STATESMAN JOURNAL (March 8, 2014) https://www.statesmanjournal.com/story/life/2014/03/07/west-salem-was-once-its-own-city/6185953/ (last accessed June 13, 2024).
[269] ORS 222.610, ORS 222.620(4).
[270] ORS 222.620(4)

period and must include a proposed permanent tax rate for the merged city.[271] Further, this rate must be the rate that would produce the same amount of tax revenue otherwise produced by the cities if they remained separate.[272] Any city that has not yet imposed a property tax may propose a permanent rate limit as part of this process, which will be taken into account in determining the rate for the merged city.[273] If a petition meets all of these requirements under state or local law, then the city must call an election.[274]

For the second city, the one into which the first city is merging, the question of merger may be submitted to its voters in one of two ways. The city may do so on its own resolution, or a second citizen petition may compel the city to put the merger to a vote.[275] The petition must meet the same requirements as the first petition above.[276]

For the most part, merger ballot measures follow the procedures for any other measure under Oregon's election law.[277] There are a few exceptions. First, the statement that is part of each city's ballot measure must include the proposed permanent tax rate from above, as well as a general description of the city boundaries that would result from the merger.[278] Second, the election notice for each city's measure must include a map of the new city's boundaries.[279] Third, each election must be held "on the next practicable date" permitted for a local election.[280] For a city that has not yet approved operating taxes and is proposing a permanent rate limit as part of its merger measure, the election must be held in May or November.[281] The two elections do not need to be held simultaneously; state law

Key Differences Between Merger and Consolidation

Merger

- Separate elections
- Two cities combine into an existing city
- Prospective petition is unnecessary
- Cannot include any surrounding areas
- Might require an "absolute majority" of eligible voters

Consolidation

- Single election
- Two or more cities combine to form a new city
- Prospective petition must be filed
- May include certain surrounding areas
- Requires a majority of the votes cast

[271] ORS 222.620(5)
[272] ORS 222.620(3)
[273] ORS 222.050(2). This rate must comply with Article XI, Section 11(c)(3) of the Oregon Constitution. *Id.* If the merger ultimately does not take place, then no permanent rate limit will be established in the city, regardless of the outcome of that city's election. ORS 222.050(7).
[274] ORS 222.620(1).
[275] ORS 222.650(1).
[276] ORS 222.650(2).
[277] ORS 222.620(6), ORS 222.650(6).
[278] *Id.*
[279] *Id.*
[280] ORS 222.620(7); ORS 222.650(7).
[281] ORS 222.050(4).

provides that "it is sufficient if both are held within a period of one year."[282]

To be valid, each city's merger measure requires authorization by "a majority of the electors" of each city.[283] For a city that has not yet approved operating taxes and has proposed a permanent rate limit as part of the merger, the merger measure also must be voted on by at least 50% of registered voters eligible to vote in the election.[284] This is sometimes referred to as an "absolute majority" instead of a simple majority.[285] Arguably, an absolute majority is required for all mergers because the Oregon Constitution requires support of "a majority of the electors," not a majority of the electors *voting* on the measure.[286]

If the merger is approved by a majority of the eligible voters in each affected city, then the two cities will merge 30 days after the date of the last election held on the matter.[287] The effect of the merger is that all property, debts and liability, and general jurisdiction of the merging city is transferred to the newly merged city. Any pending suits, actions, or proceedings of the merging city must be "defended or prosecuted to termination" by the merged city.[288]

ii. Consolidation

In addition to mergers, state law also provides a process for the joining of two or more adjoining cities and adjoining unincorporated areas.[289] In contrast to mergers, consolidation results in the incorporation of a new city.[290] The cities of Oceanlake, DeLake, and Taft consolidated in 1965 and were incorporated as Lincoln City.[291] Past efforts to consolidate the cities of Coos Bay and North Bend have been rejected by voters.[292]

Consolidation requires two or more cities to repeal their charters for the charter of the newly incorporated city. Unlike annexation, unincorporated territories do not need to be contiguous to the consolidating cities; the consolidation process permits the incorporation of

---

[282] ORS 222.610.
[283] *Id*.
[284] ORS 222.050(4)(a). Furthermore, as noted above, if the merger measure does not pass in both cities, then no permanent rate is established. ORS 222.050(7).
[285] *See Chamberlain v. Myers*, 344 Or 605, 608-9 (2008).
[286] Or Const, Art. XI, § 2a. This argument has been raised before in the Oregon Supreme Court. *See* School Dist. No. 17 of *Sherman Cty. v. Powell*, 203 Or 168, 179 (1955) (decided on other grounds). Likewise, Oregon's disincorporation statute borrows this language verbatim and this argument has been raised in that context as well. *See De Young v. Brown*, 297 Or App 355, 360 (2019) (rev' allowed). Oregon's election law defines "elector" as an "individual qualified to vote." ORS 254.005.
[287] ORS 222.680.
[288] ORS 222.700(1).
[289] ORS 222.210(1). Consolidation cannot occur with just one city and an unincorporated area. *See Mid-County Future Alts. Comm. v. Portland Metro. Area Local Gov't Boundary Comm'n*, 300 Or 14, 23 (1985).
[290] ORS 222.210.
[291] *History of Lincoln City Oregon*, LINCOLN CITY CHAMBER OF COMMERCE (2018), https://lcchamber.com/history-of-lincoln-city-oregon/ (last accessed June 13, 2024).
[292] ANDIE E. JENSEN & THE COOS HISTORICAL & MARITIME MUSEUM, IMAGES OF AMERICA COOS BAY 14 (Arcadia Publishing, 2012).

noncontiguous territory if it is within three miles from "the rest of the territory of the city."[293] Consolidation elections require approval from a majority of voters in **(1)** the most populous city proposed to be consolidated and **(2)** at least one other city or unincorporated area. If two or more cities propose to consolidate, state law also requires a written agreement addressing each city's unfunded PERS liabilities or surpluses, if any.[294]

Like incorporation, the consolidation process begins by filing a prospective petition with the county clerk in which the proposed city lies.[295] In the event the proposed city lies in more than one county; the petition is filed with the county clerk of the county in which the largest part of the proposed city lies.[296] In addition to the required petition, consolidation necessitates the filing of an economic feasibility statement.[297] This economic feasibility statement must contain three things: "(1) a description of the services and functions to be performed or provided by the proposed city; (2) an analysis of the relationship between the services and functions to be provided by the proposed city and other existing or needing governmental services; and (3) a proposed first year line item operating budget and a projected third year line item operating budget for the proposed city that demonstrates the city's economic feasibility."[298]

The prospective petition must also state the proposed city's permanent rate limit for operating taxes.[299] As with mergers, a city that has not imposed a property tax may propose a permanent rate limit as part of the consolidation process; if so, the city's proposed rate limit must be taken into account in determining the proposed rate limit of the new city.[300]

Upon receiving the prospective petition and the economic feasibility statement, the county clerk dates and time stamps the petition and authorizes its circulation.[301] The clerk also sends a copy of the petition and economic feasibility statement to each of the cities included in the proposed consolidation.[302]

The consolidation process requires this petition to be signed by no less than ten percent (10%) of the electors of each city and unincorporated areas included in the consolidation.[303] All signatures must be obtained within one year of filing the prospective petition with the county clerk.[304] The petition must state the name of the proposed new city, the names of every city to

[293] ORS 222.210(2).
[294] *Id*.
[295] ORS 222.230(1).
[296] *Id*.
[297] ORS 222.225.
[298] *Id*.
[299] ORS 222.030.
[300] ORS 222.050(2)-(3). As with mergers, this rate must comply with Article XI, Section 11(c)(3) of the Oregon Constitution, and if the consolidation ultimately does not take place, then no permanent rate limit is established for the city regardless of the election outcome. ORS 222.050(7).
[301] ORS 222.230.
[302] *Id*.
[303] ORS 222.220.
[304] ORS 222.230(2).

be included in the proposed city, and the boundaries of every unincorporated boundary that would be included as well.[305] The petition must also include the proposed permanent tax rate limit for the proposed city, which must be the rate that would generate the same amount of tax revenue that the city or cities would otherwise produce in the absence of consolidation.[306] Once the signatures are collected, the completed petition may be filed with the city recorder of any city that the petition proposes to consolidate.[307]

Once the petition is filed, a joint convention is required of the governing bodies of all of the cities proposed for consolidation. The convention must be held at the usual meeting place of the governing body of the city with the largest population, and it must be held within 20 days from when the completed petition is received.[308] If the governing bodies find the petition proper and compliant with Oregon's planning goals, then each governing body approves the petition and appoints two residents from its city to be members of a charter commission tasked with drafting the proposed consolidated city's new charter.[309] In cases where the proposed consolidation also includes unincorporated areas, the governing body for that county must appoint two additional electors to the charter commission.[310] At this stage, if the governing bodies determine that the proposal includes noncontiguous areas separated by a distance of more than three miles, this must be stated and the governing bodies must cancel any further proceedings related to the consolidation proposal.[311]

The charter commission has 60 days from the date of its creation to prepare a charter.[312] During the drafting of the proposed charter, the charter commission may employ attorneys and seek other assistance at the expense of the cities proposed to be incorporated.[313] Once the charter commission finalizes its proposed charter, the commission's secretary files certified copies of the charter with the governing bodies.[314]

The consolidation election follows the standard procedure for local measures under Oregon's election law, but with several caveats.[315] First, the election must be held on the date of the next primary or general election but cannot be earlier than 90 days after the filing date of the proposed city's charter.[316] The election must be held in May or November if a city that has not yet approved operating taxes is proposing a permanent rate limit during consolidation.[317] Second, the chief elections officer is the clerk of the county in which the largest of the cities proposed to

[305] *Id*.
[306] ORS 222.230(3).
[307] ORS 222.230(2).
[308] ORS 222.230(4).
[309] ORS 222.240.
[310] *Id*.
[311] ORS 222.210(2).
[312] ORS 222.240.
[313] *Id*.
[314] ORS 222.250(1).
[315] ORS 222.265(1).
[316] ORS 222.250(2).
[317] ORS 222.050(4).

be consolidated resides.[318] Third, if the proposal includes unincorporated areas, then notice of the election must include a map of the boundaries of each unincorporated area and those of each city.[319] Fourth, the ballot title must include a general description of the proposed city's boundaries. The statement must use "streets and other generally recognized features" and cannot exceed 150 words.[320] Fifth, the consolidation measure itself must ask three questions: **(1)** whether the proposed city should be incorporated, **(2)** whether the proposed charter should be adopted, and **(3)** whether the proposed permanent rate for the city should be adopted.[321]

Drafting the ballot title is the subject of a second joint convention of the cities.[322] Once the governing bodies receive the draft charter, they must meet again to adopt a ballot title for the question of consolidation.[323] The ballot required for consolidation must comply with the requirements of ORS 250.035.[324] Upon completion of the ballot title, but no later than the 61st day before the date of the election, the clerk of this joint convention must file the ballot title with the county clerk of the county in which the largest of the cities resides.[325] However, if this second joint convention does not result in an agreement upon the date of the election or the adoption of a ballot title, then the county clerk of the county in which the largest of the cities resides must determine the ballot title.[326]

To consolidate, the majority of the votes cast in the most populous city and the majority of the votes cast in at least one other city or unincorporated area must favor consolidation. Of course, for a city that has not yet approved operating taxes and has proposed a permanent rate limit as part of the consolidation process, the consolidation measure also must be voted on by at least fifty percent (50%) of registered voters eligible to vote in the election.[327] Upon conclusion of the election, it is the chief election officer's responsibility to canvass separately the votes cast in each city and in each unincorporated area.[328] The chief election's officer shall deliver a certified copy of the abstracts to the governing body of each city, and the governing bodies then meet in a third joint convention to review the abstracts and determine the outcome of the election.[329] If the election results cause more than three miles of noncontiguous area to exist, those portions not contiguous shall not be part of the new consolidated city.[330] Otherwise, if sufficient votes are cast in favor of consolidation, the joint governing bodies issue a proclamation

[318] ORS 222.265(2).
[319] ORS 222.265(3)
[320] ORS 222.250(4).
[321] ORS 222.250(2).
[322] ORS 222.250(1).
[323] *Id*.
[324] *Id*.
[325] ORS 222.250(5).
[326] ORS 222.250(3).
[327] ORS 222.050(4).
[328] ORS 222.270(1).
[329] ORS 222.270(2).
[330] ORS 222.270(4); *see* ORS 222.210(2).

declaring the new consolidated city.[331] The proclamation issued by the governing bodies is to be delivered to the Secretary of State by the officer performing the clerk's duties.[332]

Should the first election not result in a consolidation, there exists the potential for a second consolidation election.[333] Any city or area may request a second consolidation election if it meets one of the following descriptions:

(1) A majority of votes cast in the first election in the city or area from which a second vote is being requested was in favor of the consolidation but the city or unincorporated area is not contiguous to any other portion of the consolidated city; or

(2) A majority of votes cast in the election in the city or unincorporated area is against consolidation but the city or unincorporated area is contiguous to a consolidated city.[334]

If one of these conditions is met, then the petition for a second petition may be filed. The petition must meet the requirements for an initiative petition under state law or else the local laws of the county.[335] The petition must be filed with the clerk of the county in which the city or territory lies no later than 60 days after the date of the first election; if it is filed, then the chief elections officer will call a second election for the area on the next available election date that is no sooner than 60 days after the filing date.[336]

Once all elections are finalized, the chief elections officer has 30 days to call a special election in the consolidated city to elect officers.[337] The actual election to determine the city's officers must be held on a date specified in ORS 2221.230 and cannot be sooner than 90 days after the date on which the chief elections officer called for the election.[338]

On the tenth day following the date on which officer elections is called, elected officials will take office.[339] The day the elected representatives assume office (absent a different provision in the charter) is the date the newly consolidated city is officially incorporated as a city.[340]

A consolidation has many impacts. Upon the city's incorporation, it obtains all of the assets, liabilities, and obligations of the cities it encompassed.[341] All of the ordinances in effect in the original cities, "so far as [they] are not inconsistent with the [new] charter . . . , shall

[331] ORS 222.270(3)
[332] ORS 222.270(5)
[333] ORS 222.275(1).
[334] *Id*.
[335] ORS 222.275(3).
[336] ORS 222.275(4).
[337] ORS 222.280(1).
[338] *Id*.
[339] ORS 222.280(2).
[340] ORS 222.280(3).
[341] ORS 222.295.

[remain] in effect" and become the consolidated city's ordinances.[342] And all complaints and prosecutions for crimes committed or ordinances violated, and any other suit or cause of action, in the original cities become the responsibility of the consolidated city, absent a charter provision to the contrary.[343]

iii. Disincorporation

Finally, state law permits cities to disincorporate in certain circumstances.[344] Two main conditions apply. First, cities seeking to disincorporate cannot be liable for any debt or for any other obligation.[345] Second, a "majority of the electors of the city [must] authorize" the disincorporation.[346] The clause "majority of electors" replicates verbatim the language in Article XI, Section 2a, of the Oregon Constitution.[347] As courts have noted, it is unclear if this language requires a simple majority of the votes cast in an election or an "absolute majority" of the city's *registered* voters.[348] If an absolute majority is required, then cities would need at least a 50% turnout of its voters and, among them, a majority that supports disincorporation. Oregon courts have not yet resolved this question.[349]

To disincorporate, a petition must be filed with the city in accordance with the process for a local initiative or referendum.[350] Upon receiving a petition that meets these requirements, the city must call an election on the topic. The election on disincorporation must be held during a November election and, if the disincorporation measure fails, the petitioners must wait two years before a subsequent attempt.[351]

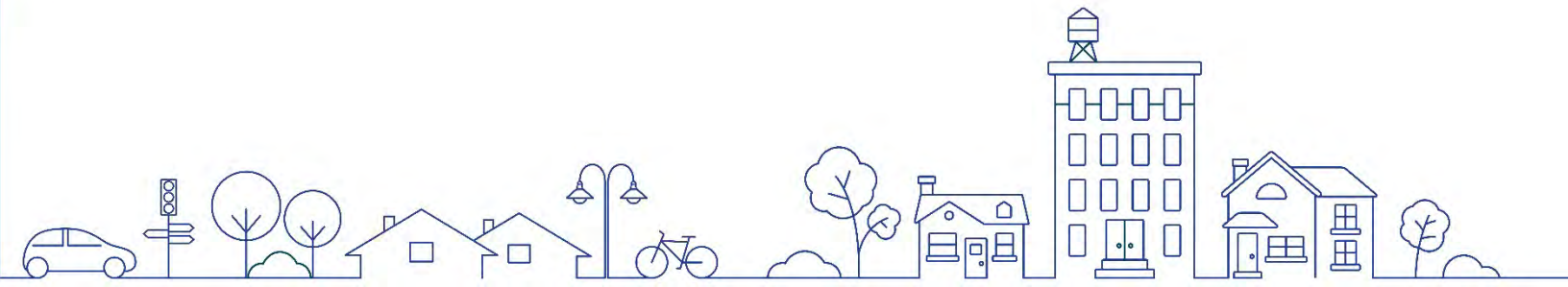
Disincorporation becomes effective 60 days after it is authorized.[352] Within 30 days after it is authorized, the city must convey all of its real property and property rights to the county in which it is located. The city's records must be transferred to the county by day 60.[353]

---

[342] ORS 222.300(1). Oregon law is silent on how to resolve inconsistencies *among* original cities' ordinances. For instance, consolidating cities are certain to have ordinances on subjects like traffic, utilities, and business licenses. Duplicate provisions will create ambiguity and some provisions might directly conflict with one another. To avoid complex legal disputes, cities should determine in advance what ordinances will remain in effect and repeal the others upon consolidation.
[343] ORS 222.300(2).
[344] ORS 221.610.
[345] *Id.*
[346] *Id.*
[347] *Id.*; *see also* Or Const, Art XI, § 2a.
[348] *See De Young v. Brow*n, 297 Or App 355, 360 n.3. (2019) (quoting *Chamberlain v. Myers*, 344 Or 605, 609 (2008)).
[349] *See School Dist. No. 17 of Sherman Cty. v. Powell*, 203 Or 168, 179 (1955) (decided on other grounds).
[350] ORS 221.621(3).
[351] ORS 221.621(4).
[352] ORS 221.650.
[353] *Id.*

Oregon Municipal Handbook

CHAPTER 2:
HOME RULE & ITS LIMITS



League of Oregon Cities

Published by the League of Oregon Cities
September 2020 / Last updated July 2024

Table of Contents

Chapter 2: Home Rule and Its Limits

This chapter will explore in detail the “home rule” authority granted to cities by the Oregon Constitution and the limits placed on it by state and federal authority. Part I begins with the origins of Oregon’s home rule amendments. The majority of the chapter then focuses on preemption, which is the result of state or federal lawmakers passing a law and preventing local laws on the same subject. Part II covers the background and modern principles of Oregon’s state preemption doctrine, which is the displacement of local lawmaking authority by state statutes. Part III then turns to the basic principles of federal preemption, which is the displacement of local laws by federal statutes. Finally, Part IV briefly addresses how the sovereign rights of state and federal government passively restrain local authority, even when state and federal lawmakers are not actively preempting local authority.

I. ORIGINS OF HOME RULE

Federalism, or the division of power between states and the federal government, traces its origins to the U.S. Constitution.[1] The concept of home rule is new by comparison — the first efforts to establish it emerged in the late 1800s.[2] In essence, home rule is the ability for cities to create their own governments and adopt their own laws without the state's approval. In Oregon, home rule was introduced in 1906 through a pair of amendments to the state constitution.[3] The two amendments represented a fundamental rethinking of municipal authority.[4]

Around this time, the nation's courts and legal scholars were wrestling with how to define the source and limits of municipal power. While cities and townships had existed for centuries, the home rule movement brought the issue to a head. In 1873, a treatise written by John F. Dillon posited that cities have no inherent powers other than those specifically delegated to them under state law.[5] This principle, known commonly as Dillon's Rule, also called on courts to narrowly construe any delegation of authority from a state to a city.[6] In 1907, the U.S. Supreme Court endorsed this principle by holding that cities draw no authority from the U.S. Constitution and instead function as "convenient agencies" of their respective states.[7]

Nevertheless, the home rule movement unfolded across the country at the state level. At the turn of the century in Oregon, only the Legislative Assembly had the power to incorporate new cities or to establish and amend city charters.[8] If a group of citizens wanted to incorporate a city, the legislature needed to pass special legislation creating the city and providing it with specified, limited powers.[9] Beginning in 1901, the Oregon Legislature began to consider constitutional amendments that would redistribute power over local charters to their respective localities.[10] Eventually, in 1906, consistent with a wave of home rule reform sweeping the

---

[1] *See, e.g.,* US Const, Amend X.
[2] *See* Paul A. Diller, *The Partly Fulfilled Promise of Home Rule in Oregon*, 87 Or. L. Rev. 939, 943 (2008) (noting that the "first movement for home rule emerged in the late 1880s and early 1900s.").
[3] *See* LEAGUE OF OR. CITIES, THE ORIGINS, EVOLUTION AND FUTURE OF MUNICIPAL HOME RULE IN OREGON 1-2 (2017), https://www.orcities.org/download_file/1cb089b9-d7fb-426b-99d0-178998e84aae/1852.pdf (last accessed June 13, 2024).
[4] *Id.*
[5] Diller, *supra* at 942 (citing 1 JOHN F. DILLON, THE LAW OF MUNICIPAL CORPORATIONS, § 9b, at 93 (2d ed. 1873)).
[6] *Id.*
[7] *See Hunter v. City of Pittsburgh*, 207 U.S. 161, 178-79 (1907). The holding in *Hunter* remains a fundamental part of how federal courts rule on municipal authority, though there is room to argue that some "federal constitutional protection for local government decision-making" exists in Supreme Court case law. *See* Diller, *supra* at 942 n.13.
[8] LEAGUE OF OREGON CITIES, THE ORIGINS, EVOLUTION AND FUTURE OF MUNICIPAL HOME RULE IN OREGON 2 (2017), https://www.orcities.org/download_file/1cb089b9-d7fb-426b-99d0-178998e84aae/1852.pdf (last accessed June 13, 2024).
[9] *Id.* n.4.
[10] *Id.* n.5.

nation, the voters of Oregon adopted one constitutional amendment that granted the people the right to make their own charters. Article XI, section 2, of the Oregon Constitution, provides:

> The Legislative Assembly shall not enact, amend or repeal any charter or act of incorporation for any municipality, city or town. The legal voters of every city and town are hereby granted power to enact and amend their municipal charter, subject to the Constitution and criminal laws of the state of Oregon[.]" amend their own municipal charters, independent of special legislative approval.[11]

In 1906, Oregon citizens also gave voters the power to vote on local initiatives and referendums, reserving these powers "to the qualified voters of each municipality and district as to all local, special and municipal legislation of every character in or for their municipality or district."[12]

Taken together, these two changes to the Oregon Constitution—Article XI, Section 2, and Article IV, Section 1(5), respectively—guarantee cities a certain degree of local autonomy. The amendments do this in a peculiar fashion; unlike the powers of state and federal government, the powers of cities under the Oregon Constitution are not clearly enumerated.[13] In fact, neither one of these 1906 amendments mentions the authority of *cities* at all—the amendments actually give power to city *voters*.[14] However, with the power to "enact … any charter" comes the ability to set the chartered government's substantive authority.[15] So, rather than conferring power on cities directly, Oregon's home rule amendments leave it to the voters to decide what their city governments can do.[16] For the most part, voter-approved charters grant broad power; the Eugene city charter, for instance, grants the city "all powers that the constitution or laws of the United States or of this state expressly or impliedly grant or allow cities, as fully as if this charter specifically stated each of those powers."[17] In addition, many charters demand that any ambiguity in its provisions be construed liberally in favor of their city.[18]

For the reasons above, Oregon's home rule amendments provide cities — courtesy of each cities' voters — with significant authority to adopt local laws and conduct local business. But cities do not exercise home rule authority in a vacuum. First, cities are subject to provisions of the U.S. and Oregon Constitutions because cities are political subdivisions of the state.[19]

---

[11] *Id.*
[12] *Id. See also Initiative, Referendum and Recall Introduction*, OR. BLUE BOOK, https://sos.oregon.gov/blue-book/Pages/state/elections/history-introduction.aspx (last accessed June 13, 2024).
[13] *See generally* Or Const, Art XI, § 2; *see also* Or Const, Art IV, § 1(5).
[14] *Id.*
[15] Diller, *supra* at 944-45 (noting that Article XI, § 2, grants cities "substantive lawmaking authority.").
[16] *Id.*
[17] EUGENE, OR., CHARTER Ch. 2, § 4 (2019).
[18] *Id.*
[19] *See, e.g.*, Or Const, Art I, § 46, which applies to "political subdivisions." The federal Bill of Rights is incorporated against states and their cities by the 14th Amendment. *See, e.g., McDonald v. City of Chicago*, 561 U.S. 742 (2010).

Second, the state and federal government exercise their own lawmaking authority that is superior to local government. So, even where a city has authority to adopt a local law under its charter, and even where it is otherwise constitutional, that law might be invalid due to a contravening state or federal statute. Third, the state and federal governments also are sovereign, which means that cities cannot exercise their home rule authority against their agents or property, at least not without their consent. This chapter will focus primarily on the second and third of these limits on municipal authority, beginning with the following section on state preemption.

II. State Preemption

State preemption occurs when a court finds that a state law prevents local laws on the same subject. As explained later, the Oregon Supreme Court's holding in *La Grande/Astoria* is the touchstone for most, but not all, matters of state preemption. Before reaching that ruling, it is important to cover some of the past approaches to state preemption. These early cases shaped the ruling in *La Grande/Astoria* and might shape future rulings.

A. Background

One of the earliest cases to address the relationship between state and local laws was *Straw v. Harris*, which found that state laws necessarily are superior to local laws.[20] In *Harris*, the plaintiff challenged the creation of the Port of Coos Bay under general laws adopted earlier that year by the state legislature.[21] In part, the plaintiff argued that the creation of the port violated local city charters because the port incorporated property within the cities' boundaries and imposed taxes and indebtedness on those properties that went "beyond the limitations prescribed" in the charters.[22]

In resolving this issue, the Oregon Supreme Court first noted that the Port of Coos Bay had been created by general law of the state legislature, not by special law that is prohibited by Article XI, Section 2, of the Oregon Constitution.[23] The court next found that the state law authorizing the port's creation did not directly amend the city charters and limited them only "to the extent that they may be in conflict or inconsistent with the general object or purpose" of the law that authorized the port.[24] Where there is a conflict, the court held that the state's power to authorize local taxing districts "necessarily" rose above a city's power to limit local taxes.[25]

[20] *See Straw v. Harris*, 54 Or 424, 435 (1909).
[21] *Id.* at 426.
[22] *Id.* at 434-37.
[23] *Id.* at 431-32. A general law applies to all parts of the state; a special law applies only to one part of it. *Id.*
[24] *Id.* at 435.
[25] *Id.*

The court reached this holding by construing the home rule amendments together with all other part of the Oregon Constitution.[26] The court reasoned that the powers acquired by cities through the home rule amendments "do not rise higher than their source," and that the Oregon Constitution also vested the Oregon Legislative Assembly with the power to adopt general laws throughout the state.[27] On this basis, the court concluded the following:

> Incorporated cities and towns may change or amend their charters at any time in the manner provided by the Constitution. The power to do so, however, is derived from the people of the state, and is necessarily limited to the exercise of such powers, rights, and privileges as may not be inconsistent with the maintenance and perpetuity of the state…. [28]

Thus, the *Harris* Court held that local laws sometimes must give way to state laws, at least where the state law's objectives are related to "the maintenance and perpetuity of the state."[29]

i. The Debate over 'Matters of Local Concern'

Five years later, the Oregon Supreme Court took a new direction in *Branch v. Albee*.[30] In *Albee*, the court issued a sweeping opinion that found cities can "legislate for themselves" on all local matters.[31] In *Albee*, the state legislature adopted a pension system in 1913 for cities with more than 50,000 inhabitants — the only such city being Portland.[32] Portland already had such a system dating back to 1903.[33] The plaintiff in *Albee*, a police officer, sued the city alleging that the city was obligated to pay his pension under the 1913 plan, not the 1903 plan that was in the city's charter.[34]

The Oregon Supreme Court found that the law passed by the state legislature was an attempt to amend the pension system under Portland's charter.[35] The court did not stop there, however. The court went on to broadly interpret municipal authority under the home rule amendments, describing them as "radical changes" that conferred upon cities "full power to legislate for themselves as to all local, municipal matters."[36] The court also noted that the amendments subjected locally adopted municipal charters only to "the Constitution" and state

[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] *See Branch v. Albee*, 71 Or 188, 188 (1914).
[31] *Id.* at 197.
[32] *Id.* at 190.
[33] *Id.* at 192 (noting that the 1903 charter remained in force in 1913).
[34] *Id.* at 189.
[35] *Id.* at 205. Interestingly, the existing pension system had been put in place by the Oregon legislature by special act in 1903 when such acts were still allowed. *Id.* at 192.
[36] *Id.* at 197.

"criminal laws."[37] The court interpreted this reference to criminal laws to mean that home rule charters were not subject to any non-criminal laws, or "civil laws of the state."[38]

Clearly, the *Albee* Court's distinction between civil and criminal laws never took hold. If it had, cities today would be free from all civil regulations, such as public records and meetings law, local budgeting laws, and statewide planning laws. But the *Albee* Court's finding that cities "legislative for themselves as to all local, municipal matters" did resonate with future courts.[39]

One example is *Kalich v. Knapp*.[40] In *Kalich*, a person injured in a car accident sued the driver of the vehicle, alleging in part that the driver had been speeding at the time of the crash.[41] The case implicated both a city of Portland ordinance, which imposed a speed limit of 10 miles an hour, and a state statute that purported to "limit the authority of cities and towns on like subjects concerned with … vehicles."[42] The *Kalich* Court decided the case by distinguishing between "matters of local concern" and "matters of state concern."[43] The court held that the home rule amendments granted cities "the *exclusive right* to exercise [powers] as legitimately belong to their local and internal affairs," and that "beyond this the legislative assembly [occupies] a field of action *exclusively their own*."[44] Ultimately, the court found Portland's speed limit was a matter of local concern and therefore could not be nullified by state law.[45] Thus, as in *Albee*, the *Kalich* Court found that local matters are not subject to the general laws of the state.[46]

Still, other Supreme Court decisions of the era found the opposite.[47] One early case, *Rose v. Port of Portland*, held that every part of a local charter is "subject to the right of the Legislature to pass a general law."[48] Later, in *Burton v. Gibbons*, the court restated this holding, finding that laws of "general application throughout the state … supersede the provision of *any* charter or *any* ordinance in conflict therewith."[49] The *Burton* Court even hinted that state laws do not need a statewide objective, observing that a general law of the state would be valid even where the subject matter was "of no concern except to the people who reside in the city."[50]

---

[37] *Id.* at 196.
[38] *Id.*
[39] *See, e.g. State ex rel Heinig v. City of Milwaukie*, 231 Or 473, 479 (1962); *see also Kalich v. Knapp*, 73 Or 558, 558 (1914).
[40] *Knapp*, 73 Or at 558.
[41] *Id.* at 560.
[42] *Id.* at 562.
[43] *Id.*
[44] *Id.* at 578 (Emphases added).
[45] *Id.* at 579.
[46] *Id.*
[47] *See Rose v. Port of Portland*, 82 Or 541, 568-69 (1917); *see also Burton v. Gibbons*, 148 Or 370, 378 (1934).
[48] *Rose*, 82 Or at 568-69.
[49] *Burton*, 148 Or at 378.
[50] *Id.* at 381.

Thus, for a time at least, the Oregon Supreme Court was inconsistent about the degree to which the legislature could supplant local laws with a state law. Like in *Burton*, the court held at times that state laws were valid even when they dealt with matters of local concern only.[51]

i. Balancing State and Local Concerns — *Heinig v. City of Milwaukie*

Finally, in 1962, the Oregon Supreme Court clarified its rulings.[52] In *Heinig*, a lawsuit was filed against the city of Milwaukie to compel the city to establish a civil service commission and a civil service system for firefighters, as prescribed by state law.[53] The city's charter did not require a civil service commission or system, and so the issue was whether the state law could require the city to adopt them, notwithstanding contrary charter provisions.[54]

The *Heinig* Court decided the case by determining whether the state law at issue had addressed a significant statewide concern.[55] In holding this view, the Oregon Supreme Court sided with the view of municipal authority presented in *Albee* and *Kalich*.[56] In strong terms, the court found that the state "does not have the authority to enact a law relating to city government … unless the subject matter of the enactment is of general concern to the state as a whole."[57]

In sum, the *Heinig* decision succeeded at solving the inconsistency of Oregon's case law on whether the Oregon legislature could regulate municipal affairs regardless of a state interest or objective—the court answered no.[58] The court also introduced a balancing test for deciding when a state law should displace local lawmaking authority.[59] In it, courts were to ask "not whether the state or the city has an interest in the matter, for usually they both have, but whether the state's interest or that of the city is paramount."[60]

In some ways, the *Heinig* test appeared to favor cities.[61] But the balancing test also proved difficult to apply. In practice, compelling arguments typically exist for both sides about whether a particular subject is more of a local or state issue and, at the time of *Heinig*'s writing,

---

[51] *Id.*; *see also State ex rel. Heinig v. City of Milwaukie*, 231 Or 473, 477 (1962) (noting that in "some of our cases the position is taken that [a statute is valid] even though the statute deals with a matter of local concern only.").
[52] *Heinig*, 231 Or at 479.
[53] *Id.* at 474.
[54] *Id.* at 475-77.
[55] *Id.*
[56] *Id.* at 479 (citing *Branch v. Albee*, 71 Or 188, 193 (1914)).
[57] *Id.*
[58] *Id.*
[59] *Id.* at 481.
[60] *Id.*
[61] *See Boyle v. City of Bend*, 234 Or 91, 98 n.6 (1963) (adding that a state law is "inoperative to the extent that it conflicts with an ordinance on a matter of local concern.").

it had already led to "confusion and conflict in the cases."[62] Eventually, the Oregon Supreme Court took an opportunity to "refine" the *Heinig* test.[63]

ii. The Modern Era — *La Grande/Astoria v. PERB*

In 1978, the Oregon Supreme Court again addressed the extent of municipal authority under the home rule amendments.[64] In *La Grande/Astoria v. PERB*, a state law required cities to establish certain insurance and retirement benefits for their employees — benefits that the cities of La Grande and Astoria did not provide.[65] The cities argued that providing insurance and benefits to city employees was primarily a matter of local concern under *Heinig* and so the state legislature was prohibited from interfering with its local provisions on employee benefits.[66] In response, the state argued that a statewide pension system represented "a substantial or significant state interest" that should prevail over conflicting local laws.[67]

When the case reached the Supreme Court, the court reconsidered the *Heinig* test.[68] In a 4-3 decision authored by Justice Hans Linde, the court found that Article XI, section 2, of the Oregon Constitution was meant to protect the structure and form of local government but not the policy preferences of local government.[69] The court then developed a set of standards to determine under what circumstances state lawmaking authority may "displace" local policy:

> "When a statute is addressed to a concern of the state with the structure and procedures of local agencies, the statute impinges on the powers reserved by the amendments to the citizens of local communities. Such a state concern must be justified by a need to safeguard the interests of person or entities affected by the procedures of local government.
>
> "Conversely, a general law addressed primarily to substantive social, economic, or other regulatory objectives of the state prevails over contrary policies preferred by some local governments if it is clearly intended to do so, unless the law is shown to be irreconcilable with the community's freedom to choose its own political form. In that case, such a state law must yield in those particulars necessary to preserve that freedom of local organization."[70]

---

[62] *Heinig*, 231 Or at 480. For example, "taxation" is a local concern, *see Pearce v. Roseburg*, 77 Or 195 (1915), but then "setting utility rates" is a state concern. *See Woodburn v. Public Service Comm'n*, 82 Or 114 (1916).
[63] *See City of La Grande v. Public Emp. Retirement Bd.*, 281 Or 137, 140 (1978).
[64] *Id.*
[65] *Id.* at 139.
[66] *Id.*
[67] *Id.* at 172 (Tongue, J., dissenting).
[68] Diller, *supra* at 961 (noting that the court "distinguished *Heinig* on its facts and sharply reduce the scope.").
[69] *Id.*
[70] *City of La Grande*, 281 Or at 156.

With these findings, the *La Grande/Astoria* Court determined that, in most cases, a state law backed by *any* state concern is a valid law.[71] But the court found state laws can only displace local laws that are "incompatible" with state law, a finding that is difficult to make.[72] The court also held that the state cannot displace a local law if it concerns "the freedom to choose [a] political form," and will face a heightened standard if a local law concerns "the structure and procedures of local agencies."[73]

For the most part, the *La Grande/Astoria* ruling remains the law today.[74] The effect of the test in *La Grande/Astoria* is to "displace" local lawmaking authority in certain circumstances, the modern term for which is **state preemption**.[75] At first glance, *La Grande/Astoria* provides effective means for the state to preempt cities — for most issues, all the legislature needs to do is articulate "substantive social, economic, or other regulatory objectives" for the state law.[76] But when it comes to proving preemption, *La Grande/Astoria* actually makes it quite difficult.[77] The *La Grande/Astoria* ruling effectively established a presumption against preemption in the context of civil laws (criminal laws are another matter).[78] The ruling required clear legislative intent to preempt a local law; it also blocked the development of an implied preemption doctrine that would perhaps see local laws preempted anytime they "engender chaos and confusion," or anytime state law addresses "the particular aspect of the field sought to be regulated.[79] Unlike at the federal level and other states, preemption is only implied under *La Grande/Astoria* if state and local law cannot possibly "operate concurrently."[80]

Whatever one's opinion of *La Grande/Astoria*, the case represents a novel approach to state preemption and one the National League of Cities recently encouraged other states to adopt, dubbing Oregon's presumption against preemption and its protections for local political form as

[71] *Id.* (noting that state laws with any "substantive…regulatory objectives" generally prevail over local law).
[72] *Id.* at 148.
[73] *Id.* at 156. These last rules resemble the "matters of local concern" test under *Heinig. Heinig*, 231 Or at 479.
[74] *See, e.g. City of Portland v. Bartlett*, 304 Or App 580, 592 (2020) (citing holdings in *La Grande/Astoria*); *see also City of Portland v. Bartlett*, 369 Or 606 (2022) (affirming the foundational decisions in *La Grande/Astoria*, rejecting City's argument that public record state law interfered with the structure of the attorney-client protections established within its charter and the holding that city code and state laws to be in conflict, therefore, displacing the local protection of attorney-client privilege public record exemption).
[75] *See, e.g. Sims v. Besaw's Café*, 165 Or App 180, 204 n.4 (2000) (describing the test for "state preemption.").
[76] *City of La Grande*, 281 Or at 156.
[77] *See, e.g., Rogue Valley Sewer Services v. City of Phoenix*, 357 Or 437, 454 (2015) (noting the "presumption against preemption" that applies to local government laws under *La Grande/Astoria*).
[78] *Id.*
[79] *See Allied Vending, Inc. v. City of Bowie*, 332 Md. 279, 299 (1993) (describing methods of implied preemption in Maryland).
[80] *Id.*; *see Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372-73 (2000); *City of La Grande*, 281 Or at 148.

two "Principles of Home Rule for the 21st Century."[81] The following section explores in detail what state preemption looks like under *La Grande/Astoria* and subsequent case law.

B. Categories of State Preemption

Courts today adhere to the preemption standards that were laid out in *La Grande/Astoria* for civil matters.[82] Generally, state laws *can* preempt any local law as long as they are enacted pursuant to "substantive social, economic, or other regulatory objectives."[83] However, state laws only *do* preempt local laws if the laws are "incompatible," either because (1) the state legislature "unambiguously" expressed the intent to preempt the local law or (2) the state and local law conflict, meaning it would be "impossible" for a person to comply with both laws concurrently.[84] If neither of these conditions is met, then courts must assume that the state legislature did not intend to preempt local home rule authority.[85]

Other standards apply for criminal matters. These standards emerged because local authority under the home rule amendments is "subject to the criminal laws" of the state, and therefore it makes less sense to assume the state legislature would not preempt local authority.[86] For the reasons explained below, the standards of preemption for criminal matters depend on the type of alleged conflict between state and local law. For instance, courts take one approach if plaintiffs challenge a local penalty and another if they challenge the crime itself.[87]

Finally, the state cannot preempt local laws that prescribe a city's "political form," and may only preempt a city's "structure and procedures" if it is to protect people affected by those local procedures.[88] Appellate courts have yet to uphold a local law on either of these grounds.

i. State Civil Laws

Under Article XI, section 2, cities are free to adopt home rule charters and, acting under the authority of those charters, enact their own substantive policies.[89] Sometimes, however, local policy choices are at odds with state policy choices. In that case, the courts will ask whether the local government has the authority to pursue its own policy goals.[90] Assuming a local substantive policy is permissible under the local charter, the courts then assess whether the local

---

[81] NATIONAL LEAGUE OF CITIES, PRINCIPLES OF HOME RULE FOR THE 21ST CENTURY 26-27 (2020), https://www.nlc.org/sites/default/files/2020-02/Home%20Rule%20Principles%20ReportWEB-2.pdf (last accessed June 13, 2024).
[82] *See, e.g.*, *Owen v. City of Portland*, 305 Or App 267, 273 (2020) (citing holdings in *La Grande/Astoria*).
[83] *See State ex rel Haley v. City of Troutdale*, 281 Or 203, 211 (1978).
[84] *See Thunderbird Mobile Club, LLC v. City of Wilsonville*, 234 Or App 457, 474 (2010).
[85] *Id.*
[86] *City of La Grande*, 281 Or at 149 n.18 (noting the relevance of the amendment's language on "criminal laws").
[87] *See City of Portland v. Dollarhide*, 300 Or 490, 497 (1986), *City of Portland v. Jackson*, 316 Or 143, 149 (1993).
[88] *City of La Grande*, 281 Or at 156.
[89] *See* Or Const, Art XI, § 2 (emphasis added).
[90] *City of La Grande*, 281 Or at 142 (noting the local law "must be authorized by the local charter or by a statute.").

policy is preempted by state law, either expressly or because the local and state laws conflict.[91] This analysis favors cities — it embodies a "presumption against preemption" of local law.[92]

a. Express Preemption

In Oregon, any party claiming that a city's home rule authority is preempted by state law must show that the state legislature "unambiguously expressed" an intent to preempt cities on the subject.[93] Courts consider the text, context, and legislative history of the state law.[94]

On many civil matters, the state legislature has expressly preempted local laws.[95] The state legislature generally accomplishes this using a **preemption clause**.[96] For instance, cities cannot adopt local minimum wage laws because "the State of Oregon preempts all charter and statutory authority of local governments to set any minimum wage requirements."[97] Cities cannot regulate drones, except as "expressly authorized" by the state, because "the authority to regulate the ownership or operation of unmanned aircraft systems is vested solely in the Legislative Assembly."[98] And cities must annex territory under certain state-mandated circumstances, "notwithstanding a contrary provision of the city charter or a city ordinance."[99]

Of course, even with a preemption clause, it can be unclear if a local law falls within the scope of that clause. As noted, whether a preemption clause covers a specific local law must be "unambiguous."[100] In *Owen v. City of Portland*, for example, the city adopted an ordinance requiring landlords to pay tenants for "relocation assistance" if the tenant's lease was terminated without cause of if the tenant's rent was increased by more than 10 percent in a year and they subsequently moved.[101] Property owners sued the city and alleged that the ordinance was

---

[91] *Id.* at 156.
[92] *See Rogue Valley Sewer Services v. City of Phoenix*, 357 Or 437, 454 (2015).
[93] *See State ex rel Haley v. City of Troutdale*, 281 Or 203, 211 (1978).
[94] *Rogue Valley*, 357 Or at 450-51.
[95] For more information, *see* LEAGUE OF OR. CITIES, LEGAL GUIDE TO OREGON'S STATUTORY PREEMPTIONS OF HOME RULE (2019), https://www.orcities.org/download_file/385/1852. (last accessed June 13, 2024).
[96] *Id.*
[97] ORS 653.017.
[98] ORS 837.385. However, effective January 1, 2024, SB 812 from the 2023 Legislative Session, grants cities and other park owners the authority to regulate or prohibit the take-off and landing of drones by resolution or ordinance. Prior to this change, a state preemption prevents cities from regulating drones generally, and a federal preemption prevents regulations once they have taken off. Under SB 812, cities will be able to determine which parks or portions of parks are appropriate for drone take-offs and landings. They will, however, be required to allow public safety and utility use and provide an affirmative defense for violations due to emergency landings.
[99] ORS 222.127. This statute was challenged in *City of Corvallis v. State*, 304 Or App 171, 180-81 (2020), in which Corvallis argued the law violated its home rule authority to hold a vote on annexation. *Id.* at 177-78. The court found the city's charter was not "contrary" because it did not require a vote on state-ordered annexations. *Id.* at 177-78. Of course, the question remains whether ORS 222.127 applies constitutionally to charters that *are* in fact "contrary."
[100] *See, e.g.*, *Owen v. City of Portland*, 305 Or App 267, 277 (2020).
[101] *Id.* at 269.

preempted by Oregon's recently enacted rent control law.[102] That law contains a preemption clause barring "any ordinance or resolution *which controls the rent* that may be charged for the rental of any dwelling unit," but the city argued their law was not rent control.[103] The *Owen* Court found in favor of the city.[104] The court acknowledged that "the legislature unambiguously intended to preempt "ordinances that regulate the amount that a landlord may charge in rent."[105] But the court found the city's ordinance requiring "relocation assistance" was itself not clearly "rent control."[106] In other words, the court did not find "unambiguous" evidence that the preemption clause was meant to preempt "other types of restrictions."[107]

b. Implied Preemption

In the absence of express legislative intent, courts only will preempt local laws where the state and local laws "cannot operate concurrently."[108] This standard is met only where "operation of the ordinance makes it impossible to comply with a state statute."[109]

For example, in *Owen*, the plaintiffs argued that Portland's ordinance conflicted with the Oregon Residential Landlord and Tenant Act (ORLTA), which permits landlords to evict tenants without cause upon less than 90 days' notice.[110] The plaintiffs argued that the ORLTA provision did not include any requirement for "relocation assistance" and that ORLTA "reflects the legislature's careful balancing of landlord and tenant's rights and obligations with respect to termination of tenancies."[111] Thus, the plaintiffs argued that Portland's ordinance conflicted with the balancing decisions made by the legislature.[112] The *Owen* Court dismissed this argument, finding that the ORLTA provision set out "minimum requirements for no-cause termination" and that the city of Portland could add stricter requirements, such as "relocation assistance," without conflicting with the state law.[113] The court found that the laws could operate concurrently because the ORLTA provision "can still be complied with while complying with the ordinance requirements of a 90-day notice and payment of relocation assistance."[114]

Another example of the conflict preemption analysis is *State ex rel. Haley v. Troutdale*, an Oregon Supreme Court case that upheld a local building standard against claims that it had

---

[102] *Id.*
[103] *Id.* at 274 (quoting ORS 91.225(2)).
[104] *Id.* at 269.
[105] *Id.* at 277.
[106] *Id.*
[107] *Id.*
[108] *City of La Grande*, 281 Or at 148.
[109] *See Thunderbird Mobile Club, LLC v. City of Wilsonville*, 234 Or App 457, 474 (2010).
[110] *Owen*, 305 Or at 279-80.
[111] *Id.*
[112] *Id.*
[113] *Id.* at 285.
[114] *Id.* at 283.

been preempted by the Oregon Building Code.[115] At the time, the state building code mandated single-wall construction, while the city of Troutdale enacted an ordinance that required double-wall building construction.[116] The Oregon Supreme Court determined that Troutdale's ordinance did not conflict with the state building code because compliance with both sets of standards was not impossible.[117] After all, a person can comply with a stringent set of local rules and a more relaxed set of state rules simultaneously. In sum, state and local law are only incompatible when compliance with both is impossible.[118]

ii. Local Concerns: Procedures, Structure, and Political form

State preemption under *La Grande/Astoria* also has unique standards that, at least in theory, prevent the state from intruding into certain matters of local concern. First, state law cannot preempt laws addressing a city's "political form." Second, state law may only preempt a city's "structure and procedures" if it is to protect people affected by those local procedures.[119]

First, in *La Grande/Astoria*, the Oregon Supreme Court held that general state laws "addressed primarily to substantive social, economic, or other regulatory objectives of the state" will prevail over contrary local policies, "unless the law is shown to be irreconcilable with the local community's freedom to *choose its own political form*."[120] For example, a state law that directs elected officials to take certain actions is theoretically prohibited — at least as applied to a home rule city.[121]

Second, the *La Grande/Astoria* Court appeared to draw a distinction between local substantive laws and local procedural laws. Regarding the latter category, the court opined that whenever state law affects "the structure and procedures of local agencies," the law violates the locality's home rule authority unless the law is "justified by a need to safeguard the interests of persons or entities affected by the procedures of local government."[122] So, theoretically, even state laws that do not concern a city's "political form" might be null and void if they reshape local structure and procedures and are not justified by a need to "safeguard" those affected.[123]

---

[115] *See State ex rel Haley v. City of Troutdale*, 281 Or 203, 211 (1978).
[116] *Id.* at 205.
[117] *Id.* at 211.
[118] *Id.*; *see also Thunderbird Mobile Club, LLC v. City of Wilsonville*, 234 Or App 457, 474 (2010) (holding that city ordinance did not conflict with state laws on selling mobile home parks, even though city ordinance imposed more requirements than state law).
[119] *City of La Grande*, 281 Or at 156.
[120] *Id.* (emphasis added).
[121] *Id.*; *see, e.g., City of Sandy v. Metro*, 200 Or App 481, 484 (2005).
[122] *City of La Grande*, 281 Or at 156.
[123] *Id.*

Significantly, no appellate courts have upheld a local law on either of these grounds. As such, cities have little guidance on what constitutes a city's "political form," what laws are "structural and procedure," or what "interest" might justify the state's intrusion into those structures and procedures. Though the arguments have been made, courts often rule on them without much analysis.[124]

In *McGee v. Civil Service Bd. of City of Portland*, the Oregon Court of Appeals found that the state legislature could not impose laws on the City of Portland Civil Service Board.[125] *McGee* involved the Civil Service for Firefighters Act, which the Oregon Supreme Court found in *Heinig* was inapplicable to home rule cities under the home rule amendments.[126] With little analysis, the court applied the holding from *Heinig* to the facts in *McGee*.[127] The court found that the case involved a matter of local concern but did not explain how it fit into the framework under *La Grande/Astoria* — whether it was the city's procedures, structure, or political form.[128]

Similarly, in *City of Sandy v. Metro*, several cities challenged Metro's authority to require city councils to review local industrial zoning districts and "amend them if necessary."[129] One of them, the City of Hillsboro, alleged that requiring the city to adopt an ordinance infringed on its "political form" because it took control of the city's power to legislate.[130] The court dismissed this argument, holding that the state legislature authorized the creation of Metro, and that "the exercise of this authority by the legislature is not irreconcilable with Hillsboro's freedom to chose [sic] its own political form because of Metro's district-wide regulatory objectives."[131] In this short holding, the court suggested that a city's power to adopt ordinances is, in fact, "political form," but then found that Metro derived higher authority from the Oregon Constitution.[132] Due to its outcome and the brevity of the court's reasoning, this ruling on "political form" is at best dicta.

In practice, LOC recommends that cities view the protections for "political form" and "structural and procedural of local agencies" under *La Grande/Astoria* as academic matters, at least until an appellate court upholds a local law on these grounds.

---

[124] *See McGee v. Civil Service Bd. of Portland*, 211 Or App 149, 151 (2007); *see also City of Sandy v. Metro*, 200 Or App 481, 484 (2005).
[125] *McGee*, 211 Or App at 151.
[126] *Id.* at 154.
[127] *Id.* at 156-161.
[128] *Id.*
[129] *City of Sandy*, 200 Or App at 484.
[130] *Id.*
[131] *Id.* at 495-96.
[132] *Id.*

iii. State Criminal Laws

State preemption applies differently in the context of criminal laws. The reason for this difference is found in Article XI, Section 2, of the Oregon Constitution, which provides:

> The legal voters of every city and town are hereby granted power to enact and amend their municipal charter, subject to the Constitution and *criminal laws* of the State of Oregon. [133]

Significantly, the amendment makes local charters subject to state "criminal laws," rather than "general laws" or "criminal and civil laws."[134] While it is not clear why the amendment is worded this way,[135] courts have construed it to mean that criminal statutes must have a greater preemptive effect than civil statutes.[136] For instance, the *La Grande/Astoria* Court found that the specific reference to criminal laws should reverse the assumption against preemption that applies to civil laws.[137] Later, in *City of Portland v. Dollarhide*, the court restated this presumption as "the assumption that state criminal law displaces conflicting local ordinances which prohibit and punish the same conduct, absent an apparent legislative intent to the contrary."[138]

As a practical matter, most state crimes are codified under the Oregon Criminal Code.[139] This code authorizes cities to adopt a range of crimes; while cities are preempted from adopting felony-level offenses, cities may adopt and enforce any number of **misdemeanor** crimes, i.e., crimes punishable by up to one year in jail.[140] While courts at times cite the reverse assumption from *La Grande/*Astoria, in reality it has been modified into clearer standards of preemption for criminal laws.[141] For the most part, conflicts tend to arise between local misdemeanors and state laws when they impose different **penalties** or when they criminalize different **conduct**.[142] In these circumstances, courts have refined or refused to follow the reverse assumption introduced in *La Grande/Astoria*.[143] The following standards apply instead.

Note that the main takeaway for cities should be that the friendly standard of preemption for local civil laws does not apply for criminal matters. LOC recommends that cities seek legal

---

[133] *See* Or Const, Art XI, § 2 (emphasis added).
[134] *Id.*
[135] *See City of Portland v. Dollarhide*, 300 Or 490, 497 (1986). In *Dollarhide*, the Court noted that fliers handed out by proponents of the amendment stated that cities would be "subject and controlled by general laws." The court then observed that "[w]e have been unable to discern an explanation for the change from subject to 'laws' and 'general laws' to subject to the 'criminal laws.'" *Id.*
[136] *Id.* (noting the "inescapable conclusion that the voters who adopted Article XI, section 2 envisioned a stricter limitation on lawmaking power than with regard to civil or regulatory measures."); *see also City of La Grande v. Public Emp. Retirement Bd.*, 281 Or 137, 149 n.18 (1978).
[137] *Id.*
[138] *Id.*
[139] *See* ORS 161.005.
[140] *See* ORS 161.525, ORS 161.505, and ORS 161.545.
[141] *Id.*; *see also City of Portland v. Jackson*, 316 Or 143, 149-51 (1993).
[142] *Jackson*, 316 Or at 149-51.
[143] *See City of La Grande v. Public Emp. Retirement Bd.*, 281 Or 137, 149 n.18 (1978).

counsel to adopt criminal ordinances and regularly review these ordinances to ensure they are not incompatible with state law.

a. Different Penalties

No conflict exists between a local misdemeanor and a state crime as long as the local penalty is less severe than the state's penalty.[144] However, if the local penalty exceeds the state punishment, then the laws conflict and the local misdemeanor is subject to preemption.[145] This test is a bright-line rule for courts to apply when reviewing local penalties, not an assumption,

Notably, local misdemeanors that impose higher minimum penalties also conflict with state law, not just those that impose higher maximum penalties.[146] In *Dollarhide*, for example, the City of Portland adopted an ordinance that imposed a mandatory minimum sentence of $500 or six months imprisonment for prostitution.[147] The minimum penalty under state law basically was no penalty, i.e., a "discharge."[148] The court found that "city punishment of the same conduct made criminal by state law may be 'lighter' than that prescribed by state statute."[149] At the same time, the court found that "a city ordinance cannot increase either the minimum or the maximum penalty that is authorized by state law for the same criminal conduct."[150]

b. Different Criminal Conduct

Sometimes, a local law criminalizes conduct that is not actually criminal under state law. Courts do not assume that the state legislature intended to preempt these local misdemeanors.[151] Rather, courts apply the test under *City of Portland v. Jackson*: **(1)** interpret what conduct the local ordinance prohibits and **(2)** determine whether the state has allowed that conduct by an "express legislative decision, by a decision apparent in the legislative history, or otherwise."[152]

- **Local misdemeanors v. State criminal law**

Almost always, preemption of local misdemeanors involves a criminal law of the state.[153] Besides penalties, state and local laws mostly conflict on the exact definition of a crime — in other words, the criminal conduct.[154] For example, in *Jackson*, a defendant was charged with a

[144] *Dollarhide*, 300 Or at 499.
[145] *Id.*
[146] *Id.* at 502.
[147] *Id.* at 493.
[148] *Id.* at 502.
[149] *Id.*
[150] *Id.*
[151] *See City of Portland v. Jackson*, 316 Or 143, 149-51 (1993).
[152] *Jackson*, 316 Or at 149-51. Note that, unlike for civil matters, "express preemption" by the state legislature for criminal matters does not need to be "unambiguous."
[153] *Id.*; *see also City of Portland v. Lodi*, 308 Or 468, 472 (1989).
[154] *Jackson*, 316 Or at 145.

crime under a Portland ordinance that prohibited all types of public exposure.[155] Separately, a state criminal law banned public exposure only if it was committed with "the intent of arousing sexual desire of the person or another person."[156] The defendant argued that the narrow crime under state law preempted the broad crime for public exposure under local law.[157] The *Jackson* court analyzed the two laws to see if the ordinance was preempted.[158] First, the court found the state law did not *expressly* allow the defendant's conduct.[159] Second, the court found it would be a mistake to assume the state, "by its silence," intended to permit this form of public exposure, thereby preempting any local laws that punished it.[160] Instead of applying the reverse assumption from *La Grande/Astoria* and *Dollarhide,* the *Jackson* Court searched the legislative history and held that unless "legislative intent to permit that conduct is apparent, the ordinance is not in conflict."[161] In the end, the court upheld the ordinance.[162]

- **Local misdemeanors v. State civil law**

On at least one occasion, a local misdemeanor has been preempted by a state civil law because the state law imposed civil penalties for slightly different conduct than the local law.[163] In *City of Corvallis v. Pi Kappa Phi*, the city of Corvallis adopted an ordinance that prohibited property owners from allowing or hosting parties where alcohol was consumed or possessed by a minor.[164] After being cited, the defendant sued, alleging that the Oregon Liquor Control Act (OLCA) preempted the ordinance.[165] Specifically, one OLCA provision punished serving minors as a civil violation, not a crime.[166] It also required the person to serve the minor "knowingly."[167]

The court found that the criminal preemption standards applied in this situation.[168] The court reasoned that the OLCA did criminalize other types of conduct, and the law as a whole "reflects the legislature's intention to criminalize certain conduct and to not criminalize other conduct."[169] The court then found that although the OCLA did not expressly preempt ordinances like the Corvallis ordinance, the legislative history indicated that state lawmakers had intended to protect individuals who did not "knowingly" serve minors from the OCLA violation.[170] As such, the court found that the OLCA impliedly permitted the "specified conduct" in the case; that is, it

[155] *Id.*
[156] *Id.*
[157] *Id.*
[158] *Id.* at 146.
[159] *Id.* at 152.
[160] *Id.* at 149.
[161] *Id.*
[162] *Id.* at 152.
[163] *See City of Corvallis v. Pi Kappa Phi*, 293 Or App 319, 333 (2018).
[164] *Id.* at 320.
[165] *Id.* (citing ORS 471.410(3)).
[166] *Id.*
[167] *Id.*
[168] *Id.* at 323.
[169] *Id.*
[170] *Id.* at 326, 331.

permitted a person to unknowingly serve a minor alcohol.[171] Therefore, the civil violations under the OLCA preempted the city's criminal ordinance.[172]

- **Local civil laws v. State crime**

Theoretically, a local civil law could permit conduct that has been made a crime under state law.[173] While this has been described as "the classic conflict scenario" for local-state criminal laws, it certainly is not the norm.[174] As noted above, cities are much more likely to impose a stricter definition of a crime or a stricter criminal penalty than they are out to flout the criminal code.[175]

At any rate, the reverse assumption of *La Grande / Astoria* and *Dollarhide* would apply to any local law that creates a "safe haven" against state crimes.[176] Under *Dollarhide*, state law preempts local law anytime an "ordinance … permits an act which the statute prohibits."[177] So, absent an express authorization for the local law — like a state provision that allows local exceptions to a crime — courts will just assume the state intended to preempt the local law.[178]

III. Federal Preemption

Just as state preemption is the displacement of local lawmaking authority by state laws, federal preemption is the displacement of local (or state) lawmaking authority by federal laws. The outcome for cities is the same, but state and federal preemption are two separate doctrines.

The preceding section explored at length the origins of Oregon's preemption doctrine. That degree of detail is not necessary for federal preemption. For the purposes of this Handbook, simply note that federal preemption is rooted in the Supremacy Clause of the U.S. Constitution and is the result of more than 200 years of federal court case law.[179] It is far more important to understand the differences between preemption in Oregon and preemption in the federal system.

As an initial matter, federal laws obviously preempt state laws as well as local laws. This preemption occurs under the same principles; a local ordinance is not any more or less likely to be preempted by a federal law than a state law.[180]

---

[171] *Id.*
[172] *Id.*
[173] *See* City of Portland v. Jackson, 316 Or 143, 146 (1993).
[174] *City of Corvallis*, 293 Or App at 332.
[175] *See, e.g.*, City of Portland v. Dollarhide, 300 Or 490, 492 (1986); *see also City of Corvallis*, 293 Or App at 320.
[176] Jackson, 316 Or at 146.
[177] Dollarhide, 300 Or at 502.
[178] *Id.*
[179] *See* US Const, Art VI, cl 2; *see also* Altria Group, Inc. v. Good, 555 US 70, 76 (2008) (explaining that state laws that conflict with federal laws are "without effect")
[180] *See Hillsborough County v. Auto Medical Labs*, 471 U.S. 707, 713 (1985).

Courts are much less likely to err on the side of cities in a federal preemption dispute (federal statute v. local law) than in a state preemption dispute (state statute v. local law). Oregon's state preemption doctrine is heavily influenced by the home rule amendments to the Oregon Constitution.[181] Federal preemption is not: Oregon's home rule amendments have no effect on federal lawmakers. None of the rules from *La Grande/Astoria* apply when a court is reviewing a federal statute — a local law can be preempted even if there is some ambiguity that is what Congress wanted, and even if it is possible for the two laws to operate concurrently.[182]

For federal preemption claims, courts first look at the text of a federal statute to see if the "plain meaning" of the statute shows that Congress intended to preempt state and local laws — note the intention does not need to be "unambiguously expressed," as in *La Grande/Astoria*.[183]

If the plain meaning of a federal statute does not expressly preempt state or local laws, courts still may find that it *impliedly* preempts them under the doctrine of impossibility, field, or obstacle preemption.[184] Impossibility preemption is identical to Oregon's conflict preemption analysis.[185] Field and obstacle preemption, on the other hand, preempt local laws on the basis of a federal law's overall framework or "objectives."[186]

Like state preemption, federal preemption does assume that certain state or local laws are not preempted if they are in "field[s] of traditional state regulation."[187] But this presumption only applies to claims of *implied* preemption; it does not apply in express preemption cases, which are the most common because most federal laws contain some clause relating to preemption.[188] Finally, even in implied preemption cases, courts often omit the presumption for state/local laws if there is a "history of significant federal presence" on the subject (trade, immigration, etc.).[189]

---

[181] *See City of La Grande v. Public Emp. Retirement Bd.*, 281 Or 137, 156 (1978).
[182] *See Engine Mfrs. Ass'n v. South Coast Air Quality Management Dist.*, 541 U.S. 246, 252 (2004) (holding that courts do not need to find that preemption was the "clear and manifest" purpose of Congress; rather, preemption need only be the "plain meaning" of the text); *see also* U.S. v. Locke, 529 U.S. 89, 115 (2000) (holding "it is not always a sufficient answer … to say that state [or local] rules supplement, or even mirror, federal requirements).
[183] *See* Puerto Rico v. Franklin Cal. Tax-Free Trust, 136 S. Ct. 1938, 1945 (2016); *City of La Grande*, 281 Or at 156.
[184] FEDERAL PREEMPTION: A LEGAL PRIMER, CONGRESSIONAL RESEARCH SERVICE 17 (2018), https://fas.org/sgp/crs/misc/R45825.pdf (last visited June 13, 2024).
[185] *Cf. Fla. Lime & Avocado Growers v. Paul*, 373 U.S. 132, 142-43 (1963), *with Thunderbird Mobile Club, LLC v. City of Wilsonville*, 234 Or App 457, 474 (2010) (finding preemption where compliance would be impossible).
[186] *See, e.g., Locke*, 529 U.S. at 115; *see also Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000) (finding that state tort claims against automobile manufactures were "obstacles" to a federal law regulating the industry).
[187] *See Hillsborough County v. Auto Medical Labs*, 471 U.S. 707, 715 (1985).
[188] *Id.*; *Puerto Rico*, 136 S. Ct. at 1945.
[189] *See, e.g., US v. Locke*, 529 U.S. 89, 115 (2000).

A. Express Preemption

Express federal preemption occurs when a federal statute specifically precludes state or local laws on the subject.[190] Courts look to determine the "plain meaning" of the law based on its text and context of the law and, if necessary, the law's legislative history.[191]

Many federal statutes use preemption clauses to displace state or local laws expressly.[192] As noted in section II, preemption clauses are a common feature of state statutes as well. Unlike Section II, however, courts do not need to find that Congress "unambiguously expressed" its intent to preempt a local law.[193] At one time, courts needed to find that preemption was the "clear and manifest purpose of Congress" to displace state or local laws in a "field of traditional state regulation" — a presumption against preemption similar to what exists in Oregon — but the Supreme Court expressly disavowed this in 2016.[194]

Many federal laws also use **savings clauses**; these are the opposite of preemption clauses because that they expressly "save" state or local lawmaking from preemption in certain areas.[195] The "plain meaning" of these clauses is not always clear because they protect "State" laws.[196] Depending on the statute, the term "State" laws may or may not include local ordinances, which are *laws* of *state* political subdivisions.

On a few occasions, the Supreme Court has found that a federal savings clause extends to local laws as well as state laws, even where the clause itself refers only to "State" laws."[197] For example, in *Wisconsin Public Intervenor v. Mortier*, the Court found that a pesticides ordinance was not preempted by federal law due to a savings clause in the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).[198] The savings clause under FIFRA provides that "State[s] may regulate" the sale and use of federally registered pesticides as long as that sale or use is not prohibited by federal law.[199] The *Mortier* Court found that under FIFRA at least, the term

---

[190] Caleb Nelson, *Preemption*, 86 Va. L. Rev 225, 226 (2000).
[191] *South Coast*, 541 U.S. at 252. Plain meaning analysis sometimes relies on *textual* presumptions, also known as canons of construction. *See* STATUTORY INTERPRETATION: THEORIES, TOOLS, AND TRENDS, CONGRESSIONAL RESEARCH SERVICE 26 (2018), https://fas.org/sgp/crs/misc/R45153.pdf (last visited June 13, 2024).
[192] *See Engine Manufacturers Association v. South Coast Air Quality Management District*, 541 U.S. 246, 252 (2004); *see also US v. City and County of Denver*, 100 F.3d 1509, 1513 (10th Cir.1996).
[193] *See Puerto Rico v. Franklin Cal. Tax-Free Trust*, 136 S. Ct. 1938, 1945 (2016); *City of La Grande*, 281 Or at 156.
[194] *See Cipollone v. Liggett Grp., Inc*., 505 U.S. 504, 533 (1992); *see also Puerto Rico*, 136 S. Ct. at 1945.
[195] FEDERAL PREEMPTION: A LEGAL PRIMER, CONGRESSIONAL RESEARCH SERVICE 17 (2018), https://fas.org/sgp/crs/misc/R45825.pdf (last visited June 13, 2024).
[196] *Id.*
[197] *See Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 601 (1991).
[198] *Id.* at 606-07.
[199] *Id.*

"State" means the states and their local governments, which federal courts have long considered to be the "convenient agencies" of states.[200]

In sum, whether a federal law expressly preempts local laws — or whether it "saves" local laws from preemption — will depend solely on the court's interpretation of the text.[201] As it stands, courts are not required to find clear or "unambiguous" evidence that Congress intended to preempt a local law.[202] "Plain" evidence of that intent is enough.[203]

B. Implied Preemption

Even if a federal law does not expressly preempt state or local lawmakers, courts may find that it does so *impliedly* under certain circumstances. One is impossibility preemption, a familiar standard under *La Grande/Astoria* for state preemption. The other two circumstances are **(1)** field preemption and **(2)** obstacle preemption — both of which are uniquely federal.

i. Impossibility Preemption

The Supreme Court has held that federal law preempts state law when it is impossible to comply with both sets of laws.[204] In *Florida Lime & Avocado Growers, Inc. v. Paul*, the Court described a hypothetical situation wherein a federal law prohibited the sale of avocados with more than 7% oil and a state law required all avocados to have at least 8% oil.[205] In this scenario, it would be *impossible* for an avocado seller to meet both standards — the 7% federal maximum and the 8% state minimum. The court found that where a person would have to choose whether to comply with federal or state law, the state law is preempted out of necessity.[206]

Courts describe this as a "demanding" test for preemption and one that is rarely met.[207] It also is identical to the only implied preemption permitted under *La Grande/Astoria*, occurring where it is "impossible" for a state law and local law to "operate concurrently."[208]

---

[200] *Id.*
[201] *See Puerto Rico v. Franklin Cal. Tax-Free Trust*, 136 S. Ct. 1938, 1945 (2016).
[202] *Id.*
[203] *Id.*
[204] *See Fla. Lime & Avocado Growers v. Paul*, 373 U.S. 132, 142-43 (1963).
[205] *Id.*
[206] *Id.*
[207] *See Wyeth v. Levine*, 555 U.S. 555, 573 (2009).
[208] *See Thunderbird Mobile Club, LLC v. City of Wilsonville*, 234 Or App 457, 474 (2010).

ii. Implied Field and Obstacle Preemption

Federal case law permits two other forms of implied preemption that are more common and easier for litigants to prove. Field preemption and obstacle preemption displace laws based on the "pervasiveness" of a statutory scheme or on a federal law's "objectives."[209]

Cities (and states) have some arguments at their disposal. First, if a federal statute contains a preemption clause and courts do *not* find that it expressly preempts local law, then a city can argue the preemption clause is the *extent* of Congress's preemptive intent.[210] Second, if the federal statute is regulating a "field of traditional state regulation," then the state or city can argue that the court must find preemption was the "clear and manifest purpose of Congress."[211] These arguments, while persuasive, have achieved mixed results.

a. Obstacle Preemption

Obstacle preemption occurs where a court finds that a state or local law is "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[212] Obstacle preemption is similar to impossibility preemption in that it requires a clear conflict. Where it is not *technically* impossible for a federal and local law to operate, i.e. impossibility preemption, obstacle preemption is there to preempt state or local laws that would be counterproductive.[213]

A recent example of obstacle preemption took place in Oregon. In *Emerald Steel Fabricators v. Bureau of Labor*, the Oregon Supreme Court held the Oregon Medical Marijuana Act (OMMA) was preempted by the Federal Controlled Substances Act (CSA).[214] The state law authorized the use of medical marijuana, whereas the CSA did not recognize a medical exception for marijuana, a Schedule I drug.[215]Applying the standards for federal preemption, the court held that the OMMA, by legalizing a substance that is illegal under federal law, stood as an obstacle to the CSA because it "authorizes what federal law prohibits."[216]

As this case illustrates, obstacle preemption usually applies when a state or local civil law promotes conduct that is prohibited by federal law.[217] A federal ban is a clear goal. Sometimes,

---

[209] *See Rice v. Santa Fe Elevator Corp*., 331 U.S. 218, 230 (1947) (finding that Congress preempted states from regulating grain warehouses).
[210] *See Atay v. County of Maui*, 842 F.3d 688, 703 (9th Cir. 2016).
[211] *See Hillsborough County v. Auto Medical Labs*, 471 U.S. 707, 715 (1985).
[212] *See Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372-73 (2000).
[213] *Id.*
[214] *See Emerald Steel Fabricators, Inc. v. Bureau of Labor and Industries*, 348 Or 159, 161 (2010).
[215] *Id.*
[216] *Id.* at 178-80 The court held the CSA did not preempt other sections of the OMMA that partly *decriminalized* the state crime for marijuana: the federal government cannot compel the state to make certain crimes. *Id.*
[217] *Id.* at 177.

however, parties base claims of obstacle preemption on congressional goals that are less clear.[218] Generally, courts are careful not to interpret Congress's goals too broadly: as one court put it, obstacle preemption does "not justify a free wheeling judicial inquiry" into Congress's goals.[219]

For example, in *Atay v. County of Maui*, a Hawaiian county adopted an ordinance that banned residents from growing or testing genetically engineered (GE) plants.[220] Existing federal law and regulations list many — but not all — GE plants as environmental threats and restrict their movement in commerce without a permit.[221] As an initial matter, the Ninth Circuit Court of Appeals found that any of the GE plants in the Maui ordinance that also are regulated by the federal government were expressly preempted by a clause in the Plant Protection Act (PPA).[222]

But the Maui ordinance also banned some GE plants that were not federally listed.[223] The growers of GE plants argued that even the non-listed GE plants were preempted by the PPA because the ordinance frustrated a secondary objective of the PPA, which allegedly was "facilitating commerce in non-dangerous GE plants" like those listed in the ordinance.[224]

The *Atay* Court rejected this argument. First, the Court found that the PPA contained a preemption clause and that it was therefore reasonable to infer that "Congress did not intend to preempt state and local laws that do not fall within the clause's scope."[225] In other words, the court began by assuming that Congress probably did not mean to preempt ordinances like the one in Maui County because the preemption clause in the PPA did not list these ordinances. Second, the court found that "land use" is one of the traditional fields occupied by states and local government and found that Congress, in enacting the PPA, did not clearly manifest their intent to prevent local governments from "exercising their traditional authority" over land use.[226] For these reasons, the court rejected this claim of obstacle preemption.

b. Implied Field Preemption

Implied field preemption occurs where a court finds that federal laws and regulations on a subject are "so pervasive as to make reasonable the inference that Congress left no room for

[218] *See Atay v. County of Maui*, 842 F.3d 688, 704 (9th Cir. 2016).
[219] *See Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 111 (1992).
[220] *Atay*, 842 F.3d at 691.
[221] *Id.* at 700.
[222] *Id.* a 701.
[223] *Id.* at 703.
[224] *Id.* at 704.
[225] *Id.*
[226] *Id.*

states to supplement it."[227] It can also occur where a court finds that the subject is one where the federal interest is so dominant that Congress must have meant to preclude state or local laws.[228]

In *City of Burbank v. Lockheed Air Terminal*, the city adopted an ordinance that imposed an 11 p.m. to 7 a.m. curfew on jet flights at the local airport.[229] Federal laws also regulated air traffic and set rules for noise at airports.[230] Neither of these federal laws expressly preempted local ordinances on air traffic noise.[231] In addition, the Court did not find that compliance with the federal law and the local law was impossible. Instead, the Court found that the "pervasive nature of the scheme of federal regulation of aircraft noise" implied that Congress had intended to occupy the field and displace any state or local laws on the subject.[232] Along the way, the Court noted that it needed to find that preemption was the "clear and manifest purpose" of Congress because the city ordinance was a field — community curfews and noise control — traditionally regulated by states and state political subdivisions.[233] The Court found this intent was clear based on extensive legislative history.[234]

Since *Burbank*, the Supreme Court has held that federal law occupies several other fields, including the regulation of tanker vessels and immigrant registration.[235] In other situations, the Court has rejected claims of field preemption and sided with local ordinances.[236]

For example, in *Hillsborough County v. Auto Medical Labs*, the Court upheld a county ordinance that imposed standards for blood plasma donations.[237] Specifically, the ordinance required donation centers to screen for hepatitis and required donors to pass a breathalyzer test.[238] Meanwhile, the Food and Drug Administration (FDA) promulgates federal standards for blood plasma donations.[239] A donation center filed a lawsuit arguing that the "pervasiveness" of the FDA rules preempted any state or local laws in the field.[240] The Court held otherwise.[241] First, the Court drew a distinction between the comprehensiveness of a federal statutory scheme and the comprehensiveness of federal regulations.[242] The Court found that "no intent to preempt

---

[227] *See City of Burbank v. Lockheed Air Terminal, Inc*., 411 U.S. 624, 633 (1973).
[228] *Id*.
[229] *Id*. at 625
[230] *Id*.
[231] *Id*. at 633.
[232] *Id*.
[233] *Id*.
[234] *Id*. at 634-635.
[235] *See US v. Locke*, 529 U.S. 89, 115 (2000); *See Arizona v. United States*, 567 U.S. 387, 402 (2012).
[236] *See Hillsborough County v. Auto Medical Labs*, 471 U.S. 707, 713-15 (1985).
[237] *Id*.
[238] *Id*. at 710.
[239] *Id*.
[240] *Id*. at 712.
[241] *Id*.
[242] *Id*. at 717.

may be inferred from the comprehensiveness of the federal *regulations*…" because federal regulations often *are* comprehensive, and a finding of field preemption on those grounds alone would take significant authority away from cities, counties, and states.[243] The Court also held there was no dominant federal interest in the field of blood plasma regulation because regulation of "health and safety matters is primarily and historically a matter of local concern."[244]

In conclusion, cities and states may sometimes mount a defense to claims of *implied* federal preemption by arguing that their law is in an area traditionally regulated by states (and by extension their cities). Cities and states may also point to the existence of a preemption clause as evidence that additional preemption is not implied. But these arguments are no guarantee and courts may infer preemption regardless from the statutory scheme or a well-stated objective.

IV. Federal/State Sovereign Rights

State and federal preemption are the primary ways that municipal authority is restricted. It is not the only way. State and federal governments do not need to pass laws to limit what cities can do. In their nature as sovereign governments, they put passive restraints on local authority.

The sovereign rights of state and federal governments, and how cities tie into these rights, is a lengthy and convoluted topic that would be impractical to address in this Handbook. It also is not trivial — issues of sovereignty can arise in strange and unexpected ways and therefore cities should have a brief understanding of what this can mean for their operations.

In short, the State of Oregon and the U.S. government are not subject to local authority. These governments are "sovereign," meaning they normally cannot be taxed, regulated, forced to turn over property, or subject in any other way to a city's authority.[245] The state also extends some of these to its political subdivisions — cities and other local governments.[246]

Of course, there are limits to these sovereign rights. First and foremost, state and federal governments may always consent to being taxed, regulated, forced to turn over property, or in some other way subject to local authority.[247] Both the federal and state government do waive

[243] *Id.*
[244] *Id.* at 719.
[245] *See, e.g.*, Goodyear Atomic Corp. v. Miller, 486 U.S. 174, 181 (1988) (finding "federal installations are shielded by the Supremacy Clause from direct state regulation unless Congress provides 'clear and unambiguous'" consent). Note that tribal governments in Oregon also are sovereign; at a fundamental level, they are separate from the state and the United States. *See Introduction to Oregon's Indian Tribes*, Or. Blue Book, https://sos.oregon.gov/blue-book/Pages/national-tribes-intro.aspx (last accessed June 13, 2024).
[246] *See, e.g.*, ORS 307.090(1).
[247] *Id.*

their sovereign rights to a certain degree, notably for lawsuits.[248] Second, as noted in Chapter 1, not every action that a city takes is an exercise of government authority. Some actions by a city are corporate in nature. To the extent a city is acting more as a corporation than as a government, an argument could exist for the state or federal government to comply with the city's demands.[249]

A. Eminent Domain

Oregon's eminent domain laws offer a good overview of these concepts. As a sovereign government, the State of Oregon generally cannot be subject to eminent domain by local governments.[250] That said, this right is limited because the Oregon Legislature has consented to eminent domain actions under certain circumstances.[251] For example, under ORS 553.270, a water district may bring an eminent domain action against state-owned property if it can show that it would put it to a more necessary public use.[252]

Note that under ORS 553.270, the Legislature waives its own immunity to this category of eminent domain *as well as* the immunity of county governments.[253] Arguably, the statute even applies to city property.[254] While a city likely could not oppose a taking on grounds that it has sovereign status, a city would have some recourse in its corporate capacity.[255] Under *City of Keizer v. Lake Labish Water Control Dist.*, the Oregon Court of Appeals found that a city could sue for just compensation after its property was taken (accidentally) by a water district.[256] The court reasoned that city was a "corporation" and thus a "person" under the takings clause of the Oregon Constitution.[257]

[248] *See* the Oregon Tort Claims Act, ORS 30.260 to ORS 30.300, and the Federal Tort Claims Act, 28 USC §§ 1346, 2671-2680.
[249] *See, e.g., City of Keizer v. Lake Labish Water Control Dist.*, 18 Or App 425, 427 (2002).
[250] *See* 21 Or Op Atty Gen 103, 1942 WL 38513 (1942) (noting that "A statute granting the general power to condemn land is not binding on the sovereign in the absence of an express provision or a necessary implication to that effect.").
[251] *See* ORS 533.270.
[252] *Id.*
[253] *Id.*
[254] *Id.*; *see also City of Keizer v. Lake Labish Water Control Dist.*, 185 Or App 425, 432 (2002) (discussing ORS 553.270 in the context of city property).
[255] *Id.* at 437-440.
[256] *Id.* at 427.
[257] *Id.* at 437-440.

B. Local Taxes and Fees

Another important example of these principles is utility fees. As sovereign governments, neither the U.S. government nor the state of Oregon may be taxed by a local government.[258] The governments at times agree to make "payments in lieu of taxes," and the state even authorizes cities to assess public property for certain public improvement costs.[259] But, absent their express consent, neither the state or federal government can be compelled to pay local taxes.[260]

Yet here again, a corporate caveat exists for cities. Though taxation is off-limits, cities and local governments may charge the U.S. government "reasonable fees related to the cost of government services provided, such as payment for metered water usage" and other utilities or city-operated service.[261] Though it depends on the circumstances, cities might be able to charge a "user fee" if the payments are "given in return for a government-provided benefit."[262] Similarly, the state and its local governments generally are exempt from paying property taxes but can be required to pay other types of fees, such as license fees or municipal utility fees.[263]

The reason for this is that the authority for a city to charge these rates flows not from its municipal authority but rather from "a municipality's basic power to obtain some measure of profit from its utility enterprise."[264] However, cities should note that it can be difficult to say for certain whether a specific city charge on state or federal instruments will be found permissible, or if it will be found null and void as a tax.[265] For example, courts everywhere appear split on whether stormwater discharge fees are "user fees" or taxes.[266]

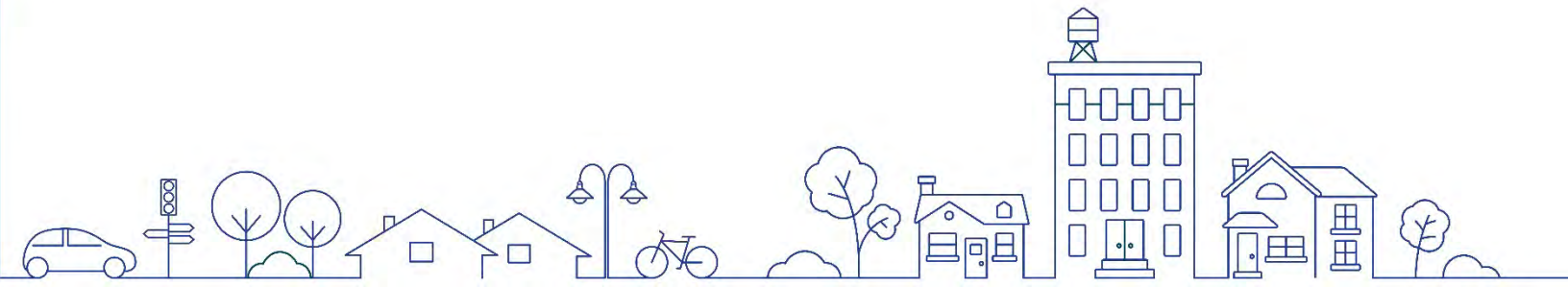
In sum, cities are prevented from taking certain actions against the federal, state, and tribal governments because these governments possess varying measures of sovereign immunity.

---

[258] *See, e.g.,* ORS 307.090; *see also US v. City of Detroit*, 355 US 466, 469 (1958) (finding that states and local governments "cannot constitutionally levy a tax directly against the Government of the United States or its property without the consent of Congress.").
[259] *Payments in Lieu of Taxes*, U.S. DEPARTMENT OF THE INTERIOR, https://www.doi.gov/pilt#:~:text=%22Payments%20in%20Lieu%20of%20Taxes,Federal%20lands%20within%20their%20boundaries.&text=PILT%20payments%20are%20one%20of,good%20neighbor%20to%20local%20communities. (last accessed June 13, 2024).
[260] *City of Detroit*, 355 US at 469.
[261] *See Novato Fire Protection Dist. v. US*, 181 F3d 1135, 1138-39 (9th Cir 1999).
[262] *See* US *v. City of Huntington*, 999 F2d 71, 73-74 (8th Cir 1993).
[263] *See, e.g.,* Or Op Atty Gen OP-6091, 1987 WL 278260 (1987) (finding in part that the City of Monmouth could rightfully charge state entities a fee based on "actual use," but that a proposed "transportation utility fee" was not based on "actual use" and therefore would constitute an impermissible tax on a state college.).
[264] *See, e.g., US v. City of Columbia*, 914 F2d 151 (8th Cir 1990).
[265] *See* Or Op Atty Gen OP-6091, 1987 WL 278260 (1987); *see also City of Huntington*, 999 F2d at 73-74 (noting that courts must consider "all the facts and circumstances … and asses them on the basis of economic realities") (quoting *US v. City of Columbia*, 914 F2d 151, 154 (8th Cir 1990).
[266] *Cf. Norfolk Southern Railway Company v. City of Roanake*, 916 F3d 315, 319-320 (4th Cir 2019) (finding that stormwater discharge fees are fees, *with Dekalb County v. US*, 108 Fed Cl 681, 696-697 (2013) (finding the fees are taxes).

That said, this avenue is open to cities if a sovereign government consents to local regulations. Additionally, depending on the circumstances, a city may find some recourse through its corporate status against an entity that is employing sovereign rights.

CHAPTER 3:
MUNICIPAL OFFICIALS



League of Oregon Cities

Published by the League of Oregon Cities
September 2020 / Last updated August 2024

Table of Contents

Chapter 3: Municipal Officials

Introduction

Municipal officials have many responsibilities. All officials must have a thorough knowledge of the community, its people, and its problems, as well as an understanding of their individual roles and the issues they will confront. This Handbook chapter will provide an overview of the common roles of municipal officials. This chapter is not intended to be a substitute for legal advice. The LOC members with additional questions about their role as a municipal official are encouraged to contact their city attorney.

Roles of Elected Council/Commission Officials

Oregon cities have councils of fewer than ten members, although there is variation in council size—from five to nine members. Most councilor terms are four years, but a few cities have two-year terms. A few city charters provide a limit for the number of terms that one individual may serve as a councilor.

City councils and commissions usually have major responsibilities in both their policy and administrative roles. Understanding these responsibilities will increase the ability of the council, councilors, and staff to get their job done. Two primary functions of city councils are policy and administration. Councils also have limited quasi-judicial powers. Policy is the process of deciding what is to be done, while administration is the process of implementing the policy. Quasi-judicial powers allow the council to act like a court of law.

Policy Role

The city council clearly has the dominant voice in policy matters, but this responsibility is shared with the city administrator, other city employees, and private citizens. The unique role of the council in the policy-making process is to serve as the decision maker within city government in resolving issues of policy. Although the administrator and city employees may be involved in policy formulation, only the council may pass an ordinance or adopt a comprehensive plan. In addition, the budget is a major vehicle for making city policy decisions – and only the council may adopt the budget.

For the council to be successful in bringing issues forward for discussion and in setting policy, each councilor must have a clear understanding of the policy process and the stages at which council intervention is most effective. The policy process may be viewed as a series of steps or phases:

- Identification of problems and needs;

- Establishment of community goals;
- Determination of objectives;
- Development and analysis of alternative means for achieving objectives;
- Establishment of priorities;
- Development of programs;
- Implementation of programs;
- Monitoring and evaluation of programs; and
- Feedback.

These steps usually do not occur as separate actions or decisions, but they may occur more or less in sequence, as in the adoption and periodic review of the comprehensive plan, a capital improvement plan, or an annual budget.

Councilors may be involved in each of these steps, but their most important contributions are likely to be in identifying needs, establishing goals and objectives, choosing among alternatives, setting priorities, and providing feedback.

Administrative Role

Once policies are established, they must be implemented through administration. Administrative actions are generally those types of decisions that are internal and relate to city operations. These decisions normally implement requirements of city ordinances and state statutes and deal with matters that are special or temporary.

There are several ways in which city councils can, and do, influence city administration. The most common actions taken by a council that affect administration are the passage of resolutions and motions, special investigations, approval of appointments, public hearings, the budget process, legislative audits, review of administrative rules, and agency reporting requirements. Resolutions are generally written and deal with matters of temporary importance. A motion is similar to a resolution, except that motions are generally not presented to the council in writing. It should be noted that motions are not limited to administrative decisions and may often be a mechanism by which a council will adopt an ordinance or other decision. Through these actions, the council exercises significant control over administration, even if the day-to-day administration of the city business is conducted separately from the council.

The extent in which the city council is involved in administration depends on the size of the city and its form of government. The council is collectively responsible for the oversight of administration in most cities,[1] but the roles that individual city councilors play in city administration vary considerably, depending on the size of the city and its form of government. Some small cities have no full-time employees and as a result, councilors for those cities may be deeply involved in administration. Often small cities rely upon part-time employees or contracted professional services to assist with various issues and volunteers. Somewhat larger cities have full-time employees. Even so, councilors may still perform administrative functions or oversee projects, usually though council committees. As cities grow and the complexity of their operations increase, councils often employ a city manager or a city administrator. Councils in these cities seldom retain any significant involvement in day-to-day supervision of city employees and departments, although the extent to which they may seek to exercise supervision may vary depending on the size of the city the abilities of the councilors, and language in the city's charter.

Quasi-Judicial Power

In some instances, the council will sit much like a court of law to hear a matter and make a decision that affects a person's rights. These "quasi-judicial" decisions always involve a specific set of rules or policies that will be applied to a specific situation in which the council must make a decision. Typical quasi-judicial decisions include land use applications and appeals of licensing decisions. A person affected by a quasi-judicial decision has certain rights such as the right to be informed of the decision, a right to address the decision maker at a hearing before the decision is made, and a right to an

[1] In a strong mayor form of government, it is the mayor who handles the administrative functions of the city, not the council. The city of Beaverton was the last city in Oregon to have strong mayor form of government. As of 2021, the city charter was amended and provided for a city manager-council form of government. *See* *https://www.beavertonoregon.gov/860/Ballot-Measure-34-298* (last accessed June 20, 2024).

Three Forms of Government

A city's form of government defines its internal organizational structure, relations along its electorate, its legislative body, and its executive officials, and the respective roles of each in the formal decision-making process. The form of government is often said to be less important to the quality of a city's performance than the personal qualities and abilities of its city officials and employees. Although there are three basic forms of city government, rarely does the organization of a city adhere completely to one form.

Council-Manager Form

Most cities with populations above 2,500 have a council-manager form of government. The council retains the decision-making authority of the city, but the charter creates an office of city manager (or administrator). The appointed city manager takes charge of the daily supervision of the city's operations and serves at the pleasure of the council. The council sets policy and the manager carries it out.

This type of form works best when the council exercises its responsibility for policy leadership and respects the manger's leadership role and responsibility for administration. Council-manager charters commonly include specific provisions that prohibit individual councilors from giving orders to city employees or from attempting to influence or coerce the manager with respect to appointments, purchasing, or other matters.

impartial decision maker.

Communications between Council/Commission and Staff

Regardless of the size of the city or its form of government, communication between the council and city staff must be made with the recognition of two facts:

- The city employee is responsible to his or her immediate supervisor and cannot take orders from an individual councilor; and

- Each councilor has authority in administrative matters only to the extent delegated by the council as a whole. This delegation is often formally contained in an ordinance or charter provision.

Misunderstandings may arise when a councilor intends to only ask for information. The employee receiving a direct request from a councilor can easily jump to erroneous conclusions or misinterpret the councilor's intent. The best way for councilors to get information about administrative matters is to make the request during a regular council meeting or to a specific manager or administrator.

Decision Making

City council action is taken by vote and that action is typically referred to as a decision. A decision may be made with respect to formal documents such as ordinances, resolutions, orders, and contracts. A decision may also be made to direct city staff to take certain action or made on a question of motion before the council.

Councils adopt laws in the form of ordinances. Ideally, councils have adopted rules that help implement the ordinance process and provide for an orderly discussion. For example, charters will often require, subject to some exceptions, that an ordinance be "read" by the council at two meetings. By comparison, the council rules will state when those meetings are to occur, whether the council will get copies of the ordinance in advance, and whether the public may speak on the proposed ordinance.

Three Forms of Government *continued*

Mayor-Council Form

The mayor-council form can either have a "weak mayor" or "strong mayor" form of government. Under a weak mayor, the elected council is the basic policy making body in the city. The mayor has no formal authority outside the council, and unless, specified by charter, has no veto power over council decisions. Under a strong mayor, the mayor essentially serves as the head administrative manager of the city.

While there is no appointed city manager, the mayor may appoint an assistant to oversee the general supervision and control over appointed city officers and employees. Rather than reporting directly to the city council, as may be the case under the council-manager form of government, the mayor's assistant reports directly to the mayor.

Commission Form

The only city that had a commission form of government was the City of Portland, but as of 2024, they are implementing a new form of government that has a city council setting policy and a mayor that oversees business with the help of a city administrator.

The city charter specifies the quorum and voting requirements for a decision. A quorum is the minimum number of councilors required to be in attendance to transact business and is usually the majority of the council.[2] City charters may impose different voting requirements for certain actions. For example, a city charter may require approval of two-thirds of the members for passage of ordinances with emergency clauses, or unanimous approval for a combined first and second reading of a non-emergency ordinance.

The council's authority to adopt law cannot be delegated to anyone else within city government. However, under the Oregon Constitution, the people have reserved unto themselves the power of initiative and referendum. An initiative is when the voters gather enough signatures to put a law on the ballot for a vote. A referendum is when the voters gather enough signatures to put a law that the council has already adopted on the ballot. A referendum is different from a referral. A referral is when the council elects to send a matter to the ballot for a vote, rather than exercising its authority to adopt the law.

Liaison Role

Councilors serve as liaisons on local, state, or even federal boards. They may also serve on commissions or committees, such as the chamber of commerce, economic development groups, selected interest groups (such as the League of Oregon cities or National League of Cities), and civic groups. The councilor will not have the authority to commit the city to any course of action but can make recommendations to the council regarding proposed actions. A councilor may also serve on an intergovernmental body, such as a council of governments, joint city-county board or commission, or any other entity created by intergovernmental agreement. The type of body may have its own independent policy-making and administrative authority. Appointment to these kinds of bodies is usually made by the mayor with council approval, but individual councilor appointees may receive more direction from the council to guide their actions on behalf of the city.

Role of Mayors

The mayor is generally recognized as the civic leader in the eyes of the community. The mayor's authority beyond that will vary from city to city depending on the city's charter and its chosen form of government. In most cities, the mayor presides over council meetings and participates in discussions. Unlike city councilors who are elected, the mayor may be either elected by the people or appointed by the council from among its own members. Many cities have two-year terms for the mayor, even though the councilors serve for four years.

[2] The Oregon Supreme Court held: (1) A quorum applies to any organized body, even if the body has not established its own quorum; and (2) the Oregon Public Meetings Laws applies to "some decision-making of a governing body that does not occur in a 'meeting'." *Tri-County Metropolitan Transportation District of Oregon v. Amalgamated Transit Union Local 757*, 362 Or 484, 497 (2018).

Policy Role

In most cities, the elected council is the legislative and basic policy-making body of the city. The mayor is the ceremonial head of the city and is often the presiding officer of the council. The mayor calls city council meetings to order; announces the order of business as provided in the agenda; states motions; puts them to a vote; announces the result of the vote; prevents irrelevant or frivolous debate or discussion; maintains order and decorum; and otherwise enforces the council's rules and appropriate parliamentary procedures. In addition to the general policy role of a council member, in most cities, the mayor also signs all ordinances and their records of proceedings approved by the council, and in small cities, they may sign all orders to disburse funds.

Administrative Role

Generally, the mayor, with consent of the council, may appoint members of commissions, boards, and committees established by ordinance or resolution. Within cities who adopt a weak mayor form of government, the mayor does not appoint administrative personnel, has no special administrative responsibility, and has no power to veto ordinances adopted by the council. However, depending on charter provisions, the mayor may appoint certain staff members, such as the city manager, city attorney, and chief of police, subject to council approval. Within cities which adopt a strong mayor form of government, the mayor is the chief executive of the city. In addition to being the ceremonial head of the city and presiding at council meetings, the mayor has the power to appoint all or most administrative personnel of the city and has the general responsibility for proper administration of city affairs.

Liaison Role

As with other members of the city council, the mayor may serve as a liaison on local, state, and federal boards. Similar to other city councilor liaison roles, the mayor will not have authority to commit the city to any course of action but may make recommendations to the rest of the council regarding proposed actions.

Recalls

The Oregon Constitution provides the public with the power to recall elected officials before the expiration of their terms.[3] However, an elected city official may not be recalled during the first six (6) months of their current term.

Process and Procedure

[3] Or Const, Art II, §18.

The recall amendment states that every elected public officer is subject to recall by popular vote. This process is initiated by the filing of a recall petition and completed by an election. A petition to recall a public officer must contain signatures equaling at least 15% of the votes cast for governor in the officer's district during the last election. The petition must contain the reasons for the recall and must be filed with the official who accepts nominations for the position, usually the city recorder. The requisite forms needed to file a petition are published online on the Oregon Secretary of State's website.

File Prospective Petition

First, the prospective petitioner must file a prospective recall petition form, which must be completed and signed by the chief petitioner stating in 200 words or less the reasons for recall and providing their residence address. This form must be submitted to the city's filing officer. Prior to collecting signatures in favor of recall, the chief petitioner must establish a campaign account, and file a statement of organization designating a treasurer with the secretary of state's elections division. After receiving the prospective recall petition, the elections official reviews the forms for required information; date and time stamps the prospective petitioner if the form is complete; and assigns the petition an identification number. The local elections official will either provide the chief petitioner with written notification of required corrections; or provide written approval to circulate the petition that includes the number of required signatures and the last day to submit signatures for verification.

Gather Signatures

After the prospective petition form is approved, the chief petitioner may then gather signatures. Once the required number of signatures are gathered, the chief petitioner or an authorized agent may submit the signature sheet along with the petition submission form to the local elections official for verification. Only signature sheets from the chief petitioner or an authorized agent will be accepted. The local elections official will either reject the submitted petition sheets that do not comply with the legal requirements or coordinate with the county elections official to verify the signatures. The local elections official will provide in writing to both the chief petitioner and the elected official subject to recall the results of the signature verification; the final number of signatures determined to be valid and either the deadline to submit additional signatures or the deadline for the elected official to resign or submit a statement of justification. After a recall petition is successfully filed, the elected official has five (5) days in which to resign.

Statement of Justification

If the elected official subject to recall does not choose to resign, he or she may file a statement of justification form explaining, in 200 words or less, the official's course in office. The statement of justification must contain true factual information and is due within five (5) days after the filing officer determines the recall petition contains sufficient signatures. The completed

statement of justification is printed on the election ballot. A recall election will be scheduled even if the public official fails to submit a statement of justification within the required deadline.

Recall Election

If the public official does not resign, a special recall election is ordered to be held within 35 days. The local elections official coordinates with the county elections official to schedule and conduct the election. If the recall election is successful, the position becomes vacant. Vacancies resulting from a recall are treated the same as vacancies caused by death or resignation. Typically, city charter provisions call for such vacancies to be filled by city council appointment. If the recall election is unsuccessful, the public official remains in office.

A public official may be subjected to only one recall election during a term in office, unless the sponsors of a later recall effort are willing to pay the entire cost of the previous, unsuccessful recall election.

Common Appointed Officials

City Manager[4]

Most Oregon cities have a council-manager form of government. In this form, the city council appoints a qualified professional person as city manager or administrator to take charge of the daily supervision of city affairs. The manager or administrator serves at the pleasure of the council. In theory, the city council sets policy and the city manager carries it out. However, managers may take part in the policy-making process when they make recommendations to the council, and many city charters require them to do so. Managers also set policy when they make decision on specific matters that are not clearly covered by existing ordinances or regulations.

The position of city manager is typically set out in the city charter and includes specific provisions that prohibit individual councilors from giving orders to city employees or from attempting to influence or coerce the manager with respect to appoints, purchasing, or other matters. However, charters do not prohibit the council from discussing administrative matters with the manager in open meetings.

Many small cities have established a position of the city administrator instead of a city manager position. This is typically accomplished by ordinance rather than by charter, and occasionally a city sets up such a position merely by budgeting for it. The duties and responsibilities of city administrators vary. In some cities, they are indistinguishable from those of a city manager. In

[4] For additional information on recruiting a city administrator, please see the League's *Guide to Recruiting a City Administrator*, https://www.orcities.org/download_file/380/1852 (last accessed August 30, 2024). The Guide includes recruitment techniques, information on interim managements, and steps in the selection process.

others, the administrator may share administrative duties with the council or its committees, including hiring and firing department heads.

City Attorney[5]

A city may appoint an attorney to oversee the city's legal affairs. The type of employment arrangement between a city and its attorney can vary. A city may appoint in-house legal counsel in which the attorney serves as a city employee and the city is not billed separately for the attorney's services. In other instances, a city may employ the use of contract counsel in which the city retains the services of an attorney or law firm and the attorney bills the city for legal services provided. A city may also employ a contract attorney on retainer in which a flat fee is paid for basic defined services. All services provided in addition to the agreed upon basics will typically be billed to the city at an hourly rate. There may be instances where due to the type of litigation, or subject matter of a legal matter, the city may wish to employ outside counsel in addition to the regularly appointed attorney to handle complex matters.

A city attorney, regardless of the employment arrangement, may be called upon to attend all city council meetings, receive and respond to requests for advice from city council and staff, draft and review ordinances and resolutions, prepare and review contracts, and represent the city in litigation. In cities with municipal courts, the city attorney may serve as the municipal prosecutor. The city attorney's ethical obligations are to the city as a whole. The city attorney may not represent individual councilors or staff members. Regardless of the type of legal counsel the city wishes to employ, the city should keep the city attorney appraised of all issues and concerns.

City Recorder

The city recorder plays a number of invaluable roles within the city. While the primary responsibility of the city recorder is to serve as the city's records custodian and elections officer, city recorders also provides routine and complex administrative support to the council, city manager, and department heads. The city recorder's roles are typically outlined in the city charter, and usually include the duty to serve as the city council clerk. Under this role, the recorder prepares meeting agendas, meeting notices, and is responsible for keeping accurate council meeting minutes. As the city's records custodian, the recorder serves as a liaison with the secretary of state's archivist to ensure that the city's records are being maintained in accordance with record retention laws. The recorder also responds to public records requests, performs record certifications, and maintains city records. As the elections officer, the recorder processes petitions, prepares required notices and forms for the city, county clerk, and the public, and arranges for the placement of measures on the ballot. In the recorder's role as administrative

[5] For additional information on recruiting a city attorney, please see the League's *Guide to Recruiting a City Attorney*, https://www.orcities.org/download_file/378/1852 (last accessed August 30, 2024). The Guide includes steps in the selection process for both a contract city attorney and an in-house city attorney.

support, the recorder may be asked to draft correspondence, coordinate events, and administer oaths of office to public officials.

Public Safety Officials

As part of the city's responsibility to provide for the safety of its citizens, cities may either employ or contract for police and fire protection services.

Police

The role of local law enforcement officers encompasses a wide range of responsibilities. Some of the functions commonly associated with police forces are crime control and investigation, preservation of the peace, regulation of conduct other than criminal activity such as licensing and inspection, traffic supervision, community relations, and provision of general assistance to the community. Oregon cities are not legally required to provide law enforcement services, and some cities do not. When a city decides to provide police services, state and federal constitutional requirements relating to the rights of individuals become applicable.

Oregon statutes prescribe certain duties and authorities of police officers and establish general requirements such as certification standards. Police officer training is governed by state law, which requires, in part, that all newly hired police officers complete a basic course of instruction.[6] City police departments must send recruits to the Oregon Police Academy for their basic training. The Oregon Department of Public Safety Standards and Training requires officers to attend 16 weeks of basic instruction. Upon graduation, officers are required to participate in a structured field training program. Some city police departments also maintain their own instruction programs.

The time and resources expended on police activities varies with the size and social and economic characteristic of the city. The history of criminal activity and police practices also plays a role in the framework for police services. In some small cities, a single officer may perform few duties other than traffic and parking enforcement, with other police functions provided by the county sheriff or the state police. Many small cities receive police services under contract with the county sheriff. As an alternative, law enforcement personnel and services may be shared by several cities, or by a city and a county. In a large city, the police department may have specialized units dealing with specific police and law enforcement functions such as crime laboratories, information management systems, juvenile programs, and intelligence.

Many cities have police reserves that volunteer to assist police officers in certain activities. Other cities have code enforcement officers who handle activities such as dogs, parking, nuisance abatement, weed control, or other non-criminal actions.

[6] ORS 181A.490.

Fire Protection

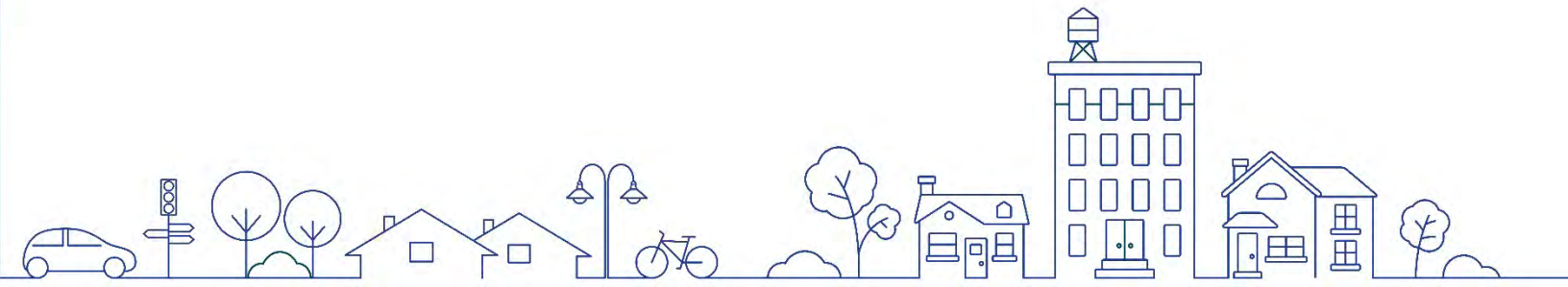
Most city fire departments are part of the city government structure. Small cities usually use volunteer firefighters, and medium-sized cities often use a combination of fulltime and volunteer personnel. In large cities, fire departments are staffed by fulltime professionals. Many city residents in Oregon receive their fire protection from Rural Fire Protection Districts (RFPDs).[7] Cooperation, contractual arrangements, and various forms of unification among local government entities are common in Oregon. Mutual-aid agreements among cities and adjacent RFPDs are virtually universal. Arrangements whereby a city provides fire protection services to neighboring RFPDs under contract are also widespread. The reverse is found in several areas – RFPDs sometimes provide service to cities under contract. This arrangement has become increasingly popular with small cities that can be served by large fire districts. Also, the law permits cities to participate in merged and consolidated districts.[8]

The state Board on Public Safety Standards and Training adopts rules and fire personnel certification programs. In addition to personnel certification, the board recommends standards for firefighting equipment and develops criteria for exemption of local jurisdictions from state fire and life safety regulations.

[7] ORS Chapter 478.
[8] ORS 198.885 – 198.915.

Oregon Municipal Handbook

CHAPTER 4:
ELECTIONS



League of Oregon Cities

Published by the League of Oregon Cities
November 2020 / Last updated September 2024

Table of Contents

Chapter 4: Election Law

More than any other level of government, local governments are the product of elections. Local voters decide not just who holds elected office—they also decide the offices. For home rule cities, the powers and structure of government are topics of voter-approved charters.

In several ways, local elections in Oregon are governed by local law. For instance, home rule charters decide the type and number of a city's public offices and the term and qualifications of each office.[1] Frequently, charters and local ordinances also provide unique processes of filing petitions and of filling vacancies in local office.[2]

That said, while local laws play some role, election law in Oregon is largely a matter of state law. Article II, Section 8, of the Oregon Constitution assigns the Oregon Legislature with the responsibility of "prescribing the manner of regulating and conducting elections" and of policing "improper conduct."[3] Because of this, elections in Oregon are regulated by a series of statutes and an administrative framework headed by the Secretary of State.[4] The Secretary of State's Office provides ample guidance on Oregon election law, with manuals on state and local candidacies, ballot measure procedures, and campaign finance regulations, among others.[5]

The state made several changes to its election system in 1979 and vested significant responsibility in county clerks, mandating that "the county clerk is the only elections officer who may conduct an election in this state."[6] Under this approach, county clerks are responsible for establishing precincts, preparing ballots and sample ballots, and receiving and processing votes."[7] County clerks also work with city election officers—such as the city's auditor, recorder, or administrator—to administer voting on local candidates and local measures.[8] County clerks are authorized to supervise cities on the administration of election law, but it is the Secretary of State that has ultimate authority to interpret and enforce state election law.[9]

This chapter will cover the most important election laws in Oregon, focusing primarily on state law. Part I covers election laws that apply directly to cities, beginning with the procedural

---

[1] *See, e.g.*, LEAGUE OF OREGON CITIES, MODEL CHARTER FOR OREGON CITIES, https://www.orcities.org/download_file/605/1852 (last accessed Aug. 16, 2024).
[2] *Id.*
[3] *See* Or Const, Art II, § 8.
[4] *See* ORS 246.110.
[5] *See, e.g.*, Or. Secretary of State, *Election Law Summary* (2024), https://stage-sos.oregon.gov/elections/Documents/elec_law_summary.pdf (last accessed Aug. 16, 2024).
[6] ORS 246.200.
[7] *Id.*
[8] ORS 246.210.
[9] ORS 246.110.

requirements for holding an election and the restrictions on political activity during work hours. Part II covers laws that apply to local candidates, from the eligibility requirements found under local law to state regulations on campaign finance. Similarly, Part III covers laws that apply to local measures, specifically local initiatives, referenda, and referral measures. Finally, Part IV describes the general enforcement process for state election offenses, which is carried out largely by the Secretary of State Elections Division.

I. Election Laws for Cities

As described above, state law governs the process for local candidates and measures to get on the ballot. In addition to these processes, state law imposes certain general requirements on cities that relate to elections. First, Oregon law restricts when cities can hold certain elections and requires cities to work with their county to facilitate the election.[10] Second, city employees are prohibited at all times—during, before, and after any election—from engaging in certain political activity during work hours.[11] Significantly, this prohibition does not apply to elected officials and includes an exception for political views in the workplace.[12] Third, with any local candidate or ballot petition, Oregon election law requires the campaign to file a statement of organization and to track every contribution and expenditure.[13]

A. Holding an Election

i. Timing Requirements

Cities, like the state, hold elections for the purposes of electing officials and approving or rejecting ballot measures. In various ways, state law limits the timing of local elections held for either purpose.[14] In general, local elections must be held on one of four dates: **(1)** the second Tuesday in March; **(2)** the third Tuesday in May; **(3)** the fourth Tuesday in August; or **(4)** the first Tuesday after the first Monday in November.[15] Absent an emergency, these dates are the only dates that a city can hold an election on a referral (i.e. a "city measure referred by the city governing body") or for a city office.[16]

[10] *See, e.g.*, ORS 221.230.
[11] *See* ORS 260.432(2).
[12] *Id.*
[13] ORS 260.005 - ORS 260.285.
[14] *See, e.g.*, ORS 221.230.
[15] *Id.*
[16] *Id.*

But additional restrictions apply.[17] First, state law requires that all regular elections for city officers "be held at the same time and place as elections for state and county officers."[18] Elections for state and county officers are conducted in **primary elections** held only "on the third Tuesday in May of each even-numbered year" and **general elections** held only on "the first Tuesday after the first Monday in November of each even-numbered year."[19] Thus, local elections for city office generally are held only on numbers (2) and (4) of the above paragraph dates, and only in even-numbered years.[20] If a city does hold an election on a date other than the primary or general election, the city bears the expense of the election."[21]

Second, restrictions apply to elections held on any city measure *other* than a referral.[22] Absent an emergency, state law requires that an "election on a city measure…other than a [referral]" must be held on the third "Tuesday in May" or "the first Tuesday after the first Monday in November."[23] While these dates are identical to the dates for primary and general elections, note that there is no requirement for the election to be held in an even-numbered year. Thus, while elections on non-referral city measures need to be held on numbers (2) and (4) of the dates in the paragraph above, they can be in an odd-numbered year.[24] Non-referral city measures include local initiatives, citizen-led referenda, recall measures, and measures seeking to alter local boundaries through annexation, withdrawal, or disincorporation.

As noted, under certain circumstances, a city may hold an **emergency election** that falls on a date other than the dates described above.[25] To do so, the city must find that an emergency actually exists and that "extraordinary hardship to the community" would result from waiting until the next available election date to conduct an election.[26] The city must adopt this finding in a resolution after a public hearing.[27] The hearing itself must be adequately noticed and cannot be held on the same day as a regularly scheduled council meeting.[28] In the event of an emergency, an election can be held as early as 47 days after giving notice to the county clerk (see below).[29]

---

[17] *See* ORS 254.035; *see also* Or Const, Art II, § 14a (requiring that "regular elections" in cities occur "at the same time [as] primary and general biennial elections" for state and county offices).
[18] ORS 254.035.
[19] ORS 254.056.
[20] *Id.*
[21] ORS 254.046.
[22] ORS 221.230(2).
[23] *Id.*
[24] *Id.*
[25] ORS 221.230(3).
[26] *Id.*
[27] ORS 221.230(4).
[28] *Id.*
[29] ORS 221.230(5).

For some city measures, however, emergency elections simply are not an option. Even in an emergency, an election cannot be held on certain types of measures that have specific timing requirements under a state statute or the state constitution. For example, Article XI, Section 11, of the Oregon Constitution requires that local measures proposing new property taxes must be presented to voters in a general election.[30] This requirement is waived if at least 50% of eligible voters participate in the election, but such turnout is difficult to achieve outside of a general election—in the past 30 years, only three primary elections have seen a turnout higher than 50%.[31] Similarly, a proposed local measure to consolidate two or more cities must be presented to voters at a "primary election or general election."[32] Due to these measure-specific timing requirements, the LOC recommends that cities thoroughly research state election laws before placing a measure on the ballot, particularly if the ballot is not a general election ballot.

ii. Filing with the County

State law also requires cities to notify the county prior to an election of every candidate and every measure that will be voted on in an election. Generally, the chief elections officer for a city needs to submit this information to the county clerk no later than the **61st day** prior to an election.[33] Cities need to file a "statement of the city offices" that are the subject of the election and information about each of the candidates.[34] Cities also need to file a "statement of the city measures" and the ballot title for each of the measures.[35]

These requirements are the same regardless of whether the city is submitting information as part of a general election, a primary election, or its own special election. That said, if the city is holding an emergency election, the process of notifying the county clerk is different.[36] The city must notify the county no later than the 47th day before the desired election date and must include a copy of the resolution and findings that an emergency election is justified.[37]

B. Prohibited Political Activity — ORS 260.432 and related federal laws

State election law in general prohibits city employees from engaging in certain political activity during work hours.[38] While this ban can seem simple, several of its definitions and

[30] Or Const, Art XI, § 11.
[31] *Id.*; Or. Secretary of State, *Voter Turnout History for Primary Elections* (2024), https://sos.oregon.gov/elections/Documents/Voter-Turnout-History-Primary.pdf (last accessed September 26, 2024); Or. Secretary of State, *Statistical Election Statistics* (2024) (last accessed September 26, 2024).
[32] ORS 222.250.
[33] ORS 254.095.
[34] ORS 254.095(1).
[35] ORS 254.095(2).
[36] ORS 221.230(5).
[37] *Id.*
[38] ORS 260.432.

exceptions make the law—ORS 260.432—deceptively complex. This section will explore the law in detail and will conclude with two federal laws that sometimes apply to city employees. For more information on all of these laws, cities can consult the manual *Restrictions on Political Campaigning by Public Employees*, which was last revised and adopted by the Oregon Secretary of State in May 2024.[39]

ORS 260.432 includes three main requirements that affect cities and city employees. First, the law prohibits any public employee from engaging in certain political activity during work hours.[40] Specifically, public employees cannot solicit money, services, or influence, and cannot otherwise support or oppose a candidate, measure, or political committee.[41] Second, the law prohibits any person from attempting to "coerce, command, or require" a public employee to engage in the prohibited conduct.[42] Third, the law requires that a notice be posted in all public workplaces about the law—this requirement applies to all public employers, including cities and other municipal corporations.[43]

ORS 260.432 is sometimes called Oregon's "Little Hatch Act," a reference to the federal Hatch Act that proscribes the political activity of federal employees.[44] It is easier to understand what this law prohibits by breaking it down into its basic elements. The law applies **(1)** only to public employees, **(2)** only during work hours, **(3)** and only to certain political activities.

i. Public Employees

ORS 260.432 does not offer a clear definition of the "public employees" that are covered by the law. The law clearly provides that "elected officials" are not public employees, but then is noticeably vague about what types of positions *are* employees.[45] Fortunately, guidance from the Secretary of State clarifies this issue.[46]

a. City Officials

Elected officials, as noted above, are not public employees, meaning that elected officials are free to engage in political activities on their own, such as endorsing a local candidate or measure.[47] However, this does not mean that elected officials can forget about ORS 260.432.

---

[39] Or. Secretary of State, *Restrictions on Political Campaigning by Public Employees*, p. 1 (2024), https://sos.oregon.gov/elections/Documents/restrictions.pdf (last accessed September 26, 2024).
[40] ORS 260.432(2).
[41] *Id.*
[42] ORS 260.432(1).
[43] ORS 260.432(4).
[44] *Oregon State Police Officers Ass'n v. State*, 308 Or 531, 535 (1989); *see* 5 U.S.C. §§ 1501–1508 (2018).
[45] ORS 260.432(6).
[46] Or. Secretary of State, *Restrictions on Political Campaigning by Public Employees* p. 1 (2024), https://sos.oregon.gov/elections/Documents/restrictions.pdf (last accessed September 26, 2024).
[47] ORS 260.432(7).

Elected officials are prohibited from ordering a public employee to engage in political activity while on the job.[48] For instance, elected officials cannot order city employees to help them make an endorsement, nor can they use city employees to support or oppose a measure or candidate.[49] Because politics are an inherent part of their job, elected officials need to be aware of this law from the moment they take office, even though they are free to engage in political activity on their own.

By contrast, non-elected officials are public employees, even if they are volunteers, according to the Secretary of State.[50] For instance, an appointed member of a budget or planning commission is a public employee under ORS 260.432, meaning they cannot engage in political activity "during work hours."[51] For an official, this includes any situation where the person is serving in their official capacity, such as attending a meeting or event or working on an official project or publication.[52]

Like any public employee, a non-elected official is permitted on their personal time to make endorsements and engage in other political activity.[53] Non-elected officials may even include their title as part of an endorsement or other political activity, as long as they are not acting in an official capacity when they do so.[54] If there is the potential for confusion about whether an employee is acting in a personal or official capacity, the LOC recommends that the employee state in advance that they are acting solely in their personal capacity and do not represent the views of their employer.

Finally, any individual who is appointed to fill a vacant city council seat is considered an elected official because their appointment is to an elected office.[55] Therefore, council appointees are free to engage in political activities as long as they do not involve public employees.

b. City Staff

Most city staff who are non-elected, paid, and work full-time are public employees. **Volunteers** generally are not public employees under ORS 260.432 because they are not compensated, and further, workers' compensation coverage is not adequate compensation for a volunteer to be considered a public employee, according to the Secretary of State.[56] Likewise,

[48] ORS 260.432(1).
[49] *Id.*
[50] Or. Secretary of State, *Restrictions on Political Campaigning by Public Employees*, p. 6 (2024), https://sos.oregon.gov/elections/Documents/restrictions.pdf (last accessed September 24, 2024).
[51] *Id.*
[52] *Id.*
[53] *Id.*
[54] *Id.*
[55] ORS 260.432(7).
[56] Or. Secretary of State, *Restrictions on Political Campaigning by Public Employees* p. 6 (2024), https://sos.oregon.gov/elections/Documents/restrictions.pdf (last accessed September 26, 2024).

contractors are not usually considered public employees because most are independent parties performing limited services for the city.[57]

That said, public employees still violate ORS 260.432 if they act through a volunteer or contractor to engage in political activity.[58] City employees cannot direct volunteers to help support or oppose a local candidate or measure, nor can a city employee hire a public relations firm to promote a local measure.[59] Any information produced by city staff must be impartial.

ii. 'During Work Hours'

Under ORS 260.432, public employees are only prohibited from engaging in political activity "during work hours."[60] But work hours are not always easy to determine, especially for salaried employees. Regardless of their time or location, a public employee is considered "at work" when performing tasks that fall within designated **job duties**.[61] Also, where applicable, a public employee is considered at work when acting in an **official capacity**—for example, a city elections employee is considered at work when working on election materials.[62] Similarly, a city official is considered at work when attending meetings as part of their official duties.[63]

Some activities are always performed while "on the job during work hours," according to the Secretary of State.[64] First, publishing material (or approving it) for an official website or publication is always work that is performed "during work hours."[65] Second, attending an event as a city's representative is always considered work hours.[66] Third, whenever an employee seeks an expense reimbursement for an activity, that activity is considered work hours.[67]

By contrast, **on-call shifts** are not considered "on the job" unless or until the public employee is called in to work.[68] A public employee generally is not considered at work until they are performing assigned work, meaning that an employee who has not yet been notified of any on-call duties is free to engage in political activity until they receive that notification.[69]

---

[57] *Id.*
[58] *Id.*
[59] *Id.*
[60] ORS 260.432(2)(7).
[61] ORS 260.432(2).
[62] Or. Secretary of State, *Restrictions on Political Campaigning by Public Employees* p. 13 (2024), https://sos.oregon. gov/elections/Documents/restrictions.pdf (last accessed September 26, 2024).
[63] *Id.* at 4.
[64] *Id.* at 5.
[65] *Id.*
[66] *Id.*
[67] *Id.* at 5.
[68] *See* 38 Or Op Atty Gen. 618, 1977 WL 31206 (1977).
[69] *Id.*

Similarly, public employees may use lunch hours, breaks, and other time off to engage in political activity that would otherwise be prohibited by ORS 260.432.[70] That said, the employee must choose to volunteer their time—in other words, a public employer cannot encourage or require employees to promote a political cause during their time off.[71] Public employers may restrict the use of public property on lunch breaks and off-work hours through a local policy.

iii. Prohibited Political Activity

Finally, ORS 260.432 prohibits only certain types of political activity.[72] In general, the law prohibits public employees from supporting or opposing measures, candidates, petitions, or political committees.[73] Each of these restrictions is intended to limit efforts to influence *voters* with public funds. But the law does not prohibit efforts to support or oppose legislative bills, meaning that public employees may lobby state and local governing bodies as part of their job.[74] Similarly, the law does not prohibit involvement in legal disputes, including disputes over the legality of local petitions and ballot titles.[75] Because neither of these areas is up to voters, there are no restrictions on public employees.

While on the job, public employees cannot collect funds, prepare election filing forms, prepare or distribute written material, or perform other campaign related activities.[76] However, a public employee may provide **impartial information** about a candidate, measure, or petition as part of their normal job duties.[77]

Of course, determining whether information is impartial can be a difficult inquiry. As such, the Secretary of State Elections Division offers to review election-related documents before they are distributed.[78] If the Elections Division approves a city document, the city is generally shielded from a subsequent finding that the document violates the impartiality requirements under ORS 260.432, under the "Division's Safe Harbor Program."[79] Generally, impartiality requires that documents **(1)** must not explicitly urge a yes or no vote, **(2)** must be factually balanced, and **(3)** if the material includes information about what a measure would pay for or do, it must also describe information about what would happen if the measure does not

---

[70] ORS 260.432(7).
[71] *Id.*
[72] ORS 260.432(1).
[73] *Id.*
[74] Or. Secretary of State, *Restrictions on Political Campaigning by Public Employees*, p. 15 (2024), https://sos.oregon. gov/elections/Documents/restrictions.pdf (last accessed September 26, (2024).
[75] *Id.*
[76] *Id.* at 7.
[77] *Id.* at 14.
[78] *Id*. at 15.
[79] *Id.*

pass; and **(4)** if the material pertains to a measure that would affect property taxes, it must include the cost per $1,000 of assessed property value.[80]

a. Personal Opinions

ORS 260.432 carves out an exception for the rights of public employees to "express personal political views" as long as a " reasonable person would not infer that the personal political views of the public employee represent the views of the public employer of the public employee" or when a public employee communicates "with a separate public employee or elected official about the appointment of a person to a public office, provided that the communication is made in furtherance of the recipient's official duties relating to an appointment required by the Oregon Constitution or a state statute.".[81]

The Secretary of State interprets this exception to mean that a public employee may communicate verbally about politics and wear buttons, t-shirts, and other political clothing, and may post campaign signs in their workplace.[82] However, this expression can be limited by content-neutral local policies, particularly where the employee becomes a disruption to the workplace or to the organization as a whole.[83] For advice on how to craft an effective local policy, cities that are members of CIS are encouraged to reach out to the Pre-Loss Legal Department.

iv. Related Federal Laws

In addition to Oregon's "Little Hatch Act," cities should be aware of two federal laws that relate to election activities. Significantly, these laws do not include an exception for personal political views and therefore impose stricter requirements on public employees.

First, the federal Hatch Act applies to public employees who work "in connection with programs financed in whole or in part by federal loans or grants."[84] For questions about how and when this law applies, LOC encourages cities to consult with their legal counsel.

Second, the National Voter Registration Act (NVRA) and state law under ORS 247.208 prohibit public employees from displaying "any indications of political preference or party

---

[80] *Id.* at 16.
[81] ORS 260.432(3).
[82] Or. Secretary of State, *Restrictions on Political Campaigning by Public Employees*, p. 8, 11-12 (2024), https://sos.oregon. gov/elections/Documents/restrictions.pdf (last accessed September 26, 2024).
[83] *Id.*
[84] *Id.* at 4; *see* 5 U.S.C. §§ 1501–1508 (2018); *see also* U.S. Office of Special Counsel website, https://osc.gov/Services/Pages/HatchAct-StateLocal.aspx (last accessed September 26, 2024). .

allegiance" during voter registration activities.[85] Specifically, the NVRA restrictions prohibit public employees from wearing political buttons while performing NVRA services, which is more restrictive than the general rule set forth in ORS 260.432, which allows public employee to wear political buttons or clothing so long as it does not violate an employer's policy.[86] However, these laws apply only to public registration drives; private efforts by public employees to register voters are not subject to these restrictions.[87]

II. Local Candidates

Running for public office in a city requires an understanding of both state and local law. First, local charters and, to a certain degree, state law limit who can run for city office.[88] Second, state law governs the process of filing for office and also requires that candidates track their campaign spending and donations.[89] Third, vacancies in office can be resolved under state law but often are covered by local law.[90] Finally, oaths of office are matters of local law.[91]

A. Eligibility Requirements

State law prevents individuals from running for multiple city offices at once and under some circumstances might also limit one's ability to hold multiple public offices.

First, under state law, local candidates cannot run for more than one city office in the same election.[92] A candidate who already holds an elected office may run for another office but filing for two or more city offices in one election is prohibited.[93]

---

[85] *See* 52 U.S.C. §§ 20501–20511 (2018); *see also* Or. Secretary of State, *Restrictions on Political Campaigning by Public Employees*, p. 6 (2024), https://sos.oregon.gov/elections/Documents/restrictions.pdf (last accessed September 26, 2024); *see also* U.S. Department of Justice Civil Rights Division website, https://www.justice.gov/crt/about-national-voter-registration-act (last accessed September 26, 2024).
[86] Or. Secretary of State, *Restrictions on Political Campaigning by Public Employees*, p. 6, 8 (2024), https://sos.oregon.gov/elections/Documents/restrictions.pdf (last accessed September 26, 2024)
[87] *Id.*
[88] *See, e.g.*, League of Oregon Cities, Model Charter for Oregon Cities, p. 3, 8-10 (2023), https://www.orcities.org/download_file/605/1852 (last accessed September 26, 2024).
[89] Or. Secretary of State *2024Campaign Finance Manual*, p. 29 (2024), https://sos.oregon.gov/elections/Documents/campaign-finance.pdf (last accessed September 26, 2024).
[90] *See, e.g.*, League of Oregon Cities, Model Charter for Oregon Cities, p. 4, 5, 7, 10, 11 (2023), https://www.orcities.org/download_file/605/1852 (last accessed September 26, 2024).
[91] *See* League of Oregon Cities, FAQ on Oaths of Office, p. 2 (2023), https://www.orcities.org/download_file/382/1852 (last accessed September 26, 2024).
[92] ORS 249.013(2).
[93] *Id.*

Second, unless otherwise provided by local law,[94] public employees are permitted to run for elected office. In other words, employees of a city generally may run for one of the city's elected offices. That said, state law prohibits the employee from campaigning during their work hours.[95] Also, if the employee is elected, then the employee may need to give up their employment through the city under Oregon common law, which historically prohibits "dual office holding" where two public positions are incompatible.[96]

Third, city officials cannot hold more than one lucrative public position at the same time under Article X, Section 2, of the Oregon Constitution.[97] Similar to above, an official who holds a lucrative office may run for a second lucrative office; however, if they are successful, that official must resign from the first office before assuming the second one.[98] While this provision might apply in some cases, most cities are not impacted by this provision because most city offices are volunteer positions that do not rise to the level of "lucrative" office. By definition, a lucrative office requires a "salary or other compensation beyond expenses."[99]

More so than state law, local charters determine who is or isn't eligible for city office.[100] The LOC *Model Charter for Oregon Cities* features many common eligibility requirements.[101] For example, many city charters limit individuals from holding multiple positions in a city, regardless of whether they are lucrative or not.[102] Most city charters also require that elected officials reside in the city, and that they do so for some period of time—usually one year—before seeking office.[103]

B. Campaign Finance Laws

For individuals who are eligible for office, the first election laws they are likely to encounter are Oregon's campaign finance laws. In general, state law provides that candidates for elected office must **(1)** open a campaign bank account and **(2)** file a statement of organization for

[94] *See, e.g.*, LEAGUE OF OREGON CITIES, MODEL CHARTER FOR OREGON CITIES (2023), P. 9, HTTPS://WWW.ORCITIES.ORG/DOWNLOAD_FILE/605/1852 (last accessed September 26, 2024).
[95] ORS 260. 432.
[96] *See Columbia Cty. Admin. School Dist. No. 5 Joint v. Prichard*, 36 Or App 643, 645 (1978); *see also* 38 Or. Op Atty. Gen. 1411, 1977 WL 31324 (1977).
[97] Or Const, Art II, § 10.
[98] *See* ORS 249.013.
[99] *See Or. Secretary of State County, City, District Candidate Manual* (2024), p. 8, https://sos.oregon.gov/elections/Documents/county-city-district-candidates.pdf (last accessed September 26, 2024).
[100] *See* LEAGUE OF OREGON CITIES, MODEL CHARTER FOR OREGON CITIES (2023), P. 8, HTTPS://WWW.ORCITIES.ORG/DOWNLOAD_FILE/605/1852 (last accessed September 26, 2024).
[101] *Id.*
[102] *Id.* at 9 (e.g. prohibiting mayor and councilor from being employed by the city).
[103] *See, e.g.*, EUGENE, OR., CHARTER Ch. 3, § 8 (2019), EUGENE, OR., CHARTER Ch. 6, § 19 (2019), https://www.eugene-or.gov/DocumentCenter/View/456/Eugene-Charter-2002-updated-2019?bidId= (last accessed September 26, 2024).

a candidate committee early in their campaign for office.[104] To some degree, cities can also adopt campaign finance reporting requirements.[105] This section is limited to the state's requirements.

As an initial matter, candidates who do not exceed more than $750 in contributions or expenditures do not need to create a campaign account or candidate committee.[106] However, if a candidate at any point exceeds the $750 threshold, the candidate will have three business days to meet these requirements.[107] That candidate will also have seven calendar days to comply with certain reporting requirements (see below).[108]

i. Candidate committees

Candidates who expect to spend or receive more than $750 are expected to file a **Statement of Organization** within three business days of their first contribution or expenditure or by the filing deadline, whichever comes first.[109] The statement of organization must be filed with the Secretary of State's Election Division.[110]

Once a committee is created, the committee must select a treasurer—the candidate may serve in this position or appoint someone else.[111] Whoever serves as treasurer must be a registered Oregon voter.[112] Among other things, the treasurer is responsible for opening a campaign account, keeping detailed financial records that are current up to within seven business days of the last contribution or expenditure, and preserving these records in compliance with state retention requirements.[113]

ii. Campaign account

Campaign accounts are bank accounts that track the money that is received or spent in furtherance of a candidate's election.[114] Campaign accounts must be opened at the time of filing the statement of organization for the candidate committee, or else within five business days of the filing.[115]

---

[104] Or. Secretary of State, *2024 Campaign Finance Manual*, p. 7 (2024), https://sos.oregon.gov/elections/Documents/ campaign-finance.pdf (last accessed September 26, 2024).
[105] *Id.* at 9.
[106] *Id.* at 5.
[107] *Id.*
[108] *Id.* at 6.
[109] *Id.* at 6.
[110] *Id.* at 9.
[111] *Id.* at 7.
[112] *Id.*
[113] *Id.*; *see also* ORS 260.055.
[114] Or. Secretary of State, *2024 Campaign Finance Manual*, p. 9 (2024), https://sos.oregon.gov/elections/Documents/ campaign-finance.pdf (last accessed September 26, 2024).
[115] *Id.*

The Secretary of State has prescribed certain rules for candidate's campaign accounts. To describe a few, the account must be opened at a financial institution that is located within the state.[116]The account must be maintained in the name of the candidate committee, though the candidate can be named as an account holder.[117] The campaign account cannot include any funds other than the contributions and other receipts received by the candidate committee.[118] For more information, consult the Secretary of State's 2024 Campaign Finance Manual.[119]

iii. Reporting Requirements

State law requires candidate committees that spend or receive more than $3,500 in expenditures or contributions to file all transactions of either type electronically on ORESTAR, which stands for Oregon Elections System for Tracking and Reporting.[120] A candidate committee that does not expect to spend or receive more than $3,500 in expenditures or contributions can file a **Certificate of Limited Contributions and Expenditures**.[121] If so, that candidate committee does need to file the transactions on ORESTAR, but nevertheless needs to maintain records of those transactions on their own.[122] If a candidate at any point exceeds the $3,500 threshold for expenditures or contributions, the committee has just seven calendar days to report all of the committee's transactions on ORESTAR.[123] For more information, consult the Secretary of State's 2024 Campaign Finance Manual.[124]

C. Filing as a Candidate

Depending on the circumstances, both state and local law might govern how candidates file for office. Under state law, local candidates may file in one of two ways: **(1)** by paying a filing fee or **(2)** by petition.[125] However, local charters and ordinances frequently provide a separate process for individuals to seek nominations.[126] LOC encourages cities and/or candidates to review local law to fully understand what is required for candidates to file. This section will focus exclusively on the filing methods under state law.

---

[116] *Id.*
[117] *Id.*
[118] *Id.*
[119] Or. Secretary of State, *Campaign Finance Manual*, p. 9 (2024), https://sos.oregon.gov/elections/Documents/campaign-finance.pdf (last accessed September 26, 2024).
[120] *Id.* at 14.
[121] *Id.*
[122] *Id.*
[123] *Id.* at 15.
[124] *Id.*
[125] Or. Secretary of State, *County, City, and District Candidate Manual*, pg. 21 (2024), https://sos.oregon.gov/elections/ Documents/county-city-district-candidates.pdf (last accessed September 27, 2024).
[126] *Id.; see also* LEAGUE OF OREGON CITIES, MODEL CHARTER FOR OREGON CITIES (2023), P. 9, HTTPS://WWW.ORCITIES.ORG/DOWNLOAD_FILE/605/1852 (last accessed September 27, 2024).

To file by fee, a candidate simply submits a form prepared by the Secretary of State and pays the applicable fee.[127] Local candidates must file with the city's election officer.[128] The fees for city offices, if any, are set by city's charter or ordinance.[129]

The deadline for filing by fee is no later than the 70th day before a primary or general election.[130] The deadline for withdrawing a candidacy is three days later, or the 67th day before these elections.[131] For those looking to file right away, candidates may file as early as the 250th day before a primary election, and the 15th day after the primary election for a general election.[132]

Candidates can avoid paying a filing fee if they instead file by petition.[133] To do so, candidates first need approval from the city's election officer to distribute the petition.[134] The process begins with a candidate submitting a prospective petition and signature sheet to the election officer on forms approved by the Secretary of State.[135] If the forms are complete, the elections officer then provides the candidate with a petition number and the number of signatures required for the candidate to file, along with the filing deadline.[136] To file by petition, a city candidate either needs 500 signatures or signatures equaling 1% of all votes cast for governor in the last election in which a governor was elected to a full-term.[137] Commonly, cities adopt different signature requirements for nominating petitions; this is an example of how local law can change the election process for local candidates.[138]

Once a candidate submits a completed petition, signature sheets, and related paperwork, the city elections official reviews the forms to confirm that the circulators certified each of the signature sheets.[139] The elections official then sends the forms to the county elections official to

---

[127] Or. Secretary of State, *County, City, and District Candidate Manual*, p. 21 (2024), https://sos.oregon.gov/elections/ Documents/county-city-district-candidates.pdf (last accessed September 27, 2024).
[128] *Id.*
[129] *Id.*
[130] ORS 249.037.
[131] ORS 249.170.
[132] ORS 249.037; ORS 249.722.
[133] Or. Secretary of State, *County, City, and District Candidate Manual*, p. 21 (2024), https://sos.oregon.gov/elections/ Documents/county-city-district-candidates.pdf (last accessed September 27, 2024).
[134] *Id.*
[135] *Id.* at 22.
[136] *Id.*
[137] *Id.* at 21.
[138] *See, e.g., Elections*, CITY OF BEND, https://www.bendoregon.gov/government/departments/city-recorder/elections (last accessed September 27, 2024).
[139] Or. Secretary of State, *County, City, and District Candidate Manual*, p. 21 (2024), https://sos.oregon.gov/elections/ Documents/county-city-district-candidates.pdf (last accessed September 27, 2024).

confirm that each of the petition signatures was made by a registered city voter.[140] Because some signatures might not survive this signature verification process, candidates are strongly advised to gather more than the minimum signatures required to file as a candidate.[141]

The deadlines for a candidate to file by fee are the same deadlines for filing by petition.[142] Significantly, however, a candidate filing by petition is not considered "filed" until their signature sheets have been verified by city and county officials.[143] This process depends on the availability of elections staff to complete the verification. Because of this, candidates seeking to file by petition must allow "sufficient" time for this process to be completed before the filing deadline and should file early to avoid complications.[144] Of course, it is possible for candidates to seek elected office as a **write-in candidate**.[145] Write-in candidates do not need to file with the city as a candidate but do need to comply with applicable campaign finance laws.[146]

Finally, if a county is not producing a voter's pamphlet, some local candidates may file to have their candidate statement included in the state's voter pamphlet.[147] This option is available to candidates who are seeking office in cities of more than 50,000 people.[148] For more information, consult the Secretary of State's *State Voter's Pamphlet Manual, last updated in January 2024.*[149]

D. Vacancies

State law does not provide a process for resolving vacancies in local office. Instead, vacancies are defined and filled pursuant to the terms of a city's charter.[150] The most obvious vacancies occur upon the death, adjudicated incompetence, or recall of an office incumbent.[151] However, a vacancy might also arise where an office incumbent violates certain conditions of office that are described in a city charter; for example, an office could become "vacant" upon a councilor's conviction of a misdemeanor or crime or upon a councilor's absence from council

---

[140] *Id.*
[141] *Id.*
[142] *Id.*
[143] *Id.*
[144] *Id.*
[145] *Id.* at 25.
[146] *Id.* The definition of "candidate" includes anyone seeking office, regardless of "whether or not the name of the individual is printed on the ballot." Or. Secretary of State, *2024 Campaign Finance Manual*, p. 21 (2024), https://sos. oregon.gov/elections/Documents/ campaign-finance.pdf (last accessed September 27, 2024).
[147] Or. Secretary of State, *State Voters' Pamphlet Manual*, p. 9 (2024), https://sos.oregon.gov/elections/Documents/VPManual.pdf (last accessed September 27, 2024).
[148] *Id.*
[149] *Id.*
[150] *See* LEAGUE OF OREGON CITIES, MODEL CHARTER FOR OREGON CITIES (2023), P. 4-5, 7, 9-11, HTTPS://WWW.ORCITIES.ORG/DOWNLOAD_FILE/605/1852 (last accessed September 27, 2024).
[151] *Id.*

meetings for longer than 60 days.[152] Typically, vacancies are filled by appointment by a majority of the city council, with the chosen appointee assuming the term of office of the last person elected to that office.[153]

In some cases, a city councilor might be absent for a prolonged period of time due to illness, injury, or temporary disability.[154] In these situations, some city charters allow for the city council to appoint a **councilor pro tem** to substitute for the incumbent until they are able to resume their duties.[155]

In extreme cases, a city council may have so many vacancies in office that they are unable to reach a quorum. Under these circumstances, state law authorizes the city to move forward with a special election to fill the vacancies.[156] State law authorizes the election itself and also authorizes the mayor, or else the remaining members of the governing body, to appoint any officers needed to carry out the election.[157] In the event that every single position in a city's governing body becomes vacant, it falls on the county to appoint a "sufficient" number of persons needed to fill any remaining vacancies.[158]

E. Oath of office

If elected, the final step for a local candidate before assuming their duties as an elected official is to typically take an oath of office. While state officials are required to take their own oaths of office, there is no constitutional article or state statute that requires the same of local officials.[159] Instead, the oath of office requirement is found in each city's local charter or ordinances.[160]

An oath of office is a sworn promise and a statement of fact that the oath taker will uphold the law and perform their duties with integrity. Cities may choose to provide for the exact wording of this oath by charter or ordinance. Otherwise, LOC has created a sample oath:

> I, [insert name of oath taker], do solemnly swear and affirm that I support the Constitution and laws of the United States and the state of Oregon, and of the

[152] *Id.* at 9-10.
[153] *Id.* at 10.
[154] *Id.*
[155] *Id.*
[156] ORS 221.160(1).
[157] *Id.*
[158] ORS 221.160(2).
[159] *See* League of Oregon Cities, FAQ on Oaths of Office, p. 2 (2023), https://www.orcities.org/download_file/382/1852 (last accessed September 27, 2024).
[160] *Id.*

> charter, ordinances, and rules of procedures for the City of [insert name of city], and that I will faithfully and honorably perform the duties of the office for which I am about to assume.[161]

A city's charter or ordinances may require that a particular position administer the oath of office, such as a municipal judge or city auditor.[162] A city might also require that the oath be reduced to writing; if so, this writing is subject to Oregon's public records laws.[163]

Finally, if an elected official fails to take the oath of office required by local law, this is not necessarily grounds for invalidating any of their actions as an elected official.[164] Oregon recognizes the "de facto officer" doctrine, which holds that the official actions of an individual who possesses public office and who acts under "a color of right" carry the same legal effect as the official actions of any other officer.[165] Thus, assuming an elected official failed to take their oath of office, any subsequent actions by that elected official likely would still be valid because they held office and acted as a public official in the meantime.[166]

III. Local Measures

As with local candidates, the laws governing the placement of measures on a local ballot are a mix of state and local law. First, campaign finance laws require chief petitioners to create petition committees for almost all local measures.[167] Second, the Oregon Constitution guarantees the right of local voters to seek initiative and referendum measures.[168] Oregon statutes provide a general process for voters, but cities may modify this process by charter or ordinance.[169] Third, state election law prescribes certain rules for cities to place referrals on the ballot.[170]

---

[161] LOC has been advised that some cities have modified their oaths of office regarding adherence to all laws of the United States. The status of marijuana in Oregon is at odds with federal laws regarding the substance. Because of this disconnect, some cities are considering recognizing this disconnect in their oaths of office.
[162] *Id.* at 3.
[163] *Id.* at 4.
[164] *Id.*
[165] *Id.*
[166] *Id.*
[167] Or. Secretary of State, *2024 Campaign Finance Manual*, p. 7 (2024), https://sos.oregon.gov/elections/Documents/ campaign-finance.pdf (last accessed September 27, 2024).
[168] Or Const, Art IV, § 1(5).
[169] *Id.*
[170] Or. Secretary of State, *County, City and District Referral Manual*, p. 6, 8, 11, 14 (2024), https://sos.oregon.gov/elections/ Documents/ReferralManual.pdf (last accessed September 27, 2024).

A. Campaign Finance Laws

Oregon's campaign finance laws apply to ballot measures as well as candidates.[171] In general, a petition committee must be created by the chief petitioners of any local initiative, referendum, or recall petition.[172] For cities, the only applicable exception to the creation of a petition committee is a petition for disincorporation.[173] Unlike candidate committees, which are not required for candidates who spend or receive less than $750, petition committees need to be created regardless of the committee's expenditures or contributions.[174]

To create a petition committee, chief petitioners are required to file a statement of organization no later than three business days after receiving any contribution or making any expenditure.[175] If no contributions or expenditures are made, the chief petitioners of a petition can file this statement at a later date; however, a city cannot approve a petition for circulation until it has verified that a petition committee has been created.[176] Furthermore, a petition committee cannot support more than one initiative, referendum, or recall petition.[177]

By and large, petition committees operate the same as candidate committees.[178] The statement of organization must be filed with the Secretary of State's Election Division.[179] The committee must report its expenditures through ORESTAR, unless the committee files a certificate of limited expenditures and contributions because it expects to receive or spend less than $3,500 in a calendar year. Petition committees have somewhat different reporting requirements depending on how close the transaction is to a primary or general election.[180] For more information, consult the Secretary of State's 2024 *Campaign Finance Manual*.[181]

B. Initiative and Referenda

Article IV, section 1(5), of the Oregon Constitution guarantees city voters the right to propose local laws through initiative, as well as the right to approve or reject recently adopted local ordinances by popular referendum.[182] This constitutional provision requires the Oregon

---

[171] Or. Secretary of State, *2024 Campaign Finance Manual*, p. 6 (2024), https://sos.oregon.gov/elections/Documents/ campaign-finance.pdf (last accessed September 27, 2024).
[172] *Id.*
[173] *Id.*
[174] *Id.*
[175] *Id.* at 9.
[176] *Id.* at 8.
[177] *Id.*
[178] *Id.* at 9-10.
[179] *Id.*
[180] *Id.* at 19.
[181] *Id.*
[182] Or Const, Art IV, § 1(5).

Legislature to establish a process for city voters to exercise these rights; at the same time, it provides that cities may modify this procedure through their own laws.[183] Cities are prohibited from requiring more than 15% of voters to sign an initiative petition or more than 10% to sign a referendum petition.[184] Cities also cannot supersede certain state statutes.[185] This section will focus exclusively on the process for initiatives and referenda under state law.[186]

i. Legislative in Nature

One significant limiting factor on the use of initiatives and referenda is that the subject of the measure must be **legislative** in nature.[187] In this way, an initiative must propose a law, not an administrative action by the council that might include, for example, a decision to enter (or not enter) a specific real estate contract.[188] Similarly, a referendum can only target a city council's legislation, not a past administrative or adjudicative decision.[189]

Sometimes, it can be difficult to know if a local decision—an ordinance, resolution, order, etc.—is a legislative act or an administrative one.[190] To answer this question, Oregon courts assess the nature of the action also the "nature of the legal framework in which the action occurs."[191] In general, a legislative action is one that "makes policy of general applicability and is more than temporary in duration."[192] By contrast, an administrative action is one that "applies previous policy to particular actions."[193] Where a city adopts a process to make certain decisions—such as naming streets—the adoption of that framework is considered "legislation," and decisions that are made *pursuant* to that framework are more likely administrative.[194]

While courts will inquire to see if a measure is legislative, this review is limited; at this stage, courts will not review the constitutionality of what a measure actually proposes, i.e., whether an initiative or referendum "would violate some completely different portion of the

[183] *Id.*
[184] *Id.*
[185] Or. Secretary of State, *County, City and District Initiative and Referendum Manual*, p. 3 (2024), https://sos.oregon. gov/elections/Documents/countycitydistrictir.pdf (last accessed September 27, 2024).
[186] *See* ORS 250.041, ORS 250.005 to 250.038.
[187] *See Foster v. Clark*, 309 Or 464, 471 (1990) (holding that initiatives and referenda are only authorized if they address "municipal legislation.").
[188] *See Monahan v. Funk*, 137 Or 580, 585 (1931).
[189] *See Rossolo v. Multnomah County Elections Div.*, 272 Or App 572, 584 (noting that "executive, administrative, or adjudicative" actions are "outside the scope of" the constitutional rights of initiative and referendum.).
[190] *See, e.g., Foster*, 309 Or at 471.
[191] *Foster*, 309 Or at 474.
[192] *Id.*
[193] *Id.*
[194] *Id.*

constitution."[195] That type of constitutional review may occur only if the measure passes and becomes law.

Finally, in documents or proceedings, a city might take a position that a particular action is legislative or not.[196] These positions carry no legal effect—whether an action is legislative or not for purposes of Oregon's initiative and referendum is ultimately one for courts to decide.[197]

i. Filing an Initiative

An initiative is an effort by local voters to propose a new law or set of laws, such as an ordinance, a charter amendment, or even a new charter.[198] Local voters may start the process of initiating a measure at any time.[199]

Under state law, the initiative process begins with the filing of a prospective petition.[200] Prospective petitions must be submitted on a form prescribed by the Secretary of State.[201] It must list no more than three chief petitioners and must provide the text of the proposed initiative.[202] It also must designate whether the circulators of the petition would be paid.[203] Once a prospective petition is submitted, the city's election officer dates and time stamps the document and, assuming it is completed correctly, assigns the document an identification number.[204]

Next, within five business days, the city's election officer must review the text of the prospective petition to ensure it complies with requirements under the Oregon Constitution.[205] Besides being legislative in nature (see above), initiatives must be limited to a **single subject** and any "matters properly connected therewith."[206] Oregon courts follow a two-part test when evaluating if an initiative petition contains a single subject.[207] First, the text of the initiative must have a "unifying principle logically connecting all provisions" in the measure.[208] Second, the court assesses if all parts of the measure are "properly connected" to that principle.[209] In general,

---

[195] *Id.* at 471.
[196] *Id.* at 472.
[197] *Id.*
[198] Or. Secretary of State, *County, City and District Initiative and Referendum Manual*, p. 8 (2024), https://sos.oregon. gov/elections/Documents/countycitydistrictir.pdf (last accessed September 27, 2024).
[199] *Id.* at 5.
[200] *Id.* at 7.
[201] *Id.*
[202] *Id.*
[203] *Id.*
[204] *Id.* at 8.
[205] *Id.* at 7.
[206] Or Const, Art IV, § 1(2)(d).
[207] *See State v. Mercer*, 269 Or App 135, 138 (2015).
[208] *Id.*
[209] *Id.*

this test is satisfied as long as an initiative proposes a law or charter amendment that "addresses a single substantive area of law, even if it includes a wide range of connected matters intended to accomplish the goal of that single subject."[210] For example, in 2018, Portland voters approved an initiative that created a clean energy fund through a 1% gross receipts tax on large retailers.[211] While the unifying principle of the measure was to create a program that funded clean energy projects, the initiative addressed many other related matters, such as the creation of the Portland Clean Energy Community Benefits Fund to recommend clean energy projects to the city.[212]

After reviewing the text to ensure that it complies with constitutional requirements, the local elections official must notify the chief petitioners of this determination.[213] If the text complies, the local elections official also forwards a copy of the prospective petition to the city attorney so that the attorney can prepare a **ballot title**.[214] Significantly, the city's determination on the constitutionality of the initiative can be challenged by any voter in circuit court.[215] If a voter files a challenge in circuit court, they must notify the county elections official by no later than 5:00 p.m. on the following business day.[216]

A ballot title is a statement that describes what a measure will do if voters approve it.[217] A ballot title consists of three main parts: (1) a caption, (2) a question, and (3) a summary.[218] The **caption** cannot exceed 10 words and identifies the petition's subject.[219] The **question** cannot exceed 20 words and must be worded so that an affirmative response to the question is the same as a "yes" vote.[220] The **summary** cannot exceed 175 words and must "concisely and impartially" summarize the initiative petition and its effect.[221] Upon receipt of the prospective petition, the city attorney has five business days to prepare the ballot title.[222]

Once the ballot title is prepared and filed, the local elections official must publish notice of the ballot title in a newspaper of general circulation and provides a copy of it to the chief

---

[210] *Id.* at 139.
[211] *About PCEF*, CITY OF PORTLAND, https://www.portland.gov/bps/cleanenergy/about-pcef (last accessed September 27, 2024).
[212] *Id.*
[213] Or. Secretary of State, *County, City and District Initiative and Referendum Manual*, p. 7 (2024), https://sos.oregon. gov/elections/Documents/countycitydistrictir.pdf (last accessed September 27, 2024).
[214] *Id.*
[215] *Id.*
[216] *Id.* at 7.
[217] *Id.* at 9.
[218] *Id.*
[219] *Id.*
[220] *Id.*
[221] *Id.*
[222] *Id.*

petitioners.[223] The notice may also be published on the city's website for a minimum of seven days.[224] Just like an initiative's text, a voter may challenge the text of a ballot title by filing a petition for review in circuit court no later than seven business days after a ballot title is filed.[225] As such, the notice of the ballot title must state that the ballot title has been received, that it may be challenged in circuit court, and that the deadline is seven business days from the ballot title filing.[226] The notice must also state that the initiative text complied with constitutional requirements and must include the text of the ballot title or information on how to obtain a copy.[227]

As soon as the ballot title is filed, the chief petitioners of an initiative can submit a draft cover sheet and signature sheets to the city for approval to circulate them.[228] Before approving the petition for circulation, the city elections official must review the sheets to confirm that they are using the official forms prescribed by the Secretary of State and that they include all of the required information.[229] The official also must confirm that the chief petitioners have created a petition committee as required under Oregon's campaign finance laws and that any challenges to the ballot title or initiative text are complete.[230]

Once a petition is approved for circulation, the petitioners can begin to gather signatures. From its approval date, a petition has two years to gather enough signatures and submit them to the city for verification.[231] Unless otherwise provided by local law, an initiative petition must be signed by not less than 15% of a city's registered voters, which also is the maximum requirement allowed by the Oregon Constitution.[232] The Secretary of State encourages petitioners to gather more than the minimum number of signatures required because some signatures might be invalidated, namely if a one or more signers are not city residents or not registered to vote.[233]

Petitioners also should keep in mind that a petition must qualify for an election and be filed with the city's governing body no later than 90 days before an election.[234] Note that this is different from a petition being submitted 90 days before an election. Once a petition is

---

[223] *Id.* at 10.
[224] *Id.*
[225] *Id.* at 7, 10.
[226] *Id.* at 10.
[227] *Id.*
[228] *Id.* at 10-11, 24.
[229] *Id.* at 10.
[230] *Id.*
[231] *Id.* at 7.
[232] ORS 250.305.
[233] Or. Secretary of State, *County, City and District Initiative and Referendum Manual*, p. 20 (2024), https://sos.oregon. gov/elections/Documents/countycitydistrictir.pdf (last accessed September 27, 2024).
[234] *Id.* at 14.

submitted, two additional steps need to take place before this deadline.[235] First, the city elections official must submit the petition to the county for verification of the signatures, a process that can take up to 15 days.[236] Second, the city must file the initiative measure with the city's governing body at its next meeting.[237] Also note that under state law, city measures other than referral measures may only be featured in a May or November election unless there are grounds for an emergency election.[238]

No later than 30 days after an initiated measure is filed with the city's governing body, the governing body must hold a meeting to review the measure.[239] The governing body has three options: (1) approve the measure into law, (2) reject the measure, or (3) reject the measure and refer a competing measure to voters.[240] If the governing body approves the measure, then the measure goes into effect without the need for an election.[241] If the governing body rejects the measure, then the measure will be submitted to city voters at the next May or November election.[242] If the city rejects the initiative and refers a competing measure, the competing measure must be prepared no later than 30 days after the initiative was filed with the governing body and must be featured in the same May or November election as the initiated measure.[243]

ii. Filing a Referendum

A referendum, also known as a popular referendum, is a method that enables voters to adopt or reject a local ordinance or other legislative enactment that has been enacted by the voters' governing body.[244] Like initiatives, the process of putting a referendum on the ballot begins with a prospective petition.[245] Unlike initiatives, a referendum petition happens quickly; a petition must be submitted with signatures no later than 30 days after an ordinance is adopted.[246] Emergency ordinances take effect immediately and generally are not subject to referendum.[247]

---

[235] *Id.*
[236] *Id.* at 6.
[237] *Id.* at 13.
[238] ORS 221.230.
[239] Or. Secretary of State, *County, City and District Initiative and Referendum Manual*, p. 6 (2024), https://sos.oregon. gov/elections/Documents/countycitydistrictir.pdf (last accessed September 27, 2024).
[240] *Id.*
[241] *Id.*
[242] *Id.*
[243] *Id.*
[244] *Id.* at 4.
[245] *Id.* at 16.
[246] *Id.* at 5.
[247] *See, e.g.*, PORTLAND, OR., CODE § 2.02.040(F) (2020).

Even though a referendum is a faster process, a prospective referendum petition must meet many of the same requirements as a prospective initiative petition.[248] A referendum petition must be submitted on the same form, SEL 370, that is prescribed by the Secretary of State.[249] It must list no more than three chief petitioners, specify if circulators are to be paid, and provide the text of the ordinance or legislative enactment that is the subject of the referendum.[250] Once a prospective petition is submitted, the city's election officer dates and time stamps the document and, assuming it is completed correctly, assigns the document an identification number.[251]

The process of filing a referendum petition does not provide time for local elections officials to review the constitutionality of the prospective petition.[252] Even so, a referendum must be for a legislative enactment to be constitutional; the method cannot be used to reverse an administrative or adjudicative decision by a city council.[253] If a referendum petition is denied as not "legislative," that decision can be challenged in circuit court.[254] Oregon courts have jurisdiction to review a proposed referendum measure to determine if it is constitutional.[255]

Once a prospective referendum petition is accepted, the local elections official must forward the petition to the city attorney so that the attorney can draft a ballot title.[256] The city attorney has five business days to do so.[257] For information on what is required in the ballot title, see the previous section on local initiatives.[258]

Once the ballot title is completed, the city attorney submits it to the local elections official, who publishes a notice of the ballot title in a newspaper of general circulation; the notice may also be published on the city's website for a minimum of 7 days.[259]

---

[248] Or. Secretary of State, *County, City and District Initiative and Referendum Manual*, p. 5 (2024), https://sos.oregon. gov/elections/Documents/countycitydistrictir.pdf (last accessed September 27, 2024).
[249] *Id.* at 17.
[250] *Id.*
[251] *Id.* at 16.
[252] *Id.*
[253] *See, e.g., Rossolo v. Multnomah County Elections Div.*, 272 Or App 572, 584 (noting that "executive, administrative, or adjudicative" actions are "outside the scope of" the constitutional rights of initiative and referendum.).
[254] ORS 246.910.
[255] *See Foster v. Clark*, 309 Or 464, 471 (1990).
[256] Or. Secretary of State, *County, City and District Initiative and Referendum Manual*, p. 16 (2024), https://sos.oregon. gov/elections/Documents/countycitydistrictir.pdf (last accessed September 27, 2024).
[257] *Id.*
[258] *See also id.* at 19.
[259] *Id.* at 16.

A voter may challenge the text of a ballot title by filing a petition for review in circuit court no later than 7 business days after a ballot title is filed.[260] If so, the voter must also notify the county elections official of the case no later than 5 p.m. on the following business day.[261]

On that note, the city's notice of the ballot title must state that the ballot title has been received, that it may be challenged in circuit court, and that the deadline is 7 business days from the ballot title filing.[262] The notice must also include the text of the ballot title or information on how to obtain a copy.[263]

While the city is preparing a ballot title, the chief petitioners of the referendum are free to submit their cover sheet and signature sheets for approval.[264] This is different from an initiative, which requires petitioners to wait until the ballot title is complete to submit these sheets.[265] The city elections officer reviews the sheets for the required information and then approves them for circulation so that the petitioners can begin gathering signatures.[266] State law still requires that the chief petitioners create a petition committee, as required by Oregon's campaign finance laws, before a local elections official can approve the petition for circulation.[267]

As noted above, the chief petitioners have just 30 days from the date the ordinance or other legislative enactment was adopted to collect enough signatures and submit them to the local elections official for verification.[268] Signature verification for a referendum petition does not need to be completed before the petition deadline.[269] This process can take up to 15 days and may occur in the days following the 30-day deadline.[270] Unless otherwise provided by local law, a referendum petition needs to be signed by no less than 10% of a city's registered voters.[271]

Once the signatures are submitted, the local elections official reviews them with support from the county elections office; if the petition gathered enough valid signatures, then the official will certify the referendum measure for an upcoming election.[272] Under state law, a referendum petition needs to be submitted no later than 90 days before an election to be on the ballot.[273] In

[260] *Id.* at 19.
[261] *Id.* at 16.
[262] *Id.* at 10.
[263] *Id.*
[264] *Id.* at 18.
[265] *Id.* at 10.
[266] *Id.* at 18.
[267] *Id.*
[268] *Id.* at 5.
[269] *Id.* at 6.
[270] *Id.* at 5, 19 (noting that the deadline is "the last day to submit signatures *for verification*") (emphasis added).
[271] *Id.* at 5.
[272] *Id.* at 22.
[273] *Id.*

addition, state law provides that referendum measures — like local initiatives — can only be voted on in a May or November election, unless there are grounds for an emergency election.[274]

C. Referrals

A referral, also known as a legislative referendum, is a method for city councils to propose a local law to voters.[275] Instead of using a petition process, a city's governing body can simply adopt a referendum that refers a measure for voters to decide.[276]

Once a city adopts this resolution, the city has two options. First, the city may file the text of the referral measure with the city's elections official.[277] The city elections official then sends the referral to the city's attorney, who has five business days to prepare a ballot title.[278] Second, and alternatively, the city's governing body can prepare the ballot title in advance and file it with the city election's official.[279] For information on what is required in a ballot title, see the above section on local initiatives.[280]

Once the ballot title is completed, the local elections official must publish a notice of the ballot title in a newspaper of general circulation and may also publish it on the city's website for a minimum of seven days.[281] Just like with initiatives and popular referenda, a voter may challenge the text of a ballot title by filing a petition for review in circuit court no later than seven business days after a ballot title is filed.[282] If so, the voter must also notify the county elections official of the case no later than 5:00 p.m. on the following business day.[283]

On that note, the city's notice of the ballot title must state that the ballot title has been received, that it may be challenged in circuit court, and that the deadline is seven business days from the ballot title filing.[284] The notice must also include the text of the ballot title or information on how to obtain a copy.[285]

If no challenge is filed against the ballot title, then the city is free to file the measure with the county elections official.[286] Significantly, however, many cities will also be required to

---

[274] ORS 221.230.
[275] Or. Secretary of State, *County, City and District Referral Manual*, p. 3 (2024), https://sos.oregon.gov/elections/Documents/ReferralManual.pdf (last accessed September 27, 2024).
[276] *Id.* at 5.
[277] *Id.*
[278] *Id.*
[279] *Id.*
[280] *See also id.* at 11.
[281] *Id.* at 10.
[282] *Id.*
[283] *Id.*
[284] *Id.* at 12.
[285] *Id.*
[286] *Id.* at 10-11.

provide an **explanatory statement** if the county is producing a county voters' pamphlet.[287] An explanatory statement must be an impartial description of the referred measure and must be no more than 500 words in length.[288]

Generally, a measure referred to voters by a city's governing body can be voted on at any election date permitted under state law: (1) the second Tuesday in March, (2) the third Tuesday in May, (3) the fourth Tuesday in August, or (4) the first Tuesday after the first Monday in November.[289] The deadline for a city to submit their referral to the county (along with all other city measures) is the 61st day before the election.[290]

i. Referring Advisory Questions

In addition to referring legislation to city voters, some cities have adopted charter provisions or ordinances that enable them to refer **advisory questions** to voters.[291] Unlike a standard referral, an advisory question is a non-binding and non-legislative measure that cities can use to seek guidance from voters on a particular topic.[292] For some cities, the process of referring an advisory question is identical to the local process of referring legislation.[293]

D. Other Local Measures

Finally, due to the wide variety of local measures, this section should not be interpreted as an all-encompassing list of local measures. Other types of local measures are addressed elsewhere in this Handbook. First, the section of this Handbook on city boundaries fully explores the requirements for residents to bring measures on incorporation, annexation, and related topics. Second, the section of this Handbook on municipal officials provides an overview of the process for putting a recall measure on the ballot.

IV. ENFORCEMENT

Oregon election law, from ORS Chapter 246 through ORS Chapter 260, is enforced mostly through complaints filed with the Secretary of State Elections Division.[294] The complaint process for election offenses is found under ORS 260.345.[295]

---

[287] *Id.* at 11
[288] *Id.*
[289] ORS 221.230.
[290] ORS 254.095.
[291] *See, e.g.*, PORTLAND, OR., CODE § 2.04.125 (2020).
[292] *Id.*
[293] *Id.*; *see also* PORTLAND, OR., CODE § 2.04.120 (2020).
[294] ORS 260.345; OAR 165-001-0095; *see also* Or. Secretary of State Report an Election Law Violation website at https://sos.oregon.gov/elections/Pages/election-law-violation.aspx (last accessed September 27, 2024).
[295] *Id.*

The enforcement process typically begins with the filing of a complaint by a registered voter.[296] The complaint must state the "reason for believing" a violation of an election law or rule occurred, along with any related evidence.[297] Anonymous complaints are not permitted.[298] Generally, complaints must be filed within 90 days of the election at which the alleged violation occurred, or 90 days following the date the alleged violation occurred, whichever is later.[299] The Elections Division may initiate investigations on their own, though, so enforcement is not entirely dependent on receiving a complaint.[300]

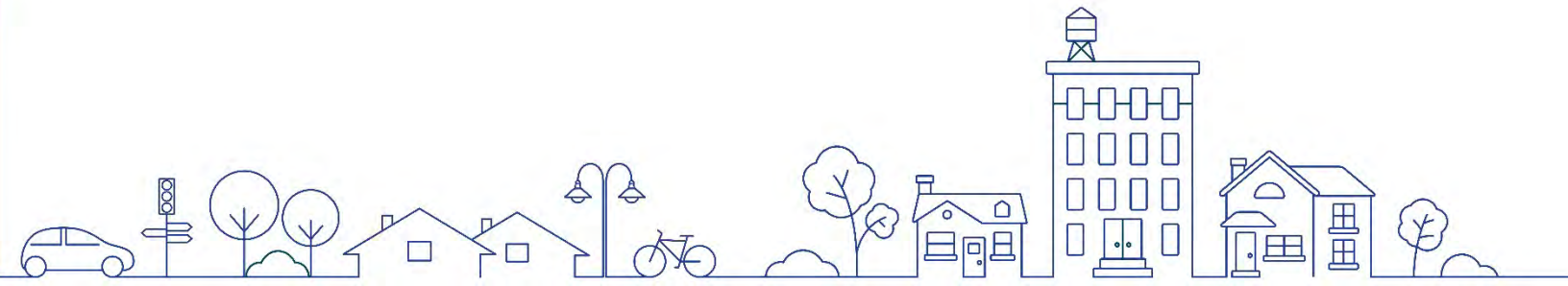
Next, the Elections Division has up to three business days to notify the person who is the subject of the complaint that the complaint has been received.[301] The Elections Division will then begin to investigate whether a violation has occurred or not; in the process, investigators may consider information outside of what is submitted in the complaint.[302] For civil violations, the complaint and any information compiled throughout the investigation is a public record and available to the public through a public records request.[303]

If there is sufficient evidence of a criminal violation, the Elections Division will forward the findings to the Oregon Attorney General's Office and request prosecution.[304] For more information on how to report an election law violation, consult the Oregon Secretary of State website found here: https://sos.oregon.gov/elections/Pages/election-law-violation.aspx (last accessed September 27, 2024).

[296] ORS 260.345(1).
[297] *Id.*
[298] *Id.*
[299] ORS 260.345(7).
[300] ORS 260.345(8).
[301] ORS 260.345(3).
[302] *Id.*
[303] *See* ORS 260.537.
[304] *Id.*

CHAPTER 5:

MUNICIPAL EMPLOYEES & PERSONNEL MATTERS



League of Oregon Cities

Published by the League of Oregon Cities
September 2020
Last Updated September 2024

Chapter 5:

Municipal Employees and Personnel Matters

This chapter was written and prepared with the generous assistance of CIS Deputy General Counsel Tamara E. Russell and Local Government Law Group Labor Attorney Diana Moffat.

Ms. Russell has practiced employment law for more than 25 years. She oversees the work of CIS' Hire-to-Retire Program, which assists local governments with their hiring processes, disability accommodation processes, termination-related issues, and general employee relations issues (including providing training on a variety of employment law topics). Prior to joining CIS in January 2013, Tamara was a partner at the Portland, Oregon law firms of Barran Liebman LLP and Miller Nash LLP, where she represented and defended public and private sector employers against employment- and labor-related claims in administrative agencies and courts. She has authored six books on employee handbooks and has been recognized for her work in employment law by Oregon Super Lawyers, Chambers USA, and The Best Lawyers in America. An Oregon native, Tamara graduated with honors from Simmons College (B.A.) and Boston University School of Law (J.D.).

Diana Moffat is a labor relations attorney at Local Government Law Group in Eugene, Ore. She is recognized statewide for her bargaining expertise. Her labor practice includes drafting collective bargaining proposals, researching comparative wages and benefits, presenting all proposals and justifications at the bargaining table as chief spokesperson, and assessing counter proposals. Diana has represented numerous public employers in the mandatory mediation process, as well as in interest arbitrations. She has advised governments regarding disciplinary proceedings and has presented unfair labor practices and unit clarification matter cases to the Oregon Employment Relations Board. Diana is well versed regarding employment issues such as: overtime pay, light duty, medical determination, seniority, annual evaluations, vacation, medical insurance coverage and sexual harassment issues

The LOC sincerely thanks both Tamara and Diana for their expertise and contributions.

Table of Contents

Chapter 5: Municipal Employees and Personnel Matters

I. Introduction

Today's smart city manager or supervisor knows that failing to keep abreast of the many Oregon and federal labor and employment laws that regulate workplaces can have financial and other consequences in the form of claims, lawsuits and unwanted publicity. Complying with these laws, and engaging in "defensive management" whenever possible, should be a priority for all managers and supervisors working for Oregon's cities.

This chapter will touch on the basic requirements of employment and labor laws, including the criteria for which laws apply to city employers. The chapter also includes a discussion about the roles and responsibilities elected officials have over day-to-day personnel matters, and some "best practices" for ensuring that the elected official-employee relationship is a positive one. In sum, this chapter will be your city's personal guide to managing your personnel and minimizing your city's risk of liability under Oregon and federal employment and labor laws.

Because this chapter is meant to provide only an overview, LOC members with specific questions are encouraged to reach out to their city's attorney or labor/employment attorney. LOC members who are also members of CIS are also welcome to contact CIS' Pre-Loss or Hire-to-Retire team members with questions at preloss@cisoregon.org or 503-763-3848. CIS members also have access to almost 100 on-demand video classes and podcasts addressing many of the employment law topics in this chapter – go to www.learn.cisoregon.org (registration required).

Resource:

Citycounty Insurance Services Pre-Loss and Hire-to-Retire Team:

Email: preloss@cisoregon.org

Phone: 503-763-3848

LOC members are also encouraged to explore the web sites maintained by the Oregon Bureau of Labor and Industries (BOLI), the Employment Relations Board (ERB) and the U.S. Equal Employment Opportunity Commission (EEOC) for more information about the laws described in here.

II. The Pre-Hire Process

Before you advertise for an open position at your city, consider the following:

A. Are we required to post this job internally before we post externally?

This question can be answered by referring to the collective bargaining agreements (CBA) your organization has entered into with unions and associations, by referring to city policy (if any) and your city's past practice (if any).

B. Have we determined what benefits are available to the employee who is selected for the position?

In order to attract, retain, and motivate qualified employees, employers need to establish and maintain compensation and benefit levels that are: (1) competitive within their labor markets, (2) internally equitable, and (3) consistent with their philosophy. This requires the employer to periodically review data on salary and benefit rates for comparable positions from their labor market in order to stay competitive and pay fairly within the market and within the organization.

> **Resource:**
>
> LOC has provided the following guides to recruiting a city attorney and city administrator:
>
> - ***A Guide to Recruiting a City Attorney,*** available in the LOC's online Reference Library.
> - ***A Guide to Recruiting a City Administrator,*** available in the LOC's online Reference Library.

Benefits include both voluntary and mandated programs. Mandated programs include workers' compensation, unemployment insurance, PERS (if applicable) and various leave of absence provisions. Examples of voluntary programs include additional types of retirement, vacation, holidays, health insurance, employee assistance programs, and educational reimbursement programs. Certain voluntary programs are mandated for police and fire personnel, e.g., retirement and life insurance.

With respect to health insurance, employers with 50 or more full-time/full-time equivalent employees are required under the federal Affordable Care Act to provide health insurance (minimum essential coverage) for their full-time employees (i.e., those employees who work 30 or more hours per week). Employers of all sizes may choose to provide some form of health insurance to its employees, either because doing so assists with recruiting and retention efforts, or because the employer is obligated to provide them because of a CBA or employment contract.

Benefits are important to employees and can be costly for the employer. Therefore, the cost of total compensation (including both salary and benefits) should be carefully reviewed before advertising for a position.

C. Have we properly assessed how much we can and should pay this employee?

There are several sources a city employer must consult in order to set a wage or salary for a new employee. First, if the position is represented, review the applicable CBA for a salary scale, band, or calculation method. Second, if the position is not represented, consider any city policies or history that establish a salary level.

Third, and most importantly, consider whether a proposed salary or wage might run afoul of Oregon's expansive Pay Equity Act. The Act requires Oregon employers to, among other things, provide equal pay for equal work unless the salary or wages are based on one or more

"bona fide" categories identified in the law. See BOLI's discussion on the Equal Pay Act here[1] and an in-depth article here.[2]

The Act prohibits discrimination between employees who perform work of comparable character, on a basis of a protected class in the payment of wages or other compensation. Thus, under the Oregon Equal Pay Act, "protected class" includes race, color, religion, sex, sexual orientation, national origin, marital status, veteran status, disability or age. Finally, the Act also defines "compensation" to include wages, salary, bonuses, benefits, fringe benefits, and "equity-based compensation." For those employers without an established, verifiable "system" in place regarding pay practices, they should document the reasons for pay differentials during a hiring process if these changes are not based on existing pay scales, established policy, etc. Reviewing the compensation for newly-created positions and comparing them to other positions of comparable character will also be a good start.

Other laws that may impact a starting salary include laws dealing with minimum wages and overtime (i.e., the proper classification of an employee as "exempt" or "nonexempt"), form of payment, maximum time between payments, and allowable deductions from compensation. See BOLI's discussion of these laws here.[3]

D. Is the job description for this position current?

Before beginning the recruiting and hiring process, and before advertising a job opening, an employer should write a job description for the position needing to be filled.

From a non-legal perspective, a job description prepared before the job solicitation process begins gives an employer the opportunity to pinpoint the exact qualifications required for the position and will assist greatly in the hiring process. Other benefits to having job descriptions include providing employers and employees with a basis for performance evaluations (and discipline, if necessary), and a benchmark for wage and salary comparisons within an organization or among different job classifications.

Legal issues also dictate the preparation of a job description before the application/job advertising process begins. A thorough, thoughtful job description assists an employer with its obligations under the Americans with Disabilities Act (ADA) and corresponding Oregon disability accommodation law. Although disability law doesn't require job descriptions, job descriptions will assist an employer who defends against a disability discrimination claim, according to federal regulations: "[I]f an employer has prepared a written description before advertising or interviewing * * * this description shall be considered evidence of the essential functions of the job." Further, if the employer has identified the essential functions of a position

[1] https://www.oregon.gov/boli/workers/Pages/equal-pay.aspx
[2] https://law.lclark.edu/live/files/27124-jonespdf.
[3] https://www.oregon.gov/boli/workers/Pages/your-rights-at-work.aspx.

before advertising it, the employer may ask applicants about their ability to perform those essential functions, with or without a reasonable accommodation.

Finally, under the federal Family and Medical Leave Act, employers who wish to have employees returning from a personal "serious health condition" leave present return-to-work paperwork from a health care provider must inform the employee of this requirement and provide the employee with a job description at the beginning of the leave.

For more information about assessing whether a function is "essential" or "marginal," see the EEOC's publication available here.[4] Sample job descriptions are available by request by emailing H2R@cisoregon.org (be sure to mention what job you are seeking a sample of).

E. Is our application in compliance with the law?

Both the EEOC and BOLI have noted that the equal employment opportunity laws they respectively enforce prohibit the use of pre-hire inquiries (including job applications) that screen out members based on protected status when the questions are not justified by some business purpose.

Questions employers are prohibited from asking on a job application:

- Marital status
- Family background
- Race
- Religion
- Any protected class
- Criminal Convictions
- Disability
- Salary history

Thus, information obtained through pre-employment inquiries and on job applications should be aimed solely at determining qualifications; inquiries that reveal information bearing no relationship to the qualifications for the job sought (for example, year of graduation from high school, childcare arrangements, country of origin, etc.) should be avoided. If such protected information is provided by an applicant who is not selected for a particular position, the applicant may allege a claim of discrimination based on that protected information. Similarly, information about an applicant's marital status, family background, race, religion and any other protected class status should not be sought at any point during the screening or interviewing process.

Some other job application prohibitions:

- Instead of asking, "Are you a United States citizen?" on an application, ask, "Are you lawfully authorized to work in the United States?" Alternatively, let the applicant know that the city requires proof of an employee's eligibility to work in the United States, and ask, "Are you able to provide proof of your eligibility to work?" Then, if the applicant is hired, the employer can verify the applicant's eligibility to work by completing the I-9 process and/or using E-Verify, the Internet-based system operated by the federal government that allows participating employers to electronically verify the employment eligibility of their newly hired employees.

[4] https://www.eeoc.gov/laws/guidance/ada-your-responsibilities-employer.

- Oregon's "ban the box" law prohibits employers from asking about criminal convictions on applications. Exceptions: If the candidate is applying to work in law enforcement or in the "criminal justice system".

- Employers cannot ask an applicant if they are disabled. But, on an application or during an interview, they can ask, "Are you able to perform the essential functions of this job, with or without accommodation?" (This assumes the candidate is given a copy of the job description when the application is received.) Additionally, job candidates can be given information about the schedule the successful candidate must work, and then be asked, "Are you able to meet the attendance requirements of the position?"

- Under Oregon's Pay Equity Act, employers may not ask an applicant for salary history information either in an application or during an interview.

- It is recommended that applications include, in the area above the line where the applicant signs: (1) a verification that everything in the application is true to the best of their knowledge and that no material omissions were made; and (2) a statement indicating that if the employer discovers any discrepancies, material omissions or false statements in the application or during the interview process, the applicant may not be hired and if hired, may be subject to termination.

- Job candidates should be informed, either on the application or in job announcements, whether there are other pre-hire "tests" or reviews that must be passed. For example, if the position sought is considered "safety sensitive", let the applicant know that a drug and alcohol screen will be sought (if your organization does pre-hire drug testing). If the position sought will be undergoing a criminal background check or a credit check (limited under Oregon law), the applicant should be informed of that as well. Mass transit positions and positions requiring a Commercial Driver's License (CDL) also have pre-hire requirements.

- Employers may not require potential hires to have a valid driver's license unless the ability to legally drive is an essential function of the job or is related to a legitimate business purpose. Cities whose background checks of candidates incude a review of their driving histories without regard to whether the positions at issue include driving as an essential function should reconsider this practice.

F. Is our screening and interviewing process in compliance with the law?

In addition to determining the most effective manner of attracting sufficient numbers of qualified candidates to compete for job openings, the screening of those applicants and selection of the most qualified individual for the available position must be planned. It is essential that this process not discriminate against protected classes of persons, either by intent or impact. Therefore, a city must base selection decisions on job-related criteria that will measure

knowledge, skills, abilities and attributes that relate directly to successful job performance for the position at issue.

In addition, when filling vacancies through a competitive process, public entities must provide and document preference for qualified veterans. This preference only applies to those veterans who meet the minimum qualifications for the position sought, or have successfully completed an initial applicant screening or candidate examination. ORS 408.230. Oregon's Veterans Preference law also has these requirements:

- Public employers are required to interview all veterans who apply for a position who meet the minimum qualifications and whose military experience is directly transferable to the position applied for, subject to a few narrow exceptions. ORS 408.225 to 408.23.

- Disabled veterans, those who have been honorably discharged from the military and rated as disabled by U.S. Department of Veterans Affairs, are entitled to additional preference points when seeking employment with a public body. ORS 408.225.

- See BOLI's discussion of Veterans' Preference Law here.[5]

Resource:

- LOC's ***FAQ on Veterans' Preference***, available in the LOC's online Reference Library.

The job interview is a process of candidate screening that is necessary, but one that also is filled with potential legal pitfalls. The purpose of the interview should be to gain information that is essential to determining if the candidate meets the skill requirements of the position. Laws such as the ADA, the Age Discrimination in Employment Act (ADEA), Title VII of the Civil Rights Act (Title VII) and corresponding Oregon laws prevent employers from considering certain information about an applicant during the screening process. To ensure compliance with these laws, employers should not ask any questions or seek information that might solicit information about an applicant's:

- Race or color

- National origin

[5] https://www.oregon.gov/boli/workers/Pages/veterans-preference.aspx. See also, LOC's FAQ on Veterans Preference available at: https://www.orcities.org/application/files/8415/6116/0018/FAQonVeteransPreference9-21-18.pdf

- Religion
- Garnishments
- Family status, pregnancy, or childcare arrangements.
- Sexual orientation
- Age
- Union participation or history.
- Salary or earnings history (but it's okay to ask about salary/wage expectations).
- Credit references or indebtedness (Oregon law allows credit checks to be run only on particular positions and only after a conditional job offer is extended. See ORS 659A.320; OAR 839-005-0080.)
- Number of sick days at former job (or questions about sick leave use "philosophy").
- Workers' compensation history.

Avoid questions that might solicit information about an applicant's:

- Race or color.
- National origin.
- Religion.
- Garnishments.
- Family status, pregnancy, or childcare arrangements.
- Sexual orientation.
- Age.
- Union participation or history.
- Salary or earnings history.
- Credit references or indebtedness.
- Number of sick days at former job.
- Workers' compensation history.

This is not a complete list; a candidate may fall into a protected class status for any number of reasons, and questions that might solicit information about any protected class should be avoided at all costs. If a candidate begins providing such unsolicited information, the interviewer needs to refocus the interview into job-related areas.

G. Pre-employment Drug/Alcohol Screens

Public sector employers may not do drug and alcohol screens on all applicants, or even all applicants who are given conditional offers of employment. Instead, due to federal Constitutional privacy rights, only those applicants who are being considered for "safety sensitive" jobs may be subject to a drug/alcohol screen, and then only after being given a conditional offer of employment. Because "safety sensitive" is defined by courts on a case-by-case basis, cities should consult with legal counsel before requiring a drug or alcohol screen of an applicant to determine whether such a screen is legal.

Some positions, like those requiring a CDL, require pre-employment drug and alcohol testing. A discussion about U.S. Department of Transportation drug/alcohol testing regulations applicable to CDL holders can be found here.[6]

H. Other Background Check Issues

Background checks are typically more involved than a simple reference check. Their importance, however, cannot be understated. Employees in public safety positions are required by law to undergo extensive background checks, including physical and psychological screenings. Smart city employers know, however, that even "regular" positions may need background checks, due to the fact that the employee would be working with "vulnerable" populations (such as the elderly or children), because driving is an essential function, or because the employee would be handling financial transactions on behalf of the city. Cities should consult with their legal counsel about what background checks are required by law for its applicants and what background checks would be recommended.

Note: If an employer uses an outside agency or otherwise pays an individual or entity to conduct a background check, the employer must follow the requirements of the Fair Credit Reporting Act (FCRA). FCRA has detailed written notice and authorization requirements that must be completed before the background check is completed. The Federal Trade Commission's in-depth discussion about FCRA can be found here[7]; sample FCRA forms can be provided upon request by emailing H2R@cisoregon.org.

I. Ethics and Nepotism in Hiring and Employment

Oregon has several laws impacting the ability of a manager or supervisor to hire a relative or close relation: ORS 244.179 (ethics – "Supervision of Relative or Member of Household") and ORS 659A.309 ("Discrimination solely because of employment of another family member prohibited").

ORS 244.179 prohibits a "public official" from "directly supervis[ing]" a relative. ORS 659A.309 makes it unlawful for an employer to refuse to hire someone who is a "member of an [employee's] family" unless the applicant/relative would be subject to a family member who is "in a position of exercising supervisory * * * authority" over that applicant/relative. Because of the complexity of these laws, cities are encouraged to consult with legal counsel about the legality of hiring a family member.

J. Extending a Conditional Offer of Employment

A written conditional offer letter advises a potential hire of any remaining steps that must be taken or any obligations that must be met before employment can begin (such as drug testing

[6] https://www.fmcsa.dot.gov/regulations/drug-alcohol-testing/overview-drug-and-alcohol-rules
[7] https://www.ftc.gov/sites/default/files/documents/reports/40-years-experience-fair-credit-reporting-act-ftc-staff-report-summary-interpretations/110720fcrareport.pdf.

if allowed by law, criminal background checks, or other background checks). It is recommended that cities extend conditional offer letters of employment to a successful candidate before beginning background checks of any kind, and before conducting a drug/alcohol screen. This practice allows the employer to demonstrate that the conditional offer was extended before it learned about any potentially protected activity or class of the applicant, which can be used to defend against unlawful failure to hire claims.

III. Labor Relations at the Local Government Level

In 1973, the Oregon Legislative Assembly enacted the Public Employee Collective Bargaining Act (PECBA). With this law, the Legislature gave public employees the legal right to form, join and participate in the activities of labor organizations. Therefore, if city employees are in a recognized or certified bargaining unit, there is a legal obligation for the city to negotiate matters concerning "employment relations" with those employees' exclusive representative.

The legislative policy statement embodied in the state's collective bargaining statute provides, in part:

> "The people of this state have a fundamental interest in the development of harmonious and cooperative relationships between government and its employees;
>
> "Recognition by public employers of the right of public employees to organize and full acceptance of the principle and procedure of collective negotiation between public employers and public employee organizations can alleviate various forms of strife and unrest. * * *
>
> "* * * * *
>
> "It is the purpose of [the statute] to obligate public employers, public employees and their representatives to enter into collective negotiations with willingness to resolve grievances and disputes relating to employment relations and to enter into written and signed contracts evidencing agreement resulting from such negotiations."

ORS 243.656(1) to (3).

A. Bargaining Rights

Most public employees are guaranteed the right to form, join and participate in the activities of labor organizations of their own choosing for the purpose of representation and collective bargaining with their public employer on matters concerning employment relations. Collective bargaining includes the mutual obligation of public employees and their employers to meet at reasonable times and to bargain in good faith. However, this obligation does not compel either party to agree to a proposal or require making a concession.

Common Local Government Unions

- American Federation of State, County and Municipal Employees
- Service Employees International Union
- International Association of Fire Fighters
- Oregon State Police Officers Association Inc.
- Laborers' International Union of North America

B. Exclusive Employee Representation

Employees are free to select representation of their own choice. During the period in which employees are contemplating the options of union representation, the city is restricted in what it can and cannot do. An exclusive bargaining representative can be voluntarily recognized by the employer or certified through a petition filed with the ERB or through an election held by the ERB.

C. Unit Determination

Oregon law establishes the criteria to be considered in the formation of an appropriate bargaining unit: community of interest, wages, hours and other working conditions of the employees involved, the history of collective bargaining, and the desires of the employees. Questions of representation and appropriateness of bargaining units, and their composition, will ultimately be resolved by the ERB upon petition by the employer, employee group or labor organization. The content and description of the bargaining unit are very important matters. A poorly considered bargaining unit description may lead to future problems and litigation. Whether to include or exclude such groups as temporaries, seasonals, casuals, and part-timers, the definition of each of those groups, and an agreement as to which employees are excluded as supervisors and confidential employees are of great importance.

D. Bargaining Impasse Procedures

In the event that parties to the public employment negotiations are unable to resolve their differences at the bargaining table, Oregon law provides for ERB supervision of mediation, binding interest arbitration, fact finding and strike activity. Under the present law, if negotiations fail to bring the parties to agreement, mediation is required. Mediation is followed by binding interest arbitration with any bargaining unit that includes one or more employees who are prohibited from striking. Employees prohibited from striking under present Oregon law are: emergency telephone worker, parole or probation officer who supervises adult offenders, police officer, firefighter, guard at a correctional institution or mental hospital, and deputy district attorneys. In addition, employees of a mass transit district, transportation district or municipal

bus system are also prohibited from striking. Fact-finding is an additional voluntary dispute resolution process that can be used by mutual agreement of the city and the employees' exclusive representative.

E. Strike Policy

Many public employees who are represented by certified bargaining agents are granted a qualified right to strike. Statutory provisions and administrative rulings by the ERB define the conditions that must be satisfied before a bargaining unit is allowed to strike.

F. Scope of Bargaining

Employment relations matters over which cities must bargain are frequently referred to as scope of bargaining or mandatory subjects of bargaining. These matters include, but are not limited to: monetary benefits, hours, vacations, sick leave, grievance procedures and other conditions of employment. Current Oregon law specifies that these matters do not include: (1) subjects determined to be non-mandatory by the ERB prior to June 6, 1995; (b) subjects the ERB determines to have a greater impact on city management's prerogative than on employee wages, hours, or other terms and conditions of employment; (3) subjects that have an insubstantial or de minimis effect on public employee wages, hours, and other conditions of employment; and (4) some staffing levels and safety issues, scheduling of services provided to the public, determination of the minimum qualifications necessary for any position, criteria for evaluation or performance appraisal, assignment of duties, workload when the effect on duties is insubstantial, reasonable dress, grooming, and at-work personal conduct requirements respecting smoking, gum chewing, and similar matters of personal conduct at work. When the city and the employees' exclusive representative disagree about whether a particular proposal is a mandatory or non-mandatory subject of bargaining, the dispute is submitted to the ERB for resolution.

G. Unfair Labor Practices

Certain actions on the part of an employer, employee group or labor organization are prohibited in order to protect the rights of the other party and to promote cooperation and harmonious relations. For example, it is an unfair labor practice for an employer to interfere with, restrain or coerce employees in, or because of, the exercise of the guaranteed rights of public employees to form, join or participate in labor organizations. Another example would be for a union, or an employer, to engage in bad faith bargaining. Unfair labor practices can be committed by either the union or the employer.

The ERB has the authority to order an employer, employee group or labor organization to stop committing an unfair labor practice and to penalize parties found to have committed such acts.

Sample Employer Unfair Labor Practices

- Interfere with, restrain or coerce employees in or because of the exercise of rights guaranteed in ORS 243.662.
- Dominate, interfere with or assist in the formation, existence or administration of any employee organization.
- Attempt to influence an employee to resign from or decline to obtain membership in a labor organization.

Sample Employee Unfair Labor Practices

- Refuse to bargain collectively in good faith with the public employee if the labor organization is an exclusive representative.
- Violate the provisions of any written contract with respect to employment relations, including an agreement to arbitrate or to accept the terms of an arbitration award, where previously the parties have agreed to accept arbitration awards as final and binding upon them.
- Picket or cause, induce, or encourage to be picketed, or threaten to engage in such activity, at the residence or business premises of any individual who is a member of the governing body of a public employer, with respect to a dispute over a collective bargaining agreement or negotiations over employment relations, if an objective or effect of such picketing is to induce another person to cease doing business with the governing body member's business or to cease handling, transporting or dealing in goods or services produced at the governing body's business.

See ORS 243.672 for more unfair labor practices.

H. Union Security

State and federal law currently provide that an employee whose position is part of a bargaining unit, need not be a member of the union even though they are still covered by the applicable CBA. An employee may, therefore, opt-out of union membership. The laws surrounding the administration of such an election are currently evolving, so a city is well advised to consult with their management labor counsel regarding such matters.

IV. Other Employment Law Issues (During Employment)

A. Workplace Safety

The Oregon Safe Employment Act (OSEA) requires all cities, as employers, to provide a "safe and healthful" workplace for its employees and comply with various recordkeeping obligations. The law and its corresponding regulations provide a broad range of mandates covering the use of workplace safety devices, the condition of workplace equipment, safety training for employees and other topics dealing with work procedures, the work facility and the work environment. The OSEA also gives the Oregon Occupational Safety & Health Administration (OR-OSHA) the authority to inspect Oregon workplaces for safety or health hazards.

LOC Members who are also CIS members should consult with their assigned Risk Management Consultant for more information about workplace safety laws, including Oregon OSHA. Additional information can be found at Oregon OSHA's website, located here.[8]

B. Employee Handbooks

Every city with employees should have an employee handbook or policy manual. Although no state or federal law requires an employer to issue a handbook or manual to its employees, some individual laws require "written' policies, and the benefits of doing so strongly favor the practice.

In a non-union environment, for example, employees often do not have one definitive source of information about the terms and conditions of employment, such as work rules, disciplinary procedures, or other employer expectations of employee conduct. Handbooks and manuals, however, allow employers to provide a consistent, uniform statement about such issues. They can help maintain consistency among departments, locations, and employee classifications because everyone operates from the same set of expectations. Employers use handbooks and manuals to communicate values and visions. In sum, everyone benefits from an environment where the expectations, rules, and policies are predictable, clear, and published.

Well-written and widely distributed handbooks also serve a legal purpose. Consistency and uniformity in applying policies, for example, reduces the risk of a discrimination or "disparate treatment" claim. Further, jurors like to see policies in writing. Even if an employer has a well-established practice, a typical juror tends to favor and believe the written policy versus the intangible "practice." For jurors who believe the other "F" word – fairness – is the benchmark for analyzing and valuing an employment law claim, a well-written and publicized policy known to the plaintiff-employee, yet not followed by the plaintiff-employee, could make the difference between a costly plaintiff's verdict and a verdict for the defendant-employer.

[8] https://osha.oregon.gov/essentials/toolkit/Pages/why-here.aspx.

Handbooks and manuals are not, however, without risk or responsibilities. If, for example, a city issues a handbook but does not update it, or neglects to follow the policies as written, that city could find itself facing claims of discrimination or other types of employment-related claims. Even a well-written handbook serves little value if it is left on a shelf to collect dust.

Employers who use handbooks also must be mindful to ensure that the handbook does not use any language stating or implying that a contractual basis for any benefit (including continued employment) exists. An employee's at-will status of employment can be voided if language in the handbook implies a promise or creates an expectation of a benefit or continued employment.

Finally, in organizations where employees are represented by unions, it is important to note in the handbook that any inconsistencies between the policies in the handbook and the policies in a CBA will be resolved in favor of the CBA (for represented employees only). In addition, if you have unionized employees you will be required to bargain, in most circumstances, regarding inclusion of mandatory subjects of bargaining that are included in the handbook, even if not covered by the applicable CBA.

Resource:

CIS issues a sample employee handbook each year for its members.

Go to: www.cisoregon.org/Member/RiskManagement/H2RToolbox for the latest edition (account registration is required).

C. Performance Appraisals

While required by some CBAs, there is no law requiring employers to provide performance reviews. It is simply a good management practice, and most employers conduct periodic performance reviews of their employees. Employers should adopt a policy advising employees how often they will be reviewed, and on what basis/bases. An effective review tells an employee whether they are meeting or exceeding performance goals, identifies any performance problems, and encourages employees to improve their performance. A performance review should not be the only feedback that an employee receives, however – it is simply one tool that an employer has to manage its employees. Finally, accurate and thoughtful documentation regarding an individual employee's performance is invaluable in litigation, whether defending against claims based upon discrimination, wrongful termination, or any other disparate treatment theory.

The employer should attempt to consistently follow the procedures outlined in its performance review policy. Employees should be required to date and sign the evaluation form - not to indicate agreement with its contents, but rather to acknowledge that they have received and reviewed the contents of the evaluation form. Employees should also be encouraged to present a response (or rebuttal) to the evaluation, which will be included in the employee's personnel file. If the employee does not respond to the evaluation form in writing, a court or jury may consider this decision an acquiescence or agreement to the contents of the review.

Performance reviews must accurately document not only an employee's strengths and skills, but also any unsatisfactory work performance or disciplinary problems. An inaccurate review is worse than no review in many circumstances. A court or jury may not believe that an employee's poor performance led to a termination decision when the performance reviews rate the employee as an "average" or "meets expectations" performer. Finally, all performance reviews should be reviewed by Human Resources for consistency and any legal issues prior to being communicated to the employee. Each employer should decide on whether additional approvals of the performance evaluations are appropriate (for example, what managers or department heads should sign off on the reviews).

Resource:

CIS provides sample performance evaluations for its members.

Go to: www.cisoregon.org/Member/RiskManagement/H2RToolbox (account registration is required).

D. Leave of Absence Laws and Issues

i. Vacation

Employers are not required by federal or state law to provide vacation benefits to their employees. There are no laws that require an employer to give an employee a specific amount of vacation time, and there are no laws that specify how vacation time is accrued. But if your organization offers vacation benefits, ensure that your handbook clearly states the employee's eligibility for vacations and vacation pay, and note any inconsistencies with vacation provisions in an applicable CBA.

Under Oregon law, an employer is required to honor any established policy or agreement relating to the payment of accrued vacation upon termination. If an employee qualifies for payment of vacation pay under the employer's policy, the employee should be paid for these upon termination. Oregon law also recognizes, however, an employer's right to specify when vacation pay will not be paid upon termination, such as when an employee is terminated for gross misconduct or if an employee fails to provide notice before resigning.

ii. Sick Leave

Under Oregon's Sick Leave law, employers of all sizes are required to provide sick leave to their employees. Employers with 10 or more employees must provide paid sick leave; employers with nine or fewer employees must provide unpaid sick leave. The law includes requirements for accrual (no less than one hour of sick leave for every 30 hours worked, starting on day one of employment), use (available starting the 91st day of employment), accrual caps (40 hours per year) and carry-over. The law also requires the issuance of a policy and periodic information to employees about sick leave accrual.

An employee can take sick leave for the following purposes:

- To care for the employee or employee's eligible family member (defined in the law) with an illness, injury or health condition or for treatment;
- To care for an infant or newly adopted or foster child under the age of 18, or to care for a child over the age of 18 if incapable of self-care because of a mental of physical disability;
- Absence associated with the death of an eligible family member (defined in the law);
- Absence related to domestic violence, harassment sexual assault or stalking for employee or a minor child or dependent;
- In the event of a public health emergency.

- BOLI has provided detailed information about the sick leave law here.[9]

Note that the law provides a "floor" in terms of the basic minimums of what an employer must provide its employees. Employers can be more generous with their sick leave benefits than what is provided here, *e.g.*, providing paid leave when only unpaid leave is required or making the accrual cap 80 hours per year instead of 40. Finally, nothing in the law requires an employer to pay a departing employee accrued but unused sick leave.

iii. Paid Time Off (PTO)

In lieu of offering separate vacation and sick leave benefits, some employers choose to provide a fixed sum of paid time off or PTO. Cities offering PTO must ensure that their benefits are the same or more generous than what Oregon law requires for sick time (but they are not obligated to give employees additional leave for paid or unpaid sick time if they meet the legal minimums for sick time through their combined PTO policy).

iv. FMLA and OFLA Protected Leaves of Absence

All public agencies are covered employers under the Family Medical Leave Act (FMLA) regardless of the number of employees they employ. For a public employee to be eligible for FMLA, the public employer must have at least 50 employees within 75 miles of an employee's work site. Eligible employees must be employed for at least 12 months (which may be based on separate stints of employment) and have worked at least 1,250 hours during the 12 months preceding the date leave is to begin. Under FMLA, an eligible employee may take up to 12 weeks of unpaid leave within a 12-month period in a leave year for the following purposes:

- To care for a newborn, newly adopted, or newly fostered child;

- To care for a spouse, child, or parent with a serious health condition;

[9] https://www.oregon.gov/boli/workers/pages/sick-time.aspx.

- To care for the employee's own serious health condition, including an illness, injury or condition related to pregnancy or childbirth that disables the employee;

- Because the employee's spouse, son, daughter or parent is on active duty or was called to active duty status in the Armed Services, National Guard or Reserves in support of a contingency operation to address certain "qualifying exigencies"; or

- To care for a "covered servicemember" with a serious injury or illness incurred in the line of duty on active duty (up to 26 weeks).

An employee may take FMLA leave for the following:

- To care for a newborn, newly adopted, or newly fostered child;
- To care for a spouse, child, or parent with a serious health condition;
- To care for the employee's own serious health condition, including an illness, injury or condition related to pregnancy or childbirth that disables the employee;
- Because the employee's spouse, son, daughter or parent is on active duty or was called to active duty status in the Armed Services, National Guard or Reserves in support of a contingency operation to address certain "qualifying exigencies"; or
- To care for a "covered servicemember" with a serious injury or illness incurred in the line of duty on active duty (up to 26 weeks).

FMLA is fraught with extensive regulations regarding an employer's obligations under the law, which include providing notice to employees regarding the law and notices regarding eligibility and an employee's "rights and responsibilities", requirements for seeking medical certification in support of certain types of leave, discussions with health care providers certifying the leave in question, and designating FMLA leave, and many more. The U.S. Department of Labor has devoted part of its website to FMLA, and provides sample forms/notices, which can be found here.[10]

Cities must also be aware of their responsibilities under the Oregon Family Leave Act (OFLA), which applies to employers with 25 or more employees. When it was enacted, OFLA mirrored many of FMLA's provisions and a leave under one law often ran concurrently with a leave under the other. All of that changed in 2024 due to significant cutbacks to OFLA that went into effect and because of Paid Leave Oregon (discussed below).

Effective July 1, 2024, an eligible employee may take up to 12 weeks of unpaid OFLA leave in a 52-week period (starting from the Sunday before leave begins) and sometimes more, under certain circumstances, for the following purposes:

-

-

[10] https://www.dol.gov/agencies/whd/fmla.

- **Pregnancy disability leave** (before or after birth of child or for prenatal care). *The employee can take up to 12 weeks of this in addition to 12 weeks for any other OFLA reason listed here.

- **Sick child leave** (for the employee's child with a serious or non-serious health condition).

- **School closure leave** – If the employee's child's school or childcare provider is closed due to a public health emergency.

- **Military family leave** (up to 14 days if the employee's spouse/same-sex registered domestic partner is a service member who has been called to active duty or is on leave from active duty).

- **Bereavement leave** (up to two weeks of leave after the death of a "family member", defined in the law) with a maximum of four weeks in any given leave year.

- **To facilitate the placement of a foster child or to handle adoption-related issues** (effective July 1, 2024, until December 31, 2024).

Employees are eligible to take OFLA-protected leave if they have been employed for 180 calendar days preceding the date a leave is to begin and worked an average of at least 25 hours per week. However, an employee taking Oregon Military Family Leave Act leave need have only worked 20 hours per week (no minimum length of employment required).

An employee may take OFLA Leave for the following:

- Pregnancy disability leave
- Sick child leave
- School closure Leave
- Military family leave
- Bereavement leave

Like FMLA, OFLA is a regulation-heavy law that imposes significant requirements on employers, including notification requirements, tracking requirements, and other administrative tasks. BOLI's website, located here,[11] has extensive information on the law.

Paid Leave Oregon

Employers of all sizes must also comply with Paid Leave Oregon (PLO). PLO provides employees with up to 12 weeks of paid leave in a 52-week period (starting the Sunday before leave begins) for three distinct categories of life events:

Family Leave – includes the birth of a child and what has traditionally been known as "parental leave" (to bond with a child in their first year, whether it be after birth, through adoption, or when the child is placed in the employee's home for foster care).

[11] https://www.oregon.gov/boli/workers/Pages/oregon-family-leave.aspx.

Medical Leave – For the "serious health condition" of an employee or the employee's "family member" (defined in the law).

Safe Leave – For survivors of sexual assault, domestic violence, harassment, bias crimes or stalking.

In addition, an employee may be able to take up to two additional weeks (up to 14 total weeks in a 52-week period) if the employee experiences illness or injury for a pregnancy- or childbirth-related reason (typically known as "pregnancy disability leave").

Because PLO is administered by the State of Oregon Employment Department or a third-party provider, an employer has almost no control over whether an employee is eligible for or may take leave (or when that leave may be taken). Instead, the employer is obligated to hold open the employee's job when on a PLO leave and refrain from taking any adverse employment action against an employee who asks about, applies for or uses PLO.

Because PLO is a new and complicated law, employers continue to struggle to learn to administer leaves under this law. Cities are encouraged to consult with legal counsel or an HR professional about both employees' and employers' rights and responsibilities under PLO, notification requirements, when leaves under PLO run concurrently with leaves under FMLA and how an employee's accrued paid leave (e.g., vacation, sick, PTO) may be used during a period of PLO. More information about PLO can be found at the State of Oregon Employment Department's Paid Leave Oregon web site (https://paidleave.oregon.gov/employers-overview/). CIS' Sample Employee Handbook has sample policies for PLO, FMLA and OFLAs, and a sample statement for those cities who do not have 25 or more employees. The handbook can be found in CIS' HR Toolbox, located here[12] (registration required).

v. Paid Holidays

There is no obligation under either federal or Oregon law to pay employees extra for working on holidays or to pay them premiums for work performed on holidays. Nor does the law require an employer to recognize one holiday versus another. If the employer does choose to provide the benefit to employees, or if it agrees to do so pursuant to a CBA or employment contract, it makes good practical sense to put the policy in writing to avoid confusion and enhance employee morale.

E. Disability Law

Cities with six or more employees are subject to Oregon's disability discrimination and accommodation law. Cities with 15 or more employees are also subject to federal disability and discrimination law, known as the ADA.

[12] https://cisoregon.org/Account?returnUrl=%2FMember%2FRiskManagement%2FH2RToolbox.

Under both Oregon and federal disability law, with respect to employment (Title I of the ADA), cities are required to provide "qualified" individuals with "disabilities" equal employment opportunities. This includes providing reasonable accommodations to help employees perform the essential functions of their job and ensuring that employees with "disabilities" are not discriminated against in all areas of the employment relationship, from hiring to retiring (or firing).

Both laws define "disability" as a "physical or mental impairment that substantially limits one or more major life activities." To receive protection under the law, the employee must be a "qualified individual with a disability." Among other obligations, an employer must engage in an "interactive process" with an employee with a disability in an effort to come to an agreement about accommodations the employer can provide to assist the employee perform their essential job functions. Nothing under the ADA or Oregon law requires an employer to remove essential job functions, however.

For more information about what constitutes a "disability", or information about an employer's obligations under these laws, please refer to the EEOC's website here,[13] or BOLI's web site here.[14] CIS' Sample Employee Handbook also includes a sample Disability Accommodation Policy, found in the HR Toolbox (here[15]– registration required).

F. Whistleblower Law

Various federal and Oregon laws protect employees who report, in good faith, their employer's violation of the law or other issues. The Oregon laws apply to public sector employers of all sizes; the federal laws most germane to public sector employers apply to those with 15 or more employees. Here are some examples:

- Opposing discrimination or retaliation in violation of Oregon or federal civil rights law (ORS 659A.030; Title VII);

- Disclosing information that the employee believes is evidence of: (1) a violation of any federal, state or local law, rule or regulation by the public employer; or (2) mismanagement, gross waste of funds or abuse of authority or substantial and specific danger to public health and safety resulting from action of the public employer (ORS 659A.199 and 659A.200 et seq.);

- Reporting criminal activity, has caused a complaint to be filed, has cooperated with law enforcement, has brought a civil action against an employer, or has testified at a civil proceeding or criminal trial (ORS 659A.230); and

[13] https://www.eeoc.gov/publications/ada-your-responsibilities-employer.
[14] https://www.oregon.gov/boli/civil-rights/Pages/disability-rights.aspx?utm_source=BOLI&utm_medium=FAQ%20Typeahead&utm_campaign=Disability%20Rights.
[15] https://cisoregon.org/Account?returnUrl=%2FMember%2FRiskManagement%2FH2RToolbox

- Many more!

Oregon law requires that public sector employers publish a policy on Oregon's whistleblower laws; a sample copy is available on request by emailing H2R@cisoregon.org.

For more information, see BOLI's publication about these whistleblower laws in its "Uniform Standards and Procedures Manual", which can be found here.[16] EEOC staff also wrote an article[17] on federal retaliation claims that provides a thorough discussion about retaliation claims and how to avoid them.

G. Drug and Alcohol Issues

When Oregon voters decided to legalize recreational marijuana sales and use in Oregon (effective July 1, 2015), Oregon employers were required to think about how they viewed employee marijuana use. One big factor: Oregon's recreational and medical marijuana laws have no impact on federal laws that classify marijuana as an illegal drug listed in Schedule I of the Controlled Substances Act. That means that while marijuana use is legal under Oregon law (with some restrictions), it is illegal under federal law.

With this contrast in mind, employers need to think about whether: (1) They want to institute a drug and alcohol testing program; and (2) if so, whether they want to be a "zero tolerance" employer or a "no impairment" employer (defined below). For cities with represented employees, the choice about whether to provide drug/alcohol testing and what the standard for that testing will be is made only through mandatory bargaining. For unrepresented employees, however, the employer is free to choose.

Federal law imposes some restrictions:

- If a city receives federal funds through a grant, the city will need to scrutinize the grant's terms for information about drug testing expectations (if any). Note: The federal Drug Free Workplace Act does not require drug or alcohol testing.

- If a city employs employees who are CDL holders, U.S. Department of Transportation (DOT) drug testing regulations prohibit the CDL holder from using marijuana, even if such use is otherwise allowed under Oregon law or the employer's "no impairment" policy. Currently, the DOT does not allow for the use of marijuana by employees in safety sensitive positions subject to federal testing guidelines. See discussion here[18].

- Employees subject to the drug testing regulations issued by the Federal Aviation Administration or any other federal agency must continue to be complied with as well.

[16] https://www.oregon.gov/boli/civil-rights/Documents/whistleblower-protections.pdf.
[17] https://www.eeoc.gov/retaliation-making-it-personal.
[18] https://www.transportation.gov/odapc.

A **"zero tolerance"** policy is just that: It tells employees that not only are they prohibited from reporting to work under the influence of any intoxicating substance (regardless of whether the substance is legal under Oregon law), employees can't show up to work with any marijuana metabolites in their system, regardless of whether they are impaired at the time of testing. Under this kind of a policy, the definition of "reasonable suspicion" testing can be broader. This is because whether an employee shows signs of intoxication or impairment is only one basis for an employer to demonstrate "reasonable suspicion"; an employee's admission of marijuana use (or any other drug) could trigger the employer's right to conduct a drug/alcohol test as well.

A **"no impairment"** policy tells employees that as long as they don't show up for work under the influence of drugs or alcohol, the employee will not be disciplined if marijuana metabolites show up in their drug/alcohol test. Under this kind of policy, an employer is typically allowed to require a drug and alcohol screen when the employee shows the typical signs of impairment while in the workplace, such as glassy eyes, slurred speech, stumbling, etc. Although an employer can include employee admission of drug/alcohol use in a "no impairment" policy, the likelihood of "catching" an employee who admits to weekend drug use is low, particularly because there is no recognized test for marijuana impairment.

CIS provides sample drug and alcohol testing policies in its Sample Employee Handbook, found here[19] (registration required).

H. Harassment in the Workplace

Employers of all sizes are required by Oregon and federal law to ensure that employees are not subject to harassment on the basis of sex, age, gender identity, race, color, religion, national origin, marital status, disability, veterans status, sexual orientation, and any other protected class recognized by Oregon or federal law. This obligation includes a responsibility to ensure that complaints of harassment are promptly investigated and acted upon (where warranted).

Sexual harassment is defined as unwelcome, or unwanted conduct of sexual nature, whether it is verbal or physical when: (1) submission to or rejection of the individual's conduct is used as a factor in decisions affecting the hiring, promotion, transfer, evaluation, financial status, or other aspects of employment; or (2) the conduct interferes with an individual's employment or creates an intimidating, hostile, or offensive work environment.

Harassment on the basis of a protected class or protected activity may include verbal, written or physical conduct that denigrates, makes fun of, or shows hostility towards an individual because of that individual's protected class or protected activity, and can include:

- Jokes, pictures (including drawings), epithets, or slurs;

[19] https://cisoregon.org/Account?returnUrl=%2FMember%2FRiskManagement%2FH2RToolbox.

- Negative stereotyping;
- Displaying racist symbols anywhere on an employer's property;
- "Teasing" or mimicking the characteristics of someone with a physical or mental disability;
- Criticizing or making fun of another person's religious beliefs, or "pushing" religious beliefs on someone who doesn't have them;
- Threatening, intimidating, or hostile acts that relate to a protected class or protected activity; or
- Written or graphic material that denigrates or shows hostility or aversion toward an individual or group because of the protected status.

An employer can be liable for any harassment caused by a nonsupervisory or non-managerial employee, or non-employees, only if the employer knew or had reason to know of the harassment and failed to remedy it. In one case, the court stated that an employer is liable for a co-worker's sexual harassment only if, after learning of the alleged conduct, the employer "fails to take adequate remedial measures." These measures must include immediate and corrective action reasonably calculated to end the current harassment and to deter future harassment from the same offender or others.

If an employee alleges that a supervisor/managerial employee caused the harassment, the employer may be liable (regardless of whether anyone other than the alleged harasser knew about the conduct) unless it can prove what is called an affirmative defense. If there is no evidence of a tangible adverse employment action resulting from the alleged hostile environment, the employer must prove two things: (1) that the employer exercised reasonable care to prevent and correct promptly any harassing behavior prohibited under the law; and (2) that the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

Whether the employer has an anti-harassment policy is relevant to the first element of the defense. And an employee's failure to use a complaint procedure provided by the employer will normally be enough to satisfy the employer's burden under the second element of the defense. The Civil Rights Act of 1991 and Oregon law have exposed employers to punitive and compensatory damages and jury trials for unlawful harassment. Additionally, courts have found that when sexual harassment has a physical component, the employer may be liable for not only statutory civil rights claims but also for physical torts such as battery. Therefore, it is imperative that employers identify and eliminate acts of harassment in the workplace.

A written harassment policy staunchly condemning sexual and other forms of harassment is a necessary first step. It should also contain a clear statement that the employer will not retaliate or tolerate retaliation against any employee making a good-faith claim of harassment or

for cooperating with any harassment investigation. Oregon law, in fact, requires employers to have a published harassment policy that includes specific provisions identified in the law. For more information about Oregon's law and the Oregon legal requirements for a policy, see BOLI's web site here[20]. CIS also has a sample harassment policy written to conform with the law's requirements, available in the HR Toolbox (here[21] - registration required).

When facing specific complaints of harassment, employers must consider each claim with the utmost seriousness. Complaints should be investigated and resolved promptly, thoroughly and, to the greatest extent possible, confidentially. Obviously, confidentiality may be difficult if not impossible to maintain in many situations. If the employer concludes that improper conduct has occurred, then the alleged harasser should be disciplined accordingly or fired.

The EEOC also has helpful information available on federal harassment laws, found at https://www.eeoc.gov/harassment.

I. Discipline and Discharge

All employers must deal with employee discipline and terminations. Unfortunately, and despite the fact that a poorly-handled termination can result in expensive litigation or claim settlement, employers continue to make some avoidable mistakes in handling the discipline and termination processes.

i. Use a Thoughtful (not a Rushed) Process for the Termination.

In this litigious era, when few gatekeepers exist to screen out the frivolous lawsuits, and few tools exist to deter underemployed lawyers from filing marginally credible (or simply frivolous) lawsuits against employers, employers should expect that any termination could result in a lawsuit or a claim for damages. If the employer hasn't thoroughly planned that termination, which includes demonstrating a history of attempting to work with the employee on their shortcomings and articulating a reason for the termination, the employer may be left without an adequate defense or left with an undesirable defense against a claim of discrimination or retaliation. In sum, an employer's best defense to a claim of discrimination or retaliation is a well-documented, thoughtful and legal basis for a termination, one that is clearly expressed and explained to the departing employee.

ii. Avoid Unfortunate Timing

Employers should avoid incidents of unfortunate timing such as terminating an employee after they return from OFLA-protected leave for an event that occurred prior to the employee's leave of absence. Oregon and federal law say that timing alone is insufficient to prove a

[20] https://www.oregon.gov/boli/workers/Pages/sexual-harassment.aspx?utm_source=BOLI&utm_medium=FAQ%20Typeahead&utm_campaign=Sexual%20harassment.
[21] https://cisoregon.org/Account?returnUrl=%2FMember%2FRiskManagement%2FH2RToolbox.

discriminatory motivation. Prudent employers understand, however, that incidents of unfortunate timing may be sufficient to raise an inference of discrimination and get the employee past a couple of hurdles and possibly even in front of a jury. It is not always possible to avoid incidents of unfortunate timing. It is, however, possible to avoid delay. If an offense is sufficient grounds for discipline or termination, then employers should act promptly. Failure to do so always creates a question in the mind of a jury: if this offense was so bad, why did the employer wait six weeks to terminate for it?

iii. Make sure there is a record of progressive discipline, in writing

Reminders about creating a written record are nothing new. A written record of progressive discipline for offenses is particularly important in defending claims that termination was in retaliation for taking protected leave, or in violation of the ADA (among other reasons). By its very nature, terminations for "just cause" pursuant to a CBA require progressive discipline except for very limited circumstances.

For public sector employers, employees who are represented by unions are in most situations required to receive progressive discipline before a termination can occur – this establishes a "just cause" basis for termination. Your city's labor counsel can address this requirement with you.

iv. Is Due Process Required Before Termination?

Under Due Process principles, a public sector employee is entitled to "notice and a meaningful opportunity to be heard" before their employer can fire them (or before receiving discipline that has an economic consequence, like a suspension without pay). Employees represented by a union must receive Due Process (also known as a "Loudermill" hearing[22]). Other employees must receive due process because the city's policies require it, or because their employment contract with the city specifies that due process must be provided. In some cases, providing due process to those employees who are not legally entitled to it can be helpful to an employer facing a potential claim from that employee.

v. Consult with Your City's Trusted Legal Counsel

There are no such things as "slam-dunk" terminations. In this "day and age" of litigation, every termination decision could be subject to a claim or a lawsuit. For that reason, conferring with the city's trusted legal counsel about a proposed termination before issuing a notice of potential (or actual) termination is a wise use of funds and time. Why would your city terminate

[22] For additional information on Loudermill hearings, please see LOC's publication "*Loudermill* FAQ: Public Employee Rights to a Hearing Prior to Termination, June 2017", accessible at: https://www.orcities.org/application/files/1515/6036/1601/FAQLoudermill-PublicEmployeeRightstoHearingPriortoTermination6-30-17.pdf.

someone's employment if that termination wasn't as defensible as it could be? This is why "defensive management" should be a part of your city's day-to-day personnel administration.

CIS members also have access to free employment law advice through the CIS Pre-Loss Program. Under the terms of the General & Auto Liability Coverage Agreement each CIS member has with CIS, the member must consult with and follow the "reasonable advice" of a CIS Pre-Loss Attorney with respect to any suspension or termination. Doing so results in the waiver of a $15,000 deductible on any claim arising out of that suspension or termination. CIS members can reach a CIS Pre-Loss Attorney by calling 503-763-3848 or by emailing PreLoss@cisoregon.org.

vi. Other Termination-Related Matters

a. COBRA

With any termination, the employer (or its health insurance carrier) needs to be sure to notify the employee and/or their qualified beneficiaries of their rights to continued health insurance coverage under COBRA. For more information about COBRA, including sample COBRA forms, visit the U.S. Department of Labor's website here.[23]

b. Timing of Final Paychecks

It is required by Oregon law to pay a departing employee's final paycheck on time. Failure to do so can result in an employer paying the employee "penalty wages" in addition to the employee's final wages and attorney fees if the employee hires an attorney. Under Oregon law, the following "final paycheck" deadlines apply:

- If an employee quits with less than 48 hours' notice, excluding weekends and holidays, the paycheck is due within five days, excluding weekends and holidays, or on the next regular payday, whichever comes first.

- If an employee quits with notice of at least 48 hours, the final check is due on the final day worked, unless the last day falls on a weekend or holiday (in that case, the check is due on the next business day).

- If an employee is discharged, the final paycheck is due not later than the end of the next business day.

- When an employer and employee mutually agree to terminate the relationship, the check is due by the end of the following business day, as in the case of discharge.

[23] https://www.dol.gov/general/topic/health-plans/cobra.

J. Posting Requirements

Numerous Oregon and federal laws require employers to post notices in the workplace in a location where they are accessible to employees (and easily visible). Failure to post such notices is itself can be a violation of the particular law.

BOLI has published an extensive list of the posters employers must use in their workplaces. The posters are also available for downloading: here.[24]

K. Personnel Recordkeeping Obligations

i. Oregon's Public Records Law

Because cities are subject to Oregon's public records laws, questions about the impact of those laws on a city's personnel recordkeeping obligations and practices should be directed to the city's attorney. More information about Oregon's public record (and meeting) laws can be found here.[25]

ii. Secretary of State Record Retention Schedules

The Oregon Secretary of State has published record retention schedules instructing cities as to how long they should keep records, including records relating to employees. Per the Secretary of State's website, the schedules provide "state and local agencies with the lawful authority to destroy or otherwise dispose of commonly occurring public records."

The record retention schedules for cities are found here.[26]

iii. Personnel Records (ORS 652.750)

Oregon law defines "personnel records" to include records that are used to determine an employee's "qualifications for employment, promotion, additional compensation, termination or other disciplinary actions", as well as "time and pay records."

According to BOLI, examples of "personnel records" include:

- Job announcements;
- Applications;
- Resumes;

[24] https://www.oregon.gov/boli/employers/Pages/required-worksite-postings.aspx
[25] https://www.doj.state.or.us/oregon-department-of-justice/public-records/public-records-and-meetings-law/
[26] https://secure.sos.state.or.us/oard/displayDivisionRules.action?selectedDivision=590.

- Records of promotion;
- Pay increase documentation;
- Performance reviews;
- Supervisor notes pertaining to named personnel actions;
- Disciplinary actions; records of verbal and written warnings; and
- Notices of termination.

Oregon law requires employers to provide an employee with the opportunity, upon request, to view or receive a copy of their personnel records within 45 days of receiving an employee's request. Failure to do so could result in penalties or other fines. Personnel records should be kept for a period of no less than three years, although six years is desirable (or longer, if ordered in the secretary of state's record retention schedules).

Employers are strongly advised to protect the confidential nature of an employee's personnel records by limiting access to those individuals with a need to know (such as a supervisor or manager), and by keeping the personnel records in a safe place with limited access (such as a locked filing cabinet).

A Note About Form I-9s: Form I-9s should not be kept in an employee's personnel file. If your city is audited, and the U.S. Citizenship and Immigration Services asks to see your I-9 forms, you will be preserving the confidentiality of your employee's personnel records if you keep the Form I-9s separate from the personnel files.

V. Council Roles and Responsibilities Over Personnel

While most city councilors consider the formulation of city policy to be their primary responsibility, they may also be concerned with the way in which policy is administered. The extent of an individual councilor's involvement in administration depends on the city's size and form of government.

Most cities in Oregon follow the council-manager form of government. Under this form, the city council directs the policy of the city while an appointed city manager or administrator oversees the daily supervision of the city's operations and personnel. The city council typically only oversees the city manager or administrator and seldom retains any significant involvement in the day-to-day supervision of city employees and departments. Larger cities may have numerous fulltime employees and departments. In contrast, some of the smallest cities have no full-time employees and rely on contracted legal and engineering services and volunteer

Further information on the various forms of city government is discussed in **Chapter 3: Municipal Officials**.

and/or part-time help. In these smaller cities, city councilors may be deeply involved in personnel administration.

Regardless the size of the city, communication between a council and city employees must be made with the following understanding:

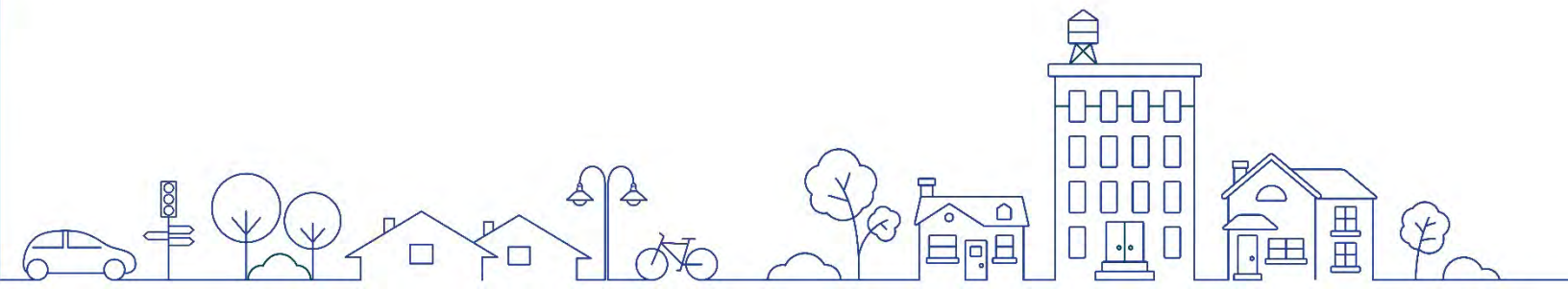
- City employees are responsible to their immediate supervisor and cannot "take orders" from a city councilor; and

- Each councilor has authority in administrative matters only to the extent delegated by the council as a whole. This delegation is often formally contained in an ordinance or charter provision.

Misunderstandings may arise when a councilor intends only to ask for information. The employee receiving the request directly from a councilor can easily jump to the erroneous conclusion or misinterpret the councilor's intent. In turn, a councilor who acts outside of their authority may be at risk for a legal claim brought by the impacted employee. The best way for councilors to get information about administrative matters is to request it through the city manager or administrator, or if appropriate, make the request during a regular council meeting.

Oregon Municipal Handbook

CHAPTER 6:
MUNICIPAL COURTS



League of Oregon Cities

Published by the League of Oregon Cities
January 2021

Chapter 6:
Municipal Courts

This chapter addresses the role that municipal courts play in cities across Oregon. Part I covers the authority that cities have to create municipal courts through their local charter or by ordinance. Part II provides an overview of the jurisdiction that municipal courts possess to hear violations and misdemeanors under state and local law. Part III then turns to the process of hearing these types of cases, with a particular focus on when and where criminal procedure, aspects of which are guaranteed by the Oregon and U.S. Constitutions, might be required in municipal court. Finally, Part IV covers the intricacies of appealing a municipal court decision and, ultimately, how to enforce municipal court judgments against defendants.

Table of Contents

I. CREATING MUNICIPAL COURTS

As with city charters, the authority for cities to create municipal courts exists under the Oregon Constitution.[1] Article VII, Section 1, which states, "Municipal Courts may be created to administer the regulations of incorporated towns, and cities."[2] Unlike city charters, however, municipal courts are authorized under the original Oregon Constitution, ratified in 1857, not the 1906 home rule amendments.[3] Prior to 1906, municipal courts were conferred jurisdiction by special laws of the Oregon Legislature.[4]

Under state law, a municipal court may be created either "by charter *or* by ordinance."[5] For many cities, municipal courts are established by charter.[6] Municipal courts must comply with a number of state and federal requirements that govern the judicial process, but are also subject to local laws.[7] Cities that establish a municipal court must decide whether its judges will be elected or appointed and also how long its judges will serve in office.[8] Some cities go further and prohibit judges from practicing law while serving on the bench, for example.[9] Others develop their own sets of local court procedures, provided these procedures comply with all state and federal requirements.[10]

As an alternative to creating a municipal court, any city may enter into an agreement with a justice court, such as one operated by a county, or another municipal court to provide the city with court services.[11] Cities may also contract with the local county circuit court for these services through the state court administrator.[12] Contracting with these other courts for them to serve as a city's municipal court does not constitute the holding of two public offices for the judge or judges who work in this capacity.[13]

---

[1] Or Const, Art VII, § 1.
[2] *Id.*
[3] *Id.*
[4] *See* Grayson v. State, 249 Or 92, 101 (1968).
[5] ORS 221.336 (emphasis added).
[6] *See, e.g.*, EUGENE, OR., CHARTER Ch. 5, § 17 (2019); *see also* LEAGUE OF OREGON CITIES, MODEL CHARTER FOR OREGON CITIES 7-9 (2018), https://www.orcities.org/ application/files/3015/7228/7626/ModelCharterUpdate03-15-19.pdf (last accessed Sept. 2, 2020).
[7] *See, e.g.*, SALEM, OR., CODE § 4.001 (2020);
[8] *Id.* at § 4.020.
[9] *Id.*
[10] *See, e.g.*, EUGENE, OR., CODE § 2.785 (2020);
[11] ORS 221.355; *see also* ORS 51.037.
[12] ORS 221.357.
[13] *Id.*

For cities with a population of more than 300,000 — Portland being the only such city — the circuit court must serve as the city's municipal court.[14] Significantly, Portland is not prohibited from holding quasi-judicial hearings to investigate violations of Portland laws, nor is it prohibited from enforcing local laws through civil penalties or other relief.[15] However, the city cannot exercise this quasi-judicial authority for "any traffic or parking offense."[16] These latter offenses are reserved for the Multnomah County Circuit Court.[17]

State law does not specify a process for cities to **abolish** their municipal courts.[18] Unfortunately, unless their local charter or ordinances say otherwise, cities are left without much guidance when terminating the operation of their municipal court. That said, state law does provide a process for abolishing justice courts, if a county seeks to do so.[19] The main requirement for counties when abolishing a justice court is to send "the docket and files of that court" to the clerk of the county circuit court.[20] While it does not appear to be statutorily required,[21] the LOC strongly encourages cities to do the same with their court records if any choose to abolish their municipal court. Failing to do so could present due process concerns over pending or past litigation.

II. JURISDICTION

Under the Oregon Constitution, municipal courts possess jurisdiction over local "regulations."[22] At a minimum, this means that municipal courts have jurisdiction to hear cases involving its city's ordinances.[23]

In addition, state law vests municipal courts with jurisdiction over "all violations" and most misdemeanors that are "committed or triable in the city."[24] This means municipal courts also have jurisdiction to hear cases involving violations or misdemeanors *under state law*.[25] One

[14] ORS 3.136.
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *See generally* ORS 221.336 to ORS 221.358.
[19] ORS 51.130.
[20] *Id.*
[21] In the context of hearing state offenses, state courts have held that municipal courts act as justice courts. *See, e.g.*, City of Salem v. Bruner, 299 Or 262, 265 (1985). Arguably, this provides a legal framework to find that municipal courts are also "justice courts" in the context of a city's decision to abolish its municipal court, particularly where that municipal court has tried defendants for state offenses.
[22] Or Const, Art VII, § 1.
[23] *See* ORS 221.339.
[24] *Id.*
[25] *Id.* Arguably, there is a limit on the civil jurisdiction of municipal courts. On multiple occasions, Oregon courts have found that municipal courts operate as "justice courts" under ORS Chapter 51 when adjudicating state offenses.

exception to this is "designated drug-related misdemeanors" under ORS 423.478, which are expressly excluded from the jurisdiction of municipal courts.[26] Municipal courts also are clearly limited to hearing misdemeanor cases; in that sense, municipal courts cannot hear any cases that involve felony charges, nor may cities adopt their own felony criminal ordinances.[27] Felonies are any crimes punishable by more than a year in prison, and the punishment of these crimes is exclusive to state law and state courts.[28]

Municipal courts have what is known as **concurrent jurisdiction** over violations and (most) misdemeanors that happen within their city limits.[29] The circuit court for the county in which the city is located, as well as any justice courts established by the county, have jurisdiction over the same set of violations and misdemeanors.[30]

Cities may decide to limit the jurisdiction of their municipal courts to certain subjects, thereby leaving jurisdiction over those matters to the circuit court or a justice court in their county.[31] There are exceptions, however.[32] If a city establishes a municipal court, that court must retain jurisdiction over two types of laws. First, a city cannot ever restrict the court's jurisdiction over any "misdemeanors created by the city's own charter or by ordinances."[33] Second, a city cannot restrict its court's jurisdiction over state "traffic crimes as defined in ORS 801.545," meaning that all municipal courts that are established must hear traffic crimes if they are filed in the court.[34]

Jurisdiction of Municipal Courts

Municipal courts may hear any of the following types of cases under state or local law, if authorized by the city's charter or by ordinance:

1) All violations committed or triable in the city; and

2) Misdemeanors committed or triable in the city, except for designated drug-related misdemeanors.

Municipal courts must hear the following types of cases:

1) Misdemeanors created by the city's own charter or by ordinance; and

2) Traffic crimes, as defined under ORS 801.545.

See, e.g., City of Brookings v. Harmon, 86 Or App 534, 535 (1987). Under Chapter 51, the civil jurisdiction of justice courts is limited to "the recovery of any penalty or forfeiture … not exceeding $10,000. ORS 51.080(1)(c).

[26] ORS 221.339(3).

[27] *Id.*

[28] *Id.*

[29] ORS 221.339(1)-(2).

[30] *Id.*

[31] ORS 221.339(4).

[32] *Id.*

[33] *Id.*

[34] *Id.*

Local violations and misdemeanors generally are enforced in municipal court, though a city may choose to enter into an agreement with the district attorney to prosecute these offenses in circuit court.[35] State violations and misdemeanors that occur within a city can appear either in circuit court or in municipal court. These offenses can be prosecuted either by the district attorney or a city attorney.[36] Absent a written agreement with a city, the district attorney does not have superior authority over city attorneys to prosecute state violations or misdemeanors that occur within the city.[37] By law, city attorneys have equal authority to prosecute; as such, whether state violations and most state misdemeanors are decided in municipal court or circuit court often comes down to where the citing officer files the matter.[38]

Finally, state law does not prohibit cities from creating private rights of action that allow individuals to sue other individuals in municipal court.[39] On one occasion, the Oregon Court of Appeals upheld a Portland law that created a private right of action for an individual to sue a local business under an anti-discrimination ordinance.[40] In general, most cities have not taken the steps to create private rights of action under state law; therefore, almost all cases that are heard in municipal courts are filed by local prosecutors enforcing state or local offenses.

III. Court Process

Assuming a municipal court has jurisdiction to hear a case, the next step for the court is determining what procedures to follow in adjudicating the case. In many cases, the first potential issue is a motion to transfer the case to circuit court. This is an option for defendants in certain circumstances.[41] If there is no transfer, then municipal courts proceed under the rules for civil or criminal cases under ORS chapter 153 and the Oregon Criminal Code, respectively.[42] Cities may modify these processes under local law, provided these laws do not conflict with state law.[43] Finally, the classification of certain offenses as "violations" does not always absolve municipal courts of the need for criminal procedure when trying the offense.[44] On appeal, courts may look at several factors to determine whether a so-called violation should have been treated as a crime

[35] ORS 221.315.
[36] ORS 221.339(5); *see also* Clatsop County Dist. Attorney v. City of Astoria, 266 Or App 769, 782-83 (2014).
[37] *Id.*
[38] *Id.* at 784.
[39] *See* Sims v Besaw's Cafe, 16 O App 180, 185 (2000).
[40] *Id.* at 183.
[41] *See, e.g.*, City of Brookings v. Harmon, 86 Or App 534, 535 (1987).
[42] *See* ORS 153.030 *et. seq.*; *see also* ORS Chapters 131-138, 142, 146, 147, and 151.
[43] *See, e.g.*, Salem, Or., Code § 4.001 (2020).
[44] *See* Brown v. Multnomah Cty. Dist. Ct., 280 Or 95, 102-108 (1977).

in municipal court, including the nature and enforcement of the offense, the size of the fine, and whether any other punitive measures were taken against the defendant.[45]

A. Transfers to Circuit Court

Under state law, some cases in municipal court may be transferred to state court, meaning that the case will be heard by the circuit court for the county in which the city is located rather than by the city's municipal court.[46] A case in municipal court may be transferred to state court if: **(1)** the defendant is charged with certain offenses under state law and **(2)** the municipal court is not a **court of record.**[47] If a case can be transferred, the municipal court must notify the defendant of this right to transfer at their arraignment.[48]

i. Establishing a Municipal Court of Record

A court of record is a standard set by state law for municipal courts and justice courts.[49] To become a court of record, municipal courts must meet certain requirements.[50] First, the municipal judge or judges must be members of the Oregon State Bar.[51] This is not required for municipal courts that are not courts of record, though many municipal judges meet this requirement anyway.[52] Second, the city must provide a court reporter or some audio recording device for its municipal court.[53] Third, the city's governing body must adopt an ordinance that approves making the municipal court a court of record.[54] Fourth, the city must then file a declaration with the Oregon Supreme Court stating that it meets these requirements.[55] The declaration must also provide the address and the telephone number for the clerk of the municipal court and the date on which the municipal court will "commence operations" as a court of record.[56] The Oregon Supreme Court cannot charge a fee for this declaration.[57] Fifth and finally, upon reviewing this declaration, the Oregon Supreme Court must enter an order that acknowledges the city's municipal court as a court of record.[58]

---

[45] *Id.*
[46] *Harmon*, 86 Or App at 535; *see also* ORS 51.050(2).
[47] *Id.*
[48] *Id.*
[49] ORS 221.342; ORS 51.025.
[50] ORS 221.342.
[51] ORS 221.342(6).
[52] *See, e.g.*, SALEM, OR., CODE § 4.015(b) (2020); *see also* FLORENCE, OR., CODE § 1-5-2-3 (2020).
[53] ORS 221.342(4).
[54] ORS 221.342(1)(a).
[55] ORS 221.342(2).
[56] *Id.*
[57] ORS 221.342(3).
[58] ORS 221.342(1((b).

For the most part, municipal courts in Oregon are not acknowledged courts of record.[59] At present, only six cities have taken the steps needed to establish municipal courts of record, those cities being West Linn, St. Helens, Lake Oswego, Beaverton, Florence and Milwaukie.[60] For these cities and any other cities that choose to declare their municipal court a court of record, there is a process for reversing that declaration in the future.[61] To cease operating a court of record, the city must file a declaration with the Oregon Supreme Court and specify the date this change will take effect.[62]

Establishing a Local Court of Record

1) The municipal judge or judges must be members of the Oregon State Bar;
2) The municipal court must have a court reporter or some form of audio recording device;
3) The city must adopt an ordinance approving the court of record;
4) The city must file a declaration with the Oregon Supreme Court that provides a start date for the court of record; and
5) The Oregon Supreme Court must acknowledge this declaration in an order.

i. Right to Transfer in Certain Cases

The significance of establishing or not establishing a court of record is that it can affect the right of individuals, under state law, to transfer a case out of municipal court.[63] Note that whether a municipal court is a court of record also affects the way in which an individual may appeal the court's decision.[64] This issue is addressed in the section below on municipal court appeals.

Defendants in municipal court who are charged with a **state misdemeanor** have a statutory right to transfer their case into the circuit court for the county in which the municipal court is located.[65] State violations, such as traffic offenses, generally do not grant defendants a right to transfer.[66] Also, as noted above, this right created by ORS

[59] *Oregon Justice/Municipal Court Registry*, Oregon Judicial Department, https://www.courts.oregon.gov/courts/Documents/rpt_JP-Muni_Court_Registry_by_County.pdf (last accessed Nov. 13, 2020).
[60] *Other Courts*, Oregon Judicial Department, https://www.courts.oregon.gov/courts/pages/other-courts.aspx (last accessed Nov. 13, 2020).
[61] ORS 221.343.
[62] *Id.*
[63] ORS 51.050(2).
[64] ORS 221.342(5).
[65] ORS 51.050(2).
[66] *Id.* (noting that the statute only applies to "a defendant charged with a misdemeanor"). However, note that defendants have a right to transfer a civil case to circuit court under ORS 52.320 if they present counterclaims that exceed $10,000 in damages, thereby exceeding the jurisdiction of "justice courts" under ORS Chapter 51. *See* ORS 52.320; *see also* ORS 51.080(1)(c). This could be relevant for municipal courts because Oregon courts have found that municipal courts operate as "justice courts" under ORS Chapter 51 when adjudicating state criminal offenses. *See, e.g.*, City of Brookings v. Harmon, 86 Or App 534, 535 (1987). Arguably then, a municipal court adjudicating a

51.050(2) extends only to instances where the municipal court is not a court of record.[67] If a municipal court is a court of record, state law does not provide a right to a transfer and the case is heard in municipal court.[68] It also is unlikely that a city could create a right to transfer under local law, either for defendants of state violations or whose cases are being heard in a court of record, because by doing so the city would be expanding the jurisdiction of Oregon's circuit courts.[69] Cities do not have the authority to compel a state court to hear cases arising in municipal court; this power lies with the legislature.[70]

Under state law, if a defendant has a right to transfer their case to circuit court, then the municipal court is statutorily required to notify the defendant of this right at the arraignment, with the notice coming "immediately after" a plea of not guilty.[71] For example, a defendant who is charged with the offense of driving under the influence (DUI), a class A misdemeanor under state law, has a right to transfer their case out of a municipal court that is not a court of record.[72] If a city prosecutes this case in municipal court and the defendant enters a plea of not guilty, the municipal court must notify the defendant of their right to transfer the case to circuit court.[73]

By contrast, defendants who are charged in municipal court with a local misdemeanor cannot transfer their case to circuit court under state law.[74] The statute in question, ORS 51.050, only creates this right for individuals charged with state misdemeanors because that is the only capacity in which a municipal court acts as a "justice court."[75] Just as a city cannot create a right to transfer for municipal court cases arising under state law, a city also cannot create a right to transfer for cases of local offenses.[76] Doing so would impermissibly expand the jurisdiction of the circuit court.[77]

---

state *civil* offense is likewise a justice court and thus subject to the jurisdictional limitations under ORS Chapter 51 and the right to transfer for defendants created under ORS Chapter 52.

[67] ORS 51.050(2).

[68] *Id.*

[69] *See* City of Brookings v. Harmon, 86 Or App 534, 535 (1987) (holding that "a city cannot enlarge the jurisdiction of a state court beyond that provided by state law.").

[70] *Id.*

[71] ORS 51.050(2).

[72] ORS 813.010(4).

[73] ORS 51.050(2).

[74] *Id.*; *see also Harmon*, 86 Or App at 535.

[75] ORS 51.05(2); *see also* City of Milton-Freewater v. Ashley, 214 Or App 526, 531 (2007) (holding that "when a municipal court that has not become a court of record prosecutes state misdemeanor offenses … the municipal court is exercising its authority as a justice court.").

[76] *Harmon*, 86 Or App at 535.

[77] *Id.*

B. Criminal Proceedings

Whenever a municipal court hears a misdemeanor case, whether it is under state or local law, the municipal court must follow the process for a criminal case that is established by the Oregon Constitution and Oregon statutes. State law defines a misdemeanor as a "crime" because a misdemeanor carries a possible sentence of up to one year of imprisonment.[78] Under state law, any crime that is punishable with a term of imprisonment is a crime.[79] As such, any defendant who is charged with a misdemeanor in municipal court is entitled to the procedural rights of a criminal defendant.[80]

Many of these rights are provided by Article 1, Sections 11 and 12, of the Oregon Constitution.[81] This section grants every defendant of a criminal prosecution: **(1)** the right to a public trial in the county where the offense is alleged to have been committed; **(2**) the right to appear in court with counsel and know the charges against them; **(3)** the right to meet witnesses face to face; **(4)** the right to subpoena their own witnesses; **(5)** the freedom from self-incrimination; **(6)** and the freedom from being tried for a local or state offense if they already have been acquitted of the charge.[82] This section also grants criminal defendants the right to choose a trial by court, with the judge as the trier of fact, instead of a trial by jury.[83]

In addition to these protections, federal constitutional case law provides another layer of rights in a criminal proceeding in municipal court. The rights of criminal defendants under the U.S. Constitution are incorporated against the states under the 14th Amendment.[84] For cities, one of the most significant rights is the right of indigent defendants to court-appointed counsel.[85] If any defendant cannot afford to hire an attorney to represent them in municipal court on criminal charges, that court must provide the defendant with the option of selecting an attorney appointed to them by the court.[86] The rights of criminal defendants under the federal constitution, as well as the Oregon Constitution, make it all the more important for municipal courts to follow the right procedures when hearing a criminal case.

Beyond these constitutional provisions, the Oregon Criminal Code specifies procedures for how criminal cases are to be heard.[87] ORS Chapter 135, for example, addresses how courts

[78] ORS 161.545.
[79] ORS 161.515
[80] *See, e.g.*, Or Const, Art I, § 11-12.
[81] *Id.*
[82] *Id.*
[83] *Id.*
[84] *See* Argersinger v. Hamlin, 407 U.S. 25, 27 (1972).
[85] *Id.* at 36.
[86] *Id.*
[87] *See, e.g.*, ORS Chapters 135 and 136.

are to proceed with arraignment, pleadings, and pretrial motions.[88] ORS Chapter 136 governs the criminal trial and covers jury selection, the conduct of the trial, and the process of seeking and obtaining witnesses by subpoena.[89]

Finally, cities may establish local laws that pertain to their municipal court hearing criminal cases.[90] While these laws cannot conflict with statutory requirements, they can provide additional requirements.[91] For example, in addition to the eligibility requirements for jurors under state law, the city of Salem requires that any juror in its municipal court must have been a resident of the city for no less than three months preceding their jury summons.[92]

C. Civil Violation Proceedings

Whenever a municipal court hears a case that is not a misdemeanor but rather a violation, the judicial process is different.[93] Civil violations include traffic-related offenses, nuisances, and land use zoning offenses, among others. Unlike misdemeanors, defendants who are charged with violations are not seen as criminal defendants and so the constitutional safeguards mentioned in the preceding section generally do not apply.[94] Instead, municipal courts proceed under a set of civil trial standards that are found under ORS Chapter 153.[95]

Violations must be enforced by a citation that includes information about the alleged violation and a summons that directs the person cited to appear in court.[96] If the person requests a trial, the trial must be conducted in the following way. First, the city must provide the defendant with the date, time, and place where the trial will occur and must do so at least **five days** before the date set for the trial. Second, the trial must be scheduled at least **seven days** from the date of the initial citation.[97] Third, state law prohibits a trial by jury for a violation; all violations, if they go to trial, must be tried by the court sitting without a jury.[98] Fourth, the burden of proof for the prosecutor is a preponderance of the evidence, which means that the court must find it is more likely than not that the defendant is guilty of the alleged violation.[99]

---

[88] *Id.*
[89] *Id.*
[90] *See, e.g.*, SALEM, OR., CODE § 4.001 (2020).
[91] *Id.*
[92] *Id.* at § 4.
[93] ORS 153.030.
[94] *See*, Or Const, Art I, § 11-12 (providing that a defendant's rights apply in "*criminal* prosecutions.") (emphasis added).
[95] *Id.*
[96] ORS 153.045.
[97] ORS 153.073; *see also* ORS 153.076.
[98] ORS 153.076(1).
[99] ORS 153.076(2).

Fifth, state law prohibits a defendant from receiving court-appointed counsel in a case where only violations are charged.[100]

On one hand, violation proceedings are clearly subject to a more lenient standard than criminal cases, as demonstrated by the lower burden of proof, the lack of a trial by jury, and the absence of court-appointed counsel.[101] On the other hand, violation proceedings do encompass some of the rigor of criminal proceedings.[102] For example, the defendant in a violation proceeding still may not be required to testify against themselves in a trial.[103] Moreover, pretrial discovery is governed by the same rules as a criminal case.[104]

As with criminal cases, cities may adopt local procedures that change how municipal courts hear violations, as long as these local laws do not conflict with what is required under state law.[105] One common way for cities to expedite the violations process is by establishing a violations clerk within their court who can assist the municipal court in processing violations.[106] Violation clerks are optional under state law and generally have authority to accept the following from individuals who have been cited for a violation: (1) written appearances; (2) waivers of trial; (3) pleas of no contest; and (4) payment of fines, costs, and assessments.[107]

i. 'Criminal' Civil Violations

Simply characterizing an offense as a "violation" under local law does not make it one. Oregon appellate courts have the authority to find, upon review, that criminal procedure should have been required in municipal court for a violation.[108] For courts, the most obvious factor in this analysis is identifying whether the purported violation carried a potential sentence of imprisonment.[109] If a violation is punishable by imprisonment, it falls within the statutory definition of a "crime" under state law and triggers the need for criminal process.[110] With that aside, a court will also consider other factors when deciding whether criminal process should have been required.[111] These other factors are discussed in detail here.

---

[100] ORS 153.076(5).
[101] ORS 153.076.
[102] *Id.*
[103] ORS 153.076(4).
[104] ORS 153.076(3).
[105] *See, e.g.*, SALEM, OR., CODE § 4.070 (2020).
[106] ORS 153.800.
[107] *Id.*
[108] *See* Brown v. Multnomah Cty. Dist. Ct., 280 Or 95, 102-108 (1977).
[109] *Id.*
[110] ORS 161.515.
[111] *Brown*, 280 Or at 102-108.

Oregon courts rely on five factors when deciding whether an "ostensibly civil penalty proceeding" is a criminal proceeding for the purposes of the U.S. and Oregon Constitutions.[112] These factors originated in *Brown v. Multnomah County District Court* (1977). In *Brown*, a defendant accused of drunk driving was charged with a non-criminal "traffic infraction" that was subject only to "civil penalties," namely a fine.[113] The defendant petitioned for an order that would appoint him counsel and require a trial by jury with proof beyond a reasonable doubt.[114] The district court refused to grant this order and the lawsuit ensued.[115] The *Brown* court rejected the court's argument that criminal process was unnecessary because imprisonment was not at stake; instead, the court held that "the absence of potential imprisonment does not conclusively prove a punishment non-criminal."[116] For such a conclusion, the court established five key factors: (1) type of offense; (2) penalty; (3) collateral consequences; (4) punitive significance; and (5) arrest and detention.[117] Outlined below, these factors apply to municipal offenses in the following ways.

Five Factors of a Criminal Proceeding

1) The type of offense;
2) Whether the defendant was arrested or detained beyond the time needed to identify and cite the individual;
3) The severity of the penalty;
4) The punitive significance of the penalty; and
5) Collateral consequences of the penalty.

a. Nature of the Offense

A local offense that is a crime under state law, or otherwise resembles a crime, likely will require criminal process, regardless of whether it is classified as a misdemeanor or a violation. The *Brown* court identified this as a factor because it realized non-criminal offenses could be "procedural short-cuts" to punishing criminal conduct.[118] Therefore, the court reasoned that a criminal proceeding might be warranted for offenses that exist as crimes at common law or are criminalized under the Oregon Criminal Code.[119]

Since *Brown*, Oregon courts have applied considerable weight to this factor, especially where the offense is defined as a crime under state law.[120] In *State v. Benoit* (2013), for instance,

[112] *See* Brown v. Multnomah Cty. Dist. Ct., 280 Or 95, 102-108 (1977).
[113] *Id.* at 97.
[114] *Id.*
[115] *Id.*
[116] *Id.* at 103.
[117] *Id.* at 102-108.
[118] *Id.*
[119] *Id.*
[120] *See* State v. Benoit, 354 Or 302, 312-13 (2013).

the Oregon Supreme Court found that the type of offense was among "the most significant factors" as applied to those particular facts.[121] That case involved a charge of criminal trespass stemming from an "Occupy" protest.[122] Following the defendant's arrest, the state chose under ORS 161.566[123] to prosecute the charge as a violation instead of a misdemeanor.[124] The court found this move unconstitutional; citing *Brown*, the court held that because the conduct was expressly criminal under state law, it remained "a criminal offense for constitutional purposes."[125]

Many offenses under local law duplicate existing crimes under Oregon law.[126] Other offenses have always been considered criminal and were crimes at common law well before the enactment of the Oregon Criminal Code.[127] For these types of offenses, cities should always prosecute them as crimes, i.e., misdemeanors, not as violations.

b. Arrest and Detention

Enforcement of a municipal offense, coupled with an arrest and search of the defendant, also will trigger criminal process requirements. In *Brown*, the court reasoned that any use of detention "beyond the needs of identifying, citing and protecting the individual or 'grounding' him … comports with criminal rather than civil procedures."[128] The court found this to be true especially where bail is required.[129] As applied to the facts, the court found it persuasive that "traffic offenses" under state law at the time retained pretrial practices, such as the arrest, search, and booking of a person, indicating that the traffic hearings provided for under the law were in truth criminal proceedings.[130]

ORS Chapter 153 prohibits the arrest and search of individuals who are only cited for violations. For violations, officers may detain individuals only briefly to "establish the identity of the person," "conduct any investigation reasonably related to the violation," and "issue a citation."[131] If local police were to arrest, search, and book an individual for a violation, these actions would by definition be more affiliated with a criminal proceeding than the one outlined

---

[121] *Id.*
[122] *Id.* at 304.
[123] Theoretically, a city might use this provision when enforcing statutory misdemeanors. *See* ORS 221.339 (2017). This is a bad idea based on the Court's ruling in *Benoit* and its companion case, State v. Fuller, 354 Or 295, 300 (2013). These cases appear to preclude its use, at least for misdemeanors that are based in common law.
[124] *Benoit*, 354 Or at 304.
[125] *Id.* at 308.
[126] *See, e.g.*, SALEM, OR., CODE § 95.040 (2020) (prohibiting assault).
[127] *See, e.g.*, PORTLAND, OR., CODE § 14A.40.050 (2020) (prohibiting unlawful prostitution).
[128] *See* Brown v. Multnomah Cty. Dist. Ct., 280 Or 95, 108 (1977).
[129] *Id.*
[130] *Id.*
[131] *See* ORS 153.039.

under ORS Chapter 153. It also is worth noting that such an arrest clearly would violate state law and likely would violate due process provisions in the U.S. and Oregon Constitutions.[132]

c. Non-imprisonment Penalties and Punitive Significance

Where a penalty does not carry a sentence of imprisonment, the nature of the penalty in a civil proceeding often is not a decisive factor in determining whether the proceeding is truly a criminal proceeding. In *Brown*, the court noted that determining whether a particular judgment carries a stigmatizing effect is a test that "has been criticized for its difficulty."[133] Decisions of later courts similarly have avoided deciding what proceedings are criminal proceedings based on the amount of the monetary penalty.[134]

In the forty years since *Brown*, the Oregon Legislature enacted laws that restrict the ability of cities to impose certain penalties, particularly fines and civil forfeitures. Where statutes do not prohibit a type of penalty, the possibility remains that a non-imprisonment penalty could transform a proceeding into a criminal proceeding if it is "so strikingly severe as to carry the same punitive significance" as a crime.[135] In *Brown*, the court applied this analysis to a traffic violation and found that the "$1,000 fine for driving under the influence [to] be at the margin of legislative discretion."[136] The court went on to find that the "magnitude of the potential fine" and other sanctions indicated that the traffic violation proceeding constituted a criminal proceeding.[137] Obviously, a $1,000 penalty in 1977 dollars is much more than $1,000 in today's dollars.

The following penalties are common alternatives to imprisonment for defendants found guilty of municipal offenses, including fines, forfeitures, and other penalties.

1. Fines.

State law today places a ceiling on the size of fines that cities can establish for municipal offenses.[138] Municipal penalties that stay within the maximum fines established for violations under state law will avoid triggering a criminal proceeding under *Brown* or violating state law.

---

[132] Citizens are protected against unreasonable searches and seizures. *See generally* U.S. CONST. amend. IV. An arrest of an individual for a mere violation, a practice not authorized by state law, seems to qualify as unreasonable.
[133] *Brown*, 280 Or at 106.
[134] *See* State v. Benoit, 354 Or 302, 312-13 (2013); *see also* State v. Fuller, 354 Or 295, 300 (2013).
[135] *Brown*, 280 Or at 104-105.
[136] *Id.*
[137] *Id.*
[138] ORS 153.018.

The maximum fine for a class A violation in Oregon is $2,000 for an individual and $4,000 for a corporation.[139] Cities may impose any fine for an ordinance that is within these limits.

2. Civil Forfeitures

State law also limits the ability of municipalities to use civil forfeiture proceedings as a penalty for municipal violations.[140] Under ORS Chapter 131A, a city may forfeit real or personal property in connection with a municipal offense, but only where that offense "constitutes the commission of a crime" under state law and only where the person or an accomplice "has been convicted of a crime."[141] The conviction element is required under the Oregon Constitution as a result of a ballot measure titled the Oregon Property Protection Act of 2000.[142] A common example of a civil forfeiture is the seizure of money that was gained as part of an illicit transaction. Whenever a municipal offense constitutes a crime and the defendant has been convicted of the crime, the city may proceed with a civil forfeiture proceeding without any need to provide the person court-appointed counsel.[143] Using the same factor analysis under *Brown*, the court found in *Selness* that a forfeiture proceeding is not a criminal proceeding for purposes of double jeopardy under the Fifth Amendment and the Oregon Constitution.[144] From this case, it is apparent that Oregon courts do not view civil forfeiture proceedings as tantamount to criminal proceedings under *Brown*.

3. Suspension or Revocation of a License

Unlike forfeitures, proceedings to suspend or revoke a local license are not subject to constitutional restrictions. Where a city is free to impose this as a penalty, the proceeding to enforce it likely will not trigger one's rights to a criminal proceeding. The court consistently has held that revocation of a person's license — either directly or indirectly as a result of a judgment — does not carry the same punitive significance as an excessive fine or jail sentence.[145] The *Brown* court reached this finding in a case that involved a person's driver's license.[146] The same conclusion has been reached for a professional license; the court held in *In re Conduct of Harris* that revocation of an attorney's bar license did not amount to a criminal proceeding.[147] Based on

---

[139] *See* ORS 153.018. By comparison, the maximum fine for a misdemeanor is $6,250. *See* ORS 161.635. Lower classes of violations carry even lower fines. For class B violations, the maximum fine is $1,000. ORS 153.018. Class C and D violations carry fines of $500 and $250, respectively. *Id.*
[140] ORS 131A.010.
[141] *See* ORS 131A.010, 131A.255.
[142] Or Const Art. 15, § 10.
[143] *See* State v. Selness, 334 Or 515, 536 (2002).
[144] *Id.*
[145] *See* Brown v. Multnomah Cty. Dist. Ct., 280 Or 95, 105 (1977); *see also* In re Conduct of Harris, 334 Or 353, 358 (2002).
[146] *Brown*, 280 Or 95 at 105.
[147] *Harris*, 334 Or at 358. The Court found the attorney did not possess a right to counsel as a result. *Id.*

these cases, it seems likely that a penalty impacting a locally issued license would not amount to a criminal proceeding either. It should be noted, of course, that an individual is entitled to due process prior to the suspension or revocation of their license. A licensed individual possesses a property interest in their license and the privileges associated with the license. As such, a license is property in the same way that money is property, and a civil license penalty entitles a person to due process in the same way that a monetary fine would.

4. Community Service

Finally, enforcement of an ordinance with a penalty of community service might constitute a criminal proceeding in extreme cases under the *Brown* factors. This outcome would on the amount and type of community service authorized by the local ordinance. Essentially, a court could at some point find that a particular sentence of community service resembles a criminal penalty because it "carries stigmatizing or condemnatory significance," just as the nominally civil traffic offense did in *Brown.*[148]

While courts have yet to address the punitive significance of community service, at least one court has found that service on a "work crew" is a stigmatizing penalty.[149] In *Langford*, a defendant who refused to serve on a work crew was found not to be in contempt of a court order requiring 10 days of community service.[150] In *Langford*, the state argued that the contempt conviction did not carry any "stigmatizing collateral consequence" because the defendant's conduct was only punishable by hours on a work crew, not by a sentence of imprisonment. The Court of Appeals rejected this argument, finding in part that "assignment to a work crew arguably carries with it a social stigma even greater than confinement because work crew is served in view of the general public."[151] Based on this reasoning, it is at least possible that a future court could conclude that an order of community service is similar to a work crew order in that it requires a defendant to carry out the sentence requirements in public. Conversely, it is possible a court could find that community service is less stigmatizing than work crew, particularly where the individual is able to perform the work on their own and through an entity of their choice, rather than at an assigned location where only sentenced individuals work.

5. Collateral Consequences

Collateral consequences are the indirect and adverse results of a judgment on a person. In *Brown*, the collateral consequence at issue was the revocation of a driver's license.[152] While the

[148] *Brown*, 280 Or 95 at 105-106.
[149] *See* State v. Langford, 260 Or App 61, 66-68 (2013).
[150] *Id.* at 63.
[151] *Id.* at 66-68.
[152] *Brown*, 280 Or 95 at 105.

court found this was an indirect result of the traffic offense proceeding, the court also found that no punitive significance attached to this revocation.[153] Subsequent courts have refused, or simply not had the opportunity, to use this factor when analyzing cases.[154] For these reasons, no more information can be provided about this factor, other than to say that it appears to be much less significant than the factors mentioned above.

IV. Appeals and Judgments

Once a case is decided, a municipal court judgment may be challenged in an appeal. If a judgment is appealed, the process depends (1) on whether the municipal court that entered the judgment is a court of record and (2) on whether the case involved a state offense or a local offense.[155] If the municipal judgment is not appealed or the judgment ultimately is affirmed, then the city has several options to enforce the judgment, including judgment liens and a number of judgment proceedings under ORS Chapters 221 and 18.[156]

A. Appeals

Under Oregon law, municipal court decisions are appealable either to the circuit court for the county in which the city is located or to the Oregon Court of Appeals, depending on whether the municipal court is a court of record.[157] If the municipal court is a court of record, any appeal proceeds directly to the Oregon Court of Appeals and the municipal judgment is treated essentially as if it were entered by a circuit court.[158] Significantly, the standard of review in the court of appeals is the standard for a criminal judgement, regardless of whether the defendant was charged with a misdemeanor or a violation.[159]

On the other hand, if the municipal court is <u>not</u> a court of record, then a defendant who is convicted in that court of violating a local law or a state violation may appeal the case to the circuit court for the county in which the city is located.[160] Such an appeal must be made exactly according to rules laid out by statute for such appeals.[161] For example, when making the appeal,

---

[153] This issue — specifically the "indirect" revocation of a license as a result of a judgement — is addressed above.
[154] See State v. Benoit, 354 Or 302, 312-13 (2013); see also State v. Fuller, 354 Or 295, 300 (2013).
[155] ORS 221.342(5); *see also* ORS 138.035.
[156] *See, e.g.*, ORS 221.351.
[157] ORS 138.035; ORS 221.359.
[158] ORS 221.342; *see also* ORS 138.035.
[159] ORS 138.057(1)(a).
[160] ORS 221.359; *see also* ORS 53.010 and ORS 157.020. While the later two chapters address appeals from justice courts, Oregon courts have held that municipal courts that are not courts of record act as "justice courts" when enforcing state violations and misdemeanors, and state law as such provides the defendants with a statutory right to appeal. *See* City of Milton Freewater v. Ashley, 214 Or App 526, 532-533 (2007).
[161] ORS 138.057(1)(b); *see also* ORS 53.030.

the defendant must file with the municipal court the *original* notice of appeal that was served on the adverse party.[162] Oregon courts have held that failure to file this original document deprives the circuit court of jurisdiction to hear the matter.[163] In addition to the requirements under ORS Chapter 138, the defendant must also comply with requirements under ORS Chapter 221, a chapter that applies generally to cities.[164] Unlike courts of record, when a municipal court case is appealed to the circuit court in this manner, the circuit court conducts the trial *de novo*.[165]

Once this second trial is conducted and a judgment is reached by the circuit court, a further appeal to the Oregon Court of Appeals is often allowed, but it is not guaranteed for all defendants who are convicted under local law.[166] For state violations and misdemeanors, defendants have a statutory right to appeal to an appellate court under ORS Chapters 53 and 157, respectively.[167] Similarly, for local violations and misdemeanors, defendants have a statutory right to an appeal under ORS Chapter 221, provided the municipal court is a court of record.[168] However, if the municipal court is not a court of record, the question becomes much less clear if a defendant can appeal their case to the Oregon Court of Appeals from the circuit court.

For instance, if the defendant raised a constitutional claim during trial by arguing that the local charter provision or ordinance violates the Oregon Constitution, then the defendant has a clear right to appeal their case to the state's appellate courts.[169] But several Oregon courts have held that these are the only circumstances that a defendant can appeal their case from a municipal court that is not a court of record.[170] That said, recent case law casts doubt on these decisions.[171] In *City of Eugene v. Hejazi*, the Oregon Court of Appeals stated in a footnote that other statutes appear to vest appellate courts with jurisdiction over municipal court cases based in local law, regardless of whether that municipal court is a court of record.[172] Therefore, while the right to an appeal is not a guarantee for defendants who are convicted of a local offense in a municipal court that is not a court of record, it appears there could be a strong case for such a right going forward.

---

[162] *Id.*
[163] *Ashley*, 214 Or App at 532-533.
[164] *See* ORS 221.359(1)-(3).
[165] *See* ORS 221.390(1); *see also* City of Salem v. Bruner, 299 Or 262, 264 (1985). A *de novo* trial is one that retries the case from the lower court. A circuit court hearing a municipal court case *de novo* will conduct its own trial on the alleged conduct and reach its own verdict.
[166] *See, e.g.,* City of Lowell v. Wilson, 197 Or App 291, 299 (2005).
[167] ORS 53.010; ORS 157.010.
[168] ORS 221.342(5).
[169] ORS 221.360.
[170] *See Wilson*, 197 Or App at 299; *see also Bruner*, 299 Or at 264.
[171] *See* City of Eugene v. Hejazi, 296 Or App 204, 207 n.2 (2019).
[172] *Id.*

B. Enforcing Judgments

Once a municipal court enters its judgment and any and all appeals have been resolved, the question often becomes how to enforce the court's judgment. For this, cities have two main avenues. First, a city may file a judgment lien against real property that is owned by the defendant or defendants.[173] Second, a city can file an enforcement proceeding against the defendant to collect the judgment through garnishment or a writ of execution to seize a defendant's personal property.[174] Note that these laws do not apply to parking violations.[175]

As a prerequisite to enforcing any judgment, the municipal court first must register with the Oregon Department of Revenue (DOR). [176] The court does this by contacting the DOR and providing the agency with the name and address of a person who is authorized to act on behalf of the municipal court.[177] Once registered, municipal courts must then maintain an electronic court docket that tracks daily activity in the court.[178]

As a registered municipal court, judgments are eligible to be enforced. First, judgment liens are able to be filed against defendants.[179] To create a lien, a judgment must exceed $3,000, or else there must be two or more judgments against the same defendant that exceed $3,000.[180] To file the lien, the judgment or judgments must be filed with the county clerk in the county in which the defendant's real property is located.[181] In general, once a lien is filed on real property, it can be collected when the real property is sold or foreclosed.

Alternatively, a municipal court that is registered with the DOR can proceed with enforcement proceedings against a defendant.[182] Depending on the circumstances, these might include writs of execution for real or personal property or proceedings to garnish the defendant's wages.[183] For more information on these options, cities should consult with their legal counsel.

[173] ORS 221.351.
[174] ORS 221.346.
[175] ORS 221.344(6).
[176] ORS 221.344.
[177] *Id.*
[178] ORS 221.252.
[179] ORS 221.351.
[180] ORS 221.351(1).
[181] ORS 221.351(2).
[182] ORS 221.346.
[183] *Id.*

CHAPTER 7: MUNICIPAL BOARD COMMISSIONS AND COMMITTEES

League of Oregon Cities

Published by the League of Oregon Cities
January 2023

Table of Contents

Chapter 7: Municipal Board Commissions and Committees

Municipal board commissions and committees (hereinafter referred to as "board commissions") play an important role in city governance by assisting the governing bodies in addressing specific issues in detail, lending professional expertise, facilitating community decision-making and serving as a conduit between citizens, city staff and the governing body. Effective use of board commissions will result in a highly engaged community and facilitate the governing board's decision making.

Certain board commissions, such as a planning commission and a budget committee, are authorized or required by law.[1] However, most operating governing board commissions form and operate at the discretion of the governing board. This chapter will discuss the basic considerations of formation and the essential elements of board commissions.[2] This chapter will also give practice tips for the effective use of board commissions.[3]

Although the focus of this chapter will be on board commissions, much of the same guidance can be applied to internal committees formed to advise city staff.[4] Internal committees are established by city staff for implementation of governing body policy, and the formation of such committees do not require the approval of the governing body. Some common examples of internal committees include an Americans with Disabilities Act committee, a code enforcement task force, and a policy review committees.

Please note that this chapter is meant to provide LOC members with an overview of effective formation and use of board commissions. Specific city charters and ordinances may provide additional restrictions or procedures not discussed below. LOC members with specific questions are encouraged to contact their city attorney.

I. FORMATION

Understanding the reason for the formation of board commissions is essential for ensuring compliance with the law. There are two reasons for establishing a board commission: (1) the commission is authorized or required by law, or (2) the governing body exercises its

[1] *See, e.g.*, ORS 294.414, ORS 227.020
[2] *Id.*
[3] *Id.*
[4] *Id.*

discretion to form a commission. Note that some city charters require a regularly convened charter review committee to recommend amendments to the city charter.[5]

A. Authorized or Required by Law

i. Budget committees

For purposes of approving a budget, state law requires that the governing body of each city "establish a budget committee." [6] The "budget committee shall consist of the members of the governing body" and an equal number of members of the public.[7] The purpose of the budget committee is to receive the budget message and the budget document and to ask questions and make comment on the budget document.[8] The budget committee "approves" the budget, and it is sent to the governing body for final approval.[9]

Although the membership and duties of the budget committee are required by law, the governing body has discretion in all other things not specified by law. For example, the governing body may determine that at least one budget committee member should have financial experience or work for another governmental entity.

ii. Planning commissions

Planning commissions are authorized by statute.[10] Although it is discretionary for the governing body to form a planning commission, once authorized, state law places restrictions on the membership.[11] The law limits the planning commission to two voting members engaged "principally in the buying, selling or developing of real estate" and no more than two members "shall be engaged in the same kind of occupation, business, trade or profession."[12]

Similar to budget committees where state law is silent, governing bodies have discretion to determine their own internal procedures and scope of review for planning commissions. State law expressly gives discretion to the governing body to determine the duties of an authorized planning commission.[13] Such duties may include recommending actions to the council related to traffic, industrial lands, housing, sanitation or conducting land use hearings.[14] However, the

[5] *See e.g.,* Portland City Charter, Chapter 13 Charter Revision and Interpretation, Section 13-301.
[6] ORS 294.414.
[7] *Id.*
[8] ORS 294.426.
[9] ORS 294.428; ORS 294.456.
[10] ORS 227.020.
[11] ORS 227.030(4).
[12] *Id*.
[13] ORS 227.090.
[14] *Id.*

scope of the planning commission's duties and review is established by its comprehensive land use plan and implementing ordinances and once established, the governing body would need to follow the proper statutory procedure to amend these documents. Governing bodies should consult with their city attorney before action is taken to amend a planning commission's responsibilities.

iii. Other Examples

State law requires a commission on the issue of consolidation of cities if a petition is deemed legally sufficient by the affected cities.[15] Similarly, state law requires a charter commission on the issue of consolidation of a city and county if the issue is properly initiated either by a governing body or electors.[16]

B. Established by Governing Body

The most common type of board commission is where the governing body exercises its discretion to form a commission. A governing body may establish a commission by intergovernmental agreement, ordinance or resolution.

Commissions formed by intergovernmental agreement are often for the purpose of overseeing the functions delegated by one or more public entities to a separate entity. More information about working with such commissions is contained in Chapter 11, Working with Other Governments.[17]

A governing body is most likely to create a commission through a resolution or an ordinance. The decision on whether to use a resolution or ordinance will be determined by the governing body. An ordinance is a local law, prescribing general, uniform, and permanent law. In contrast, resolutions are less permanent enactments than ordinances and often deal with matters of a special or temporary character. For those commissions of a more long-standing nature, the governing body will enact an ordinance, and for those commissions that deal with a short-term goal or purpose, the governing body will pass a resolution.

[15] ORS 222.240.
[16] ORS 199.725. *See generally* ORS chapter 199.
[17] *See generally* LEAGUE OF OREGON CITIES, OREGON MUNICIPAL HANDBOOK (2022), CHAPTER 11, WORKING WITH OTHER GOVERNMENTS.

II. ELEMENTS OF BOARD COMMISSIONS

Most governing bodies find that for efficiency and productive citizen engagement, it is necessary to state certain things in the ordinance or resolution, also known as the enacting documents. Specifically, the enacting documents should state the purpose, the membership, and the procedure for accomplishing the purpose.

Other than those commissions authorized or required by law as discussed above, i.e., planning commissions and budget committees, there are no known cases or statutes requiring any specific element or function of a commission. Even for commissions required or authorized by statute, many of the best practices discussed below can be incorporated into the city's practices.

A. Defining Purpose

The most important element to a successful commission is to define the purpose of the commission. The governing body should define the purpose through the enacting documents. Clear statements of purpose from the governing body at the outset will help to define goals and purpose and prevent scope creep. Scope creep is the uncontrolled, unmanageable, and often inevitable widening of a commission's scope. Specific, measurable outcomes reported back to the governing body is another way to clearly state a commission's purpose.

Depending on the purpose, commissions can be established to be perpetual advisors or to provide specific feedback for a short duration. Some commissions are used to support a specific city function such as parks, airport, library, police citizen oversight, historic commission, or urban renewal area. Other commissions have a specific, identifiable goal such as ensuring diversity and equity, increasing access to childcare, promoting tourism or reviewing a city charter. Lastly, commissions can be used to serve as a communication conduit between the governing board and certain categories of citizens such as youth or senior citizens.

The governing body should consider whether the commission's purpose is to make decisions or whether to advise the governing body. Lastly, the governing body should consider whether to provide some sort of financial support to achieve the commission's objectives.

B. Membership

The second necessary element in the enacting documents is to define who will compose the members of the commission. Recruiting and engaging the *right* members is critical in accomplishing the purpose of the commission.

Specifically, the enacting documents should provide the following information:

- *Number of members*. Try to select an odd number of members such as three, five or seven members so there is less likely to be a tie vote. A commission with too many or too few members may find it difficult to accomplish its purpose.
- *Composition of membership*. Depending on the commission purpose, the governing body may benefit from professional expertise. For example, it is common to recruit or specify that at least one member of the budget committee has financial experience. Or, in the case of an architectural review commission, the governing board may specify that one or more should be architects, landscape architects or other design professionals.
- *Term*. How long do you expect that the members will hold their position? Two years is a common appointment term. Do you wish to have term limits?
- *Appointing authority*. Who will appoint the members? Some city charters state that the mayor will appoint certain commission members and the rest will be appointed by the governing body.
- *Other requirements.* Is there a requirement in the ordinance or charter that requires that commission members be residents of the city? Are there any other restrictions in the law or city ordinance that places any requirements on the members such as serving on only one commission?
- *Governing body liaison.* In some cases, the governing body chooses to select one of its own members to participate in a board commission. Depending on the relationships developed with the commission, such participation may further link the communication between the two bodies.

Although not official members of the commission, staff members often provide the link between the commission members and the governing body. The city manager may choose to assign a staff liaison to each commission to provide support coordination and guidance. For example, staff can ensure that the required meetings occur and assist the commission chair prepare the monthly meeting agendas.

C. Procedures for Conducting Meetings

The third element to a successful commission is to establish the procedures for the commission. The governing body's enacting documents or a commission charter (as discussed below in Practice Tips) may address the following issues:

- *Quorum*. Unless stated otherwise, a majority of the commission members must be present to constitute a quorum.
- *Chair duties*. The chair is usually elected annually by the commission members. The duties include setting the agenda, conducting the meetings, and act as the

spokesperson for the commission. The chair is also responsible to encourage the input of ideas, set a positive tone and facilitate the decision-making process.

- *Parliamentary procedure*. Commissions generally adopt a modified Robert's Rules of Order. It is not necessary to recite all the parliamentary rules such as "point of order." Rather, it is sufficient to state that the commission will generally follow Modified Robert's Rules of Order.
- *Vacancy.* The procedures may establish how a vacancy is declared. In addition to a voluntary resignation, vacancies can be established by procedure if a member has too many unexcused absences or no longer meets the membership qualifications.

Some of the basic commission meeting procedures may be contained in the governing body's enacting documents. As discussed below, more detailed meeting procedures may be contained in a commission charter that is the product of the appointing commission and approved by the governing body.

III. Laws that Impact Board Commissions

Several laws that impact cities also impact board commissions. The laws discussed below are Oregon Public Meetings Law, Oregon Public Records Law, and Oregon Government Ethics Law.

A. Public Meetings

A commission that has the authority to make recommendations to a public body on policy or administration is a "governing body" under the Oregon Public Meetings Law (OPML).[18] As such, any public meeting of the board commission requires proper notice of the meeting and that the meeting is accessible to people with physical and communication disabilities.[19] OPML requires that the public meetings must also be recorded, or written minutes are taken.[20]

As a practical matter, staff members will coordinate with volunteer commissions to ensure that OPML requirements are met. For example, staff often coordinates with the commission chair to ensure that an agenda is drafted, adequate notice is provided to the public, the meeting is available to the public in person and virtually, and the meeting is either recorded or minutes are taken.

[18] ORS 192.610(3).
[19] *See generally* League of Oregon Cities, Oregon Municipal Handbook (2020), Chapter 9, Public Meetings Law.
[20] ORS 192.650(1).

Since a commission is likely a "governing body" under the OPML, it is possible for commission members to convene a public meeting through "serial communications" on a topic.[21] As discussed below in Practice Tips, the LOC recommends training commission members on public meetings.

B. Public Records

Oregon Public Records Law applies to any documents containing "information relating to the conduct of the public's business * * * regardless of physical form or characteristics."[22] Public records include: (1) emails, (2) text messages, and (3) social media posts.[23]

Public records are not limited to those prepared by the city or public body.[24] Rather, those records can include information sent or posted by individual commission members if the record contains information relating to the public's business.[25]

As a practical matter, staff will store, retain and dispose of all public records prepared by the city in accordance with state law. Staff will also respond to all public records requests. It is important for public bodies to train staff and commission members to avoid the unintentional creation of public records.

C. Government Ethics

Oregon Government Ethics Law applies to "public officials." A volunteer such as a commission member is a "public official" if the person is appointed by a governing body.[26] Commission members who are concerned about the applicability of the rules discussed below are encouraged to discuss their concerns with the city attorney or the Oregon Government Ethics Commission. This discussion is intended to give a brief overview. For more detailed information, please see the League of Oregon Cities Oregon Municipal Handbook, Chapter 8: Ethics.

Public officials are prohibited from using or attempting to use their "official position or office to obtain financial gain or avoidance of financial detriment" if the benefit would not otherwise be available but for the public official's holding of the official position."[27]

A public official must declare any conflicts of interest when participating in official actions such as a discussion, deliberation or decisions that would or could result in a financial benefit to the official or the official's family.[28] Potential conflicts of interest are those that *could*

[21] See Handy v. Lane County, 274 Or App 644, 664-65 (2015), *reversed on other grounds*, 360 Or 605 (2016).
[22] ORS 192.311(5)(a). *See generally* LEAGUE OF OREGON CITIES, OREGON MUNICIPAL HANDBOOK (2020), CHAPTER 14, PUBLIC RECORDS (2021).
[23] *Id.*
[24] *Id.*
[25] *See* ODOJ, ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL (2022).
[26] *See generally* LEAGUE OF OREGON CITIES, OREGON MUNICIPAL HANDBOOK (2020), CHAPTER 8, ETHICS.
[27] ORS 244.040(1).
[28] ORS 244.120.

result in a financial impact to the official or the official's family.[29] Potential conflicts must be declared but the official can participate in the official action.[30] Actual conflicts of interest are those that *would* result in a financial impact to the official or the official's family.[31] Actual conflicts must be declared and the official *cannot* participate in the official action.[32] A public official may be exempt from announcing the nature of the conflict of interest for specific circumstances.[33]

Except as allowed by law, a public official or relative may not solicit any gift exceeding $50 from a single source having a legislative or administrative interest in a decision of the public official.[34]

A public official is prohibited from using their position to create the opportunity for additional personal income.[35]

Planning commission members must file a Statement of Economic Interest with the Oregon Government Ethics Commission by April 15 of each year.[36]

IV. Practice Tips

A. Commission Charter

Although a commission's purpose is often stated in the enacting documents, the statement is short and lacks detail. Over time, with changes in commission membership or the governing body, this original purpose is often forgotten. Defining this purpose will keep the commission focused on the nature of the commission and prevent "scope creep." Scope creep is the uncontrolled, unmanageable and often inevitable widening of a commission's scope. The main reason for scope creep is the lack of clearly defined goals or purpose.

To combat scope creep, many cities require a commission to create a commission charter. The commission charter would be created (or amended) by the commission and approved by the governing body. The charter would state many of the considerations such as purpose, membership and procedures. The advantage of a commission charter is to provide more detail

[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] *See generally* League of Oregon Cities, Oregon Municipal Handbook (2020), Chapter 8, Ethics.
[34] ORS 244.025.
[35] ORS 244.040.
[36] ORS 244.050.

than a resolution or ordinance. Further, a commission charter may be more easily amended than a resolution or ordinance to fit the particular needs of the commission or governing body.

B. Annual Workplan

One practice tip is for each commission to prepare and submit an annual work plan to the governing body. The governing body reviews the work plan and provides feedback annually to the commission. The work plan can include the results of the prior year's plan and if applicable, metrics of community involvement and participation in meetings.

The governing body can refer additional items to the commission for inclusion in the annual work plan. This annual review creates a communication conduit between the governing body and the commission and ensures that the commission continues to follow the governing body's purpose.

C. Commission Handbook

A commission handbook is a reference guide that applies to board commissions. It provides an overview of the basic laws and procedures during a member's term and clarifies the roles and responsibilities of the commission in relation to the governing body, staff and the public. Some items to consider include:

- Member-signed acknowledgement of receipt of the handbook. Can include acknowledgement of rules of conduct, responsibility to follow public meetings, public records and ethics laws.
- General information about the city, the type of government and the commissions.
- Restrictions on appointments to commissions such as term limits or city residence requirements.
- Statements of the commission's goals, purposes and responsibilities.
- Roles and responsibilities of each commission members such as preparation, collaboration, and respect for each other. State expectations for conduct during public meetings.
- Define any mandatory training such as parliamentary procedure or ethics.
- Elaborate the role of staff liaisons. Define acceptable conduct with staff.
- The commission charter and any adopted procedures.

Many Oregon cities have created their own board commission handbooks such as the cities of Florence, Hillsboro, and Oregon City.[37] [38] [39]

D. Regular Trainings.

Another practice tip is to provide regular trainings to all new committee members about topics such as parliamentary procedure, public meetings and public records. These trainings can be done virtually or taped for future use.

The LOC has trainings available online at: https://www.orcities.org/education/training/on-demand-trainings

E. Public Recruitment

Ensuring that the commission represents a diverse and inclusive pool of candidates facilitates the community decision-making process and better serves as a conduit between citizens, city staff and the governing body. Fully engaged city volunteers are often future fully engaged elected officials.

Regularly advertising commission vacancies is one method of ensuring that the governing body has a diverse pool. Other recruitment methods, such as building relationships with community organizations, can be used to build a stronger pool of interested and qualified commission members.

Candidates for the open commission positions can be invited to interview with the governing body in a public meeting. This allows the governing body to have an open and transparent discussion about the goals and purpose of the commission and sets the stage for a productive relationship.

F. Staff Liaison Handbook

Creating a fully trained staff to support the needs of the governing body and commission is crucial to success. Staff liaisons will provide direction, guidance and clerical, organizational and administrative support. Creating a handbook outlining the staff expectations, will ensure

[37] *See Committee and Commission Manual*, CITY OF FLORENCE, https://www.ci.florence.or.us/sites/default/files/fileattachments/commissions_and_committees/page/10801/committee_commission_manual.pdf (last accessed Nov. 30, 2022).
[38] *See Advisory Groups, Member and Staff Handbook*, CITY OF HILLSBORO, https://www.hillsboro-oregon.gov/home/showdocument?id=25660&t=637225437277930000 (last accessed Nov. 30, 2022).
[39] *See Boards and Commissions Orientation Manual*, OREGON CITY, Boards and Commissions Orientation Manual | City of Oregon City (orcity.org) (last accessed Nov. 30, 2022).

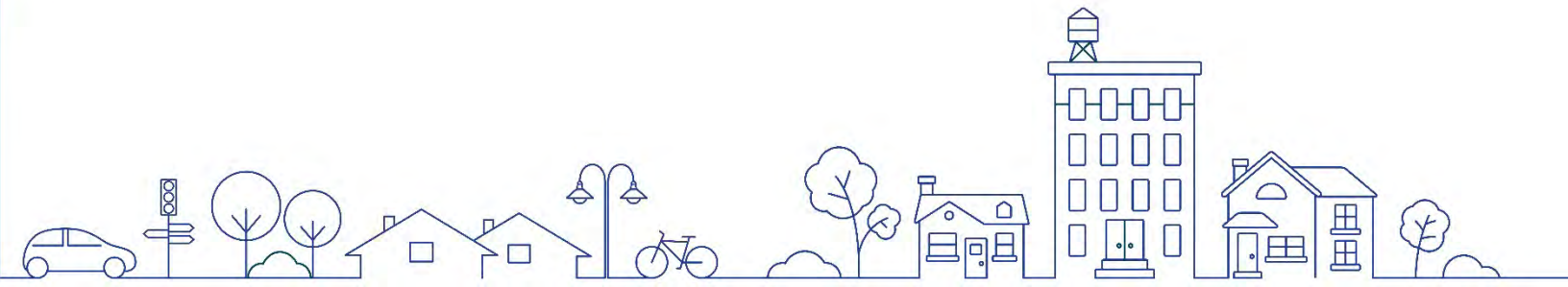
that staff is fully able to support board commissions. In addition to the topics discussed above for the commission handbook, some items to consider including in a handbook:

- Ensuring that the required commission meetings occur.
- Preparing meeting agendas in coordination with the commission chair.
- Properly noticing the public meetings. Recording or taking written minutes of the public meetings. Coordinating the in-person and virtual meetings.
- Researching and investigates the issues for the commission. Prepare alternatives and recommendations for the commission.
- Implements governing body decisions as they relate to the commission.
- Facilitating the communication of the commission interests, concerns, and recommendations to city staff.
- Support the creation of the commission charter and/or annual workplan.

In short, an effective and strong commission requires the coordination of staff, the commission and governing bodies.

Oregon Municipal Handbook

CHAPTER 8:
ETHICS



League of Oregon Cities

Published by the League of Oregon Cities
September 2020

Table of Contents

Chapter 8: Ethics

This chapter of the handbook will provide an overview of Oregon government ethics law. This chapter is not intended to be a substitute for legal advice. LOC members with additional questions about ethics are encouraged to contact their city attorney or the Oregon Government Ethics Commission.

Introduction

"Ethics refers to standards of behavior that tells us how human beings ought to act in the many situations in which they find themselves as friends, parents, children, citizens, businesspeople, teachers, professionals, and so on."[1]

In the public context, sometimes it is easy to discern when an action is unethical:

- A city employee accepts a bribe;
- A city councilor votes to award a contract to a company in which she has a large financial investment; or
- An elected official accepts an all-expenses paid golfing trip to Hawaii from a city contractor.

Other times, whether an action is ethical is more difficult to determine:

- A city councilor votes to appoint a campaign supporter to a city commission over another candidate when both individuals are equally qualified; or
- A city recorder solicits charitable contributions from city contractors for a city-run summer camp for underprivileged youth.

Public officials are subject to ethical standards set by law. A public official is defined under Oregon law to include, "any person * * * serving the State of Oregon or any of its political subdivisions or any other public body, as an elected official, appointed official, employee or agent, irrespective of whether the person is compensated for the service."[2] The law regarding public officials' ethics and conflicts of interest is provided by various federal and state constitutional and common law provisions, state statutes and, occasionally, local charters or ordinances.

[1] Markkula Center for Applied Ethics: *A Framework for Ethical Decision Making*.
[2] ORS 244.020(15).

The Oregon Government Ethics Commission

The Oregon Government Ethics Commission is a nine-member citizen commission charged with the jurisdiction over Oregon government ethics laws,[3] lobby regulation laws,[4] and the executive session provisions of the Oregon Public Meetings Law.[5,6]

Review and Investigations

The commission may investigate complaints of unethical behavior under its jurisdiction from any person or initiate an investigation on its own. The public official against whom the action may be taken is notified of the complaint, the identity of the complainant, and information received by the commission. The commission has 30 days to review the complaint, deliberate and vote on a finding of cause or to dismiss. If the commission votes to dismiss the complaint, the matter is concluded.

If a finding of cause is made, the commission has 180 days to investigate the complaint. At the end of the investigation, the commission will either dismiss the complaint or make a preliminary finding that an ethical violation had occurred. Upon a preliminary finding that an ethical violation had occurred, the public official may request a contested case hearing.

Resolution

Preliminary findings are either resolved by a settlement, in which a Stipulated Final Order is issued, or by the contested case process under the Oregon Administrative Procedures Act. The Commission may issue sanctions ranging from a letter of reprimand to civil penalties and forfeitures. Any monetary sanctions paid are deposited into the state's general fund.

Advice

In addition to enforcement of ethics laws, the commission provides training in the form of presentations, handouts and online resources, and advice in the form of informal and formal opinions. The commission staff are available to answer inquiries via telephone, email or letter. Formal advice may be issued as a Staff Advisory Opinion or a Commission Advisory Opinion. A public official's reliance upon a Staff Advisory Opinion may be considered by the commission when determining whether the public official committed an ethical violation.[7] A public official's good faith reliance upon a Commission Advisory Opinion prohibits the commission from

[3] ORS chapter 244.
[4] ORS 171.725 - 171.785.
[5] ORS 192.660, 192.685.
[6] For additional information on executive sessions, please see the League's *Guide to Executive Sessions* (April 2019), *available at* https://www.orcities.org/application/files/7415/6772/9151/GuidetoExecutiveSessions-03-27-19.pdf.
[7] ORS 244.282.

imposing a penalty on that official unless it is determined that the person who requested the advice omitted or misstated material facts in the opinion request.[8] However, reliance upon a Commission Advisory Opinion does not prohibit the commission from finding a violation. Copies of recent advisory opinions are available at: https://apps.oregon.gov/ogec/cms/advice.

Oregon Government Ethics Law: A Guide for Public Officials
Available at https://www.oregon.gov/ogec/Pages/Guide-for-Public-Officials.aspx

By law, the commission is required to prepare and publish a manual on government ethics that explains the provisions of the Oregon government ethics laws. The commission is prohibited from imposing a penalty for any good faith action a public official or candidate takes in reliance on the manual, or any update of the manual that is approved by the commission.

Oregon Government Ethics Law - ORS Chapter 244

ORS Chapter 244 applies only to public officials, their relatives or members of their households. The rules contained in ORS Chapter 244 are focused on preventing an Oregon public official from receiving a financial benefit based on their public position. A public official is any person who serves the state of Oregon or any of its political subdivisions, including cities, or any other public body as defined in ORS 174.109 as an elected official, appointed official, employee or agent.

A volunteer may also be considered a "public official" if the any of the following apply:

- The person is elected or appointed to a governing body of a public body;
- The person is appointed or selected for a position with a governing body, or a government agency with responsibilities that include deciding or voting on matters that could have a pecuniary impact on the governing body, agency or other persons; or
- The volunteer position includes all of the following:
    - Responsibility for specific duties;
    - The duties are performed at a scheduled time and designated place;
    - The volunteer is provided with the use of the public agency's resources and equipment; and
    - The duties performed would have a pecuniary impact on any person, business or organization served by the public body.

[8] ORS 244.280.

Use of Office Prohibition – ORS 244.040

Financial Gain or Avoidance: Public officials are prohibited from using or attempting to use their "official position or office to obtain financial gain or avoidance of financial detriment for [themselves] or a relative or member of [their] household * * *, if financial gain or avoidance of financial detriment would not otherwise be available but for the public official's holding of the official position or office."[9] This means that a public official may not use their official position to reap a financial benefit for themselves, their family, or household members. Examples of prohibited use include:

- The mayor of a city signs a contract obligating the city to pay for janitorial services provided by a business owned by a relative of the mayor.
- A city billing clerk alters water use records so that the amount billed to the clerk's parents will be less than the actual amount due.
- A volunteer firefighter borrows the fire department's power washer to prepare the exterior of the volunteer's personal residence for painting.
- Receiving an item for personal use at a discount not otherwise available when adding on to a bulk purchase made through the public official's public office.[10]

Who is a Relative?

ORS 244.020(16) defines a "relative" as:

- A public official's:
  - Spouse
  - Child, son or daughter-in-law
  - Parent, including stepparent
  - Sibling, including stepsibling
- Same members of the public official's spouse's family
- Anyone for whom the public official has a legal support obligation
- Anyone receiving benefits of the public official's public employment

Anyone from whom the public official receives a benefit of employment

There are exceptions to the prohibition of using one's official position or office for financial gain. These include:

- Any part of a public official's official compensation package;
- Honoraria when related to the public official's office or position with a maximum value of $50;[11,12]

[9] ORS 244.040(1).
[10] *Davidson v. Oregon Government Ethics Com'n*, 300 Or 415 (1985) (Vice president and actuary of the State Accident Insurance Fund, improperly used his public office when he purchased a car for his personal use as an "add-on" to SAIF's purchase of fleet cars, saving himself almost $1,300).
[11] ORS 244.042.
[12] "'Honorarium' means a payment or something of economic value given to a public official in exchange for services upon which custom or propriety prevents the setting of a price. Services include, but are not limited to, speeches or other services rendered in connection with an event." ORS 244.020(8).

- Reimbursement of approved expenses;[13]
- Unsolicited awards for professional achievement;
- Gifts with an aggregate value of less than $50 in a calendar year from a source with a legislative or administrative interest;
- Gifts from a source that could not reasonably be known to have a legislative or administrative interest;
- Any item excluded from the definition of gift under ORS 244.020; or
- Contributions to a legal expense trust fund.[14]

Promise of Future Employment: "A public official may not solicit or receive, either directly or indirectly, and a person may not offer or give to any public official any pledge or promise of future employment, based on any understanding that the vote, official action or judgement of the public official would be influenced by the pledge or promise."[15]

Use of Confidential Information Gained Through Public Office: A public official may not attempt to further his or her personal gain using confidential information gained through the course of, or by reason of holding, his or her public position.[16] This remains in effect even after the person ceases to be a public official.[17]

Representation Before a Governing Body for Fee: A person may not attempt to represent or represent a client for a fee before the governing body of the public body of which the person is a member.[18]

A prohibited use of office violation may also be a conflict of interest violation and vice versa.

Conflicts of Interest – ORS 244.120

A public official is met with a conflict of interest when participating in official actions – such as a discussion, deliberation or decision – which would or could result in a financial benefit or avoidance of a financial detriment – such as receiving a "break" on the cost of an item – to the public official, a relative of the public official or a business with which either are associated. An actual conflict of interest exists when the action taken by a public official *would* affect the financial interest of the official, the official's relative or a business with which the official or a

[13] OAR 199-005-0035(4).
[14] ORS 244.040(2).
[15] ORS 244.040(3).
[16] ORS 244.040(4).
[17] ORS 244.040(5).
[18] ORS 244.040(6).

relative is associated.[19, 20] A potential conflict exists when the action taken by the public official *could* have a financial impact on that official, a relative of that official or a business with which the official or the relative is associated.[21]

If a potential conflict of interests exists, a public official must announce or disclose the nature of the conflict. A public official does not need to announce the exact amount of the financial benefit they stand to gain. Instead, the public official must explain the specific nature of the conflict. The way disclosure is made depends upon the position held by the public official:

- Public Employees: Public officials who are appointed, employed or volunteer must provide a written notice to the person who appointed or employed them. The notice must describe the nature of the conflict of interest with which they are met and request that the appointing authority or employer dispose of the matter.[22] The supervisor or appointing authority must respond by:
    - Assigning someone else to the task, or
    - Instruct the employee on how to proceed with the matter.[23]
- Elected Officials or Appointed Members of Boards and Commissions: An elected public official, other than a member of the Oregon Legislative Assembly, or an appointed public official serving on a board or commission must publicly announce the nature of the conflict of interest before participating in any official action on the issue giving rise to the conflict of interest.[24] The notice must be recorded in the official records of the public body.[25]

An announcement regarding a conflict of interest needs to be made at each meeting or on each occasion the issue causing the conflict of interest is discussed or debated. For example, an

[19] ORS 244.020(1).
[20] A "business with which the person is associated" is defined under ORS 244.020(3) as:
- A private business or closely held corporation if a person or the person's relative:
    - Is a director, officer, owner, employee, or agent; or
    - Owned $1,000+ in stock, equity interest, stock options, or debt interest during the preceding calendar year;
- A publicly held corporation if a person or the person's relative;
    - Is an officer or director; or
    - Owned $100,000+ in stock, equity interest, stock options, or debt interest during the preceding calendar year; and
- Any business listed by the public official as required as a source of income on a statement of economic interest.

[21] ORS 244.020(13).
[22] ORS 244.120(1)(c).
[23] *Id.*
[24] ORS 244.120(2)(a) and ORS 244.120(2)(b).
[25] ORS 244.130.

elected member of the city council would have to publicly announce a conflict one time during a meeting of the city council. If the matter giving rise to the conflict of interest is raised at another meeting, the disclosure must be made again. An employee must provide a separate written notice on each occasion they participate in an official action on a matter that gives rise to a conflict of interest. For example, a city planner would have to provide separate written notice on each occasion they receive an application or otherwise participates in official action on a matter that gives rise to a conflict of interest.

A public official may be exempt from making a public announcement or giving a written notice describing the nature of a conflict of interest if any of the following circumstances apply:

- If the conflict of interest arises from a membership or interest held in a particular business, industry, occupation, or other class that was a prerequisite for holding the public position.[26]

- If the official action would financially impact the public official, relative, or business of the public official to the same degree as other members of an identifiable group or "class."[27] Only the Oregon Government Ethics Commission may designate a class. A public official should discuss a class exemption with legal counsel prior to acting upon it. A public official may subject themselves to personal financial liability if they are incorrect about a class designation.

- If the conflict of interest arises from a position or membership in a nonprofit corporation that is tax-exempt under section 501(c) of the Internal Revenue Code.[28]

Following the announcement of a potential conflict of interest, the public official may participate in official action on the issue that gave rise to the conflict of interest.

If an actual conflict of interest exists, the public official must announce or disclose the conflict in the same manner discussed above. In addition to announcement, the public official must refrain from any further participation in, discussion, or voting on the issue that gave right to the conflict of interest.[29] The LOC also recommends that the public official step down or away from their seat during the discussion to avoid any appearance of impropriety.

Though rare, if a public official is met with an actual conflict of interest and the public official's vote is necessary to meet the minimum number of votes required for official action, the public official may vote. This is known as the "Rule of Necessity." The public official must still announce the conflict and refrain from any discussion, but may participate in the vote required for official action by the governing body.[30] This provision does not apply in situations where there are insufficient votes because of a member's absence. Rather, it applies where a quorum is

[26] ORS 244.020(13)(a).
[27] ORS 244.020(13)(b).
[28] ORS 244.020(13)(c).
[29] ORS 244.120(2)(b)(A).
[30] ORS 244.120(2)(b)(B).

lacking solely because members must refrain from voting due to actual conflicts of interest. Members with actual conflicts may vote only when it is impossible for the governing body to take official action, even if all members are present. Public officials who wish to vote under the Rule of Necessity should discuss this issue with their legal counsel prior to taking any action.

Gifts – ORS 244.025

A gift is something of economic value given to a public official, a relative, or member of the public official's household for which the recipient either makes no payment or makes payment at a discounted price. Unlike the prohibited use of office provisions, the gift provisions focus on benefits derived from outside sources. The opportunity for the gift is one that is not available to members of the general public under the same terms and conditions as those offered to the public official.[31] Gifts include discounts. If the public official receives an item and pays for it at a discounted price, the item may qualify as a gift.

Generally, a public official, relative or household member of the public official may not solicit or receive any gift with a value exceeding $50 from any *single source* reasonably known to have a *legislative or administrative interest.*[32] The "source" of the gift is the person or entity making ultimate payment of the expense.[33] The recipient public official has the burden of knowing the source's identity. A "legislative or administrative interest" is an economic interest, distinct from that of the general public, in any matter subject to the decision or vote of the public official acting in the public official's capacity as a public official.[34] The rationale for this limitation is that the giver may be giving the item to the public official to curry favor.

The law provides several exemptions from the definition of gift and from the $50 gift limitation. These exemptions operate to allow public officials to accept these types of gifts, even if they exceed the $50 gift limit:

- Gifts from relatives or household members;[35]
- Reasonable expenses paid by certain entities if:
    - The entity is a government entity, a Native American tribe, a membership organization to which the governing body pays dues, or a 501(c)(3) non-profit organization; and
    - The public official is participating in a convention, fact-finding mission/trip, or meeting where he or she is scheduled to speak, participate in a panel discussion or

[31] ORS 244.020(7)(a).
[32] ORS 244.025 (emphasis added).
[33] OAR 199-005-0030(2).
[34] ORS 244.020(10).
[35] ORS 244.020(7)(b)(B).

represent his or her governmental unit;[36]

- Reasonable food, travel or lodging expenses for the public official, a relative, household member or staff while the public official is representing his or her governmental unit on:
    - An officially sanctioned fact-finding mission or trade-promotion; or
    - In officially designated negotiations, or economic development activities, approved in advanced;[37]
- Admission, food and beverages for the public official, a relative, household member, or staff while accompanying the public official at a reception, meal or meeting held by an organization where the public official represents his or her governmental body;[38]

When is something considered officially sanctioned or designated?

When there is written approval by a local public body or by a person authorized by the public body to provide that approval. As related to cities, written notice from a supervisor or the city council is sufficient to constitute an officially sanctioned or designated activity. The chief administrator of a city may officially sanction or designate events for themselves. OAR 199-005-0020(3)(b).

- Food, beverage and entertainment that is incidental to the main purpose of the event;[39]
- Food or beverage consumed by a public official acting in an official capacity in association with a financial transaction or business agreement with another government agency, another public body or a private entity, including review, approval or execution of documents or closing a borrowing or investment transaction;[40]
- An unsolicited token or award of appreciation in the form of a plaque, trophy, desk or wall item or similar with a resale value of under $25;[41]
- Anything of economic value offered, solicited or received as part of the usual and customary practice of the recipient's private business or the recipient's employment or position as a volunteer with a private business, corporation, or other legal entity operated for economic value. The item must bear no relation to official business and must be historical or established long-standing traditions or practices resulting in economic

[36] ORS 244.020(7)(b)(F).
[37] ORS 244.020(7)(B)(H).
[38] ORS 244.020(7)(b)(E).
[39] ORS 244.020(7)(b)(L) & (M); OAR 199-005-0001(3).
[40] ORS 244.020(7)(b)(I)(i).
[41] ORS 244.020(7)(b)(C).

benefits for those that are not in public office;[42]

- Informational material related to the performance of official duties;[43]
- Waiver or discount of registration expenses or materials provided at a continuing education event that a public official or candidate may attend to satisfy a professional licensing requirement;[44]
- Legal defense trust fund contributions;[45] and
- Campaign contributions.[46]

When a public official is offered a gift, he or she should ask themselves the following questions when deciding whether to accept or decline:

- Is it a "gift" within the definition under ORS 244.020(7)?
- Do any exceptions apply?
- Is it subject to the gift limitation (i.e. is the giver reasonably known to have a distinct economic interest in my decision-making)?
- Is it within the $50 limit?

Nepotism – ORS 244.177 and 244.179

Nepotism is the term used to describe the practice of favoring relatives without regard to merit. A public official may not appoint, employ or promote a relative or household member to, or discharge, fire or demote a household member from a position with the public body that the public official serves or over which the public official exercises control, unless the public official follows the rules regarding conflicts of interest.

After the public official applies the rules regarding conflicts of interest disclosure, the public official remains prohibited from participating in any personnel action taken by their public agency that would impact the employment of a relative or member of the public official's household. The public official may not participate in any interview, discussion or debate

[42] ORS 244.020(7)(b)(O); OAR 199-005-0027.
[43] ORS 244.020(7)(b)(D).
[44] ORS 244.020(7)(b)(J).
[45] ORS 244.020(7)(b)(G).
[46] ORS 244.020(7)(b)(A).

regarding the employment of a relative or household member or directly supervise a relative of household member.

Public officials may, however, provide a reference, recommendation or conduct a ministerial act that is otherwise part of their regular job function. Additionally, public officials may participate in personnel actions involving a relative or household member who is an unpaid volunteer and may supervise a relative or household member if the public body adopts policies permitting a public official acting in an official capacity to directly supervise a person who is a relative or household member.

Outside Employment - ORS 244.040

The Oregon ethics laws do not prohibit a public official from holding private employment while also serving in his or her public capacity. Public officials are, however, prohibited from using their public position to create the opportunity for additional personal income. The public official must maintain clear boundaries between their public and private matters. Boundaries may be maintained by refraining from:

- Using governmental time or resources for private employment;
- Taking official action that could have a financial impact on the official's private enterprise;
- Using confidential information obtained through the official's public position for private use;
- Representing a client for a fee before the public official's public body; and
- Using the official position to create the opportunity for private income.

Subsequent Employment – ORS 244.040 and 244.045

The Oregon ethics law provides restrictions on the subsequent employment of certain public officials. The majority of these restrictions relate to former state officials. As related to local government positions, the following restrictions apply:

- Public Contracts: A public official who authorized or had a significant role in a contract or was a member of a governing body while acting in an official capacity may not have a direct, beneficial financial interest in the public contract for two years after leaving the official position.[47] Authorization means that the public official performed a significant role in the selection of a contractor or the execution of the contract.[48] This can include

[47] ORS 244.047.
[48] OAR 199-005-0035(6).

recommending approval of a contract, serving on a selection committee, or having the final authorizing authority or signing a contract.

- Investments: For two years after serving in public capacity, a former public official is restricted from:

    - Being a lobbyist or appearing before the agency, board or commission for which public funds were invested;

    - Influencing or trying to influence the agency, board or commission for which public funds were invested; and

    - Disclosing confidential information gained through employment.

Annual Verified Statement of Economic Interest - ORS 244.050

In cities, all elected officials, the city manager or principal administrator, municipal judges and planning commission members must file a Statement of Economic Interest (SEI) with the Oregon Government Ethics Commission by April 15 of each year. Candidates for any of the above positions must also file an SEI form.

In January of each year the commission prepares a list by jurisdiction of each public official required to file an SEI form. The list is sent to the contact person for each jurisdiction. The city recorder usually serves as the city's contact person, but every city is different. The contact person is required to review the list for accuracy and return the list with any corrections to the commission by February 15.[49] The commission notifies each public official required to file a SEI form directly by email. Public officials are required to complete the online SEI form by April 15 of every year. Late filing fees are $10 for each of the first 14 days after April 15 and $50 for each day after until the maximum penalty of $5,000 is reached.[50]

The SEI requires public officials and candidates to disclose information about:

- Businesses in which the public official or a member of the public official's household was an officer or director;

- Businesses in which the public official or member of the public official's household did business;

- Sources of income for the public official and members of the public official's household that represent 10% or more of the annual household income;

[49] OAR 199-020-0005(2).
[50] ORS 244.350(4)(c).

- Ownership interests held by the public official or members of the public official's household in real property except for the principal residence, located within the boundaries of the governmental agency in which the filer holds the position;

- Honoraria that exceeded $15 in value given to the elected official or members of the public official's household;

- The name of each lobbyist associated with any businesses the public official or a member of the public official's household is associated;

- Names of any entities from which the public official received more than $50 to participate in a convention, fact-finding mission, trip, negotiations, economic development activities or other meeting; and

- The following information if the information requested related to an entity that had been or could reasonably be expected to do business with the public official's governmental agency or had a legislative or administrative interest in the public official's governmental agency:

    - Name, address and description of each source of income that exceeded $1,000 for the public official or a member of the public official's household;

    - Name of each person the public official or a member of the public official had owed $1,000 or more excluding debts on retail contracts or debts with regulated financial institutions;

    - Business name, address and nature of beneficial interest greater than $1,000, or investment held by the public official or a member of the public official's household in stocks or securities greater than $1,000. Mutual funds, blind trusts, deposits in financial institutions, credit union share and the cash value of life insurance policies are excluded; and

    - The name of each person from whom the elected official received a fee of more than $1,000 for services, unless disclosure is prohibited by a professional code of ethics.

Executive Sessions – ORS 192.660

An executive session is a meeting of public officials that is held in private. Executive sessions are only permitted for the specific circumstances provided under ORS 192.660. As related to cities, executive sessions may only be held to:

- Consider the employment of a public officer, employee, staff member or individual agent.[51]

- Consider the dismissal or disciplining of, or to hear complaints or charges brought against, a public officer, employee, staff member or individual agent who does not request an open hearing.

- Conduct deliberations with persons designated by the governing body to carry on labor negotiations.

- Conduct deliberations with persons designated by the governing body to negotiate real property transactions.

- Consider information or records that are exempt by law from public inspection.

- Consider preliminary negotiations involving matters of trade or commerce in which the governing body is in competition with governing bodies in other states or nations.

- Consult with counsel concerning the legal rights and duties of a public body with regard to current litigation or litigation likely to be filed.

- Review and evaluate the employment-related performance of the chief executive officer of any public body, a public officer, employee or staff member who does not request an open hearing.

- Carry on negotiations for the administration of public funds with private persons or businesses regarding proposed acquisition, exchange or liquidation of public investments.

- Consider matters relating to school safety or a plan that responds to safety threats made toward a school.

- Discuss information about review or approval of programs relating to the security of any of the following:

[51] The ability to hold an executive session to consider the employment of a public officer, employee, staff member or agent does not apply to: the filling of a vacancy in an elective office, position on any public committee, commission or advisory group; or the consideration of general employment policies. In addition, an executive session to consider the employment of the head administrator, or other public officers, employees or staff of a city is allowed only if the city has advertised the vacancy and adopted regular hiring procedures. In the case of an officer, the city must allow the public the opportunity to comment on the employment of the officer. In the case of the head administrator, the city must have adopted hiring standards, criteria and policy directives in open meeting and the public must have had the opportunity to comment on the standards, criteria and policy directives. ORS 192.660(7).

- A nuclear-powered thermal power plant or nuclear installation.
- Transportation of radioactive material derived from or destined for a nuclear-fueled thermal power plant or nuclear installation.
- Generation, storage or conveyance of electricity; gas in liquified or gaseous form; hazardous substances as defined in ORS 453.005(7)(a), (b) and (d); petroleum products; sewage; or water.
- Telecommunication systems, including cellular, wireless or radio systems.
- Data transmissions by whatever means provided.

- Labor negotiations where negotiators for both sides request that negotiations be conducted in executive session.

The executive session statutes are each narrowly tailored to address limited circumstances. If the subject of a proposed meeting does not fit within one of these circumstances, the executive session is prohibited and the meeting must be held in open session. Complaints alleging a violation of the executive session laws by a public official may be made to the Oregon Government Ethics Commission for review, investigation and possible imposition of civil penalties up to $1,000.[52] We advise that members consult with their attorney if they have questions regarding executive sessions.

Other Sources of Government Ethics

In addition to the laws under the jurisdiction of the Oregon Government Ethics Commission, public officials are subject to additional constitutional, criminal and statutory provisions that prohibit or redress unethical behavior. Violation of these provisions may lead to financial and criminal penalties.

Constitutional Provisions

The Due Process Clause of the 14th Amendment to the United States Constitution provides:

- The right to an unbiased and impartial decision maker; and
- The right to a fair process.

Article II of the Oregon Constitution prohibits:

[52] ORS 192.685, 244.350(2).

- Holding concurrent incompatible offices;[53] and

- Accepting bribes while in office.[54]

Criminal Provisions

The criminal law prohibitions below provide criminal penalties for acts which may also constitute ethical violations under Oregon law. Public officials who engage in these activities may not only be subject to penalties for ethics law violations, but may also be subject to criminal liability.

Bribe Receiving (Class B Felony) – ORS 162.025

A public servant[55] commits the crime of bribe receiving if the public servant:

- Solicits any pecuniary benefit with the intent that the vote, opinion, judgment, action, decision or exercise of discretion as a public servant will thereby be influenced; or

- Accepts or agrees to accept any pecuniary benefit upon an agreement or understanding that the vote, opinion, judgment, action, decision or exercise of discretion as a public servant will thereby be influenced.

Tampering with Public Records (Class A Misdemeanor) – ORS 162.305

A person commits the crime of tampering with public records if, without lawful authority, the person knowingly destroys, mutilates, conceals, removes, makes a false entry in or falsely alters any public record, including records relating to the Oregon State Lottery.[56]

Official Misconduct in the Second Degree (Class C Misdemeanor) – ORS 162.405

A public servant commits the crime of official misconduct in the second degree if the person knowingly violates any statute relating to the office of the person.

---

[53] Or Const, Art II, § 10.
[54] Or Const, Art II, § 7.
[55] "Public servant" means:
(a) A public official as defined in ORS 244.020;
(b) A person serving as an advisor, consultant or assistant at the request or direction of the state, any political subdivision thereof or of any governmental instrumentality within the state;
(c) A person nominated, elected or appointed to become a public servant, although not yet occupying the position; and
(d) Jurors[.]
ORS 162.005(2).
[56] Tampering with records relating to the Oregon State Lottery is a Class C felony. ORS 162.305(1)(b).

Official Misconduct in the First Degree (Class A Misdemeanor) – ORS 162.415

A public servant commits the crime of official misconduct in the first degree if:

- With intent to obtain a benefit or to harm another:
    - The public servant knowingly fails to perform a duty imposed upon the public servant by law or one clearly inherent in the nature of office; or
    - The public servant knowingly performs an act constituting an unauthorized exercise in official duties; or
- The public servant, while acting as a supervisory employee, violates ORS 162.405 and is aware of and consciously disregards the fact that the violation creates a risk of:
    - Physical injury to a vulnerable person;
    - The commission of a sex crime as defined in ORS 163A.005 against a vulnerable person; or
    - The withholding from a vulnerable person of necessary and adequate food, physical care or medical attention.

Misuse of Confidential Information (Class B Misdemeanor) – ORS 162.425

A public servant commits the crime of misuse of confidential information if in contemplation of official action by the public servant or by a governmental unit with which the public servant is associated, or in reliance on information to which the public servant has access in an official capacity and which has not been made public, the public servant acquires or aids another in acquiring a pecuniary interest in any property, transaction or enterprise which may be affected by such information or official action.

Unlawful Legislative Lobbying (Class B Misdemeanor) – ORS 162.465

A person commits the crime of unlawful legislative lobbying if, having an interest in the passage or defeat of a measure being considered by either house of the Legislature of this state, as either an agent or principal, the person knowingly attempts to influence a member of the assembly in relation to the measure without first disclosing completely to the member the true interest of the person therein, or that of the principal of the person and the person's own agency therein.

Coercion (Class C Felony) – ORS 163.275(h)

A person commits the crime of coercion when the person compels or induces another person to engage in conduct from which the other person has a legal right to abstain, or to abstain from engaging in conduct in which the other person has a legal right to engage, by means of instilling in the other person a fear that, if the other person refrains from the conduct compelled or induced or engages in conduct contrary to the compulsion or inducement, the actor or another will:

- Unlawfully use or abuse the person's position as a public servant by performing some act within or related to official duties, or by failing or refusing to perform an official duty, in such manner as to affect some person adversely.

Theft by Extortion (Class B Felony) – ORS 164.075(h)

A person commits the crime of extortion when the person compels or induces another person to either deliver property or services to the person or to a third person, or refrain from reporting unlawful conduct to a law enforcement agency, by instilling in the other person a fear that, if the property or services are not so delivered or if the unlawful conduct is reported, the actor or a third person will in the future:

- Unlawfully use or abuse the position as a public servant by performing some act within or related to official duties, or by failing or refusing to perform an official duty, in such manner as to affect some person adversely.

Other Oregon Statutory Provisions

While they do not specifically implicate criminal liability, other Oregon statutes provide for penalties for unethical acts. These non-criminal statutes may impose personal liability upon a public official meaning that he or she will be personally responsible for paying any civil penalties out of their own pocket.

Solicitation of Public Employees and Activities During Working Hours – ORS 260.432

While on the job during working hours, public employees are prohibited from: soliciting any money, influence, service or other thing of value or otherwise promoting or opposing (1) any political committee; (2) the nomination or election of a candidate; (3) the gathering of signatures on an initiative, referendum or recall petition; (4) the adoption of a measure; or (5) the recall of a public office holder. For the purposes of this law, an elected official is not considered a "public employee;" however under no circumstances should a public employee or elected official use public funds or resources to promote or oppose any of the above activities.

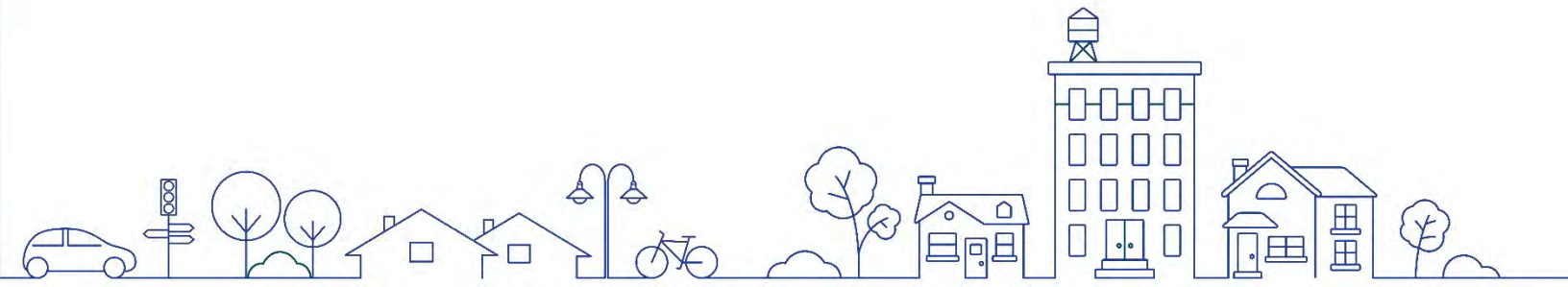
Misuse of Public Funds – ORS 294.001

It is unlawful for "any public official" to spend public funds for any purpose not authorized by law. Public officials are personally liable for any money improperly spent, if the expenditure

constitutes “malfeasance in office or willful or wanton neglect of duty” by the public official. This means that a public official can be personally responsible for the unauthorized expenditure of public funds if he or she knew or should have known that the expenditure was not within the approved budget, or otherwise illegal or unauthorized, but acted to expend the funds anyways.

Oregon Municipal Handbook

CHAPTER 9:
PUBLIC MEETINGS LAW



League of Oregon Cities

Published by the League of Oregon Cities
September 2020 ***(Updated October 2024)***

Table of Contents

Chapter 9: Public Meetings Law

The purpose of the Oregon Public Meetings Law (OPML) is to make decision-making of state and local governing bodies available to the public. This policy is stated expressly in the law: "The Oregon form of government requires an informed public aware of the deliberations and decisions of governing bodies and the information upon which such decisions were made. It is the intent of [this law] that decisions of governing bodies be arrived at openly."[1]

That policy is given effect through various substantive provisions contained under ORS 192.610 to ORS 162.690, discussed below.[2] Additionally, the Oregon Legislature, in 2023, passed HB 2805, authorizing the Oregon Government Ethics Commission (OGEC) the authority to enforce Oregon's Public Meetings Law and conduct rulemaking to clarify specific OMPL rules. After rulemaking that occurred in 2024, the OGEC proposed 16 rules in total, two of which were amendments to existing rules, found in Oregon Administrative Rule (OAR) Chapter 199—Division 40 (Exeecutive Session) and Division 50 (Public Meetings).[3] The OGEC voted to approve the final rules on September 20, 2024, and the rules became effective October 1, 2024.

Although compliance with these provisions might reduce the speed and efficiency of local decision-making, local residents benefit from a better understanding of the facts and policies underlying local actions. The required process and formality also can make it easier for cities to justify a decision if one is later challenged in an administrative or judicial proceeding.[4]

This chapter will touch on the basic requirements of the law, beginning with the criteria for what gatherings constitute "meetings" and what organizations constitute "governing bodies" under the OPML.[5] Where applicable, the OPML generally requires that meetings be open to the public unless an executive session is permitted, that proper notice be given, and that meeting minutes and votes be recorded.[6] The OPML also governs the location of meetings.[7] Finally, the OPML includes enforcement provisions for when these provisions are violated.[8]

Please note that this chapter is meant to provide the LOC members with an overview of the OMPL. The LOC members with specific questions are encouraged to contact their city's attorney. Further, note that this chapter of the Handbook is based extensively on material in the

[1] ORS 192.620.
[2] *Id.*
[3] *See* Secretary of State - Oregon Government Ethics Commission website, https://secure.sos.state.or.us/oard/viewSingleRule.action?ruleVrsnRsn=317423 (last accessed October 4, 2024).
[4] *See, e.g.*, ORS 192.650. By recording the minutes of any meeting, including the "substance of any discussion on any matter," cities build a record that shows the basis for their actions. This record can dispel claims that a city's action is arbitrary, discriminatory, retaliatory, etc.
[5] ORS 192.610.
[6] ORS 192.630 to ORS 192.660. *See also* OAR 199-050-0055 (Effective October 1, 2024).
[7] *Id.*
[8] ORS 192.680.

Oregon Attorney General's Public Records and Meetings Manual (2019).[9] The LOC strongly recommends that cities purchase the print version of this manual, which is updated every two years.[10] A free online version is available at https://www. doj.state.or.us/oregon-department-of-justice/public-records/attorney-generals-public-records-and-meetings-manual/. Finally, note that the Oregon Department of Justice (ODOJ) reserves its legal advice for the state of Oregon and its agencies; as such, cities with specific questions on the OPML again should consult their legal counsel.

I. Covered Entities

Understanding the scope of the OPML is critical for ensuring compliance with the law. In short, the OPML applies to **(A)** governing bodies of a public body that **(B)** hold meetings for which a quorum is required to make a decision or deliberate toward a decision on any matter.[11] The first of those elements addresses the *who* of the OPML—that is, which entities are subject to the law. The second of those elements addresses the *what* of the OPML—that is, what types of meetings are subject to the law. This section addresses the first of those elements.

A. Governing Bodies of Public Bodies

The OPML applies only to the "governing bodies" of a "public body."[12] A public body includes state bodies, any regional council, a county, a city, a district, or any other municipal or public corporation.[13] A "public body" also includes a board, department, commission, council, bureau, committee, subcommittee, or advisory group of any of the aforementioned entities.[14] A "governing body," meanwhile, does not just mean city council; it means two or more members of any public body with "the authority to make decisions for or recommendations to a public body on policy or administration."[15] The following

Examples:

A city is a public body under ORS 192.610(4), and a five-member city council is a governing body of the city. Further, a planning commission of a city is also a public body, and a three-member board of commissioners is a governing body of the planning commission. ORS 192.610(3).

[9] The Oregon Department of Justice Attorney General's Office typically publishes an updated version every five years, however, due to the HB 2805 (2023) OGEC anticipated rulemaking process, the next version will be delayed.
[10] Note: as of October 2024, the most recent publication date of the Oregon AG Public Records and Meetings Manual was published in 2019.
[11] ORS 192.610(5); ORS 192.630(1).
[12] ORS 192.630(1).
[13] ORS 192.610(4).
[14] *Id.*
[15] ORS 192.610(3).

subsections examine in more detail the authority to make decisions and recommendations, and what entities might in turn qualify as a "governing body."

i. A body that makes decisions for a public body

A body with the authority to make decisions for a public body on "policy or administration" is a governing body.[16] For instance, cities are public bodies and their governing bodies are city councils. Sometimes, cities delegate decision-making authority to lower bodies, such as planning commissions; these too are governing bodies for the purposes of the OPML.

ii. A body that makes recommendations to a public body

A body that has the authority to make recommendations to a public body on policy or administration is itself "a governing body" under the OPML.[17] These recommending bodies are sometimes called "advisory bodies."[18] From time to time, a local government agency or official may appoint a group or committee to gather information about a subject. If this "advisory body" makes a recommendation to a governing body, then it shares the title of governing body and becomes subject to the OPML.[19]

For cities, common examples of bodies that make recommendations to a governing body include subcommittees of the city council and city boards and commissions. The OPML applies to local advisory bodies and all of their members, including private citizens. The language of the OPML is not limited to public officials; rather, it applies to all "members" of a body making decisions or recommendations to a public body, even if all of the members are private citizens.[20]

iii. Exemptions: OPML does not apply to the following types of bodies

Pursuant to OAR 199-050-0010, there are three types of groups that the OMPL does not apply to.

(a) **Fact Gathering Bodies**. Bodies with only the authority to gather and provide purely factual information to a public body, and that do not have the authority to make decisions or recommendations.

[16] ORS 192.610(3).
[17] ORS 192.610(3).
[18] ODOJ, ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL 138 (2019).
[19] ORS 192.610(3).
[20] ORS 192.610(3).

(b) Bodies Advising Individual Public Officials. Bodies appointed by an individual public official with authority to make recommendations only to that individual public official who has the authority to act on the body's recommendations and is not required to pass the recommendations on unchanged to a public body.

(c) Certain Multi-Jurisdiction Bodies. Multi-jurisdictional bodies whose Oregon members do not constitute a majority of the governing body's voting members.

B. Governing Bodies of Certain Private Bodies

Technically, only "public bodies" are covered by the OPML.[21] However, it is at least possible that some private bodies might fall under the gamut of the law if they assume clear public functions.

There is no test for determining whether or when a private entity should be considered a "public body" for purposes of the OPML. Therefore, cities should consult their attorney when in doubt about whether a private body is covered by the law. Note that the Oregon Supreme Court follows a six-part test for determining when a private entity is the "functional equivalent" of a "public body" under Oregon's Public Records Law.[22] Those factors include (1) the entity's origin, (2) the nature of the functions, i.e., whether the function performed is traditionally private or public, (3) the scope of authority exercised by the entity, (4) whether the entity receives financial support from the government, (5) the degree of government control over the entity, and (6) the status of the entity's offices and employees.[23] That said, the OPML has its own definition of "public body," and so it is not clear whether these factors apply in the meetings context.[24]

II. Covered Meetings

The previous section explained that the OPML applies to the "governing bodies" of a public body."[25] Not every action that a governing body takes, of course, is subject to the OPML. Only a "meeting" of a governing body of a public body is subject to the law.

The OPML defines a meeting as **(1)** the "convening of a governing body" in order to **(2)** "make a decision or deliberate toward a decision" and for which **(3)** "a quorum is required."[26]

---

[21] ORS 192.610.
[22] *See Marks v. McKenzie High School Fact-Finding Team*, 319 Or 451, 463-65 (1998) (interpreting ORS 192.311).
[23] *Id.*
[24] ORS 192.610(4).
[25] ORS 192.630(1).
[26] ORS 192.610(5).

Taken together, a meeting only occurs where a governing body convenes, reaches a quorum, and discusses or deliberates on city matters.[27] This section examines each of these elements under the OPML and how courts have interpreted them.

Before reviewing the meeting elements, please note that at least two categories of gatherings that might otherwise qualify as "meetings" under the OPML have been exempted by statute.[28] As such, these gatherings are not "meetings" for the purposes of the OPML.

- The on-site inspection of any project or program; and

- A gathering of any national, regional, or state association to which the public body or its members belong. This includes any monthly, quarterly, or annual gatherings of the League of Oregon Cities or National League of Cities.

A. 'Convening' a Meeting

For governing bodies, the most natural method of convening is in person. Of course, modern technology provides many other ways for members of a governing body to convene with one another. Because convening might occur by accident, members of governing bodies need to be mindful about how they communicate[29] with each other and staff to avoid holding a "meeting" under the OPML. In the 2023 Legislative session, House Bill 2805[30] amended ORS 192.610 and defined "convening"[31] as well the "deliberation."[32]

Outside in-person meetings, the OPML applies to teleconferences, web conferences, and more generally to "telephone or electronic communications."[33] Moreover, the OPML applies in exactly the same way to these meetings as it does to in-person meetings.[34] Inherent in this are logistical issues, such as guaranteeing public attendance to the meeting and ensuring that the

[27] *Id.* Under the OPML, a decision is any action that requires a "vote of the governing body." ORS 192.610(1).
[28] ORS 192.610(5).
[29] OAR 199-005-0005(1)(2) (Effective October 1, 2024) defines "**communicate**" as the act of a person expressing or transmitting information to another person though verbal, non-verbal, written, or electronic means. Non-verbal means includes gestures, such as thumbs-up and thumbs-down, as well as sign language, and "**communication**" as "the expression or transmission of information from one person to another through verbal, non-verbal, written or electronic means. Non-verbal means include gestures, such as thumbs-up and thumbs-down, as well as sign language."
[30] *See* https://olis.oregonlegislature.gov/liz/2023R1/Measures/Overview/HB2805 (last accessed October 9, 2024).
[31] ORS 192.610(1) defines "**convening**" as (a) Gathering in a physical location; (b) Using electronic, video or telephonic technology to be able to communicate contemporaneously among participants; (c) Using serial electronic written communication among participants; or (d) Using an intermediary to communicate among participants."
[32] ORS 192.610(3) defines "**deliberation**" as "discussion or communication that is part of a decision-making process."
[33] ORS 192.670.
[34] *Id.*

medium of communication can accommodate everyone who wishes to attend. Local governing bodies must solve these issues and comply with all other OPML requirements if they hold a meeting that it is not in-person.[35]

It may be possible for a governing body to convene through serial communications on a topic.[36] In 2015, the Oregon Court of Appeals found that three county commissioners—a quorum of the governing body—had violated the OPML by using a series of phone calls and emails to reach a county decision.[37] While the Oregon Supreme Court reversed the ruling, the court did not express an opinion one way or the other on serial communications.[38] Therefore, that portion of the Court of Appeals ruling still holds at least some weight.

The Court of Appeals noted "not all private, serial communications among members" are OPML violations.[39] Just as it is with meeting in person, members of a governing body may correspond through email or voicemail on topics unrelated to city business. These serial communications may become an issue only when they are "conducted for the purpose of deliberation or decision."[40]

In the 2023 Legislative session, House Bill 2805 incorporated parts of the judicial holdings in the *Handy* cases and added "exceptions" to ORS 192.690(1)(m)[41] to exempt trainings, non-city business, and administerial activities.

As of October 1, 2024, the Oregon Government Ethics Commission completed its rulemaking process and prohibited serial communications.[42]

> (1) A quorum of the members of a governing body shall not, outside of a meeting conducted in compliance with the Public Meetings Law, use a series of communications

[35] *Id.*
[36] *See Handy v. Lane County*, 274 Or App 644, 664-65 (2015), *reversed on other grounds*, 360 Or 605 (2016). *See also* OAR 199-050-0020 (Effective October 1, 2024).
[37] *Handy*, 274 Or App 644, 664-65 (2015).
[38] *See generally Handy v. Lane County*, 360 Or 605 (2016).
[39] *See Handy*, 274 Or App at 664-66 (2015).
[40] *Id.* The Court of Appeals noted that a plaintiff likely needs "some evidence of coordination, orchestration, or other indicia of a purpose…to deliberate or decide out of the public eye." *Id.*
[41] *See* HB 2805 (2023), https://olis.oregonlegislature.gov/liz/2023R1/Measures/Overview/HB2805 (last accessed October 8, 2024).
[42] OAR 199-050-0020 (Effective October 1, 2024).

of any kind, directly or through intermediaries[43], for the purpose of deliberating or deciding on any matter that is within the jurisdiction of the governing body.[44]

> (2) The prohibitions in section (1) apply to using any one or a combination of the following methods of communication:
>
> (a) In-person;
>
> (b) Telephone calls;
>
> (c) Videos, videoconferencing, or electronic video applications;
>
> (d) Written communications, including electronic written communications, such as email, texts, and other electronic applications;
>
> (e) Use of one or more intermediaries to convey information among members; and
>
> (f) Any other means of conveying information.[45]

This type of communication covers things such as social media posts, emails, and text messages, or any other means of conveying information. Serial Electronic Written Communications is defined as "a series of successive or sequential communications among members of a governing body using written electronic means, including emails, texts, social media, and other electronic applications that communicate the written word."[46]

B. Meeting 'Quorum'

By law, a meeting cannot take place without a "quorum" of the governing body.[47] The term "quorum" is defined as "the minimum number of members of a governing body required to legally transact business. In the absence of a statute, ordinance, rule, charter, or other enactment specifically establishing the number of members constituting a quorum, a quorum is a majority of the voting members of the governing body."[48] For cities, quorum requirements often are set by charter, bylaws, council rules, or ordinance. In the absence of a specific definition, the general definition of "quorum" under state law is a majority of the governing body.[49]

---

[43] "**Intermediaries**" is defined in OAR 199-050-0005(7) (Effective October 1, 2024) as "a person who is used to facilitate communications among members of a governing body about a matter subject to deliberation or decision by the governing body, by sharing information received from a member or members of the governing body with other members of the governing body. The term "intermediary" can include a member of the governing body."
[44] *Id*.
[45] *Id*.
[46] OAR 199-050-0005(10) (Effective October 1, 2024).
[47] ORS 192.630.
[48] OAR 199-050-0005(9) (Effective October 1, 2024).
[49] ODOJ, ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL 142 (2019).

If a quorum of members convenes, then the OPML will apply unless the subject matter discussed is completely unrelated to a city decision or recommendation. Conversely, if less than a quorum convenes, then a "meeting" has not taken place, as that term is defined in the law.

Quorum is a technical requirement. As a practice, cities should take care not to deliberate toward decisions or recommendations in small groups. Gatherings that are below quorum and clearly deliberations violate (if nothing more) the policy of OPML, which is to include the public in the decision-making process.[5051]

Significantly, meetings that do not require a quorum are not "public meetings" under the OPML. As such, meetings with staff generally do not constitute public meetings. A single city council member may meet with staff to discuss city business because staff are not members of the city council.

C. Meeting for a 'Decision'

By law, members of a governing body only meet for purposes of the OPML if they are making or deliberating toward a "decision."[52] The OPML defines a "decision" as the following:

> Any determination, action, vote or final disposition upon a motion, proposal, resolution, order, ordinance or measure on which a vote of a governing body is required, at any meeting at which a quorum is present.[53]

In other words, only topics that relate to the business of the governing body trigger the OPML. This subject matter requirement means that members of a governing body are free to gather to discuss a number of topics—sports, television, literature—as long as these do not concern the work of the governing body. Similarly, if a quorum of a governing body meets to discuss matters on which it has no authority to make a decision, it is not a "meeting" under the OPML either.[54]

Social Gatherings? A quorum of a governing body is permitted to meet in a social setting without triggering the OPML. Care must be taken, however, to avoid any discussion of public policy or administration, lest the social gathering evolve into an illegal public meeting.

[50] ORS 192.620.
[51] OAR 199-050-0005(4) (Effective October 1, 2024) defines decision-making process as "the process a governing body engages in to make a decision, such as (a) identifying or selecting the nature of the decision to be made; (b) gathering information related to the decision to be made; (c) identifying and assessing alternatives; (d) weighing information; and (e) making a decision."
[52] ORS 192.610(5); OAR 199-050-0005(3) (Effective October 1, 2024)
[53] ORS 192.610(1).
[54] ODOJ, ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL 144 (2019) (citing 38 Op Atty Gen 1471, 1474, 1977 WL 31327 (1977)).

Pursuant to recent rulemaking, Applicable meetings subject to PML to include the following: (1) regular meetings, (2) special meetings, (3) emergency meetings, (4) executive sessions (separate to or convened with another type of meeting), and (5) work sessions/workshops.[55] Noteworthy, there are enumerated exemptions, including the following:

(a) On-site inspections of projects or programs, provided the members of the governing body do not engage in deliberations or decisions on matters that could reasonably be foreseen to come before the governing body.

(b) The attendance of members of a governing body at any national, regional or state association to which the public body or the members belong, provided the members of the governing body do not engage in deliberations or decisions on matters that could reasonably be foreseen to come before the governing body.

(c) Communications between or among members of a governing body, including communications of a quorum of members, that are:

(A) Purely factual or educational in nature and that convey no deliberation or decision on any matter that might reasonably come before the governing body;
(B) Not related to any matter that, at any time, could reasonably be foreseen to come before the governing body for deliberation and decision; or
(C) Non-substantive in nature, such as communication relating to scheduling, leaves of absence and other similar matters.

(d) Any matters listed in ORS 192.690.

Lastly, this new rule specifically states that private meeting where a quorum of a governing body engages in discussions or communications that are part of the governing body's decision-making process on matters within the authority of the governing body violates the Public Meetings Law.

Yet where the topics do relate to matters concerning the governing body, any discussion by a quorum of the body will trigger the OPML. As noted by the ODOJ, even meetings "for the sole purpose of gathering information" fall under the OPML.[56] Accordingly, the LOC recommends that members of governing bodies avoid discussing with each other <u>any</u> of the facts or context of local matters unless they are participating in a proper public meeting.

[55] OAR 199-050-0015.
[56] *Id.*

III. REQUIREMENTS

The last two sections answered the *who* and the *what* of the OPML, namely what entities and what meetings of those entities are subject to the law. Now comes the meeting requirements, including rules on notice, meeting location, and the recording of minutes and votes. The OPML also requires public attendance, and many laws further require public participation. This section addresses these requirements and the challenges that accompany it.

A. Meeting Types and Notice

As a reminder, each city in Oregon is subject to its own individual charter, municipal code and rules of procedures. Public notice is a common topic of local procedure. As such, the LOC recommends that cities conduct a thorough review of applicable charter provisions, municipal code sections, and their respective city's rules and procedures to ensure that those provisions do not provide additional requirements to be followed when creating and posting a public notice. This section will address the minimum notice requirements under state law.

i. When Notice is Required

The OPML requires public notice to be given any time a governing body of a public body holds a "meeting" as defined under the law.[57] Therefore, all regular, special, and emergency meetings require notice, though the amount of notice depends on the meeting type. Generally, notice is required for any interested persons and any media outlet that has requested notice.[58]

ii. Contents of the Notice

ORS 192.640(1) requires a notice for meetings which are open to all members of the public to contain, at a minimum, the following information:

- Time of the meeting;
- Place of the meeting; and
- A list of the principal subjects anticipated to be considered at the meeting.

While the first two items are self-explanatory, the list of principal subjects is less clear. While publishing the agenda along with the notice is generally sufficient for this requirement, the ODOJ recommends that the list of principal subjects "be specific enough to permit members of

[57] ORS 192.640.
[58] *Id.*, *see also* OAR 199-050-0040 (Effective October 1, 2024).

the public to recognize the matters in which they are interested."[59] This means that notices should avoid repeating generic descriptions, such as "consideration of a public contract," and should instead state qualities specific to the subject, such as "consideration of contract with X company to provide Y services."[60]

Occasionally, a governing body may wish to discuss a subject that was not on the list, perhaps because the issue arose too late to be included in the notice. As a matter of state law at least, the absence of a subject from a notice does not preclude the governing body from discussing it; under the OPML, the list of *anticipated* subjects does "not limit the ability of a governing body to consider additional subjects."[61]

Beyond these requirements, a common practice is to include information in the notice for persons with disabilities. The OPML mandates that public bodies make all meeting locations accessible to persons with disabilities.[62] The ODOJ suggests that notices include the name and telephone number of a city employee who can help a person in need of a reasonable accommodation.[63]

iii. Methods of Notice

There are a variety of ways a public meeting notice may be posted. A governing body satisfies the public notice requirement by providing notice of its meetings when displayed conspicuously in the following places: (1) public body's website; (2) Oregon Transparency website (non-state agencies may post here); (3) newspaper; (4) community / bulletin boards; (5) social media accounts; (6) email; or (7) mail.[64] Additionally, media notice may be required if a media representative has requested notice.[65]

iv. Amount of Notice

The number of days in advance a city must give notice of a public meeting depends on the type of meeting to be conducted. For regularly scheduled meetings, notice must be "reasonably calculated" to provide actual notice of the time and place of the meeting "to

[59] ODOJ, ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL 151 (2019).
[60] *Id.*
[61] ORS 192.640.
[62] ORS 192.630(5).
[63] ODOJ, ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL 151 (2019).
[64] OAR 199-050-0040(2) (Effective October 1, 2024).
[65] OAR 199-050-0040(2)(c) (Effective October 1, 2024).

interested persons including news media which have requested notice."[66] As much notice as reasonably possible, but no less than 48 hours advance notice is required.[67]

For special meetings, i.e. non-regular meetings, notice must be provided at least 24 hours in advance to "the general public" and again to "news media which have requested notice."[68] The only exception to the 24-hour notice rule for special meetings is an emergency meeting.[69]

For an emergency meeting, the governing body must show that "an actual emergency" exists and must describe the circumstances of the emergency in the meeting minutes.[70] Even these meetings require notice; the OPML requires that emergency meetings be noticed in a manner that is "appropriate to the circumstances."[71] Furthermore, an emergency meeting may only be used to discuss matters pertaining to the emergency.[72] In *Oregon Association of Classified Employees v. Salem-Keizer School District*, the Oregon Court of Appeals found that a school district had violated the OPML by using an emergency meeting held for budget reasons to discuss a "contract approval," a non-emergency matter.[73] The LOC recommends that cities use emergency meetings only in clear emergencies and only as a way to respond to the emergency.

v. Noticing Executive Sessions

If the type of meeting to be held is an executive session, the governing body holding the executive session is required to give notice in the manner described above.[74] In addition, the notice must be sent to each member of the governing body.[75] No member of the governing body can be excluded from receiving notice of the executive session, even if it is known that the member is unable to attend the meeting. In addition, when providing notice of an executive session, the notice is required to state the specific provision of the OPML that authorizes the executive session.[76] Finally, unless the executive session is necessary to respond to an emergency, the notice of the session must be provided with a minimum of 24 hours' notice.[77]

---

[66] ORS 192.640(1).
[67] OAR 199-050-0040(4)(a) (Effective October 1, 2024).
[68] ORS 192.640(3); *see also* OAR 199-050-0040 (4)(b) (Effective October 1, 2024).
[69] OAR 199-050-0040 (4)(c) (Effective October 1, 2024).
[70] *Id.*
[71] *Id.*
[72] *See Or. Ass'n of Classified Employees v. Salem-Keizer Sch. Dist.* 24J, 95 Or App 28, 32 (1989).
[73] *Id.*
[74] ORS 192.640(2); *see also* OAR 199-050-0040(3)(d) (Effective October 1, 2024).
[75] *Id.*
[76] *Id.*
[77] ORS 192.640(3).

The LOC Guide to Executive Sessions explores these issues and offers sample notices.[78]

B. Proper Meeting Space

The OPML requirements for a public meeting space fall roughly into four categories. First, the meeting space must have appropriate **capacity.**[79] Second, the meeting space must be within the right **geography**.[80] Third, the meeting space must satisfy criteria for **accessibility**.[81] Fourth, the space must be a place of **equality**.[82]

i. Capacity

The OPML provides that any and all public meetings must "be open to the public" and that anyone interested in attending "shall be permitted to attend."[83] Based on this language, it should be inferred that governing bodies need to anticipate roughly how many citizens will be interested in a meeting and plan accordingly. A meeting space that is woefully inadequate for the expected turnout likely is a violation of the OPML.

ii. Geography

The OPML lays out certain criteria for the location of a governing body's meeting. The provisions are presented in an "either/or" list, and so not all of the criteria need to be satisfied. The OPML requires that a meeting space *either* be **(1)** "within the geographic boundaries" of the public body, **(2)** at the public body's "administrative headquarters," *or* **(3)** the nearest practical location.[84] Generally speaking, the LOC recommends public meetings be held within the city unless exigent circumstances arise. In the event of "an actual emergency necessitating immediate action," these criteria do not apply and the governing body may hold an emergency meeting at a different location than the ones described here.[85]

iii. Accessibility

In three main ways, the OPML requires accessibility for persons with disabilities.[86] First, meetings subject to the OPML must be held in places accessible to individuals with mobility and

[78] LEAGUE OF OREGON CITIES, GUIDE TO EXECUTIVE SESSIONS (2019), https://www.orcities.org/download_file/505/1852 (last accessed October 9, 2024).
[79] ORS 192.630(1).
[80] ORS 192.630(4)
[81] ORS 192.630(5).
[82] ORS 192.630(3).
[83] ORS 192.630(1).
[84] ORS 192.630(4). A fourth option for most public bodies is to hold a public meeting within "Indian country." *Id.*
[85] *Id.*
[86] See ORS 192.630(5)(a).

other impairments.[87] Second, the public body must make a "good-faith effort" to provide an interpreter at the request of deaf or hard-of-hearing persons.[88]

Third, due to the coronavirus pandemic, the government—state and local—were forced to adapt to virtual public meetings to meet the strict standards of allowing public access to the elected official and public policy decision-making process. Oregon Legislature passed House Bill 2560[89] in the 2021 session, requiring those remote options to continue.[90] This amendment became effective January 1, 2022, requiring government agencies, whenever possible, to allow the public to remotely attend public meetings—through telephone, video or other electronic means—as well as give the public the ability to testify remotely.[91]

The amendment emphasizes the requirement of governing bodies to make most public meetings (excludes executive sessions) remotely accessible when it's "reasonably possible."[92] Members of the media already have access to most executive sessions, but ORS 192.670 does not specify if governing bodies must also provide remote access to the media for these meetings.[93]

Cities can find guidance on the first requirement, and the potential penalties for failure to comply, under laws and regulations of the Americans with Disabilities Act (ADA). As for the "good faith" requirement, this can be enforced only through the OPML.[94] The law defines a "good-faith effort" as "including … contacting the department or other state or local agency that maintains a list of qualified interpreters and arranging for the referral of one or more qualified interpreters to provide interpreter services."[95]

iv. Equality

Public bodies are prohibited from holding meetings where discrimination is practiced on the basis of race, color, creed, sex, sexual orientation, national origin, age, or disability.[96]

---

[87] *Id.*
[88] *Id.*
[89] *See* HB 2560 (2021), https://olis.oregonlegislature.gov/liz/2021R1/Measures/Overview/HB2560 (last accessed October 8, 2024).
[90] ORS 192.670 (HB 2560) - Meetings by Means of Telephone or Electronic Communication.
[91] *Id.*
[92] *Id.*
[93] *But see* OAR 199-050-0050(4) (Effective October 1, 2024) (requiring media access to be allowed to virtually attend executive sessions if any other individual is virtually attending).
[94] *See* ODOJ, ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL 154-55 (2019).
[95] ORS 192.630(5)(e).
[96] ORS 192.630(3).

Generally, a public body may not hold a meeting at a location that is used by a restricted-membership organization, but may if the location is not primarily used by such an organization.[97]

C. Recording and Retaining Minutes

The OPML requires that the governing body of a public body provide for sound, video, or digital recording, or written minutes, of its public meetings.[98] Whatever the format, the record of the meeting must include the following categories of information:

> **(a)** All members of the governing body present;
> (**b)** All motions, proposals, resolutions, orders, ordinances and measures proposed and their disposition;
> **(c)** The results of all votes and, except for public bodies consisting of more than 25 members unless requested by a member of that body, the vote of each member by name;[99]
> **(d)** The substance of any discussion on any matter; and
> **(e)** Subject to ORS 192.311 to 192.478 relating to public records, a reference to any document discussed at the meeting. [100]

When recording minutes, the objective is not to include every word said at the meeting, but rather to provide "a true reflection of the matters discussed at the meeting and the views of the participants."[101] Upon conclusion of the meeting, the minutes must also be available to the public "within a reasonable time."[102] The ODOJ notes that, with some exceptions, the minutes should also be "available to persons with disabilities in a form usable by them, such as large print, Braille, or audiotape."[103] The minutes or recordings required, which include executive sessions, shall provide for either written minutes or audio, video, or digital recordings.[104]

Finally, the OPML requires that minutes or another record of a public meeting must be preserved for a reasonable time.[105] However, the Secretary of State's Retention Schedule for

---

[97] *Id.*
[98] ORS 192.650(1)
[99] Note that the recording of minutes requires the "vote of each member by name" to either be recorded or made available on request. This means that members of a governing body cannot vote anonymously. The Court of Appeals has held, however, that the "absence of a recorded vote alone is not reversible error." *See* ODOJ, ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL 158-59 (2019) (citing *Gilmore v. Bd. of Psychologist Examiners*, 81 Or App 321, 324 (1986)). *See also* OAR 199-050-0055 (Effective October 1, 2024).
[100] ORS 192.650(1).
[101] *Id.*, *see also* OAR 199-050-0060 (Effective October 1, 2024).
[102] *Id.*
[103] ODOJ, ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL 161 (2019).
[104] OAR 199-050-0060 (Effective October 1, 2024).
[105] *Id.* at 162 (citing *Harris v. Nordquist*, 96 Or App 19 (1989)).

cities requires minutes of non-executive session meetings to be retained permanently.[106] Executive session minutes must be retained for 10 years.[107] The LOC recommends that cities consult with their attorney before setting a retention schedule for meeting minutes.

D. Public Attendance and Participation

The OPML is a public attendance law, not a public participation law. Generally, meetings of a governing body of a public body are open to the public unless otherwise provided by law.[108] Yet while the law guarantees the right of public attendance, the law does *not* guarantee the right of public participation. In fact, the OPML only expressly mentions public participation in two specific contexts: the opportunity for "public comment" on the employment of a public officer and the opportunity for "public comment" on the standards to be used to hire a chief executive officer.[109]

Importantly, public participation laws *do* exist elsewhere under state and local laws. In many cases, public participation might be required by another statute, a state regulation, or by a local charter or ordinance. For example, a city ordinance may require the city council to hear public comment when the council considers whether to condemn private property for public use. Similarly, state law requires cities to provide an opportunity for public testimony during the annual budgeting process.[110] State regulations, meanwhile, require that "[c]itizens and other interested persons [have] the opportunity to present comments orally at one or more hearings" during the periodic review of a local comprehensive plan.[111] For this reason, the LOC cautions cities to consult their attorney before choosing to withhold opportunities for public comment. Note that there is no rule *against* public participation if cities wish to allow it at meetings.

i. Maintaining Order

For cities, the charter ordinarily designates a specific person with authority to keep order in council meetings, often the mayor or the council president. For other governing bodies serving the city, the one with this authority likely is the leader of the body, such as the head, chair, or president of a particular committee, group, or commission. Generally speaking, a city may adopt meeting rules and a violation of these rules can be grounds for expulsion. For more information

[106] OAR 166-200-0235.
[107] *Id.*
[108] ORS 192.630(1).
[109] ORS 192.660(7)(d)(C); ORS 192.660(7)(d)(D).
[110] ORS 294.453
[111] OAR 660-025-0080(2).

on maintaining order in council meetings, consult the LOC's Model Rules of Procedure for Council Meetings.[112]

Reasonable restrictions also may be placed on public participation. However, care must be taken to protect the freedom of speech under the First Amendment and Article 1, Section, of the Oregon Constitution. For example, the First Amendment protects the interest of citizens who are "directing speech about public issues to those who govern their city."[113] Speech is a protected right that can be enjoyed not only through **actual speech** but also through **expressive conduct**, such as making a gesture, wearing certain clothing, or performing a symbolic act.[114] While the right to speech is "enormous," it is subject to content-neutral limitations.[115] Further, no city is required to "grant access to all who wish to exercise their right to free speech on every type of government property, at any time, without regard to the disruption caused by the speaker's activities."[116]

a. The Time, Place, and Manner of Speech

Under federal law, a city's council meeting or similar meeting is considered a limited public forum.[117] At a minimum, any expression of speech at a limited public forum in Oregon can be limited through time, place and manner restrictions.[118] Time, place and manner restrictions are simply that — rules regulating the **time** in which a person may speak, the **place** in which a person can speak, and the **manner** in which the speech can be made. An important caveat is that all of these restrictions must be viewpoint neutral.[119] The restrictions also must serve a "legitimate interest" and provide "ample alternatives for the intended message."[120]

Because these restrictions are constitutional, local governing bodies generally can establish a specific format for speech at a council meeting or other public meeting. For example,

---

[112] LEAGUE OF OREGON CITIES, MODEL RULES OF PROCEDURE FOR COUNCIL MEETINGS (2017), https://www.orcities.org/download_file/604/1852 (last accessed October 9, 2024).
[113] *See White v City of Norwalk*, 900 F2d 1421, 1425 (9th Cir 1990).
[114] *See Virginia v. Black*, 538 US 343, 358 (2003).
[115] *See White*, 900 F2d at 1425 (1990).
[116] *See Walsh v Enge*, 154 FSupp3d 1113, 1119 (D Or 2015) (quoting *Cornelius v. NAACP*, 473 US 788, 799 (1985)).
[117] *See White*, 900 F2d at 1425 (1990).
[118] *See State v. Babson*, 355 Or 383, 408 (2014). Under federal law, expressions of speech in a limited public forum can also be subject to "content-based" rules, provided those rules are both "viewpoint neutral" and "reasonable." *Enge*, 154 FSupp 3d at 1128. Thus, under federal law, a city council could limit the *content* of a public comment to the subject-matter at hand as long as it did not apply this rule unevenly. *White*, 900 F2d at 1425 (1990). In Oregon, however, the free speech clause Oregon Constitution appears to prohibit any "content-based" regulation of speech. *See Outdoor Media Dimensions, Inc. v. Dept. of Transp.*, 340 Or 275, 288 (2006). Cities should err on the side of caution by permitting speech on any "subject" at meetings and limiting only its time, place, and manner.
[119] *See White*, 900 F2d at 1425 (1990).
[120] *See Babson*, 355 Or at 408 (2014).

a city's budget committee may choose to limit public comment to the start of a hearing and limit the amount of time a person may speak. Limiting public comment to the start of a public hearing is not legally contentious.

The challenge of time, place, and manner restrictions is ensuring that the restrictions are enforced consistently and equally to all speakers and that the restrictions cannot be construed as discriminating against a given viewpoint.[121] That said, cities generally will avoid triggering the First Amendment if their restrictions serve "purposes unrelated to the content of expression."[122] This is true even if an otherwise valid restriction, under particular circumstances, "*incidentally* burdens some speakers, messages or viewpoints."[123]

b. Disruptive Conduct

A good example of an "incidental" restriction on speech is rules on disruptive conduct. As noted above, cities and other governments are not required to tolerate "actual disruptions" when carrying out government business. So, even if the disruptive activity is a voice or some form of expressive conduct, i.e., speech, it can be regulated.[124] The rule against actual disruptions means that governing bodies may override one's freedom of speech in certain circumstances, such as when an audience member is shouting loudly at others or when an individual refuses to sit down long after their allotted speaking time has ended. The general rule of thumb is that the disruption has to be preventing the governing body from completing its work.

Conversely, cities must allow any actions that are not "**actual**" disruptions to the governing body's ability to conduct business.[125] In *Norse v. City of Santa Cruz*, for example, the Ninth Circuit Court of Appeals found that an audience member giving the Nazi salute did not actually interfere with or interrupt the public meeting and that the city therefore had not been justified in removing the individual from the meeting.[126] In reaching its decision, the *Norse* Court found that "[a]ctual disruption means actual disruption. It does not mean constructive disruption, technical disruption, virtual disruption, *nunc pro tunc* disruption, or imaginary disruption."[127]

---

[121] *See Norse v City of Santa Cruz*, 629 F3d 966, 976 (9th Cir 2010) (noting that viewpoint neutrality is a key element under the First Amendment),
[122] *Alpha Delta Chi-Delta Chapter v Reed*, 648 F3d 790, 800 (9th Cir 2011) (quoting, in part, *Ward v Rock Against Racism*, 491 US 781, 791(1989)).
[123] *Id.*
[124] *Norse*, 629 F3d at 976.
[125] *Id.*
[126] *Id.*
[127] *Id.*

c. Barring Disruptive Individuals

It is not uncommon for a person desiring to make their point to cause several disruptions at the same meeting or over a series of meetings. The constant disruption of public meetings by the same person, despite repeated warnings and removals, often leads public officials to consider suspending the person from future public meetings. Unfortunately, any efforts to suspend or ban individuals from future hearings are highly suspect and likely unconstitutional.

On two separate occasions, federal courts have held that prohibiting a disruptive person from attending future meetings, and from entering the entirety of a government facility, is not permitted under the First Amendment. In *Reza v. Pearce*, the Ninth Circuit Court of Appeals ruled that "imposing a complete ban" on a person's entry into a government building "clearly exceeds the bounds of reasonableness … as a response to a single act of disruption."[128] Similarly, in *Walsh v. Enge*, a federal district court found that the city of Portland could not "prospectively exclude individuals from future public meetings merely because they have been disruptive in the past."[129] Note, however, that a district court decision is not binding precedent. While neither of these cases conclusively answers the question of whether a frequently disruptive individual can be barred from future hearings, they cast serious doubt that a court would uphold such an action.

For a description of these cases and a more detailed overview of the options available to cities for handling disruptive members of the public at public meetings, see the LOC's Legal Guide to Handling Disruptive People in Public Meetings (2017).[130]

IV. Executive Sessions

An executive session is a public meeting that is closed to members of the general public. Executive sessions may only be held for certain reasons and the other meeting requirements discussed above still apply, such as notice, location, and minute-keeping requirements.[131]

For a thorough assessment of how executive sessions apply to cities, including sample notices and a model media policy, consult the LOC Guide to Executive Sessions.[132]

---

[128] *Reza v Pearce*, 806 F3d 497, 505 (9th Cir 2015).
[129] *See Walsh v Enge*, 154 FSupp. 3d 1113, 1119 (D Or 2015).
[130] League of Oregon Cities, Legal Guide to Handling Disruptive People in Public Meetings (2017), https://www.orcities.org/download_file/384/1852 (last accessed July 11, 2024).
[131] *See* ORS 192.660; *see also* ORS 192.610(2) (defining an executive session as a "meeting.").
[132] League of Oregon Cities, Guide to Executive Sessions (2017), https://www.orcities.org/download_file/505/1852 last accessed July 11, 2024).

A. Executive Sessions for Municipalities

The Oregon Legislative Assembly has identified 16 circumstances in which an executive session is authorized.[133] Of these, 12 circumstances are likely to be used by municipalities:

1. Employment of a public officer, employee, staff member or individual agent.

Members of governing bodies may generally deliberate whether to employ individuals that meet this description. However, only consideration of an initial employment is permissible under this section.[134] That said, this exception does not apply to any public officer, employee, staff member, or chief executive officer unless **(1)** the position has been advertised **(2)** and there already exists an adopted regular hiring procedure. In addition, with respect to public officers, the public must have had an opportunity to comment on the officer's employment. With regard to chief executive officers, there must be adopted hiring criteria and policy directives.
This type of executive session **cannot** be used for either of the following purposes:

- To fill a vacancy in any elected office, public committee or commission, or advisory group; [135] or

- To discuss an officer's salary.[136]

2. Dismissal, disciplining, or hearing complaints or charges relating to a public officer, employee, staff member or individual agent who does not request an open hearing.

A governing body may hold an executive session on disciplinary matters; however, the subject of the deliberations must be provided with an opportunity to request an open hearing.[137] Clearly, this means that the governing body must notify the individual well in advance and determine whether they wish to have an open hearing.

Generally, cities should be aware that public employees have a property interest in their employment. When in doubt, cities that are members of CIS are encouraged to consult the CIS Pre-Loss Legal Department before taking disciplinary action. Failing to do so can negatively impact a city's deductible if a lawsuit or wrongful termination complaint is subsequently filed.

3. Persons designated by the governing body to carry on labor negotiations.

---

[133] ORS 192.660.
[134] OAR 199-040-0027 (Effective October 1, 2024).
[135] *See* ORS 192.660; *see also* ORS 192.660(7)(a)-(d).
[136] *See generally* 42 Op Atty Gen 362, 1982 WL 183044 (1982).
[137] ORS 192.660(2)(b).

This provision allows city officials to hold an executive session to conduct deliberations with the person they have designated to act on the city's behalf during labor negotiations.[138] Note that this is one of the few meetings where news organizations and the media can be excluded from an executive session.[139]

4. Persons designated by the governing body to negotiate real property transactions.

This provision allows city officials to hold an executive session to conduct deliberations with the person they have designated to act on the city's behalf regarding real property transactions.[140] A real property transaction likely may include the purchase of real property, the sale of real property, and/or negotiations of lease agreements.[141] The deliberations conducted during an executive session held under this provision must concern a specific piece of property or properties—the session may not be used to discuss a city's long-term property needs.[142]

5. Information or records that are exempt by law from public inspection.

In order to hold an executive session under this provision, the information and records to be reviewed must otherwise be exempt from public inspection under state or federal law.[143] The most common source for public records exemptions is Oregon's Public Records Law and the attorney-client privilege under ORS 40.225.

6. Preliminary negotiations involving matters of trade or commerce in which the governing body is in competition with governing bodies in other states or nations.

A governing body may use this provision to meet in executive session when it has good reason to believe it is in competition with other governments on a "trade or commerce" issue.[144]

7. Rights and duties of a public body as to current litigation or litigation likely to be filed.

A governing body may use executive sessions as a way to consult with legal counsel about current or pending litigation.[145] In the event the litigation is against a news organization, the governing body must exclude any journalist who is affiliated with the news organization.[146]

---

[138] ORS 192.660(2)(c).
[139] ORS 192.660(4).
[140] ORS 192.660(2)(e).
[141] ODOJ, ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL 165 (2019).
[142] *Id.* (citing Letter of Advice to Rep. Carl Hosticka, 1990 WL 519211 (OP-6376) (May 18, 1990)).
[143] ORS 192.660(2)(f).
[144] ORS 192.660(2)(g).
[145] ORS 192.660(2)(h).
[146] ORS 192.660(5).

8. Employment-related performance of the chief executive officer of any public body, a public officer, employee, or staff member who does not request an open hearing.

A governing body may hold an executive session to evaluate an employee's performance; however, the subject of the deliberations must be provided with an opportunity to request an open hearing.[147] Clearly, this means that the governing body must notify the individual well in advance and determine whether they wish to have an open hearing.

Generally, cities should be aware that public employees have a property interest in their employment. When in doubt, cities that are members of CIS are encouraged to consult the CIS Pre-Loss Legal Department before taking disciplinary action. Failing to do so can negatively impact a city's deductible if a lawsuit or wrongful termination complaint is subsequently filed.

9. Negotiations under ORS Chapter 293 with private persons or businesses regarding proposed acquisition, exchange or liquidation of public investments.

This provision allows cities to conduct negotiations about certain public investments.[148] The final decision on these investments must occur in an open public meeting (see below).[149]

10. Information on the review or approval of certain security programs.

In order to hold an executive session under this provision, the security program must be related to one of the areas identified under ORS 192.660(2)(n). These include telecommunication systems and the "generation, storage or conveyance of" certain resources or waste.[150]

11. To consider matters relating to the safety of the governing body and of public body staff and volunteers and the security of public body facilities and meeting spaces.[151]

12. To consider matters relating to cyber security infrastructure and responses to cyber security threats.[152]

B. Final Decision Prohibition

Under the OPML, executive sessions must not be used "for the purpose of taking any final action or making any final action."[153] While final decisions cannot be made, city councils

[147] ORS 192.660(2)(i).
[148] ORS 192.660(2)(j).
[149] ORS 192.660(6).
[150] ORS 192.660(2)(n).
[151] ORS 192.660(2)(o). HB 2806 in 2023 Oregon Legislature added this topic to qualify for executive session.
[152] ORS 192.660(2)(p). HB 2806 in 2023 Oregon Legislature added this topic to qualify for executive session.
[153] ORS 192.660(6).

and other public bodies may still reach an informal consensus during an executive session.[154] This provision simply guarantees that the public is made aware of the deliberations. Thus, a formal vote in a public session satisfies the requirement, even if the vote merely confirms the consensus reached in executive session.[155]

C. Media Representation at an Executive Session

Representatives of the news media must be allowed to attend all but two types of executive sessions.[156] The news media may be excluded from an executive session held to conduct deliberations with a person designated by the governing body to carry on labor negotiations or an executive session held by a school board to discuss certain student records.[157] Also, remember that a city council or other public body must exclude any member of the press if the news organization the reporter represents is a party to the litigation being discussed during the executive session.[158]

Even though news organizations are permitted to attend virtually every executive session, governing bodies may prohibit news organizations from disclosing certain specified information.[159] Media access must be allowed virtual attendance if any individual is attending virtually.[160] Unless a governing body specifies what information is prohibited from disclosure, news organizations are free to report on the entire executive session. It also is worth noting that there is no penalty or punishment under the OPML against a news organization that shares information from an executive session without the city's permission. The OGEC advises that if media does report something in an executive session that they were advised not to disclose, the legal recourse options must be staffed with legal counsel.

The OGEC does provide a sample script to read at the start of any executive session that covers: (1) lists the statutory authorization of the executive session; (2) allows news media/designated staff to attend executive session; (4) representatives of news media are specifically directed not to report on any of the deliberations during the executive session except to state the general subject to the session as previously announced; (4) no decision may be made in the session; and (5) at the completion of the session, the open session will resume.

---

[154] OAR 199-040-0060 (Effective October 1, 2024).
[155] *See* ODOJ, ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL 173-75 (2019); *see also* OAR 199-050-0055 (Effective October 1, 2024).
[156] ORS 192.660(5).
[157] *Id.*
[158] ORS 192.660(5).
[159] ORS 192.660(4).
[160] ORS 192.670; *see also* OAR 199-050-0050(4) (Effective October 1, 2024).

The term "representatives of the media" is not defined by the OPML or in case law.[161] However, the Oregon Attorney General recently issued an advisory opinion wherein it concluded that under Oregon law "news-gathering representatives of institutional media" are permitted to attend executive sessions and the term is "broad and flexible enough to encompass changing technologies for delivering the news."[162] The conclusion reached by the attorney general seems to imply that bloggers and other social media news entities are authorized to attend executive sessions. In reaching this conclusion, the attorney general relied heavily on what it believes are the stated reasons the Legislative Assembly allowed the media to attend executive sessions when the law was originally adopted.[163]

Due to the ambiguity around who is or isn't a "representative of the media," the LOC recommends that cities generally permit any person providing the public with news, including internet bloggers, to attend executive sessions.[164] Some cities may seek to establish a stricter media attendance policy and, if so, those cities need to undertake a meaningful and in-depth discussion with their city attorney before drafting such a policy.[165] Denying "representatives of the media" access to meetings can lead to costly litigation.

V. TRAINING REQUIREMENT

A. Governing Body Member Training Requirement

The OGEC, during the 2024 rulemaking process, created a new training requirement for all members of governing bodies.[166] This training requirement applies to (1) all governing body members; (2) with expenditures more than $1 million dollars in a fiscal year[167]; (3) attend an OGEC approved OPML training; (4) once per term.

The OGEC has indicated that a person who holds multiple positions, can attend a certified course and that will count for the positions held at that time. The member must maintain a record of the training, and truthfully report completion upon request of the OGEC.[168] The OGEC is authorized to provide advice on whether an individual must comply.

---

[161] Additionally, OGEC has stated they cannot define media.
[162] *See generally* Op Atty Gen 8291 (2016).
[163] *Id.*
[164] The OGEC states that public bodies may determine if individual meets requirement in opinion and can adopt procedures to do so.
[165] *See* OAR 199-050-0050(4) (Effective October 1, 2024).
[166] OAR 199-050-0080 (Effective October 1, 2024).
[167] OGEC indicated the $1 million dollar expenditure requirement was limited to governing body members that authorized the expenditures of the $1 million dollars (or exceeding thereof).
[168] *Id.*

The LOC will be submitting all relevant trainings for OGEC approval, to satisfy this training requirement, but as of October 8, 2024, there are no approved trainings, other than the OGEC trainings found on their website: https://www.oregon.gov/ogec/training/Pages/default.aspx.

VI. Grievance and Complaint Process

A. General Enforcement

The OGEC is authorized to investigate and adjudicate OPML violations. The new administrative rule, OAR 199-050-0070, clarifies requirements of ORS 192.705 for filing a written grievance with a public body alleging violations of OPML. As of October 1, 2024, there are new requirements for public bodies. For assistance in creating your local grievance process policy/procedure, please contact OGEC[169] and your legal counsel for advice.

B. Filing Public Meetings Complaints

i. There are three prerequisites for when an individual who thinks an OPML violation has occurred:

   a. Submit written grievance to the public body;

   b. Within 30 days of the alleged violation; and

   c. The public body[170] has 21 days to respond to complainant.[171] The public body must respond in writing to both the complainant and a copy to the OGEC (by email: pbgr@ogec.oregon.gov or via mail), at the same time. The response may contain the following options: (1) deny facts/deny violation; (2) admit facts/deny violation; or (3) admit facts / admit violation. [172]

ii. After 21-day period is over, complainant may submit a compliant to the OGEC, which must include a copy of the grievance submitted to the public

[169] OGEC contact information: www.oregon.gov/ogec / 503-378-5105 / mail@ogec.oregon.gov.
[170] The public body must respond, not individual members of the governing body.
[171] ORS 192.705(1); OAR 199-050-0070 (Effective October 1, 2024).
[172] ORS 192.705(2).

body and must provide public body's response.[173] If the complainant fails to provide the above, the OGEC will dismiss the complaint.

iii. The public body must provide information on the grievance notice process, specifically, who to submit grievances to and how to submit grievances.[174]

C. OGEC Complaint Process

The OGEC will review received complaints for satisfaction of prerequisites; conduct a preliminary review; and possibly initiate an investigation.[175]

The OGEC may issue sanctions for OPML violations to include: (1) civil penalty (up to $1,000 fine); (2) letters of education; and/or (3) training requirement.[176]

VII. ENFORCEMENT

A. General Enforcement

Any person affected by a decision of a governing body of a public body may file a lawsuit to require compliance with, or prevent violations of, the OPML by members of the governing body.[177] Lawsuits may be filed by "any person who might be affected by a decision that might be made."[178]

A plaintiff may also file suit to determine whether the OPML applies to meetings or decisions of the governing body.[179] Under ORS 192.680(5), any suit brought under the OPML must be commenced within 60 days following the date the decision becomes public record.[180]

A successful plaintiff may be awarded reasonable attorney fees at trial or on appeal.[181] Whether to award these or not is in the court's discretion.[182] If a court finds that a violation of the

[173] ORS 192.705(2); OAR 199-050-0070 (Effective October 1, 2024).
[174] OAR 199-050-0070(3) (Effective October 1, 2024).
[175] ORS 192.685; ORS 244.260. *See also* OAR 199-050-0075 (Effective October 1, 2024).
[176] ORS 244.350.
[177] ORS 192.680(2).
[178] *See Harris v. Nordquist*, 96 Or App 19, 23 (1989).
[179] ORS 192.680(2).
[180] ORS 192.680(5).
[181] ORS 192.680(3).
[182] *Id.*

OPML was the result of willful misconduct by a member or members of the governing body, each is liable for the amount of attorney fees paid to the successful applicant.[183]

If a governing body violates the OPML in a decision, the decision is not necessarily void. In the case of an unintentional or non-willful violation of the OPML, the court has discretion to void a decision, but such an action is not mandatory.[184] The law permits a governing body that violates the OPML to reinstate the decision while in compliance with the law.[185] If a governing body reinstates an earlier decision while in compliance with the law, the decision will not be voided and the decision is effective from the date of its initial adoption.[186]

Importantly, reinstatement of an earlier decision while in compliance with the law will not prevent a court from voiding the earlier decision "if the court finds that the violation was the result of intentional disregard of the law or willful misconduct by a quorum of the members of the governing body."[187] In that case, the court will void the decision "unless other equitable relief is available."[188]

B. Civil Penalties for Violations of ORS 192.660

Apart from the enforcement provisions described above, the Oregon Government Ethics Commission (OGEC) may review complaints that a public official has violated the executive session provisions of the OPML as provided in ORS 244.260.[189] The commission has the authority to interview witnesses, review minutes and other records, and obtain other information pertaining to executive sessions of the governing body for purposes of determining whether a violation occurred.[190] If the commission finds a violation of the executive sessions provisions, the commission may impose a civil penalty not to exceed $1,000.[191] If, however, the violation occurred as a result of the governing body acting on the advice of its legal counsel, the civil penalty may not be imposed.[192]

Further, the OGEC was granted additional authority in the 2024 Legislative Session in House Bill 4117.[193] This legislation expanded the scope of authority of the OGEC to give advice

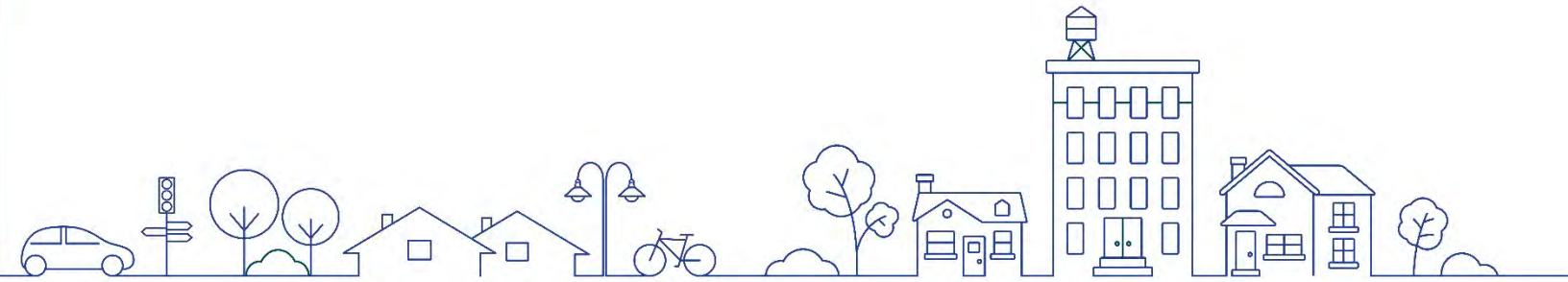
[183] ORS 192.680(4).
[184] ORS 192.680(1).
[185] *Id.*
[186] *Id.*
[187] ORS 192.680(3).
[188] *Id.*
[189] ORS 192.685(1).
[190] ORS 192.685(2).
[191] ORS 244.350(2)(a).
[192] ORS 244.350(2)(b).
[193] *See* HB 4117 (2024), https://olis.oregonlegislature.gov/liz/2024R1/Measures/Overview/HB4117 (last accessed October 9, 2024).

on public meetings laws, issue advisory opinions on the application of the public meetings law to actual or hypothetical circumstances, authorized the executive director of the commission to issue staff advisory opinions or written or oral staff advice on the application of the public meetings law to actual or hypothetical circumstances, and permits other commission staff to issue written or oral staff advice on the public meetings law. The OGEC now hears complaints and renders decisions about allegations of impermissible ethics, executive sessions, and all provisions of the public meeting laws, effective March 20, 2024.

Oregon Municipal Handbook

CHAPTER 10:

WORKING WITH THE PUBLIC



League of Oregon Cities

Published by the League of Oregon Cities
March 2021

Table of Contents

Chapter 10: Working with the Public

Two of the most important objectives for local government officials are determining citizen opinion and ensuring that citizens have enough information to form intelligent opinions. Accomplishing these objectives requires a constant effort on the part of cities to: (1) communicate with the public; and (2) provide opportunities for citizen participation. This chapter addresses both of these essential categories and offers several resources and best practices that cities can apply when working with the public.

I. CITIZEN PARTICIPATION

Fundamentally, cities are organized to pursue the interests of its residents. In any home rule charter, local voters grant the city the power to exist on the condition that the city will meet the needs of its community.[1] Not surprisingly, citizen participation in government helps a city understand these needs.

Simply put, a city benefits by having conversations with its residents. Topics can be as technical as traffic patterns or local land use policy; or they can be purely aesthetic, such as a park design or the look of a civic center. Whatever the issue, citizen involvement serves as an important guide for cities.

This section covers some of the ways that cities can encourage citizen involvement. The section first explores how to hold effective public hearings. It next addresses citizen advisory committees and neighborhood associations as means of working with the public. The section then turns to best practices for volunteer participation before concluding with a brief description of public opinion polls.

A. Public Hearings and Public Comment

With the exception of elections, public hearings and public comments are the most traditional and prevalent ways for citizen involvement in local government decisions. While state law provides certain minimum criteria for public meetings,[2] local law governs how these meetings are conducted, including how much time is given to citizens for public testimony. By and large, state law leaves it to public bodies to establish their own **rules of procedure** for hearings and regularly scheduled meetings. That said, these rules of procedure often are required by a city's charter.[3] Even if not required, these rules serve a vital role for cities by ensuring a consistent, fair, and objective approach to a city's public meetings. By extension, this ensures a smooth dialogue with citizens who attend and participate in meetings.

In 2017, the LOC drafted model rules of procedure for council meetings.[4] These model rules include suggestions on how to approach public hearings and public comments.[5] For example, the rules suggest that cities present the audience with a "hearing roster" prior to the

[1] *See generally* Or Const, Art XI, § 2; *see also* Or Const, Art IV, § 1(5).
[2] *See* ORS 192.610 to ORS 162.690.
[3] *See, e.g.,* BAKER CITY, OR., CHARTER § 16 (1986) (providing that the city council "shall…adopt written rules for the government of its members and proceedings.").
[4] *See* LEAGUE OF OREGON CITIES, MODEL RULES OF PROCEDURE FOR COUNCIL MEETINGS 1 (2017), https://www.orcities.org/download_file/604/0 (last accessed Feb. 16, 2021).
[5] *Id.* at 7-10, 19-22.

start of any hearing, upon which anyone interested in speaking can write their name and address.[6] The rules also recommend requiring each speaker at a hearing to state their name and whether they are a resident of the city and to limit their testimony to three minutes or less.[7] It is useful to clarify that city council members can ask "clarifying or follow-up questions" of any speaker at a hearing, but that these questions should not be used as a ploy to lengthen or expand a speaker's testimony.[8] The LOC model rules provide that councilors "shall be expected to use restraint … when exercising" their right to ask questions of speakers, and further provides that the "presiding officer may intervene if a councilor is violating the spirit of this guideline.'[9] It is important to note that the LOC model rules also suggest a different and more specific approach for a city's land use hearings.[10] Many land use hearings are quasi-judicial in nature and, as such, speakers at land use hearings are far more likely to be represented by an attorney.[11]

The LOC model rules offer several more suggestions for the public comment periods typically offered during regularly scheduled meetings.[12] First, the model rules state a public comment period "shall not exceed a maximum of 30 minutes, unless a majority of councilors present vote to extend the time."[13] Second, the rules suggest allowing members of the public to use city audio or visual equipment as part of their comment, but only if they provide the materials to city staff prior to the meeting."[14] Third, the rules suggest requiring members of the public who want to speak at a public hearing to reserve their comments for that time, rather than speaking during the public comment period and the public hearing.[15]

In sum, rules of procedure are a practical necessity for cities and often are required by a city's charter. Please note that the LOC model rules are merely suggestions and cities are encouraged to design their own rules of procedure in a way that works best for their community. Often, cities identify useful provisions that are unique to their rules; for example, the city of Happy Valley requires council members to seek input from the city 's manager and attorney before attempting to revise a prepared ordinance during a meeting.[16] The city of Bend uses its rules to add clarity to the state's ethics laws.[17]

---

[6] *Id.* at 8.
[7] *Id.* at 9.
[8] *Id.*
[9] *Id.*
[10] *Id.* at 19-22.
[11] *Id.*
[12] *Id.* at 7-8.
[13] *Id.* at 7.
[14] *Id.* at 8.
[15] *Id.* at 7.
[16] *See* HAPPY VALLEY, OR., CITY COUNCIL RULES § E(3)(d) (2020).
[17] *See* BEND, OR., GENERAL COUNCIL RULES § 1.040 (2011).

Of course, rules of procedure are not the only step that cities can take to promote positive citizen participation at public meetings. Public hearings in particular often benefit from an **opening statement** by the presiding officer that explains the subject that is being considered and makes clear the rules that are in place at the hearing. While city staff and the public body may be aware of the rules of procedure, the same cannot be said for most members of the public; therefore, an opening statement that explains relevant rules can lower the likelihood of discontent or friction during public testimony. Similarly, many members of the public are not always aware of past deliberations or decisions that a city has made on an issue. By providing a summary of factual information related to a subject at the start of a hearing, a city can promote a broader understanding of the issue and prevent rumors or other misunderstandings from taking hold.

Likewise, hearings should close with the presiding officer making a **closing statement** that explains what further actions, if any, need to be taken by the public body or its staff. These conclusory remarks give everyone in attendance a better idea of where matters stand on a particular subject.

On controversial matters, except for quasi-judicial hearings, a prehearing conference with the issues' chief proponents and opponents may be useful. Questions of fact may be resolved at such conferences and time may be saved at the hearing. To preserve the impartiality required for quasi-judicial hearings and to avoid violation of the open meeting law, prehearing conferences should be conducted by city staff members rather than councilors.

Occasionally, public hearings or public comment periods attract unhappy individuals who act out with offensive, disruptive, or sometimes violent behavior. It is not uncommon for these same individuals to cause several disruptions at the same meeting or over a series of meetings. Certainly, cities have the right to prohibit behavior that is truly disruptive.[18] However, cities must take care to ensure that the individual has actually *disrupted* the proceeding; conduct that is merely rude or unpleasant does not rise to this level and is likely a protected form of speech under the Oregon Constitution or the U.S. Constitution. For a more detailed overview of the options available to cities when responding to disruptive individuals in public meetings, see the LOC's Legal Guide to Handling Disruptive People in Public Meetings (2017).[19]

B. Advisory Groups, Boards, and Committees

Citizen advisory committees are created for a variety of reasons and there are many ways to use them. First, advisory committees can be used to ensure ongoing public involvement on issues of significant public interest. In some cases, the issue applies to the city as a whole. In

[18] LEAGUE OF OREGON CITIES, LEGAL GUIDE TO HANDLING DISRUPTIVE PEOPLE IN PUBLIC MEETINGS 3 (2017), https://www.orcities.org/download_file/384/0 (last accessed Feb. 16, 2021).
[19] *Id.*

2017, for example, the city of Eugene established a Community Safety Citizen Advisory Board pursuant to its local code.[20] The board mainly serves to "monitor the collection and the spending" of a local payroll tax that funds the city's community safety programs.[21] In other cases, the issue might only be applicable to a portion of a city. An example of this includes the Tryon Creek Wastewater Treatment Plant Community Advisory Committee, a public body serving the city of Portland.[22] Among other things, this committee reviews the planning and design of projects related to the treatment plant.[23]

Advisory committees can also be used to gain insight from, or improve relations with, specific groups within a community. For example, the city of Medford depends on its Bicycle & Pedestrian Advisory Committee for advice on how to improve the city's infrastructure for these users.[24] The city of Ashland relies on the Ashland Senior Advisory Committee for recommendations on senior support services as well as "low-cost recreational, health promotion and educational opportunities at the Ashland Senior Center and other locations."[25] And the city of Gresham employs a Youth Advisory Council for input on "issues, projects, and proposals that have an impact on youth."[26]

Advisory committees can even be used to find creative solutions to much larger issues. Several cities, including Salem and Tigard, have created advisory bodies to address homelessness in their communities.[27] Likewise, the city of Bend authorized its Environment and Climate Committee to develop and implement a climate action plan for the city, among other topics.[28]

In general, advisory committees are established by council resolution and the committee members are appointed by the city's mayor or council. The LOC recommends that cities clearly delineate the duties and responsibilities of these committees to avoid conflicts. The LOC also

---

[20] *Community Safety Citizen Advisory Board*, CITY OF EUGENE, https://www.eugene-or.gov/4417/Community-Safety-Citizen-Advisory-Board (last accessed Feb. 12, 2021).
[21] *Id.*
[22] *Tryon Creek Wastewater Treatment Plant Community Advisory Committee*, CITY OF PORTLAND, https://www.portlandoregon.gov/civic/article/701600 (last accessed Feb. 12, 2021).
[23] *Id.*
[24] *Bicycle & Pedestrian Advisory Committee*, CITY OF MEDFORD, https://www.ci.medford.or.us/CCBIndex.asp?CCBID=36 (last accessed Feb. 12, 2021).
[25] *Ashland Senior Advisory Committee*, CITY OF ASHLAND, http://www.ashland.or.us/Page.asp?NavID=17877 (last accessed Feb. 12, 2021).
[26] *Youth Advisory Council*, CITY OF GRESHAM, https://greshamoregon.gov/Youth-Advisory-Council/ (last accessed Feb. 12, 2021).
[27] *Downtown Homeless Solutions Task Force*, CITY OF SALEM, https://www.cityofsalem.net/Pages/downtown-homeless-solutions-task-force.aspx (last accessed Feb. 12, 2021); *see also Homelessness Resources*, CITY OF TIGARD, https://www.tigard-or.gov/city_hall/homelessness_resources.php (last accessed Feb. 12, 2021).
[28] *Environment and Climate Committee*, CITY OF BEND, https://www.bendoregon.gov/government/committees/environment-climate-committee (last accessed Feb. 12, 2021).

recommends that a city councilor play a role in each of these committees, either as a voting member, ex officio member, or liaison.

For the most part, advisory committees are voluntary, and members are not compensated for their time. City staff are often assigned to provide technical and administrative support as well as to lend continuity and direction. Advisory committee meetings generally are considered public bodies and therefore are subject to Oregon's public meetings law. For more information on what qualifies as a "public body" and what is required of one when it meets, see the chapter of this handbook on Oregon's Public Meetings Law.

C. Neighborhood Associations

Neighborhood associations are formed by citizens to work on matters involving traffic, transportation, social services, housing, zoning, land use, law enforcement, recreational facilities, and other matters that affect their neighborhoods.

There is considerable disagreement about whether it is appropriate for a city to formally recognize and sponsor these associations. Those who favor city sponsorship cite increased citizen participation, more realistic neighborhood planning, better public relations, and a more knowledgeable citizenry. Others argue that neighborhood groups tend to be parochial units that lead to political factions and a lack of cooperation with the city and other community institutions.

D. Volunteers

Perhaps the best illustration of the "two-way street" of citizen participation is the use of volunteer assistance in city government. When citizens have an opportunity to participate in the actual workings of government, they have an opportunity to influence it. Volunteer experiences range from refereeing a parks and recreation sports league or serving as a librarian to helping keep a community safe with the local fire or police department. Without volunteers, there are many services that cities simply would not have the funds to provide. Beyond this obvious benefit, volunteerism also serves an important function for a city's relations with the public. There is perhaps no more effective way to explain the intricacies of local government to citizens than through their direct involvement as volunteers.

There are pitfalls, however. Volunteers can be a source of significant liability for cities. This risk can be minimized and the effectiveness of volunteers can be enhanced by developing guidelines for their use. Cities that are members of CIS can take advantage of many excellent resources offered by the agency's risk management specialists. For example, CIS offers a number of model forms that cities can use when recruiting and managing their volunteers. These forms include volunteer applications and waivers, a vehicle use policy, suggested duties for

volunteer coordinators, and a guidance document that helps cities choose among the types of insurance coverage that are available for volunteers.[29] CIS also offers a volunteer policy manual template that cities can review when developing their own manual.[30] For more information, cities should contact CIS at (503) 763-3800 or cisoregon.org.

E. Public Opinion Surveys

One final method of increasing citizen participation in local government is through the use of public opinion surveys. A good survey has a clear purpose. For example, a survey might (1) determine citizen demand for a new service; (2) help measure the effectiveness of existing services; or (3) test the citizenry's knowledge of city matters in order to design appropriate public information programs.

Public opinion surveys require different levels of staff assistance depending on the type of survey and its objectives. The most reliable and unbiased results often can be obtained by professional polling or survey organizations. That said, if cities conduct their own surveys, technical advice may be available from staff, local colleges, or other outside sources. The actual work that goes into conducting a local survey — e.g. folding, stapling, envelope stuffing, mailing, and coding responses — usually can be accomplished with the help of civic groups and other volunteers. If the questions are brief, surveys can even be enclosed with utility bills.

II. COMMUNICATING WITH THE PUBLIC

Just as cities need to hear from citizens to know how to best serve them, citizens need to hear from cities in order to know about local issues. Encouraging citizen involvement is one half of the battle; cities benefit the most when their residents are both involved *and* informed. While communicating with such a large number of people is inherently difficult, cities have a number of tools at their disposal that can provide residents with the information they need.

A. Communication Policies and Plans

To ensure effective communication with the public, the LOC strongly recommends that cities develop written policies that govern the distribution of public information. Much like a city personnel manual, written policy guidelines create a framework for public issues to be dealt with in a manner that is both consistent and objective. The LOC also recommends that cities develop an overall strategy or plan to guide their outreach. For example, the city of McMinnville developed its Communication Strategy in 2016 that lays out several long-term goals for the city

[29] *Resource Library*, CIS, https://www.cisoregon.org/Member/RiskManagement/ResourceLibrary (member cities will be required to log in before accessing the library) (last accessed Feb. 17, 2021).
[30] *Id.*

in terms of its communications with the public.[31] This strategy lays out several methods of accomplishing these goals, such as by working with media outlets and face-to-face, mail, and digital outreach.[32]

A communications plan can help a city identify what groups are present in their community, what groups are adequately represented, and what groups are underrepresented in a city's deliberations. From there, that city can develop short and long-term goals to increase or maintain the participation of these groups in the decision-making process. The residents of any city may be thought of as several overlapping groups of individuals, organized or unorganized, with common interests and objectives. Everyone in a community is a member of multiple interest groups: taxpayer, voter, business owner, cyclist, park-goer, neighbor, senior, union member, or consumer. The list goes on. In general, a city's communications should be made with an idea for the groups that will find it interesting. If the topic is of general interest, the information can be distributed to all members of the community. If the issue is of interest to only a few stakeholders, such as a water rights issue, then time and money can be saved by targeting information to only the affected individuals.

When forming a strategic plan, cities might find support through universities. The city of Albany, for example, recently researched a communications plan for its Parks & Recreation Department in conjunction with the University of Oregon (U of O) and the Sustainable Cities Initiative (SCI).[33] In 2017, the university offered a graduate course in its journalism school on strategic public relations planning; through the SCI, the city's public relations staff collaborated with the students to develop a communications plan based on the latest research.[34] This might be an option for other cities seeking to develop a plan, either with the U of O or another university.

Finally, the LOC recommends that cities publish communications in all of the languages that are spoken by residents. This act ensures that no segments of the community are left out of communications and also signals to non-English speakers that their opinions matter to the city.

B. Media Outlets

Good media relations are essential, not only in the city's effort to communicate with the public, but also in the ability of city government to carry out its basic functions and responsibilities. The "two-way street" works in media relations, and city officials can go a long

[31] *Communication Plan*, CITY OF MCMINNVILLE, https://www.mcminnvilleoregon.gov/cityadmin/page/communication-plan (last accessed Feb. 16, 2021).
[32] *Id.*
[33] Rian Rasubala & Kelli Matthews, *Communication Plan for Albany Parks & Recreation*, SUSTAINABLE CITY YEAR PROGRAM 1 (2017), https://core.ac.uk/download/pdf/84755668.pdf (last accessed Feb. 16, 2021).
[34] *Id.*

way toward happy relations by adopting a cooperative and businesslike stance (toward the media) based on mutual respect and understanding.

Media relations require regular methods of bringing reporters and government officials or employees together for the purpose of gathering and disseminating news. Some cities assign responsibility for media relations to one person. This might be a communications specialist with media and public relations as the primary or sole duty; or, media relations may be assigned to the city recorder, mayor, city administrator, or another staff member. A city media relations person functions as a coordinator who puts news people in contact with public officials or employees, notifies reporters of meetings, supplies background material, writes news releases, and oversees city communications efforts in general.

A formal public information policy also helps to establish good media relations. First, a communications policy can clarify who may serve as a media relations person and who may perform other media-related roles, such as handling public records requests or helping a reporter find information that is already publicly accessible. By identifying the types of inquiries that city employees may handle directly, as opposed to inquiries that should be referred to city officials, a city can operate more efficiently while ensuring it conveys clear messages to the public. For more information on the basic requirements and deadlines of public records requests, refer to the chapter of the handbook on Oregon's public records law.

Second, a communications policy can provide standards for press releases, such as the use of quotations or photographs, as well as for press conferences when they are necessary. Third, a communications policy can require training sessions for department heads, elected officials, and other key figures with the city. Fourth, a communications plan sets citywide goals, such as encouraging department heads to "proactively initiate communications and dialogue rather than simply responding to issues and events as they occur."[35]

News releases provide updates to media outlets that often result in press coverage. Releases can be used to announce a public event, publish the text or abstract of a speech, report changes in city functions or procedures, or share biographical information about a new city appointee or employee, along with other matters that are more generally of public interest. While it may be helpful to follow some of the basic rules of journalistic style in preparing news releases, it is essential that these releases convey information in simple, direct terms.

When working with media outlets, it is important to be aware of the differences between the many forms of media. For instance, print media outlets have different schedules and

[35] *Communication Plan*, CITY OF MCMINNVILLE, https://www.mcminnvilleoregon.gov/cityadmin/page/communication-plan (see "Communication Strategy" under supporting documents) (last accessed Feb. 16, 2021).

deadlines than radio or television outlets. Generally, newspapers and magazines assign beat reporters to cover local affairs and so a city can expect more in-depth coverage by these publications.

By contrast, radio coverage usually consists of brief, up-to-the-minute news. Many stations depend entirely on telephone interviews, news releases, and wire service reports, but some assign reporters to cover city hall and give in-depth coverage. Radio, with its ability to provide immediate coverage, is especially useful for emergency situations that occur with city utility systems, traffic, air pollution, or for dissemination of local disaster information. Television presents its own demands and opportunities. TV conveys images and action but typically is less suited for a discussion of technical issues. Artwork, maps, charts, graphs, photographs, and slides can all help television outlets tell a visual story.

Although commercial radio and television have been deregulated and stations are no longer required to devote a specified amount of time to public service announcements, most stations run brief announcements and public affairs programs. Cities can take advantage of such opportunities but should set high standards of quality and relevance for public service programs. Communities served by public radio and television have wider opportunities for specialized programming.

C. Social Media and City Websites

Social media platforms like Facebook and Twitter represent some of the most effective ways for cities to communicate with residents. Despite these benefits, social media platforms also pose unique challenges for cities. First, choosing to create social media accounts comes with the pressure of maintaining these accounts. Cities that do so may come under scrutiny for failing to provide up-to-the-minute posts about local issues or events. Conversely, cities that post frequently to their social media accounts run the risk of publishing false or misleading information. Second, most elected officials and city staff maintain their own personal social media accounts. These accounts can lead to dramatic situations quite easily; if a city official or employee happens to make a controversial statement, cities can become embroiled in the controversy by affiliation. Third, city-sponsored social media accounts present various legal issues. Social media posts constitute public records, and any censorship of comments made on these posts can trigger free speech claims under the Oregon Constitution or U.S. Constitution.

Cities must know and prepare for these concerns. The LOC strongly recommends that cities adopt a social media policy before opening any city-sanctioned social media accounts. The model social media policy developed by the LOC begins by defining what is and is not “social

media."[36] For instance, a blog or forum on a city's website could be included as social media, particularly where there is significant public participation. A social media policy also should include certain requirements for opening a new social media account, with a minimum requirement that any city account be affiliated with a city-issued email address.[37] By using a city email address, a city guarantees it will be able to access the account, regardless of whether the employee who created the account has left on vacation or for another job. A policy should also require the display of the city's logo and a notice that describes the account as a city webpage.[38] The following is a sample notice:

> This site is created by the city of _____. This site is intended to serve as a mechanism for communication between the public and the city of _____ on all topics relevant to city business. The city of _____ reserves the right to remove comments or postings that violate any applicable laws. A list of content that will be removed may be viewed at: *[insert hyperlink to social media policy]*. Postings to this site are public records of the city of _____ and may be subject to disclosure under the Oregon Public Records Law.
>
> The city of _____ does not endorse nor sponsor any advertising posted by the social media host, that the social media is a private site, or the privacy terms of the site apply. The city of _____ does not guarantee reliability and accuracy of any third-party links.[39]

As mentioned in the notice, a city's social media policy also should include a list of content that the city may remove from its social account. This content may include any profane or discriminatory content, any inappropriate sexual content, any advertisements or solicitation, any information that is private or confidential, and any information that tends to compromise the safety or security of others.[40] Cities may also consider adopting social media user guidelines that describe other prohibited conduct.

Finally, a social media policy should require that city officials and employees avoid discriminating against any public speech based on its content or viewpoint.[41] This extends to the decisions the account manager makes about who to "friend," "follow," "like" or "retweet."[42]

---

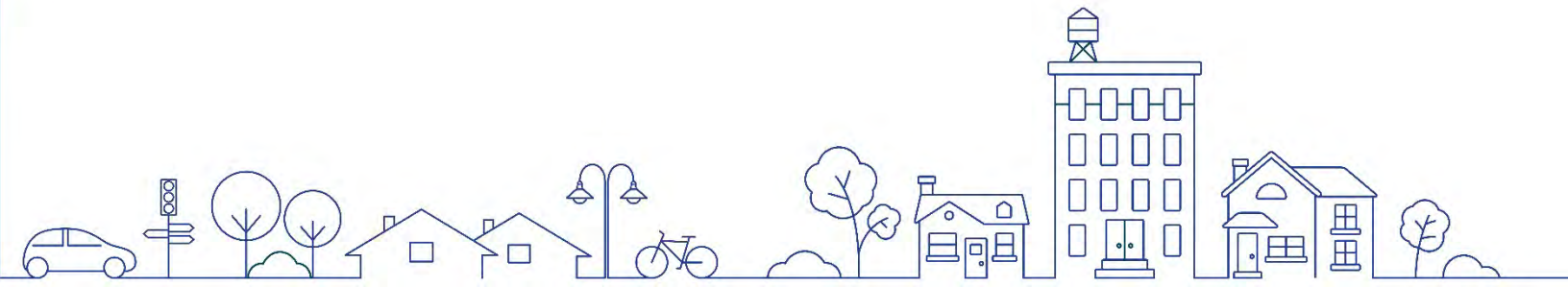
[36] *See* LEAGUE OF OREGON CITIES, MODEL EMAIL AND SOCIAL MEDIA POLICY 6 (2018), https://www.orcities.org/download_file/147/0 (last accessed Feb. 16, 2021).
[37] *Id.* at 7.
[38] *Id.* at 6.
[39] *Id.* at 6-7.
[40] *Id.* at 7.
[41] *Id.*
[42] *Id.*

D. City Publications

City publications include handbooks, reports, bulletins, posters, films, slide shows, and various other visual displays that are published by a city. For instance, some cities publish annual reports. Originally, these reports were just an accounting of yearly municipal activities, but now are seen as an important public relations tool. Many cities also use brochures to describe programs or services, such as recreational programs, local improvement assessment procedures, and energy conservation programs. Some cities even publish periodicals; the city of Bend, for example, publishes a monthly newsletter that provides "updates from the city as well as important council decisions."[43]

[43] *City News*, CITY OF BEND, https://www.bendoregon.gov/government/departments/communications (last accessed Feb. 12, 2021)

CHAPTER 11:
WORKING WITH OTHER GOVERNMENTS



League of Oregon Cities

Published by the League of Oregon Cities
January 2023

Table of Contents

Chapter 11: Working with Other Governments

Cities are connected financially and legally to a complex, interlocking, and interdependent system of governments – federal, tribal, state and other local governments. Local government officials must devote their attention and energies not only to the internal affairs of their organizations, but also to how their city interacts with other governments.

This chapter will describe how cities often work with other governments, including counties, special districts, the state of Oregon, and other governments such as tribes and the United States.

I. RELATIONSHIPS WITH OTHER GOVERNMENTS

As discussed below, understanding the nature of other governments is useful for cities to assess potential conflict and areas of cooperation. The types of overlapping governments – counties, special districts, the state of Oregon, United States and Tribes – each have their own authority and types of considerations. More information about Oregon local governments can be found in this Handbook – Chapter 1: Nature of Cities.

A. Counties

i. Two types of home rule: constitutional and statutory

Originally, counties functioned almost exclusively as agents of the state government. Their every activity had to be either authorized or mandated by state law. A 1958 amendment to the Oregon Constitution reserved to the voters of Oregon counties the right to adopt charters prescribing how their county governments should be organized, what powers they should have, and what procedure they should follow in administering county affairs.[1] Since 1958, nine of Oregon's 36 counties have adopted charters.[2]

In 1973, the Oregon Legislative Assembly enacted a statute delegating to all counties the power to enact local legislation on matters of county concern.[3] The 1973 statute greatly expanded the discretionary authority of general law (non-charter) counties, although charter counties have more options than general law counties with respect to reorganization.[4] Oregon

[1] Or Const, Art VI, s. 9a (the "Legislative Assembly shall provide by law a method whereby the legal voters of any county, by majority vote of such voters voting thereon at any legally called election, may adopt, amend, revise or repeal a county charter.").
[2] Counties adopting charters: Benton (1972) Clatsop (1988), Hood River (1964), Jackson (1978), Josephine (1980), Lane (1962), Multnomah (1967), Washington (1962), and Umatilla (1993).
[3] ORS 203.035.
[4] *Id*.

counties therefore enjoy two kinds of home rule: constitutional and statutory.[5]

ii. Governing body structure

The governing board structure for charter counties is comprised of three to five elected officials. For Clackamas County, the board of commissioners is comprised of five elected officials. For Crook, Gilliam, Sherman, Wheeler, Grant, Harney, Morrow and Malheur counties, the elected officials consist of a county judge and two commissioners. For the remaining 18 counties, the county is governed by a board of commissioners comprised of three elected officials. [6]

iii. Matters of county concern

Generally, counties exercise their authority and render services in "matters of county concern."[7] Matters of county concern are similar to cities in areas such as roads, parks, land use planning, raising revenue, and police powers.[8] Some common police powers exercised by Oregon counties include regulations on animal control, nuisance and code regulation, abandoned and impounded vehicles, tobacco sales, mass gatherings, and solid waste.[9]

iv. Overlapping jurisdictions

Applicability of a county ordinance adopted under the counties' statutory delegation of powers is limited to areas outside cities unless the cities consent by action of the city councils or voters. [10] Some county charters also have provisions that limit a county's exercise of powers inside cities. Even in the absence of such provisions, the attorney general has ruled that "ordinances of `home rule' counties would not . . . be effective within a city which has delegated to itself under its charter the power to regulate the same subject." [11] However, there are some

---

[5] *See generally* ASSOCIATION OF OREGON COUNTIES, COUNTY HOME RULE IN OREGON (2005), https://drive.google.com/file/d/0B4bfnUJ9POS_RjVYMDhWZHowbHM/view?resourcekey=0-vQ8hnGby1VzLj4u0GxVDsA (last accessed December 30, 2022).
[6] *See* ASSOCIATION OF OREGON COUNTIES, COUNTY STRUCTURES (2022), https://drive.google.com/file/d/1rVk4kPNEO6sjPudc1wHoNHcU1ZHFcHvX/view (last accessed December 30, 2022).
[7] ORS 203.035.
[8] *Id*.
[9] *See generally* ASSOCIATION OF OREGON COUNTIES, COUNTY HOME RULE IN OREGON (2005), https://drive.google.com/file/d/0B4bfnUJ9POS_RjVYMDhWZHowbHM/view?resourcekey=0-vQ8hnGby1VzLj4u0GxVDsA (last accessed December 30, 2022); *See also* ASSOCIATION OF OREGON COUNTIES, SHARED STATE-COUNTY SERVICES (2022), https://drive.google.com/file/d/0B4bfnUJ9POS_NmY4c0RZbVJreEU/view?resourcekey=0-ZvW9t-HoCw_-xDudStiXiw (last accessed December 30, 2022).
[10] ORS 203.040.
[11] *See* Op Atty Gen 6495 (1968).

notable exceptions such as maintenance of a "county road," a designated road type that indicates maintenance responsibilities by the county, even if the road is in city limits.[12]

In addition to these functions that are similar to cities, many counties operate functions that are unique to counties or functions that counties share with the state of Oregon. For example, cities in Oregon do not assess property or collect their own property taxes: state law mandates that function to counties on a countywide basis.[13] State law also requires counties to conduct city elections.[14] Counties also administer a number of services that extend to residents of cities as well as unincorporated areas – public health and mental health programs, county surveyor, property document recording, county jails, search and rescue, vector control, solid waste disposal, county fairs, veteran services, and others.[15]

v. Issues in city-county relations

Friction sometimes arises in city-county relations. The issues are often financial, such as the double taxation issue when cities complain that city property owners pay county taxes but some county services are provided only outside cities. County roads annexed to cities remain a county responsibility until the city voluntarily takes over, and there are city-county disagreements over the level of maintenance that should be provided on such roads. [16] City councils and county governing bodies in many areas hold joint periodic meetings to keep communications open on these and other issues.

Since many city services overlap with county services, there are opportunities to coordinate activities. The advantages of utilizing intergovernmental cooperation in the form of an intergovernmental agreement are discussed below.

B. Special Districts

School districts are the largest special purpose local governments in terms of number of personnel and size of budget. All parts of the state are within at least one district, and parts of the state are also within a community college district. More numerous are the non-school special districts which were created for cemetery maintenance, county service, domestic water supply, drainage, fire protection, health, irrigation, library, parks and recreation, people's utility, ports, road assessment, sanitary, soil and water conservation, special road, vector control, water

[12] *See* ORS 373.270; *See also* ASSOCIATION OF OREGON COUNTIES, COUNTY ROAD MANUAL, 203-204 (2022).
[13] *See* ORS chapters 308 to 312.
[14] ORS 246.200 to 246.210.
[15] *See generally* ASSOCIATION OF OREGON COUNTIES, SHARED STATE-COUNTY SERVICES (2022), https://drive.google.com/file/d/0B4bfnUJ9POS_NmY4c0RZbVJreEU/view?resourcekey=0-ZvW9t-HoCw_-xDudStiXiw (last accessed December 30, 2022).
[16] *See* ORS 373.270; *see also* 373.310 to ORS 373.330 (giving cities of Gresham, Myrtle Point, and Salem jurisdiction over certain county roads declared city streets).

control, water improvement. [17] Excluding school districts, there are more than 1,000 special districts located in every region of the state.[18]

Note that county service districts organized under ORS chapter 451 are an unusual mix of counties and special districts to provide services to specific areas in a county. Usually governed by the county governing board, services can include library, road, law enforcement, cemetery, animal control, water service, public transportation, agricultural educational extension services and parks.[19]

i. Principal act authority

Special districts provide a specific service and all decision-making and all funds collected are dedicated to providing that service. Unlike cities, which are typically governed by home rule charter, special districts derive nearly all of their authority directly from statutes, known as the "principal act." A district's principal act provides for the duties and responsibilities of the district, the method of elections, and limits to the district's authority.[20]

Principal acts commonly grant special districts the following: (1) to sue and be sued; (2) to construct, reconstruct, operation, maintain real and personal property; (3) to enter into contracts, deeds, leases; (4) to assess, levy and collect taxes; and (5) to employ necessary persons. Any city interacting with a district should review the appropriate principal act to understand the district's authority and limitations.[21]

The process for special district boundary changes, including formation, dissolution, merger, consolidation, and annexation, are determined by statute.[22]

ii. Issues in city-special district relations

An area of contention between cities and special districts are urban renewal programs. Special districts are concerned that future tax revenues are diverted from the special districts to the urban renewal agency, often a city, with little input by the special district. Although the laws were amended in 2009 and 2019 to require more cooperation with the impacted special districts and limit the maximum indebtedness of an urban renewal plan except with concurrence of overlapping special districts, many special districts continue to be concerned about the loss of future revenues.[23]

---

[17] SPECIAL DISTRICTS ASSOCIATION OF OREGON, WHAT IS A SPECIAL DISTRICT?, https://www.sdao.com/files/a3473de8b/what-is-special-district.pdf (last accessed January 1, 2023).
[18] *Id*.
[19] ORS 451.010.
[20] *See City of Powers v. Coos County Airport*, 119 P3d 225, 201 Or App 222 (Or. 2005).
[21] *See e.g.*, ORS 838.005 to 838.075 (principal act of airport districts).
[22] ORS 198.705 to 198.955.
[23] *See* ORS 457.089; ORS 457.190(4); ORS 457.220(4); ORS 457.455; ORS 457.470.

C. State Government

Oregon has three branches of government -- executive, legislative and judicial. Cities interact with the each of the branches in different ways. The following will discuss how cities commonly interact with the state of Oregon.

i. Executive branch

Oregonians elect five statewide officials to manage the executive branch of government.[24] These officials are the governor, secretary of state, treasurer, attorney general, and commissioner of labor and industries.[25]

Many state agencies have programs that regulate city activities. The following list illustrates the agencies with whom cities most frequently interact, but it is not a comprehensive list:

- *Department of Land Conservation and Development.* Administers statewide land use goals and rules, reviews city comprehensive plans and land use ordinances, and provides grants-in-aid and technical assistance.
- *Department of Environmental Quality.* Promulgates standards for air and water quality, except in Lane County, where the county and its cities have established a regional air pollution authority. Provides technical assistance and advice on a wide range of matters such as water and air quality, solid waste, and recycling.
- *Department of Transportation.* Constructs and maintains state highway system and administers federal and state grants-in-aid for city road systems.
- *Secretary of State.* Prescribes local government audit standards and supervises the administration of elections.

ii. Oregon Legislative Assembly

The present Oregon Legislative Assembly is a bicameral system—two houses with senators and representatives.[26] The Legislature enacts new laws and revises existing ones, makes decisions that keep the state in good economic and environmental condition and provides a forum for discussion of public issues.[27]

---

[24] *See Executive Branch*, OR. BLUE BOOK, https://sos.oregon.gov/blue-book/Pages/state-executive.aspx (last accessed January 1, 2023).
[25] *Id*.
[26] *See Legislative Branch*, OR. BLUE BOOK, https://sos.oregon.gov/blue-book/Pages/state/legislative/about.aspx (last accessed January 1, 2023).
[27] *Id*.

The Legislature reviews and revises the governor's proposed budget and passes tax laws to provide needed revenue.[28] The Oregon Constitution requires that the state must not spend money in excess of revenue.[29]

The Legislature also influences executive and judicial branch decisions. Enacting laws and adopting the budget establish state policy that directs all state agency activity and impacts the courts.[30] The Senate confirms gubernatorial appointments to certain offices. The Legislative Counsel Committee reviews state agency administrative rules to ensure that legislative intent is followed.[31]

Beginning in 2011, the Oregon Legislative Assembly meets each year, limited to 160 calendar days in odd-numbered years and 35 calendar days in even-numbered years.[32]

Most of the work of the Legislature takes place in committees. Committees of the Legislature can amend bills, pass them out with or without recommendation as to passage, table them or simply let them die. Because of the broad discretion vested in committees, the powers of the presiding officers of each legislative chamber in appointing committees and in referring bills are of crucial importance.

Most action of the Legislature has some direct or indirect effect on local government. City and county officials have frequent dealings with individual legislators, particularly from their own districts, and with legislative committees and leaders. Local government officials receive information from many sources about bills that might affect them, but one of the most important is the weekly *LOC Bulletin* which is sent out electronically by the League of Oregon Cities each Friday. An important part of the legislative effort of this organization is to keep city officials informed of legislative developments both during and between sessions.

iii. Judicial branch

Oregon's judicial branch of government reviews cases for compliance with federal, state and local laws. [33]

The judicial branch of state government affects local government by: 1) awarding damages, imposing penalties, or issuing orders in cases to which a local government is a party; and 2) interpreting constitutional provisions, charters, laws, ordinances, and rules that determine what a local government may do or not do, and how it may do it.

Local governments may be drawn into court in a variety of ways, including petitions for writ of review of their actions in the circuit court, actions for damages in tort or contract, and

[28] *Id*.
[29] *Id*.
[30] *Id*.
[31] *Id*.
[32] Ballot Measure 71, Approved November 2, 2010.
[33] *See Judicial Branch*, OR. BLUE BOOK, https://sos.oregon.gov/blue-book/Pages/state-judicial.aspx (last accessed January 1, 2023).

petitions for writs of mandamus or injunction. Local governments can minimize the risk of lawsuits by retaining competent counsel, keeping their legal advisors informed of their actions, and following the legal advice they receive from their advisors.

iv. Issues in city-state interactions

Often, cities and the state work together to accomplish objectives for their communities. However, there is friction in the city-state relationship when the state: (1) exercises preemption over local concerns; (2) imposes limitations or constraints on city activities (usually in financial matters); (3) mandates certain city functions, activities, or expenditures, and (4) changes to state shared revenues.

- *Preemption*. The state preempts a matter on which local government might otherwise act when it precludes local government regulation completely or in part. Examples of preemption specifically provided by law include energy facility siting and the regulation of real estate brokers and salespersons. Implied preemption may exist in laws even though preemption may not be specifically and expressly stated.

  Less sweeping preemptions are those in the state traffic code. Under these laws, local governments are merely preempted from enacting local ordinances or regulations that conflict with state law. A 1986 Oregon Supreme Court decision holds that the wording of the city home rule amendment prevents cities from setting criminal penalties that are greater than those established by state law for the same crimes.[34]

- *Limitations*. Limitations and constraints are used extensively to regulate cities. Examples include statutory debt limits, limits on the length of time for which a serial levy may be approved, conduct of local elections, political activity of public employees, and public contracting.

- *Mandates*. Mandates are state action that requires increased city expenditures. Mandates can take many forms including statute or conditions to a grant. Some common examples include land use planning, providing unemployment and workers' compensation for employees.

  Although many mandates are necessary, cities object to mandates that they regard as unnecessarily intrusive. In November 1996, the voters passed an amendment to the Oregon Constitution stating that cities may not need to comply with a state law or administrative rule adopted after January 1, 1997, that requires the expenditure of money for a new program or increased level of service for an existing program until the state appropriates reimbursement for any costs incurred.[35] Cities should consult

[34] *City of Portland v. Dollarhide*, 300 Or 490 (1986).
[35] Or Const, Art XI, s. 15.

with their legal counsel to determine whether and to what extent the power applies to an unfunded mandate imposed by the state.

- *Shared Revenue*. The state shares revenues from the Highway Trust Fund, liquor revenues, marijuana tax revenues, cigarette tax revenues and 9-1-1 tax revenues. Although cities have a long history of sharing revenue with the state in exchange for not taxing these industries, cities are concerned about long term stability of the revenue. For example, gas tax revenues in 2020 dropped for passenger vehicles due to the pandemic and more fuel efficient and electric vehicles but trucking increased due to online shopping.

D. Other Governments

i. United States

Contracts with the United States can be executed for number of reasons such as grant assistance with Federal Aviation Administration, cooperative policing or security agreements. Although most cities will not contract directly with the United States or a federal agency, many cities do receive federal grants. Several federal laws and requirements apply to cities, including the Americans with Disabilities Act, environmental quality, and nondiscrimination. Through the voluntary acceptance of federal grants, the federal government imposes federal regulations such as Davis-Bacon prevailing wage requirement, relocation assistance, and historic preservation requirements.

ii. Indian Tribes

Within Oregon, there are nine federally recognized Indian Tribes. In 2001, SB 770 passed the Legislature, requiring state agencies to include Tribes in the development and implementation of state programs that affect tribes.[36] In Oregon, Tribes are legislatively represented through the Oregon Commission on Indian Services (LCIS), an advisory body of 13 Tribal leaders and legislators.

Most cooperation with Indian Tribes will be with the state of Oregon. For example, in 2022, the Coquille Indian Tribe and the state agreed to co-manage fish and wildlife habitat in Southern Oregon to address issues such as dwindling fish on the Coquille River. The state of Oregon is a leader in state-Tribal government-to-government relations.

According to former LCIS Director Karen Quigley, local governments are encouraged to: (1) appreciate and respect the legal and historical basis of Tribal governments; (2) learn the distinction between federally recognized tribal governments and non-federally recognized tribal governments, Indian organizations, and self-identified Indians, and (3) ask before adopting a new policy or program – will this action affect tribal government interests? Some cities have a

[36] *See* ORS 182.163 to 182.168.

"history of exploring ways to cooperate with local Tribes to expand opportunities and provide services in a time of scarce resources in a way that enhances the health, safety and welfare of their citizens, tribal members and non-Tribal members." [37]

In addition to the above considerations, cities may also consider that each Tribe is their own elected government, with their own laws. Since each tribe is unique, each Tribe has their own unique culture, legal history and struggle. Cities are encouraged to reach out to and ask to learn more about working with an individual Tribe and consider possible partnerships.

II. INTERGOVERNMENTAL AGREEMENTS

Cities often find it advantageous to work with other cities or with counties, special districts, the state of Oregon, or Tribal nations. These relationships are often formalized into an intergovernmental agreement (IGA) authorized by law.[38]

An IGA is any agreement that involves or is made between two or more governments in cooperation to solve problems of mutual concerns. Local governments are encouraged to make the most efficient use of their powers by enabling them to cooperate with other governments based on mutual advantage.[39] Such agreements often result in lower cost and more effective provision of public services – especially where there are significant economies of scale or more efficient utilization of staff or other resources.

Examples of intergovernmental cooperation to tackle issues like the need for expensive technology and equipment and improve on the delivery of services that alone would be difficult to provide. For example, expensive pieces of road maintenance equipment that see limited use throughout the year can be shared between cities—particularly those that have relatively few miles of road to maintain and/or limited budgets. Agreements can be applied to an array of other cooperative efforts, such as volume materials purchasing, professional services, shared emergency medical services, joint youth or senior programs, combined planning efforts, and joint quasi-municipal government to operate a water utility.

Oregon statutes authorize cities to enter into intergovernmental agreements with other governments for the performance of any and all functions and activities that a party to the agreement has the authority to perform.[40] IGAs have whatever duties, authority and

[37] KAREN QUIGLEY, OREGON'S APPROACH TO STATE-TRIBAL RELATIONS – AND HOW LOCAL GOVERNMENT MAY WANT TO USE SOME OF IT, https://www.oregonlegislature.gov/cis/Pages/education.aspx (last accessed January 1, 2023).
[38] ORS 190.010.
[39] ORS 190.007 states, "In the interest of furthering economy and efficiency in local government, intergovernmental cooperation is declared a matter of statewide concern. The provisions of ORS 190.003 to 190.130 shall be liberally construed."
[40] Id.

responsibilities that the founding governments delegate to it. The IGA is approved and signed by each of the governing bodies that are parties to the agreement.

Developing an IGA can be challenging. This section provides an overview of the types of IGAs, when and how they are used, and answers to frequently asked questions.

A. Legal Authority

Before 1953, the Oregon Legislature gave local governments the express authority to cooperate with other governmental entities.[41] Recognizing the value of intergovernmental cooperation, in 1967, the Oregon Legislature declared the matter of statewide concern and encouraged such cooperation to further the "economy and efficiency in local government" and that the "provisions of ORS 190.003 to 190.130 shall be liberally construed."[42]

Oregon law gives cities the authority to cooperate another local government, an Oregon state agency, another state agency, the United States or its governmental agencies, or an Indian Tribe or its agencies.[43] Local governments include "county, city, district or other public corporation, commission, authority or entity organized and existing under statute or city or county charter."[44]

B. Intergovernmental Cooperation Activities

In addition to the broad grant of authority, the statutes enumerate the methods of intergovernmental cooperation. In cooperation with other governments, cities may provide for the performance of the following functions or activities: (1) consolidating a department; (2) jointly providing for administrative officers; (3) operating joint facilities or equipment; (4) providing a service or duty for another government; (5) creating an intergovernmental entity that acts on behalf of the local governments, or (6) any combination of the above. [45]

In addition to the general provisions, Oregon law authorizes specific intergovernmental cooperation. One such authorized use is the ability to obtain "benefits" for the use of an intergovernmental entity.[46] For example, a type of benefit that is authorized would include grants for a 9-1-1 dispatch center.

Oregon statutes also allow intergovernmental cooperation for "geographic data that have commercial value" and to collect fees for access to such data.[47] Cities are also authorized to enter into agreements with the United States to "perform security functions at a military

[41] ORS 190.003 to 190.265.
[42] ORS 190.007. *See State ex rel. Dewberry v. Kitzhaber*, 259 Or App 389, 403 (2013), *rev. den.*, 354 Or 838 (2014); *Chinese Consol. Benevolent Ass'n v. Chin*, 316 Or App 514 (2021).
[43] ORS 190.110(1).
[44] ORS 190.003.
[45] ORS 190.010.
[46] ORS 190.035.
[47] ORS 190.050.

installation or facility in the United States and to receive payment for performing the functions."[48]

C. Type of Agreements

An IGA is created when two or more governments agree to cooperate and formalize the agreement in writing. An IGA is approved by the governing bodies of the participating governments.

There are numerous types of IGAs, but generally, such agreements fall into two different categories: (1) creation of an intergovernmental entity that has established a delegated governance structure, and (2) agreements formed for a specific purpose, but the parties have not created a governance framework. As described below, depending on the type of IGA, state law requires specific terms and conditions to be in the IGA.[49]

i. Intergovernmental entities

An Intergovernmental Entity (IGE) is a public entity with specific and limited governmental powers and responsibilities. The participating governing bodies delegate certain governmental tasks and responsibilities to the newly created IGE.[50] Since the IGE is delegated duties and authorities by the participating governing bodies, it is similar to a city, county, a school district, or a special district, but with some notable differences.

Generally, Oregon law treats an IGE as a public body; thus, most laws that affect the founding governments also apply to the IGE and the services it provides.[51] One major exception to the laws that apply to IGEs is that these entities are not generally required to follow budget law.[52]

As described below, Oregon law requires certain items to be addressed within the agreement but does not prescribe how the IGE is formed or organized.[53] Thus, the

Examples of Intergovernmental Entities:

- Clackamas 800 Radio Group
- League of Oregon Cities
- Lane Council of Governments
- South Central Oregon Economic Development District
- Central Oregon Workforce Consortium
- Columbia River Estuary Study Taskforce
- Josephine County-City of Grants Pass Solid Waste Agency
- Umatilla Basin Water Commission
- Tri-County Cooperative Weed Management Area

[48] ORS 190.112.
[49] ORS 190.020.
[50] See PORTLAND STATE UNIVERSITY, A PRACTICAL GUIDE TO INTERGOVERNMENTAL ENTITIES IN OREGON: CREATING AND MANAGING AN INTERGOVERNMENTAL ENTITY UNDER ORS 190.010(5) (2020), https://www.pdx.edu/policy-consensus-center/sites/g/files/znldhr3416/files/2020-09/NPCC_Gov_Guide_Final_9-16-20.pdf (last accessed January 1, 2023).
[51] ORS 175.109 defines "public body" to include "state government bodies, local government bodies and special government bodies." "Special government bodies" include "an intergovernmental body formed by two or more public bodies." ORS 174.117(1)(f).
[52] ORS 294.316(14).
[53] ORS 190.020.

forming governments are given flexibility to collaborate and craft an IGE that will best fit their situation.

Members of the IGE governing body are not usually elected by the people through a regular election process; rather, the IGE is governed by members who are appointed by the City Council(s). The IGE is often referred to as a "board" or "commission."

An IGE can be the benefactor of the transfer of possession of or title to real or personal property. All governance, financial, administrative such as information systems, human resources support, payroll, legal, personnel, facility, equipment, and liability details for the IGE should be set forth in the IGA. As discussed below,

Each party must determine whether the benefits outweigh the costs of participating in the IGE. As discussed above, the benefits could be the need for expensive technology and equipment or to improve on the delivery of services that alone would be difficult to provide. Although an IGE may not obtain revenue through a levy taxes or general obligation bonds, an IGE can issue revenue bonds.[54] The liabilities could include: (1) transfer of employee liabilities such as PERS, sick leave, vacation leave, long-term disability; (2) transfer of facilities, apparatus, equipment, and (3) budgeting issues such as beginning fund balance and reserves.

A phenomenal resource on IGEs is Portland State University, A Practical Guide to Intergovernmental Entities in Oregon: Creating and Managing an Intergovernmental Entity under ORS 190.010(5) available at https://www.pdx.edu/policy-consensus-center/sites/g/files/znldhr3416/files/2020-09/NPCC_Gov_Guide_Final_9-16-20.pdf .

ii. Specific purpose cooperation

Specific purpose cooperation is a type of IGA is a form of intergovernmental cooperation but does not have a separate governance structure. In this type of IGA, the participating governing bodies retain more control over the delegated functions rather than vest the decision making in the governing structure. The participating governments also retain the ability to control of their own property, equipment and employees, but may share the expenses and revenues from coordinating their services.

Since the participating governments maintain control over their own resources, the issues that are negotiated in a special purpose IGA are reduced and will not require as much discussion and negotiation. As a result, special purpose cooperation IGAs are easier to form than an IGE and are far more commonly used than an IGE.

Like described above, Oregon law requires certain items to be addressed within the agreement but does not prescribe how the collaboration is organized.[55] Thus, the forming governments are given flexibility to collaborate in a way that will best fit their situation.

[54] ORS 190.080.
[55] ORS 190.020.

D. Contents of the IGA

Regardless of the type of IGA, state law requires certain issues to be addressed within the agreement.[56] The issues, if applicable, that must be addressed are the following:

- Apportionment of costs of performance.
- Apportionment of revenue and accounting for revenue.
- Transfer of personnel and the costs of the employment benefits.
- Transfer of possession of or title to real or personal property.
- Term or duration of the agreement, which may be perpetual.
- The rights of the parties to terminate the agreement.[57]

Most IGAs are simple cooperation agreements and will contain the minimum amount of provisions based on the situation. IGAs can be modified by the parties to meet the needs of emergent issues.

E. Practice Tips

When determining the form and content of an IGA, consider the following when crafting an intergovernmental agreement:

1. *Purpose*. What is the purpose of the cooperation? What types of services and activities will be accomplished?

2. *Parties*. What governments will be cooperating? Consider the potential conflicts with the governments (as discussed above). Will it be a simple two-government cooperation or is there a need to include multiple parties?

3. *Resource needs*. Will one government be able to absorb the work or does the nature of the cooperation need its own staffing and resources? Will it need its own budget and if so, will you comply with local budget law through the cooperation?

4. *Decision-making*. Will the participating parties make the decisions or delegate the decisions to a separate board? What type of oversight do the founding governments require?

5. *Liability*. How will the founding governments divide the liability?

6. *Assets*. Will the founding governments retain the assets or will the assets be distributed to an entity?

7. *Termination*. How much notice is needed to terminate the cooperation? How will the governments distribute assets once terminated?

[56] ORS 190.020.
[57] ORS 190.020.

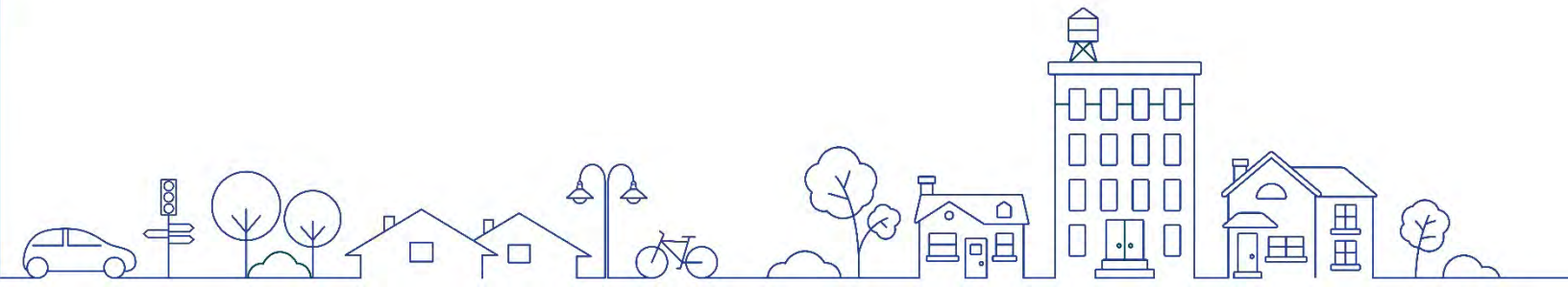
8. *Other impacts*. Will the cooperation impact other parties such as Indian Tribes? Should the other identified parties be consulted?

Several examples of IGAs – both IGEs and specific purpose cooperations—are available online.[58]

[58] *See* PORTLAND STATE UNIVERSITY, A PRACTICAL GUIDE TO INTERGOVERNMENTAL ENTITIES IN OREGON: CREATING AND MANAGING AN INTERGOVERNMENTAL ENTITY UNDER ORS 190.010(5), https://www.pdx.edu/policy-consensus-center/sites/g/files/znldhr3416/files/2020-09/NPCC_Gov_Guide_Final_9-16-20.pdf (last accessed January 1, 2022); Washington County, https://www.washingtoncountyor.gov/support-services/documents/csda-grant-iga-template/download?inline (last accessed January 2, 2022).

Oregon Municipal Handbook

CHAPTER 12: FINANCIAL MANAGEMENT AND TAXATION



League of Oregon Cities

Published by the League of Oregon Cities
October 2024

Table of Contents

Chapter 12: Financial Management and Taxation

A city's strength and breadth of services depends on its active management of its finances. Financial management includes the following: (1) budgeting and forecasting; (2) accounting and financial reporting, including internal controls and audits; (3) capital planning and asset management, (4) compensation and benefits; and (5) treasury and investment management.

In addition to these topics, this chapter will discuss taxation. Taxation is the primary resource to allow cities to fund essential city services including police, fire, roads, water, parks and more.

I. Budgets and Forecasting

Budgeting is the process of allocating finite resources to the prioritized needs of an organization.[1] The budget also provides an important tool for the control and evaluation of sources and the uses of resources.

Budgets in the public arena are often considered the definitive policy document because an adopted budget represents the financial plan used by a government to achieve its goals and objectives.[2] When a unit of government legally adopts a financial plan, the budget has secured the approval of the governing board and reflects:

- Public choices about which goods and services the unit of government will or will not provide;
- The prioritization of activities in which the unit of government will be involved;
- The relative influence of various participants and interest groups in the budget development process; and
- The governmental unit's plan for acquiring and using its resources.[3]

As discussed below, state law prescribes the framework of the budget adoption process. The basic budget framework requires several steps including public notice, hearing, and two public meetings.[4] Depending on the size of the city and the goals set forth by its governing

---

[1] For excellent discussions on the importance of budgeting, *see* National Center for Education Statistics, *Financial Accounting for Local and State School Systems*, available at: https://nces.ed.gov/pubs2004/h2r2/ch_3.asp (last accessed on Sept. 28, 2023); and University of Wisconsin-Madison, *Local Government Education, Finance and Budgeting*, available at: https://localgovernment.extension.wisc.edu/finance-and-budgeting/ (last accessed on Sept. 28, 2023).
[2] *Id*.
[3] *Id*.
[4] ORS 294.305 to 294.565; OAR 150-504-420.

board, this framework can be greatly expanded to accommodate different budgeting models or engagement of the public.[5]

In Oregon, the Department of Revenue (DOR) provides yearly training for budget officers, governing body members and appointed members of budget committees.[6] The DOR maintains its Local Budgeting Manual, adopted as OAR 150-504-420, providing detailed guidance and forms for meeting the statutory requirements.[7]

In addition to the budgeting framework required by law, this section will provide additional resources and methods not prescribed by law.[8] For example, this section discusses different methods that cities use to develop the budgets that allow cities to allocate resources to specific goals, rather than historical budgeting. Lastly, this section will discuss the necessity of forecasting resources and expenditures in the future to guide the decision makers when preparing and approving a current budget.

A. Budget Framework: Requirements[9]

Most cities must prepare and adopt an annual budget.[10] A budget is a financial plan estimating the revenues and expenditures for a fiscal year, or biennial budget period.[11] A fiscal year begins July 1 and ends June 30.[12] A biennial budget period begins on July 1 and ends June 30 of the second calendar year next following.[13] Without a budget for the new fiscal year (July 1st to June 30), a city is not able to spend money or incur obligations.[14]

---

[5] *Id*.
[6] *See* Oregon Department of Revenue, *Local Budget Law Training and Resources*, available at: https://www.oregon.gov/dor/programs/property/pages/local-budget.aspx (last accessed on Sept. 30, 2023).
[7] Oregon Department of Revenue, *Local Budgeting Manual*, available at: https://www.oregon.gov/dor/forms/FormsPubs/local-budgeting-manual_504-420.pdf (last accessed on Sept. 30, 2023).
[8] *See, e.g.*, League of Oregon Cities, *Budgeting Basics*, LOCAL FOCUS, available at: https://www.orcities.org/application/files/1016/4805/3045/BudgetingBasics2-10-22.pdf (last accessed on Sept. 28, 2023); Government Finance Officers Association, *Budgeting and Forecasting Topic Library*, available at: https://www.gfoa.org/materials/topic/budgeting-and-forecasting (last accessed on Dec. 18, 2023).
[9] This discussion on the budget framework is courtesy of Oregon Department of Revenue, *Local Budgeting Manual*, available at: https://www.oregon.gov/dor/forms/FormsPubs/local-budgeting-manual_504-420.pdf (last accessed on Sept. 30, 2023).
[10] ORS 294.305 to 294.565.
[11] *Id*.
[12] ORS 294.311(17).
[13] ORS 294.323.
[14] ORS 294.305 to 294.565.

i. **Prepare the Proposed Budget**

Although each city prepares their proposed budget differently, generally, the city manager prepares a proposed budget based on requests by city departments.[15]

To guide the preparation of the budget, the city manager provides departments with budget preparation guidelines that may include:

- A budget transmittal letter from the city manager, which provides the overall context for budget development;
- A budget overview, which explains the budgeting philosophy and approach, outlines the budget development process, and refers to major assumptions and changes in the budgetary process from the previous year;
- Fiscal limitations to be observed, such as maintenance of service levels, specific percentage increases or decreases in resource allocations, and personnel hiring guidance;
- A budget calendar of critical dates for budget completion, submission, and review;
- Instructions concerning expenditure items to be budgeted and the detail required for submission; and
- A copy of standard budget preparation worksheets and submission forms.[16]

Once departments have developed a departmental budget, departments may present the requested budget to the city manager and/or budget officer.[17] The budget officer will review and adjust the department's requested budget reflecting the city priorities.[18]

The different options for developing the budget are discussed below and include: (1) line-item budgeting; (2) performance budgeting; (3) program and planning budgeting; (4) zero-based budgeting, and (5) outcome-focused budgeting.

Budget Message

The budget officer will finalize the budget message, trends, initiatives, and narratives. The budget message gives the public and the budget committee information that will help them understand the proposed budget.[19] It contains a brief description of the financial policies reflected in a proposed budget and, in connection with the financial policies, explains the

---

[15] *See, e.g.*, City of Salem: https://www.cityofsalem.net/government/budget-finance/annual-budget/get-involved-in-the-budget-process (last accessed on Dec. 18, 2023); City of Gresham, https://greshamoregon.gov/budget/ (last accessed on Dec. 18, 2023).
[16] *See, e.g.*, City of Hillsboro: https://www.hillsboro-oregon.gov/our-city/departments/finance/budget (last accessed Dec. 28, 2023).
[17] *Id*.
[18] *Id*.
[19] ORS 294.403.

important features of the budget.[20] The budget message must also explain proposed changes from the prior year's budget and any major changes in financial policies.[21]

Funds

Every city budget will have at least one fund, the general fund, which accounts for the daily operations of the city.[22] In practice, a city budget will have several funds, each designed to account for a specific purpose. A budget should include enough different types of funds to clearly show what services and programs a local government is doing and how it is paying for expenditures.[23] See below in fund accounting for more information.

Each year a city's budget provides a brief financial history of each fund.[24] To meet this requirement, the annual budget will include detailed information on: the actual revenues and expenditures for the prior two years; the budgeted revenues and expenditures for the current year; the estimated balanced budget as proposed by the budget officer for the coming year which includes columns for the budget approved by the budget committee; and the final budget adopted by the governing body.[25] The budget also includes a column for the descriptions of expenditures and resources.[26]

Organizational Unit and Programs

Within each fund, estimated expenditures must be arranged by organizational unit or program.[27] An organizational unit is an administrative subdivision of the local government which is responsible for specific services, functions or activities.[28] These are usually identified as departments, divisions, offices, etc.[29] For example, a city may be structured into organizational units such as: Police Department, Public Works Department, Office of the City Recorder, etc.

A program is a group of related activities aimed at accomplishing a major service or function.[30] Programs could include services and functions such as: fire protection, water, sewers, road maintenance, etc.

---

[20] *Id*.
[21] *Id*.
[22] OAR 150-294-0420.
[23] *Id*.
[24] OAR 150-294-0470; ORS 294.358.
[25] ORS 294.438.
[26] For an example of the typical resources and expenditures found in a city budget, see page 33 of the Oregon Department of Revenue, *Local Budgeting Manual*, available at: https://www.oregon.gov/dor/forms/FormsPubs/local-budgeting-manual_504-420.pdf (last accessed on Sept. 30, 2023).
[27] ORS 294.438.
[28] ORS 294.311(31).
[29] *Id*.
[30] ORS 294.311(33).

Object classifications

Within each organizational unit or program, the estimates of line-item expenditures must be detailed by the following object classifications: personnel services, materials and services and capital outlay.[31] In addition, separate estimates must be made in each fund for special payments, debt service, interfund revenue transfers, operating expenses and general capital outlays that cannot reasonably be allocated to one particular unit or program.[32]

This proposed budget is sent to the budget committee.

ii. Appoint a Budget Officer and a Budget Committee

While the city is preparing a budget, the elected officials appoint a budget officer and a budget committee.[33] The budget officer prepares or supervises the preparation of the proposed budget to present to the budget committee.[34] Often, the budget officer is the city manager or the finance director.

For the budget committee, the elected officials appoint lay members of the jurisdiction.[35] The budget committee comprises of an equal number of lay members as governing board members.[36] If the governing body cannot identify enough citizens willing to serve on the budget committee, then the committee is made up of the citizens who have volunteered to serve along with the entire governing body.[37]

The appointed members of the budget committee must be electors of the city, meaning they must be qualified voters who have the right to vote on the adoption of any measure.[38] The members of the budget committee are appointed for staggered three-year terms, and cannot be employees, officers or agents of the city.[39] No member of the budget committee can receive compensation for serving on the committee except reimbursement of expenses incurred while serving.[40]

iii. Publish Notice of Budget Committee Meeting

The city must publish notice of the date, place and that public comment will be heard at the budget committee meeting.[41] If the budget officer anticipates that more than one meeting

---

[31] ORS 294.388(3).
[32] *Id*.
[33] ORS 294.331.
[34] *Id.*
[35] ORS 294.414(2)
[36] *Id.*
[37] *Id.*
[38] *Id.*
[39] ORS 294.414(4) and 294.414(5).
[40] ORS 294.414(3).
[41] ORS 294.426 and ORS 294.438.

will be needed, it may provide notice of several meetings. Notice is usually one of the following:

- If the only form of notice is newspaper publication, the notice must be published at least twice, five to 30 days before the scheduled budget committee meeting date.[42]
- If the notice is published both in a newspaper and online, it need only be published once, but the publication must include the website address, and it must be published online for at least 10 days before the meeting.[43]

iv. Budget Committee Approves the Budget

The budget committee conducts public meetings to hear the budget message delivered at the first meeting of the budget committee by the budget officer, the chief executive officer or the governing body chair.[44] A budget committee holds at least one meeting for the purpose of receiving the budget message and the budget document, and to provide the public with an opportunity to ask questions about and comment on the budget.[45]

A quorum, or more than one-half of the committee's membership, must be present for a budget committee to conduct an official meeting.[46] Any action taken by the committee first requires the affirmative vote of a majority of the membership. If only a quorum is present at a meeting, all members must then vote in the affirmative for an action to be taken.[47]

Like a governing body, members of the budget committee are required to declare actual and potential conflicts of interest.[48] Budget committee members who have actual conflicts of interest may not participate in the discussion or the vote; therefore, it is unlikely that any budget committee member with an actual conflict would attend the budget committee meeting.

The budget committee reviews the budget proposed by the budget officer. One of its most important functions is to listen to comments and questions from interested citizens and consider their input while deliberating on the budget.[49] The budget committee can revise the proposed budget to reflect changes it wants to make in the local government's fiscal policy provided that the revisions still produce a balanced budget.[50] When the committee is satisfied, it approves the budget.

---

[42] ORS 294.426(5)(a).
[43] ORS 294.426(5)(b).
[44] ORS 294.426(1)(a).
[45] ORS 294.426(1)(b).
[46] OAR150-294-0450.
[47] ORS 294.414; OAR 150-294-0450.
[48] ORS 244.020; ORS 244.120.
[49] ORS 294.426(1)(b).
[50] ORS 294.388(1).

When approving the budget, the budget committee must also approve a property tax rate or the tax amounts that will be submitted to the county assessor.[51]

v. Publish Notice of Summary Budget

Upon approval of the budget by the budget committee, the budget officer completes the budget column labeled "approved by budget committee," noting any changes from the original proposed budget.[52] A summary of the approved budget, which includes a narrative description of prominent changes to the budget from year to year, is published in the newspaper with the notice of a public hearing to adopt the budget five to 30 days before the hearing date.[53]

vi. Budget is Adopted by Governing Body

The governing body must conduct a budget hearing by June 30 to receive the budget committee's approved budget, conduct deliberations and consider any additional public comments.[54] The council can make any adjustments that it deems necessary (with some restrictions) to the approved budget before it is adopted prior to July 1.[55]

The budget hearing and the resolutions or ordinances necessary to adopt the budget and impose taxes can be conducted at the same public meeting. The types of changes the governing body can make without republishing are:

- Increasing expenditures in any fund in the annual budget up to $5,000 ($10,000 in a biennial) or 10%, whichever is greater;
- Reducing expenditures of any funds;
- Reducing the tax rate or amount approved by the budget committee; and
- Adjusting the other resources in each fund—does not require republishing[56]

However, if the expenditure increase needs to be more than $5,000 in an annual budget, the council must republish the budget summary and hold a second public hearing before July 1st.[57] If the budget is republished and a second budget hearing is held, the governing body can increase the amount or rate of taxes to be imposed above what the budget committee approved but only up to the city's permanent rate limit, a voter-approved local option tax rate or dollar amount, and bond principal and interest requirements.[58]

---

[51] ORS 294.456(1); ORS 310.060.
[52] ORS 294.428(1).
[53] ORS 294.438.
[54] ORS 294.408; ORS 293.605.
[55] ORS 294.456.
[56] ORS 294.456; ORS 294.453.
[57] ORS 294.456.
[58] *Id.*

To adopt the budget, the city council enacts a resolution or ordinance which provides the legal authority to: establish or dissolve funds; make appropriations for expenditures; adopt a budget; impose and categorize taxes; and perform all other legal actions pertaining to budgeting and authorizing tax levies.[59] To accomplish this, cities do not have to pass multiple resolutions or ordinances; rather, all the enactment statements can be combined into one resolution or ordinance, which must be signed by the mayor before submission to the county assessor's office.

vii. Appropriations and Certifies Tax to the County Assessor by July 15

By July 15 of each year, a city must submit two copies of the resolution or ordinance adopting the budget, making appropriations, and imposing and categorizing the tax to the county tax assessor.[60] In addition, the notice of property tax certification (form LB-50) and successful ballot measures for local option taxes or permanent rate limits must be submitted. [61]

In addition to the county tax assessor's copies, a copy of the resolutions must be submitted to the Oregon Department of Administrative Services by July 31.[62] Finally, a copy of the published adopted budget document, including the publication and tax certification forms, must be submitted to the county clerk's office by September 30.[63]

viii. Changing the Adopted Budget

After July 1, cities may change appropriations in an adopted budget with resolutions authorizing transfers of funds and supplemental budgets to change the adopted expenditure appropriations and estimated resources. [64] The resolutions must be approved before more money is spent beyond what is appropriated in the adopted budget. Any changes made to the adopted budget require that the budget remain in balance after the change.

It is unlawful to spend public money in excess of the amounts budgeted.[65] Public officials can be sued for such actions if the expenditure is found to be malfeasance in office or willful or wanton neglect of duty.[66] Creating a supplemental budget or a resolution transfer after the expenditure is made does not protect the governing body members from a lawsuit.

---

[59] *Id*.
[60] ORS 294.458; ORS 310.060.
[61] OAR 150-310-0020.
[62] ORS 221.770.
[63] ORS 294.458(5).
[64] ORS 294.471.
[65] ORS 294.471(4) and ORS 294.100.
[66] ORS 294.100.

B. Types of budgeting processes

As discussed above, Oregon law requires local governments to follow specific steps to adopt a budget. However, the development of the budget is largely left to the discretion of the city's governing body and city manager. As discussed below, there are several different methods to prepare a budget and create a link between the services provided and the resources allocated by the city.[67]

Cities generally use the following methods of budgeting: (1) line-item budgeting; (2) performance budgeting; (3) program and planning budgeting; (4) zero-based budgeting, and (5) outcome-focused budgeting.[68] Many governments use a variety of hybridized versions to address the specific needs of the organization.[69]

i. Line-Item Budgeting [70]

Line-item budgeting is the most widely used approach in many organizations. In line-item budgeting, expenditure requests are based on historical expenditure and revenue data. The line-item budget approach offers simplicity and ease of preparation. This method budgets by organizational unit and object and is consistent with the lines of authority and responsibility in organizational units. As a result, this approach enhances organizational control and allows the accumulation of expenditure data at each functional level. Finally, line-item budgeting allows the accumulation of expenditure data by organizational unit for use in trend or historical analysis.

Although this approach offers substantial advantages, critics have identified several shortcomings including that it presents little useful information to decisionmakers on the functions and activities of organizational units. Since this budget presents proposed expenditure amounts only by category, the justifications for such expenditures are not explicit and are often unintuitive. However, to overcome its limitations, the line-item budget can be augmented with supplemental program and performance information.

ii. Performance Budgeting[71]

In a performance budgeting includes narrative descriptions of each program or activity.

---

[67] *See* Government Finance Officers Association, *Recommended Budget Practices: A Framework for Improved State and Local Government Budgeting* (1998), available at: https://gfoaorg.cdn.prismic.io/gfoaorg/e4534548-fa06-47ad-9cc8-5f37e6e2f21e_RecommendedBudgetPractices.pdf (last accessed Dec. 29, 2023).
[68] This discussion on the types of budgeting is courtesy of the National Center for Education Statistics, *Financial Accounting for Local and State School Systems* (2009) available at: https://nces.ed.gov/pubs2009/fin_acct/chapter3_2.asp (last accessed Dec. 28, 2023).
[69] *Id.*
[70] *Id.*
[71] *Id.*

The budget is organized into quantitative estimates of costs and accomplishments and focuses on measuring and evaluating outcomes.

The performance approach is considered superior to the line-item approach because it provides more useful information for evaluation. The performance approach does not necessarily evaluate the appropriateness of program activities in relation to reaching an organization's goals or the quality of services or outputs produced. Consequently, the performance approach has become most useful for activities that are routine in nature and discretely measurable such as vehicle maintenance and accounts payable processing. Performance budgeting may offer considerable enhancement to the line-item budget when appropriately applied.

iii. Program and Planning Budgeting[72]

Program budgeting bases expenditures solely on programs of work regardless of objects or organizational units. Program budget requests and reports are summarized in terms of a few broad programs rather than in the line-item expenditures or organizational units.

This conceptual framework includes the practices of explicitly projecting long-term costs of programs and the evaluation of different program alternatives that may be used to reach long-term goals and objectives. The focus on long-range planning is the major advantage of this approach.

This approach may be limited if there are changes in long-term goals, lack of consensus regarding the city's fundamental objectives, lack of adequate program and cost data, and the difficulty of administering programs that involve several organizational units.

iv. Zero-Based Budgeting[73]

Zero-based budgeting is a budgeting process that allocates funding based on program efficiency and necessity rather than budget history. As opposed to traditional budgeting, no item is automatically included in the next budget. In zero-based budgeting, every expenditure must be justified annually during the budget development process.

Expenditures are assigned a predicted outcome and costs and then expenditures are then ranked by their importance in reaching a city's goals and objectives. Therefore, when the proposed budget is presented, it contains a series of budget decisions that are tied to the attainment of the city's goals and objectives.

The central thrust of zero-based budgeting is the elimination of outdated efforts and expenditures and the concentration of resources where they are most effective. This is achieved through an annual review of all program activities and expenditures, which results in improved

[72] *Id.*
[73] *Id.*

information for allocation decisions. However, proper development requires a great deal of staff time, planning, and paperwork.

Experience with the implementation of this approach indicates that a comprehensive review of zero-based budgeting decision packages for some program activities may be necessary only periodically. Additionally, a minimum level of service for certain programs may be legislated regardless of the results of the review process. As a result, zero-based budgeting has had only modest application, although the review of program activities makes zero-based budgeting particularly useful when overall spending must be reduced.

v. Outcome-Focused Budgeting[74]

Outcome-focused budgeting is the practice of linking the allocation of resources to the production of outcomes. The objective is to allocate the city's resources to those service providers or programs that use them most effectively. Outcome-focused budgeting argues that mission-driven cities are superior to those that are rule-driven because they are more efficient, are more effective in producing desired results, are more innovative, are more flexible, and have higher employee morale.

City budgeting is becoming increasingly outcome-focused because it is closely linked to the planning process in governments. For a city to focus on outcomes, goals and objectives must be identified and tied to budget allocations for the achievement of those objectives.

C. Forecasting [75]

Forecasting is used to inform and assist in decision-making. Forecasting imparts a long-term perspective to the budgeting process and emphasizes financially sustainable decisions. The Government Finance Officers Association (GFOA) recommends that cities should forecast major revenues and expenditures several years into the future.

Cities should consider that adoption of financial policies might be particularly helpful for promoting interest in financial forecasting. Such policies could include: (1) a reserve policy, which establishes the desired level of reserves to maintain; (2) a policy that requires recurring expenditures to be less than recurring revenues; (3) a long-financial planning policy, which commits officials to considering the long-term implications of decisions made today, and (4) capital improvement plans.

The forecast, along with its underlying assumptions and methodology, should be clearly stated and made available to stakeholders in the budget process. The assumptions should be

---

[74] *Id.*

[75] *See* Government Finance Officers Association, *Financial Forecasting in the Budget Preparation Process*, available at: https://www.gfoa.org/materials/financial-forecasting-in-the-budget-preparation-process (last accessed Dec. 18, 2023).

made very clear, simple, and explain how the assumptions lead to the forecast. The key steps in a sound forecasting process include the following:

i. Define Assumptions[76]

The first step in the forecasting process is to define the fundamental issues impacting the forecast. The results will provide insight into which forecasting methods are most appropriate and will help create a common understanding among the forecasters as to the goals of the forecasting process. There are four key questions to consider when defining assumptions for the forecast:

- *What is the time horizon of the forecast?*
- *What is the objective of the government's forecasting policy?* For example, a "conservative" forecast underestimates revenues and builds in a layer of contingencies for expenditures. This might make it harder to balance the budget but reduces the risk of an actual shortfall. On the other hand, an "objective" forecast seeks to estimate revenues and expenditures as accurately as possible, making it easier to balance the budget, but increasing the risk of an actual shortfall.
- *What are the political/legal issues related to the forecast?* Be aware of current laws or expected changes in laws that affect forecasts.
- *What are the major revenues and expenditure categories?*

The assumptions used for a budget forecast should be documented for future reference to allow each financial forecasting process to utilize the same assumptions.

ii. Gather Information[77]

To support the forecasting process, cities should use statistical data as well as the accumulated judgment and expertise of individuals such as department heads. Gathering information increases the forecaster's knowledge about the forces impacting revenues and expenditures, including potential disruptive events and trends. Such information allows the forecaster to build quantitative models more intelligently and to make a forecast using his or her own judgment.

---

[76] *Id*.
[77] *Id*.

iii. Preliminary/Exploratory Analysis[78]

The preliminary analysis should examine the historical data and relevant economic conditions. This analysis improves the quality of the forecast both by giving the forecaster better insight into when and what quantitative techniques might be appropriate.

In particular, the forecaster should look for evidence related to:

- **Business cycles.** Does the revenue (or expenditure) tend to vary with the level of economic activity in the community or are they independent of cycles? How do broader market forces impact key expenditures, such as pension contributions affected by investment returns?
- **Demographic trends.** Are population changes affecting service demands and/or revenues?
- **Outliers and historical anomalies.** Does the data contain any extreme values that need to be explained? It could be that these represent highly anomalous events that don't add to the predictive power of the data set.
- **Relationships between variables.** Are there important relationships between variables that could aid in forecasting?

iv. Select Methods of Forecasting[79]

After running a preliminary analysis, the city should select one or more forecasting methods. The three basic models of forecasting to consider include:

- **Extrapolation**. Extrapolation uses historical revenue data to predict future behavior by projecting the trend forward.
- **Regression/econometrics**. Regression analysis is a statistical procedure based on the relationship between independent and dependent variables. If a linear relationship exists between the independent and dependent variables, one or more of the independent variables can be used to predict future revenues or expenditures.
- **Hybrid forecasting**. Hybrid forecasting combines knowledge-based forecasting, a type of forecasting that uses the forecaster's own experience as the basis for the forecast with a quantitative method of forecasting. Hybrid forecasting methods are very common in practice and can deliver superior results.

[78] *Id*.
[79] *Id*.

II. ACCOUNTING AND FINANCIAL REPORTING

Accounting and financial reporting for state and local governments is highly specialized. Even accountants and auditors familiar with corporate accounting and financial reporting, but new to the public sector, must immediately face the daunting challenge of familiarizing themselves with the local government rules, guidelines, and practices.

The Governmental Accounting Standards Board (GASB) provides guidance in its statements, codified in the publication known as Government Accounting, Auditing, and Financial Reporting, also known as the "GAAFR Blue Book."[80] The Blue Book includes the GFOA's current best practices on accounting, auditing, and financial reporting, all of the guidance of the GASB, as well as the GFOA's current best practices.[81]

A. Fund Accounting

Fund accounting is a system of specialized accounting to track the amount of cash assigned to different purposes and the usage of that cash. The intent of fund accounting is not to track whether an entity has generated a profit, since this is not the purpose of a local government. Funds are used by governments because they need to maintain very tight control over their resources, and funds are designed to monitor resource inflows and outflows, with particular attention to the remaining amount of funds available. Fund accounting emphasizes accountability rather than profitability. In this method, a fund consists of a self-balancing set of accounts, and each is reported as either unrestricted, temporarily restricted or permanently restricted based on the provider-imposed restrictions.

Every city budget will have at least one fund, the general fund, which accounts for the daily operations of the city.[82] There are seven types of funds used in most city budgets:[83]

- **General Fund** – records expenditures needed to run the daily operations of the local government and the money that is estimated to be available to pay for these general needs.
- **Special Revenue Fund** – accounts for money that must be used for a specific purpose and the expenditures that are made for that purpose.

---

[80] *See* Governmental Accounting Standards Board, Government Accounting, Auditing, and Financial Reporting , available at: https://www.gfoa.org/egaafr (last accessed Dec. 18, 2023).
[81] *Id*.
[82] This discussion on funds is courtesy of League of Oregon Cities, *Budgeting Basics*, LOCAL FOCUS (First Quarter 2022), available at: https://www.orcities.org/application/files/9116/7814/3966/Q12023LF.pdf (last accessed May 31, 2023).
[83] *Id*.

- **Capital Project Fund** – records the money and expenditures used to build or acquire capital facilities, such as land, buildings or infrastructure. This is a type of special purpose fund and is only used while a project is being completed.
- **Debt Service Fund** – records the repayment of general obligation and revenue bonds and other financing obligations. The expenditures in the fund are the principal and interest payments. Money dedicated to repay these obligations cannot be used for any other purpose.
- **Trust and Agency Fund** – accounts for money that is held in trust for a specific purpose as defined in a trust agreement or when the government is acting as a custodian for the benefit of a group. Example: gifts of investments or securities given to the city with provisions that the income be used to aid the library or park system.
- **Reserve Fund** – accumulates money to pay for any service, project, property or equipment that the city can legally perform or acquire. It functions as a savings account. A special resolution or ordinance of the governing body is needed to set up a reserve fund. Example: money set aside to pay for the future replacement of city vehicles at the end of their useful lives.
- **Enterprise Fund** – records the resources and expenditures of acquiring, operating and maintaining a self-supporting facility or service—such as a city water or wastewater utility.

For most funds, the accounting basis, or when revenue and expenditures are recognized and counted against the fund, is a modified accrual basis which involves recognizing revenue when it becomes both available and measurable, rather than when it is earned.[84] Expenditures, a term preferred over expenses for modified accrual accounting, are recognized when the related liability is incurred.[85]

B. Audits[86]

Except as discussed below, most cities are subject to Oregon's Municipal Audit Law.[87] An audit is an independent assessment of the government's external and internal budgetary controls. performed at least once each calendar or fiscal year.[88]

---

[84] *See*, *e.g.*, City of Molalla, *Finance*, available at: https://www.cityofmolalla.com/finance/page/budgets (last accessed Dec. 12, 2023); ORS 294.333(1) ("municipal corporation shall record its revenues and expenditures, on a fund by fund basis, using the cash basis, the modified accrual basis or the accrual basis of accounting, at the discretion of the municipal corporation.")
[85] *Id*.
[86] *See* League of Oregon Cities, *FAQ on Municipal Audits* (2018), available at: https://www.orcities.org/application/files/8716/8721/7532/FAQ-MunicipalAudits-updated5-23.pdf (last accessed Dec. 28, 2023).
[87] ORS 297.405 to 297.740 and 297.990.
[88] ORS 297.425.

Starting on January 1, 2024 with 2023 House Bill 2110, cities with expenditures more than $1 million must have their financial statements reviewed or audited by an accountant licensed as a municipal auditor.[89] Cities with combined expenditures of more than $250,000 but less than $1 million, and whose financial statements have been reviewed by a licensed municipal auditor, may file "review reports" with the secretary of state within 180 days after its fiscal or calendar year ends.[90] A city with combined expenditures less than $250,000, and whose chief fiscal officer is bonded for the total amount of money received during the year may file unaudited financial statements with the secretary of state within 90 days after its fiscal year ends.[91]

Cities report the results of their annual operations in an annual comprehensive financial report (ACFR), the equivalent of a business's financial statements.[92] An ACFR includes a single set of government-wide statements, for the entire government entity and individual fund statements.[93] The Governmental Accounting Standards Board (GASB) establishes standards for ACFR preparation.[94]

Audits are required to inquire into:

- The methods followed by the city in recording, summarizing and reporting its financial transactions and financial condition;
- The accuracy and legality of the transactions, accounts, records, files and financial reports of the officers and employees of the city as they relate to fiscal affairs;
- The city's compliance with the requirements, orders and regulations of public officials which pertain to the financial conditions and operations of the city;
- The city's compliance with the legal provisions of federal laws, state laws, charter provisions, court orders, ordinances, resolutions, and rules and regulations issued by any governmental entity; and
- The city's compliance with programs wholly or partially funded by federal, state or other local government agencies.[95]

Independent auditors review the ACFR and prepare an opinion on whether the city's financial statements: (1) adequately disclose material information; (2) present fairly its financial position; and (3) show results of its operations in conformance with generally accepted

[89] ORS 297.435
[90] *Id.*
[91] ORS 297.435.
[92] *See* ORS 297.415 ("requiring periodic reports of financial condition and financial operations be prepared and submitted to the Secretary of State"). The "minimum standards" adopted by the Secretary of State are in OAR 162, divisions 10 (audits) and 40 (reviews).
[93] *See* Governmental Accounting Standards Board, *Government Accounting Statement Nos. 34 and 37*.
[94] *Id*.
[95] ORS 297.425, OAR 162-010-0020.

accounting principles (also known as GAAP).[96] Qualified audits mean there are concerns with a city's practices which should be rectified.[97] A good audit, preferably unqualified, is a necessity when attempting to incur debt at a reasonable interest rate.

Audit reports must be filed with the Audit Division of the Oregon Secretary of State's Office within six (6) months after the close of the city's calendar or fiscal year under audit.[98] Upon receipt of its audit, the city is required to provide copies of the audit to each member of its governing body who was in office during the applicable year of the audit and who currently holds office.[99] The city is then required to review the audit to determine if any deficiencies in the city's financial operations were found.[100] Copies of all financial statements, whether unaudited, reviewed, or audited, must be filed with the secretary of state.[101]

The Government Finance Officers Association (GFOA) recommends that cities establish audit committees, made up of appropriate audit committee members, that are responsible for review, oversight, establishing procedures, and providing a written report.[102] An audit committee is a practical means for a governing body to provide much needed independent review and oversight of the government's financial reporting processes, internal controls, and independent auditors. An audit committee also provides a forum separate from management in which auditors and other interested parties can candidly discuss concerns.[103] By effectively carrying out its functions and responsibilities, an audit committee helps to ensure that management properly develops and adheres to a sound system of internal controls, that procedures are in place to objectively assess management's practices, and that the independent auditors, through their own review, objectively assess the government's financial reporting practices.[104]

D. Internal Controls

Cities across the United States face increasing local government fraud and embezzlement from inside of the organization. Some examples of such theft include theft of cash, fuel, and inventory; electronic vendor payment fraud; expense reimbursement schemes; and purchasing and fraudulent return schemes. Many of the recent local government fraud and embezzlement cases are for tens of thousands, hundreds of thousands, or even millions of dollars.

---

[96] *See* Government Auditing Standards, a set of standards for government entities also known as Generally Accepted Government Auditing Standards (GAGAS), also known as the Yellow Book, available at: https://www.gao.gov/products/gao-21-368g (last accessed on Dec. 28, 2023).
[97] *Id.*
[98] ORS 297.465(2).
[99] *Id*.
[100] ORS 297.466.
[101] ORS 297.465.
[102] Government Finance Officers Association, *Audit Committees*, available at: https://www.gfoa.org/materials/audit-committees (last accessed on Dec. 28, 2023).
[103] *Id.*
[104] *Id.*

In one extreme example, Rita Crundwell, the city comptroller of Dixon, Illinois, stole $53 million of public funds across 20 years, using the funds to build one of the nation's leading quarter horse breeding empires, all while forcing staff cuts, police budget slashing, and neglect of public infrastructure.[105] In Oregon, West Linn Finance Director Elma Magkamit admitted in 2007 to embezzling $1,411,561 from the city using a city signature stamp to forge checks.[106]

Proper internal controls keep any organization and its employees safe from fraud and its repercussions. Understanding the fraud triangle is important to explain why workers commit fraud at a workplace.[107] It consists of three elements responsible for fraud – pressure, rationalization, and opportunity.[108] The first element of the triangle is the *pressure* to commit the crime to solve their financial problems.[109] Examples of financial issues include the inability to pay bills, having a drug or alcohol addiction, or wanting status, such as a bigger house or fancy car.[110] The second element of the fraud triangle is the opportunity, or ways to commit fraud with the lowest amount of risk.[111] Examples of fraud opportunities may include lying about the number of hours worked, sales numbers, or productivity to receive higher pay.[112] The last element of the triangle is rationalization that person believes that they are doing the right thing.[113] Such rationalizations may include that they were "borrowing" the money, they feel entitled to the money or they were just trying to pay their bills and provide for their family.[114]

A strong system of internal controls not only deters fraud but also supports greater efficiency and legal compliance within the local government business function.[115] Segregation of duties is a key internal control that should be implemented wherever possible.[116] For example, once accounts payable cuts a check, someone other than accounts payable should mail it.[117] Bank deposits should be made by someone other than the person who records the

---

[105] For a chilling documentary of the largest case of municipal fraud in American history, *see* ALL THE QUEEN'S HORSES (Helios Digital Learning and Kartemquin Films Production 2018).
[106] *See* City of West Linn, Embezzlement – 4 Years Later, available at: https://westlinnoregon.gov/sites/default/files/fileattachments/finance/page/6347/wl_embezzlement_4_years_later_may09.pdf (last accessed on Dec. 28, 2023).
[107] See Todd Clemens, *The Fraud Triangle: Incentive, Opportunity, and Rationalization* (Apr. 7, 2021), available at: https://accountants.sva.com/biz-tips/fraud-triangle-opportunity-incentive-and-rationalization#:~:text=Herepercent20arepercent20apercent20fewpercent20examples,proprietarypercent20companypercent20informationpercent20topercent20competitors (last accessed on Dec. 3, 2023).

[108] *Id*.
[109] *Id*.
[110] *Id*.
[111] *Id*.
[112] *Id*.
[113] *Id*.
[114] *Id*.
[115] *See* James Seaman, *A Beginner's Guide to Internal Controls*, GOVERNMENT FINANCE REVIEW, Oct. 2022, available at: https://gfoaorg.cdn.prismic.io/gfoaorg/86947daa-4e82-471e-8d6b-ab027d7c0b2f_InternalControls-gfr1022.pdf (last accessed Dec. 18, 2023).
[116] *Id*.
[117] *Id*.

deposits.[118] The person who deposits funds or writes checks should not be the person who completes the bank reconciliation or posts to the general ledger.[119]

Segregation of duties holds individuals accountable.[120] Bank reconciliations should be completed in a timely manner, and any differences should be investigated and resolved right away.[121] An additional best practice is to periodically review your organization's vendor listing.[122] Any vendor that has been added to the list, or a vendor that isn't on the government's approved list, is a red flag.[123] Vendors should be reviewed and approved before any payments are made to them.[124]

4 SIMPLE TIPS TO EFFECTIVE INTERNAL CONTROLS

1. Make sure management sets the tone with sound ethical practices.

2. Establish communication, transparency and openness about public funds from the top down.

3. Engage in cross-functional dialogue about the organization's strategic, operational, financial, compliance and reputational risks.

4. Conduct a supervisory review on the accounts payable disbursements, deposit register and bank reconciliations.

III. Capital Planning and Asset Management

Capital planning and asset management is essential for a thriving community.[125] It is important for cities to document the deficiencies to its infrastructure and decide how to allocate its limited budget between competing projects and interests. The GFOA has developed an approach to financial decision-making called "Financial Foundations for Thriving Communities. This framework seeks to solve the challenges inherent in managing shared financial resources."

Although there is no "magic bullet" for capital planning, the GFOA suggests several keys to successful capital planning practices. In a case study of Wake County, North Carolina, the GFOA suggests the following are the keys to a strong financial foundation.

1. **Establish a long-term vision.** Forecasting capital revenue that looks at least three years into the future. The long-term vision must be balanced with the short-term goals. These goals and priorities help define the community needs and are used to determine capital investments.

---

[118] *Id*.
[119] *Id*.
[120] *Id*.
[121] *Id*.
[122] *Id*.
[123] *Id*.
[124] *Id*.
[125] For a detailed discussion by the GFOA, *see* Shayne Kavanagh and Katie Ludwig, *Capital Planning and the GFOA Financial Foundations Framework*, 2019, available at: https://gfoaorg.cdn.prismic.io/gfoaorg/7a0cba9e-ea94-4dab-b09b-1c8320198633_CapitalPlanningWakeCounty.pdf (last accessed Dec. 18, 2023).

2. **Take a principled approach to capital investment.** For financial stability, a city may consider investments that provide operating expense savings or will help maintain the current capital assets. For example, a city may consider energy saving projects or renovations that improve service delivery. Cities are encouraged to define a small, meaningful set of criteria to guide capital investment decisions.

3. **Provide a fair distribution of costs and benefits among generations.** Since capital assets may have a life span measured in decades, there may be a good chance that many citizens who are present when the asset is acquired will no longer be in the community when the asset reaches the end of its useful life. Wake County tries to stay within the "80/20 rule," where 80% of the project is financed by debt, and the remaining 20% is funded by cash. Cities may wish to define the acceptable mist of debt and cash financing for capital projects.

4. **Institutionalize the long-term view.** Cities are encouraged to develop master plans, using extensive public input to gain a clear, long-term vision for services. Master plans are great for capital projects, like building a new facility. Many cities create a capital improvement plan (CIP) that is updated yearly to identify funding and the scope of the project. The CIP can be reviewed yearly to address the purpose, timing, and cost of the projects.

5. **Create clear rules for debt limitation.** Cities should consider adopting a policy that puts limits on the amount of debt a city will incur. This limit allows a city to maintain its bond ratings, a limit that allows a city to borrow debt at a cheaper rate. There are several different ways to limit debt such as limiting the debt service fund to a percentage of the general fund, requiring that a large percentage of the debt principal is paid within a time such as 10 years and the "80/20 rule" discussed earlier. Establishing these clear rules allows that debt to be considered within the city's financial means.

6. **Dedicate revenue stream for capital investments.** To ensure that the necessary resources are available, cities can dedicate a portion of their funding for debt and capital investment. Wake County assigns roughly 29% of its property taxes for debt and capital purposes.

7. **Active monitoring of policy implementation.** Cities are encouraged to regularly measure and monitor the implementation of their policies to ensure that, when looking forward, the cities will continue to meet the financial policies. Wake County utilizes a dashboard to monitor its debt and capital financial model. This expected future position is helpful rather than forcing adjustments when it is too late.

IV. Compensation and Benefits

Cities should consider their financial obligations toward its employees, in particular, Oregon Equal Pay Act, Oregon Public Employee Retirement System (PERS), and the Affordable Care Act (ACA).

A. Pay Equity

The Oregon Equal Pay Act requires Oregon employers to pay employees equitably, when doing comparable work with similar qualifications.[126] In other words, Oregon prohibited discrimination between employees on the basis of an employee's status as a member of a protected class in the payment of wages or other compensation for work of comparable character.[127] "Protected class" is defined as "a group of persons distinguished by race, color, religion, sex, sexual orientation, national origin, marital status, veteran status, disability or age."[128]

Employers may pay employees for work of comparable character at different compensation levels if the difference in compensation levels is based on a bona fide factor that is related to the position and is based on:

- A seniority system
- A merit system
- A system that measures earnings by quantity or quality of production, including piece-rate work
- Workplace locations
- Travel, if travel is necessary and regular for the employee
- Education
- Training
- Experience, or
- Any combination of these factors, if the combination of factors accounts for the entire compensation differential.[129]

Oregon created a "safe harbor," an incentive for employers to complete a pay equity study.[130] An employer may avail itself of the "safe harbor" if: (1) an equal-pay analysis of the employer's pay practices was completed within three years before the date that the employee filed the action; and (2) the employer has made reasonable and substantial progress toward eliminating unlawful wage differentials.[131] If the "safe harbor" is granted by a court, the employee's compensatory and punitive damages are disallowed, but the employer would be responsible for up to two years' back pay, plaintiff costs, and reasonable attorneys' fees.[132]

According to many legal experts in the field of compensation, the gold standard to determine whether pay is equitable is to utilize a regression analysis of comparable employees.

---

[126] ORS 652.210 to 652.235.
[127] ORS 652.220(1)(b).
[128] ORS 652.210(6).
[129] ORS 652.220(2); OAR 839-008-0015.
[130] ORS 652.235
[131] *Id.*
[132] *Id.*

Courts have upheld disparities in pay where a regression analysis demonstrates that pay is less than two standard deviations of the mean.[133]

For employees that are below the minimum pay amount, you must raise the employee's pay.[134] If an employee is above the maximum pay, you cannot reduce the employee's salary.[135] However, you may wish to use a strategy to hold the employee's pay by not granting all cost-of-living allowances until the employee below the maximum pay.

B. Oregon Public Employee Retirement System

Oregon's Public Employees Retirement System (PERS) is a retirement and disability fund for public employees. [136] Roughly 95% of Oregon's state and local government employees participate in the system.[137]

Independent studies have found that Oregon PERS was one of the most generous pension plans ever devised, causing unfunded liability for Oregon employers and reducing economic incentives to promote longer tenure.[138] The system is currently funded by the employer as a percentage of the employee's pay and the investments made by the Oregon PERS Board.[139] Since the mid-1990s, concerns about the unfunded liability have caused the Oregon Legislature to adjust the formulas for new employees.[140]

The unfunded actuarial liability (UAL) exists when a pension plan's liabilities (i.e., money the system owes to current and future retirees) are greater than its assets (i.e., money coming into the plan).[141] The UAL is calculated for each PERS employer and impacts the

---

[133] *See, e.g.*, *Adams v. Ameritech Servs., Inc.*, 231 F.3d 414,424 (7th Cir. 2000) (noting that in employment discrimination cases, "[t]wo standard deviations is normally enough to show that it is extremely unlikely … that [a] disparity is due to chance."); *Cullen v. Indiana Univ. Bd. Of Trustees*, 338 F.3d 693, 702 (7th Cir. 2003) (explaining in Equal Pay case that "generally accepted principles of statistical modeling suggest that a figure less than two standard deviations is considered an acceptable deviation").
[134] ORS 652.220.
[135] *Id.*
[136] *See* State of Oregon, *Oregon PERS History* (3d ed. 2021), available at: https://www.oregon.gov/pers/Documents/General-Information/PERS-History.pdf (last accessed Dec. 18, 2023).
[137] *See* State of Oregon, *What is PERS*?, available at: https://www.oregon.gov/pers/emp/pages/what-is-pers.aspx (last accessed Dec. 18, 2023).
[138] *E.g.*, Kevin E. Cahill et al, *Pension Generosity in Oregon and its Impact on the K12 Workforce*, U.S. BUREAU OF LABOR STATISTICS (April 2016), available at: https://www.bls.gov/osmr/research-papers/2016/ec160030.htm (last accessed Dec. 18, 2023).
[139] *See* State of Oregon, *Guide to Understanding Unfunded Actuarial Liability* (2021), available at: https://www.oregon.gov/pers/EMP/Documents/UALRP-Guides/Guide-to-understanding-UAL.pdf (last accessed
[140] *See* State of Oregon, *Oregon PERS History* (3d ed. 2021), available at: https://www.oregon.gov/pers/Documents/General-Information/PERS-History.pdf (last accessed Dec. 18, 2023).
[141] *See* State of Oregon, *Guide to Understanding Unfunded Actuarial Liability* (2021), available at: https://www.oregon.gov/pers/EMP/Documents/UALRP-Guides/Guide-to-understanding-UAL.pdf (last accessed Dec. 18, 2023).

employer's share to cover the employer's UAL.[142] Oregon's public employers have little control over the pension plan or investments, so it is understandable that they become very concerned about how the UAL impacts the rates and the increasing percentages of employee's pay to fund the UAL.[143]

C. Affordable Care Act

Cities, like private employers, are subject to the federal Affordable Care Act (ACA) if the city has 50 or more full-time employees and only for full-time employees.[144] Such employers must either offer minimum essential coverage that is "affordable" and that provides "minimum value" to their full-time employees (and their dependents), or potentially make an employer shared responsibility payment to the Internal Revenue Service.[145]

Since many cities that employ 50 or more full-time employees provide health insurance to their employees, the issue is when a part-time or seasonal employee triggers the insurance requirement. Under the ACA, a full-time employee is an employee with an average of at least 30 hours of service pers week for an employer.[146]

VI. Revenue Sources

City governments throughout Oregon collect revenue from a variety of sources, including taxes, user charges, intergovernmental payments, and various other sources. Depending on specific services offered by the city, the specific source of revenue can vary considerably from government to government.

A. Oregon Property Tax System

Property taxes are the second largest source of state and local tax revenues, with income tax being the largest source.[147] Property taxes, however, are the largest source of tax revenues for cities.[148] Property taxes thus play a vital role in funding the essential services that cities provide, including police, fire, roads, parks and more.[149] Property tax revenues also fund other

---

[142] *Id.*
[143] *Id.*
[144] IRC § 4980H(c)(2)(A); 26 CFR § 54.4980H-1(a)(4).
[145] IRC §§ 36B, 4980H(a)-(b), 5000A(f).
[146] IRC § 4980H(c)(4); 26 CFR § 54.4980H-1(a)(13), (18).
[147] *See* League of Oregon Cities, *City Property Tax Report*, available at: https://www.orcities.org/application/files/4015/7480/9685/City_Property_Tax_Report_2016.pdf (last accessed Dec. 18, 2023).
[148] *Id.*
[149] *Id.*

essential local government services through taxes imposed by counties and special districts.[150] Lastly, property taxes provide approximately one-third of the state's education budget, bringing in more than $3.5 billion for schools in 2014-15.[151]

i. Permanent Tax Rate

In Oregon, the unique property tax system was established in the Oregon Constitution and modified by the voters by ballot measure. Prior to 1996, the Oregon Constitution limited the amount of property taxes that a local government may levy without a vote of the people.[152] In 1990, the first property tax limitation came with the passage of Measure 5.[153] As discussed below, Measure 5 imposed tax rate limits on local governments: one for schools (kindergarten through community colleges), and one for all other local governments.[154]

In November 1996, the voters adopted Ballot Measure 50.[155] Measure 50 created a new property tax system by repealing the tax base system and replacing it with a permanent tax rate system with some local options and the concept of maximum assessed value.[156]

After Ballot Measure 50 was adopted, the Oregon Legislature adopted enabling laws and the state established each jurisdiction's permanent property tax rate.[157] No action of a city may increase the permanent rate.[158] The permanent tax rate is applied to the assessed value of property, which is the lower of either the real market value or the maximum assessed value of the property each year.[159]

ii. Other Tax Levies

There are only two ways a city may increase its property tax collections: (1) to request voter approval of local option levies for either operating or capital purposes; or (2) to request voter approval of general obligation bonds to finance capital costs and the authority to levy a

---

[150] *Id.*
[151] *Id.*
[152] This limitation, first adopted in 1916, was repealed and replaced by Ballot Measure 50 in 1996. *See* League of Oregon Cities, *FAQ on Measures 5 & 50* (March 2023), available at:https://www.orcities.org/application/files/2216/8685/9599/FAQonMeasures5and_50-updated5-23.pdf (last accessed Dec. 18, 2023).
[153] OR Const Art XI, § 11(b).
[154] *Id.*
[155] Oregon Department of Revenue, *A Brief History of Oregon Property Taxation* (2009), available at: https://www.oregon.gov/DOR/programs/gov-research/Documents/303-405-1.pdf (last accessed Dec. 28, 2023).
[156] *Id.*
[157] *Id.*
[158] *Id.*
[159] Oregon Department of Revenue, *Maximum Assessed Value Manual* (2018), available at: https://www.oregon.gov/dor/forms/FormsPubs/maximum-assessed-value-manual_303-438.pdf (last accessed Dec. 28, 2023).

property tax to pay those bonds.[160] The three types of levies available to cities, including the tax rate, are described in the table below.

Type of Levy	Length	Purpose	Other Limitations
Permanent Tax Rate	Indefinite	General	Subject limitations to M5
Local Option Levy -- Fixed Dollar	Up To 5 Years	Any purpose	Levy the same dollar amount each year, subject to M5 limitations and special compression[161]
	Up to 10 years	Capital purposes only	
Local Option Levy -- Fixed Rate	Up To 5 Years	Any purpose	Levied as maximum rate per $1,000 AV; must estimate amount raised for each year, subject to M5 limitations and special compression[162]
	Up to 10 years	Capital purposes only	
General Obligation Bond Levy (Capital)	Term of bonds	"Capital costs" as defined in the Oregon Constitution	Restricted to annual principal and interest payments; not subject to M5 limitations[163]

Local option levies for capital purposes include the acquisition of land, the acquisition of buildings, additions to buildings that increase its square footage, construction of a building, the acquisition and installation of machinery and equipment that will become an integral part of a building, or the purchase of furnishings, equipment, or other tangible property with an expected life of more than one year.[164]

iii. Assessed Value

As discussed above, by July 15 of each year, a city must submit two copies of the resolution or ordinance adopting the budget, making appropriations, and imposing and categorizing the tax to the county tax assessor.[165]

Counties are responsible for determining the value of properties, calculating taxes, and collecting the taxes. [166] The amount of property tax assessed is based on two conditions: 1) the

---

[160] Oregon Department of Revenue, *Local Budgeting Manual*, available at: https://www.oregon.gov/dor/forms/FormsPubs/local-budgeting-manual_504-420.pdf (last accessed on Sept. 30, 2023).
[161] ORS 280.060.
[162] *Id*.
[163] OR Const Art XI, § 11.
[164] ORS 280.060.
[165] ORS 294.458(3)(a).
[166] ORS 308.232; Oregon Department of Revenue, *Local Budgeting Manual*, available at: https://www.oregon.gov/dor/forms/FormsPubs/local-budgeting-manual_504-420.pdf (last accessed on Sept. 30, 2023).

assessed value of property, and 2) the amount of taxes that each taxing district is authorized to raise.[167]

Measure 50 created two values for each property. Property is taxed on its assessed value. The assessed value, as shown on Oregon tax statements is the *lower* of either the real market value or the maximum assessed value of the property.[168]

Tax Rate Example on $250,000 Assessed Value House

Taxing Entity	Tax Rate (per $1,000)	Assessed Value	Total Tax
City	$4.00	$250,000	$1,000.00
County	2.66		665.00
Park Dist.	1.25		312.50
Total	**$7.91**		**$1,977.50**

The real market value (RMV) is the value of the property as of January 1 each year and is determined by the assessor based on the previous calendar year's actual real estate market activity for like properties.[169] For new properties, appraisers apply standardized appraisal methods to determine the property's real market value (RMV).[170] Usually, existing real property accounts are not physically reappraised every year, but instead their real market values are trended, based on sales of similar properties.[171]

The maximum assessed value was established for each property based on a calculation that was made in the year after Measure 50 was approved.[172] Maximum assessed values were established in 1997 as the 1995-96 real market value minus 10 percent.[173] The maximum assessed value increases by three percent a year plus additions for new construction, subdivision, remodeling, rezoning, loss of special assessment or exemption.[174]

Because assessed values were initially established at levels below real market values, and because the real estate market has appreciated at a rate of more than three percent in most years since Measure 50 passed, the assessed values of many properties are substantially lower than their real market values.[175] This means that assessed values may continue to increase even though the real market value of a property can be falling as a result of current market

---

[167] *Id.*
[168] *Id.*
[169] ORS 308.210; ORS 308.250
[170] *See* Oregon Department of Revenue, *Local Budgeting Manual*, available at: https://www.oregon.gov/dor/forms/FormsPubs/local-budgeting-manual_504-420.pdf (last accessed on Sept. 30, 2023).
[171] *Id.*
[172] *Id.*
[173] OR Const. Art. XI, § 11.
[174] *Id.*
[175] *See* League of Oregon Cities, *FAQ on Measures 5 & 50* (March 2023), available at:https://www.orcities.org/application/files/2216/8685/9599/FAQonMeasures5and_50-updated5-23.pdf (last accessed Dec. 18, 2023).

conditions.[176] Once the real market value falls below the maximum assessed value, it becomes the assessed value for tax purposes that year.[177] This means that it is possible for a city to see less than 3% growth in their tax levies if enough properties in the area have a market value below their maximum assessed value.[178]

ii. Compression

County assessors calculate the taxes for each taxable property for the taxing entities. Cities certify property taxes as a rate per $1,000 of assessed value and levies for municipal bonds and local option levies for a fixed dollar amount.[179] For the fixed dollar amounts, the assessor must convert these tax amounts into tax rates.[180]

Compression Example on $250,000 RMV House

Taxing Entity	Tax Rate (per $1,000)	Tax Before M5 Limit	Reduction Due to M5	Amt. Billed After Compression
City	$7.50	$1,875	($703.12)	$1,171.88
County	5.50	1,375	(515.63)	859.37
Park Dist.	3.00	750	(281.25)	468.75
Total	**$16.00**	**$4,000**	**($1,500)**	**$2,500**
Measure 5 Limit	$10.00	**$2,500**		

For each property, the assessor must test to ensure that all of the certified taxes for each taxing district are within the limits set by Measure 5.[181] Taxes are separated into two categories: for education and for all other government services.[182] If the amount of tax calculated for a property is more than $5 per $1,000 of real market value for education, or $10 per $1,000 of RMV for all other government purposes, the taxes in the category are reduced ("compressed") to fall within the limit.[183] Voter approved debt service is not included in the $10 limit; so the actual total tax rate may be higher than $10, but the portion that goes for operations may not exceed $10.[184] All property tax levies except levies for general obligation bonds are subject to compression.[185] Note that the values used are for real market value, not the maximum assessed value used under Measure 50.[186]

---

[176] *Id.*
[177] *Id.*
[178] *Id.*
[179] ORS 294.458.
[180] ORS 310.090.
[181] OR Const Art XI, § 11b.
[182] *See* Oregon Department of Revenue, *Local Budgeting Manual*, available at: https://www.oregon.gov/dor/forms/FormsPubs/local-budgeting-manual_504-420.pdf (last accessed on Sept. 30, 2023).
[183] OR Const Art XI, § 11b.
[184] OR Const Art XI, § 11b.
[185] *Id.*
[186] OR Const Art XI, § 11.

Local option levies are subject to "special compression."[187] This means that local option levies are reduced (to zero if necessary) before other levies are reduced to bring the total tax on the property down to the Measure 5 limit.[188] If a property is subject to multiple local option levies then all local option levies are reduced proportionally.[189] If the property remains in compression after all local option levies have been reduced to nothing, then all the remaining, compressible levies are reduced proportionally until the remaining compressible levies are equal to $10 per $1,000 of real market value.[190]

iii. Tax Collection

The county tax collector is responsible for collecting all property taxes.[191] The tax collector mails the property tax statements and receives the payments.[192] If a taxpayer fails to pay on time, the tax collector computes the delinquent interest they owe and mails a notice of delinquency.

After taxes on real property have been delinquent for three years, the tax collector begins foreclosure proceedings on the property.[193] At the end of the foreclosure process, the property is sold to satisfy the tax lien.[194]

The tax collector prepares a tax percentage distribution schedule from the tax roll information provided by the assessor.[195] The amount of tax imposed for each taxing district is divided by the total tax imposed in the county to determine each districts' distribution percentage.[196] The percentage distribution schedule is given to the county treasurer.[197]

When taxes are paid, the treasurer distributes a proportionate share to each taxing district according to the schedule.[198] All districts also share the loss when refunds are made. A county

---

[187] *Id.*
[188] *Id.*
[189] *Id.*
[190] *Id.*
[191] *See* Oregon Department of Revenue, *Local Budgeting Manual*, available at: https://www.oregon.gov/dor/forms/FormsPubs/local-budgeting-manual_504-420.pdf (last accessed on Sept. 30, 2023).
[192] *Id.*
[193] *Id.*
[194] *Id.*
[195] ORS 311.390; *See* Oregon Department of Revenue, *Local Budgeting Manual*, available at: https://www.oregon.gov/dor/forms/FormsPubs/local-budgeting-manual_504-420.pdf (last accessed on Sept. 30, 2023).
[196] *See* Oregon Department of Revenue, *Local Budgeting Manual*, available at: https://www.oregon.gov/dor/forms/FormsPubs/local-budgeting-manual_504-420.pdf (last accessed on Sept. 30, 2023).
[197] *Id.*
[198] *Id.*

court may opt to make an advance distribution to a taxing district from the county general fund of the entire amount anticipated to be collected from that district's taxes.[199]

The treasurer distributes the tax money and the interest earned on it to the taxing districts using the percentage distribution schedule.[200] When disbursing tax moneys, the treasurer sends each district a statement showing the amount of taxes being distributed.[201]

C. State Shared Revenue

Over the years, Oregon cities and the state of Oregon have developed a number of shared revenue streams.[202] Many of the revenues shared are the result of agreements in which cities have given up their right to regulate or establish taxes or fees on an activity in exchange for a promise by the state of a share of revenue from its regulation or taxation of the activity.[203]

Currently, cities share with the state for the following: (1) liquor; (2) cigarettes; (3) highway trust funds (gas taxes), (4) 9-1-1 emergency tax revenues, and (5) marijuana. The specific formulas for distribution, restrictions on the use of the tax revenues and whether a local tax is preempted is discussed below.

For some of the state-shared revenues listed below, the distributions are based, at least in part, by how many people reside in each city, also known as per capita distributions.[204] Per capita distributions for revenue sources are calculated based on certified population statistics from Portland State University's Center for Population Research (PSUCPR).[205] Population estimates compiled each July are typically certified on December 15, and thereafter begin to govern the distributions.[206]

For cigarettes and gas taxes, and in counties with populations greater than 100,000, a city must certify that it provides at least four of the following municipal services: fire protection; police protection; street construction, maintenance and lighting; sanitary sewers; storm sewers; planning, zoning and subdivision control; or one or more utility services.[207] For liquor sales and

---

[199] ORS 311.392.
[200] ORS 311.390.
[201] *See* Oregon Department of Revenue, *Local Budgeting Manual*, available at: https://www.oregon.gov/dor/forms/FormsPubs/local-budgeting-manual_504-420.pdf (last accessed on Sept. 30, 2023).
[202] *See* League of Oregon Cities, *2022 State Shared Revenue Report with Estimates*, available at: https://www.orcities.org/application/files/1416/4520/8358/2022SSRFullReport-Revised.pdf (last accessed Dec. 18, 2023).
[203] *Id.*
[204] *Id.*
[205] *Id.*
[206] *Id.*
[207] *See* ORS 221.760 (imposing certification requirement for cities in counties with a population greater than 100,000 to receive revenues from cigarette, gas and liquor taxes). As of 2023, counties with a population greater

cities located in counties with populations greater than 100,000, to receive the per capita disbursement to cities, cities must certify that it provides four of the aforementioned services.[208]

Annually, the League of Oregon Cities releases a report with the estimated state shared revenue forecasts and recent legislative and administrative changes that impact cities. For example, the LOC provided the following report for 2024 state shared revenue estimates: https://www.orcities.org/application/files/7317/0726/5239/2024SSRFullReport.pdf.

i. Liquor Taxes[209]

Cities may not impose a tax or fee on malt beverages or any alcoholic liquors[210]. Cities also are restricted on the amount they may impose for licensing fees.[211] The state imposes a sales tax on distilled spirits, beer and cider, and wine.[212] Currently, distilled spirit sales make up more than 95% of this revenue source and the state sets the markup formula using the wholesale price.[213] Oregon's beer and cider tax is one of the lowest in the country at approximately 8 cents per gallon, or about 4 cents on a six-pack.[214]

Cities' share of this state shared revenue source is 34%, of which 20% is distributed per capita, with 14% distributed using a formula that factors in property taxes, population, and income.[215] The three major contributors to this revenue source are: the sale of distilled spirits; liquor licensing fees; and taxes on beer, wine and cider.[216]

The 14% liquor revenue share to cities uses an adjusted population formula that factors in per capita property taxes and per capita income of each city.[217] For liquor sales and for cities located in counties with populations greater than 100,000, to receive the 20% per capita

---

than 100,000 are: Clackamas, Deschutes, Douglas, Jackson, Lane, Linn, Marion, Multnomah, Washington and Yamhill.

[208] ORS 471.810(1)(b).

[209] ORS 221.760 to 221.770; ORS 471.810; ORS 473.005 to 473.060.
[210] ORS 471.045; ORS 473.190.
[211] ORS 471.166.
[212] ORS chapter 473.
[213] *See* League of Oregon Cities, *2022 State Shared Revenue Report with Estimates*, available at: https://www.orcities.org/application/files/1416/4520/8358/2022SSRFullReport-Revised.pdf (last accessed Dec. 18, 2023).
[214] *Id*.
[215] *Id*.
[216] *Id*.
[217] ORS 221.770.

disbursement, cities must certify that it provides four municipal services.[218] The funds derived from liquor taxes is unrestricted.[219]

ii. Cigarette Taxes

The 1965 Oregon Legislative Assembly, in cooperation with counties and cities, referred a cigarette sales tax to the voters with a 50-50 sharing between the state and local governments.[220] The referendum passed decisively by a 63% majority.[221]

In November 2020, voters passed Measure 108, which increased cigarette taxes, increased the cap on the cigar tax, created a tax on vape products, and preempted cities from taxing vape products.[222] After the increase, cities' share of that revenue is a meager 0.6% of the tax.[223] Cities do not receive shared revenue on tobacco products other than cigarettes, including cigars, moist snuff, chewing tobacco, pipe tobacco, and now vape.[224] Cities may not impose a tax on the sale or the use of tobacco products.[225] Cities may not impose a tax on the sale of vape.[226]

Over the years, revenues from cigarette taxes have dramatically declined from the Legislature and due to the drop in smoking.[227] This revenue source is projected to continue trending downward—as it has for more than 10 years—as smoking decreases.[228] Funds derived from cigarette taxes are unrestricted.[229]

iii. Marijuana Tax[230]

In November 2014, Measure 91 passed and allowed recreational marijuana sales and imposed a tax on marijuana products.[231] The state imposes a 17% sales tax on recreational

---

[218] ORS 471.810(1)(b).
[219] *See* League of Oregon Cities, *2022 State Shared Revenue Report with Estimates*, available at: https://www.orcities.org/application/files/1416/4520/8358/2022SSRFullReport-Revised.pdf (last accessed Dec. 18, 2023).
[220] *See* Association of Oregon Counties, *Shared Revenue Agreements*, (January 2015), available at: https://drive.google.com/file/d/0B4bfnUJ9POS_c0VpQVQ3MUVTa1k/view?resourcekey=0-hGO0oj8P5faS03r4f5g3rA (last accessed Dec. 18, 2023).
[221] *Id*.
[222] *See* League of Oregon Cities, *2022 State Shared Revenue Report with Estimates*, available at: https://www.orcities.org/application/files/1416/4520/8358/2022SSRFullReport-Revised.pdf (last accessed Dec. 18, 2023).
[223] *Id*.
[224] *Id*.
[225] ORS 323.640.
[226] Measure 108 (2020).
[227] *Id*.
[228] *Id*.
[229] *Id*.
[230] Measure 91 (2014) (legalizing recreational marijuana sales); ORS chapter 475C; Measure 110 (2020).
[231] *See* Oregon Measure 91 (2014), available at: https://www.oregon.gov/olcc/marijuana/documents/measure91.pdf (last accessed Dec. 18, 2023).

marijuana products.[232] Until the end of 2020, cities received 10% of the state's total tax revenues (minus expenses) on recreational marijuana products.[233]

In November 2020, Measure 110 decriminalized possession of small amounts of street drugs and shifted the allocation of state marijuana revenue distributions.[234] Currently, cities share $1,125,000 quarterly, or $4,500,000 annually, which is indexed to inflation beginning in 2022. For state revenues, 75% of the shared revenue is distributed to eligible cities on a per capita basis, and 25% is distributed based on the number of licensed premises in the city.[235] Note that the license-portion (25%) of the distribution is particularly hard to forecast as shops open and close.[236] Funds derived from marijuana taxes is unrestricted because the former language "to assist local law enforcement" language was deleted in 2017.[237]

Distributions are made quarterly to cities that certify that they do not ban any marijuana license type within city limits.[238] This certification had been required quarterly with the Oregon Liquor Control Commission (OLCC), but in 2020 moved to an annual certification with the Oregon Department of Administrative Services (DAS), similar to other shared revenue certifications.[239]

A city may adopt an ordinance imposing a tax on retail sale of recreational marijuana (not medical marijuana), but state law requires the city refer the ordinance to the electors of the city for approval.[240] In addition, a city may not impose more than a 3 percent tax.[241] Most cities have an agreement with the Oregon Department of Revenue (DOR) to have the state collect their local tax at the same time the state tax is collected.[242] However, that local tax revenue is not considered a state shared revenue.

---

[232] ORS 475C.009.
[233] *See* League of Oregon Cities, *2022 State Shared Revenue Report with Estimates*, available at: https://www.orcities.org/application/files/1416/4520/8358/2022SSRFullReport-Revised.pdf (last accessed Dec. 18, 2023).
[234] *Id*.
[235] *Id*.
[236] *Id*.
[237] *Id*.
[238] *Id*.
[239] *Id*.
[240] *Id*.
[241] ORS 475B.345.
[242] *See* League of Oregon Cities, *2022 State Shared Revenue Report with Estimates*, available at: https://www.orcities.org/application/files/1416/4520/8358/2022SSRFullReport-Revised.pdf (last accessed Dec. 18, 2023).

iv. Highway Trust Fund (Gas Taxes)

The Oregon Highway Trust Fund supports the construction, reconstruction, preservation, maintenance, repair and improvement of streets and roads.[243] To fund the Highway Trust Fund, the state imposes a sales tax on a certain number of cents per gallon of fuel and imposes fees on certain registrations.[244] Using a melded computation of the various tax and fee increases over time, cities receive approximately 20% of the Highway Trust Fund. [245]

In 2017, the Legislature approved a comprehensive transportation funding package that significantly increased cities' per capita funding.[246] The package included a 10-cent gas and use fuel tax increase and a 53% increase in the weight-mile tax (both phased in over a seven-year period), along with graduated registration and title fee increases.[247] Full implementation of annual gas tax increases has been met.

From the cities' total allocation, $2.5 million is directed annually off the top to the special city allotment fund. The allocation is matched and administered by the Oregon Department of Transportation (ODOT) to provide competitive grants to small cities with a population less than 5,000.[248] This is in addition to their per capita allocation.[249] The 2017 transportation package also included a new 1% statewide payroll tax, a 0.5% privilege tax/use tax on certain "new" vehicles, and a $15 bicycle tax.[250] Those additional taxes are not included in the per capita disbursements, but cities may be eligible for additional funds from programs funded by these taxes.[251] Cities may use the gas taxes for the construction, reconstruction, and maintenance of highways, roads, streets, bike paths, foot paths and rest areas.[252]

---

[243] ORS 184.657; ORS chapter 319; ORS 366.739 to 366.752; ORS 366.785 to 366.820; ORS 803.420; ORS 803.090.
[244] *Id*.
[245] *See* League of Oregon Cities, *2022 State Shared Revenue Report with Estimates*, available at: https://www.orcities.org/application/files/1416/4520/8358/2022SSRFullReport-Revised.pdf (last accessed Dec. 18, 2023).
[246] OR HB 2017 (2017).
[247] *Id*.
[248] *See* League of Oregon Cities, *2022 State Shared Revenue Report with Estimates*, available at: https://www.orcities.org/application/files/1416/4520/8358/2022SSRFullReport-Revised.pdf (last accessed Dec. 18, 2023).
[249] ORS 366.805.
[250] OR HB 2017 (2017).
[251] OR HB 2017 (2017).
[252] ORS 366.790; OR Const Art IX, § 3a.

As discussed below, cities may impose a gas tax, but it must be referred for voter approval of a new or increased local fuel tax.[253] Approximately 30 cities have a gas tax, and the rate varies—generally 1 to 3 cents per gallon.[254]

v. 9-1-1 Emergency Communication Tax Revenues [255]

Cities that operate a public safety answering point (PSAP) provider connected to the statewide network receive this shared revenue.[256] Since less than 20 of the 45 PSAPs in Oregon are operated by cities, most of these shared revenues are directed to the PSAPs managed by counties or a regional entity.[257]

The PSAPs are only partially funded through the state's Emergency Communications Tax, with the balance of operating costs coming primarily from property taxes.[258] Local governments receive approximately 60% of 9-1-1 taxes, but the taxes generally covered less than 25% of the costs of total PSAP operations before the recent rate increases.[259] The revenues received from the 9-1-1 taxes are restricted.[260]

C. Local Tax Efforts[261]

A city's power to tax derives from the home rule charter granted by Article XI, section 2 of the Oregon Constitution. Where not preempted by the Oregon Legislature, cities can enact local taxes. The Oregon Supreme Court held that Multnomah County, a statutory county, had the same powers as a home rule county and therefore had the authority to levy taxes. [262] The court refuted the argument that sales and income taxes are traditional state concerns and held that the constitutional grant of power to a home rule county includes the power to levy an income

---

[253] ORS 319.950.
[254] *See* League of Oregon Cities, *2022 State Shared Revenue Report with Estimates*, available at: https://www.orcities.org/application/files/1416/4520/8358/2022SSRFullReport-Revised.pdf (last accessed Dec. 18, 2023).
[255] ORS 403.200 to 403.250; OAR 104-080-0195 to 104-080-0210.
[256] *Id*.
[257] *See* League of Oregon Cities, *2022 State Shared Revenue Report with Estimates*, available at: https://www.orcities.org/application/files/1416/4520/8358/2022SSRFullReport-Revised.pdf (last accessed Dec. 18, 2023).
[258] *Id*.
[259] *Id*.
[260] *See* ORS 403.240(9) and OAR 104-080-0195 for permitted expenditures associated with 9-1-1 costs. Intergovernmental agreements might also restrict use of revenues.
[261] *See* League of Oregon Cities, *Discretionary City Revenue Sources* (Apr. 2018), available at: https://www.orcities.org/application/files/5215/7487/1825/RevenueSources.pdf. (last accessed Dec. 18. 2023).
[262] *Multnomah Kennel Club v. Department of Revenue*, 295 Or 279 (1983).

tax.[263] Similarly, cities have a home rule authority that allows cities to levy a tax, unless preempted.[264]

The Oregon Legislature has preempted a city's ability to enact taxes for: telecommunications to fund 9-8-8 services; commercial activity; insurance providers; animal racing; real property transfers; cigarettes; alcoholic beverages; lottery tickets or lottery game retailers; real estate broker business licenses; and federal old age and survivors insurance and Railroad Retirement Act benefits.[265] In addition to preemption, the Legislature has enacted cap and/or time limitations on the municipal authority to tax: property taxes; sale of marijuana items; local fuel taxes; system development charges; lodging taxes, and telecommunications carrier privilege taxes.[266]

These local taxes can be grouped into three categories – income taxes, sales/excise taxes, and fees for services.

i. Income Taxes

As discussed above, unless preempted, cities can tax the income of businesses or individuals pursuant to a city's home rule authority.

Local income taxes can come in the form of a personal income tax, business license tax, corporate income tax, or payroll tax. Currently, Multnomah County taxes the personal income of individuals, and the city of Portland taxes the businesses through a business license tax.[267] The city of Eugene also taxes payroll.

ii. Sales/Excise Taxes

Sales taxes are levied on the sale of goods and services. In 1985, Oregon voters overwhelmingly rejected statewide sales taxes, and statewide, Oregonians have rejected a general sales tax proposals six times. [268]

Local sales taxes can include an admissions tax for performances, entertainment and sporting events, a local gas tax, a local marijuana tax, a motor vehicle rental tax, a restaurant tax,

---

[263] *Id*.
[264] *LaGrande/Astoria v. PERB*, 281 Or 137, 153-55 (1978). *See also* 33 Or Op Atty Gen 238 (May 1, 1967) (finding that cities have the authority to enact provisions imposing income or sales taxes).
[265] *See* League of Oregon Cities, *Legal Guide To Oregon's Statutory Preemptions Of Home Rule* (2019), https://www.orcities.org/application/files/4715/7904/6324/StatutoryPreemptionSummary02-10-19.pdf (last accessed April 27, 2023)
[266] *Id*.
[267] *See* City of Portland, *Revenue Division*, available at: https://www.portlandoregon.gov/revenue/index.cfm?&c=29320 (last accessed on Dec. 29, 2023).
[268] *See* The Associated Press, *Oregon Voters Overwhelmingly Reject a Sales Tax*, N.Y. TIMES, Sept. 19, 1985, available at: https://www.nytimes.com/1985/09/19/us/oregon-voters-overwhelmingly-reject-a-sales-tax.html (last accessed Dec. 18, 2023).

a retail sales tax for specific goods, a transient lodging tax (TLT), and a utility consumption tax. Given the deep opposition to a general sales tax in Oregon, it appears that Oregonians are reluctant to pass sales taxes. Only for a handful of cities, voters have adopted a specific sales tax for food and beverages.[269]

As discussed below, for transient lodging tax, local gas taxes, and local marijuana taxes, the Oregon Legislature imposed additional restrictions in the use of such funds.

Transient Lodging Tax[270]

Transient lodging taxes (TLTs) are taxes for temporary lodging at hotels, motels, campgrounds, and other temporary lodgings. Oregon has a statewide TLT, and cities can also charge a local TLT subject to certain limitations.[271]

The limitations require that for new or increased local lodging taxes, 70% must be used for tourism promotion or tourism-related facilities, and the remaining 30% is unrestricted in use.[272] For the existing local lodging taxes, cities are required to maintain the percentage of existing lodging tax used for tourism promotion and tourism facilities.[273]

Many cities pass on transient lodging tax revenues to third parties, such as a chamber of commerce or an event organizer. Cities should carefully restrict use of such revenues by such organizations and/or require reporting to ensure they are complying with the state statutes that restrict the use of transient tax revenues.

Local Gas Taxes

In many cities, the taxes shared from the State Highway Fund are the primary source of street funding.[274] Many cities have found that the shared gas taxes are not sufficient to address the backlog of street improvements. Cities have looked to local funding options, such as local fuel dealer license taxes, or "local gas taxes."

---

[269] *See* Les Zaitz, *Restaurant Tax Coming to Cannon Beach*, THE OREGONIAN (Nov. 3, 2021), available at: https://www.oregonlive.com/politics/2021/11/restaurant-tax-coming-to-cannon-beach-estacada-will-tax-marijuana-sales-after-tuesdays-vote.html (last accessed Dec. 18, 2023); Kathleen Stinson, *Prepared Food Tax is not New Oregon*, CANNON BEACH GAZETTE, Jul. 27, 2021, available at: https://www.cannonbeachgazette.com/news/prepared-food-tax-is-not-new-oregon-other-communities-have-passed-similar-measures/article_0a3533f0-eeed-11eb-bf68-3f0b06264caf.html (last accessed Dec. 18, 2023).

[270] ORS 320.300 to 320.350; League of Oregon Cities, *Lodging Tax*, available at: https://www.orcities.org/resources/reference/topics-z/details/lodging-tax (last accessed Dec. 18, 2023); League of Oregon Cities, *Legal Guide to Collecting Transient Lodging Tax in Oregon* (June 2021), available at: https://www.orcities.org/application/files/4116/2464/5603/TLT_Guide_-_Updated_6.25.2021.pdf (last accessed Dec. 18, 2023).

[271] ORS 320.300 to 320.365.

[272] ORS 320.350.

[273] ORS 320.345.

[274] *See* League of Oregon Cities, *Local Gas Tax*, available at: https://www.orcities.org/resources/reference/topics-z/details/local-gas-tax (last accessed Dec. 29, 2023).

In Oregon, local gas tax ordinances levy a business license tax on fuel dealers. The amount of tax levied is set as a certain number of cents per gallon of motor vehicle fuel sold by the dealer. A city, county or local government must submit the proposed new or increased gas tax to the electors for their approval, prior to enacting or amending any charter, provision, ordinance, resolution or other provision taxing fuel for motor vehicles.[275]

For more information, please see the League of Oregon Cities' Model Motor Vehicle Fuel Tax Ordinance (April 2020) - https://www.orcities.org/resources/reference/topics-z/details/local-gas-tax

Local Marijuana Tax

The Legislature has the sole authority to "impose a tax or fee on the production, processing or sale of marijuana items," thereby preempting local governments from imposing their own tax except as provided by the law.[276]

Cities may adopt an ordinance imposing a tax or fee of up to three percent on the sale of marijuana items by a retail licensee.[277] The ordinance must be referred to the voters in a statewide general election, meaning an election in November of an even-numbered year.[278] In 2016, the Legislature adopted a restriction on local governments by providing that a local tax may not be imposed on a medical marijuana patient or caregiver.[279]

For more information, please see Chapter 27: Marijuana Law.

iii. Fees for Services

Cities count on a variety of fees for revenue, including business license fees, franchise fees, land use and planning fees, parking fees, and development and permit fees. Like taxes, fees for services are within the city's power granted by Article XI, section 2 of the Oregon Constitution. Where not preempted by the Oregon Legislature, cities can enact local fees. However, courts have found that where the Oregon Legislature has not given a clear statement of intent to preempt a local government from enacting regulations, that a city is not precluded from enacting additional fees.[280]

---

[275] ORS 319.950.
[276] ORS 475C.453.
[277] *Id.*
[278] *Id.*
[279] *Id.*
[280] *Northwest Natural Gas, Co. v. City of Gresham*, 359 Or 309 (2016) (finding ORS 221.450 is not an unambiguous expression of an intent to preclude local governments from imposing a privilege tax in the city right of way limited to five percent of the utilities' gross revenues earned within the city).

There are a few fees for which the Oregon Legislature imposed additional restrictions on a city's ability to collect revenue. One example are system development charges (SDCs).[281] SDCs are a one-time fee imposed on new development to equitably recover the cost of expanding infrastructure capacity to serve new customers.[282] SDCs are not taxes—they are collected for a specific purpose and provide a distinct benefit to the persons who pay the fee. SDC revenue must be used to provide needed capital improvements.

Another example of the Oregon Legislature imposing additional restrictions on a city's ability to collect revenue is a local improvement district (LID).[283] An LID allows a group of property owners to share in the cost of infrastructure improvements, most commonly for roads, sidewalks, or storm water.[284] A shared LID project ensures economies of scale and avoids piecemeal infrastructure development.[285] Generally, the city finances the public improvement and the property owners benefited repay the city.[286] Property owners benefited can pay assessments in full or by installments with a lien on the property.[287] There is a required assessment procedure and financing methodology to follow.[288]

E. Tax Increment Financing

Another option available to cities is the use of tax increment financing, also known as "urban renewal."[289] Tax increment financing funds projects within urban renewal areas by earmarking property tax revenue from increases in assessed property value within an urban renewal area.[290] Essentially, the tax increment financing process splits tax revenue from properties within the urban renewal area into two components: base revenue and incremental revenue.[291] Base revenue is the level of property tax revenue available before the urban renewal area is established and is unaffected by urban renewal.[292] Incremental revenue is the revenue that exceeds base revenue and is (ideally) generated by development projects in the urban renewal

---

[281] ORS 223.297 to 223.316; League of Oregon Cities, *Model System Development Charge Ordinance for Oregon* Cities (February 2019), available at: https://www.orcities.org/application/files/3816/8721/7848/Model-SystemDevelopmentChargesOrdinance-updated5-23.pdf (last accessed Dec. 29. 2023).
[282] ORS 223.001 to 223.295.
[283] *Id*.
[284] *Id*.
[285] *Id*.
[286] *Id*.
[287] *Id*.
[288] ORS 223.001.
[289] ORS chapter 457 gives cities the authority to activate an urban renewal agency to utilize tax increment financing.
[290] *See* League of Oregon Cities, *Chapter 26: Economic Development*, MUNICIPAL HANDBOOK, , available at: https://www.orcities.org/application/files/3016/6636/8249/Chapter_26_-_Economic_Development_EDITED.pdf (last accessed Dec. 18, 2023); League of Oregon Cities, *FAQ on Urban Renewal* (Apr. 2018), available at: https://www.orcities.org/application/files/6416/8721/7421/FAQ-UrbanRenewal-updated5-23.pdf (last accessed Dec. 18, 2023).
[291] *Id*.
[292] *Id*.

area.[293] Incremental revenues are allocated to the urban renewal agency to finance urban renewal projects.[294]

VII. DEBT MANAGEMENT

Most cities find it necessary to borrow money from time to time. Oregon cities can borrow money in a wide variety of ways and from a variety of sources. The choices a city makes can have a significant effect on the cost of the borrowing and the speed at which the borrowing can be done.

For most borrowings, a city can either: select a lender and work with that lender to structure the borrowing and set interest rates (a negotiated sale); preliminarily structure a borrowing and do "requests for proposals" to select a lender to finalize the borrowing structure and set interest rates (sometimes called a "quasi-competitive sale"); or structure the borrowing and invite bids from the public to set interest rates (a "competitive sale"). [295]

A. Types of Borrowings

i. Bonds

A "bond" is simply the written promise of a city to pay a specified principal amount on a specified date, together with interest. Bonds typically pay interest every six months, and principal every year. If a city issues $2 million in principal amount of bonds, a portion of the principal would be due each year, so that the annual debt service over the life of the bonds was about the same. The main categories of bonds that Oregon cities use are:

1. General obligation bonds.

General obligation bonds are bonds that are secured by the power of the city to levy an additional property tax, outside of constitutional limits, that is sufficient to pay the bonds. This tax is dedicated solely to pay the bonds and cannot be used by the city for other purposes. The amount and rate of the tax are said to be "unlimited" because a city may levy whatever amount is necessary to collect enough taxes to pay the bonds.

---

[293] *Id.*
[294] *Id.*
[295] This discussion on the types of borrowings and types of financing is courtesy of League of Oregon Cities, *Guide to Borrowing and Bonds for Oregon Municipalities* (March 2018), available at: https://www.orcities.org/application/files/7115/6036/0907/GuidetoDebtIssuanceFINAL03-23-18-print.pdf (last accessed Dec. 18, 2023).

Because the property tax system is considered to be very reliable and stable, and the taxes that can be levied to pay the bonds are not limited, general obligation bonds are regarded as very secure and are usually the least expensive way for a city to borrow money.

Although the property taxes a city imposes to pay general obligation bonds are not limited, a city's ability to issue general obligation bonds is substantially limited by the Oregon Constitution and statutes. General obligation bonds must be approved by the city's voters and can only finance "capital costs." General obligation bonds are usually issued as long-term, fixed-rate bonds, but they can be issued as short-term bonds, or variable rate bonds. In addition, the "lending of credit" provision of the Oregon Constitution prevents general obligation bonds from being used to finance certain kinds of projects with substantial involvement by private businesses.[296]

The issuance of general obligation bonds must be approved by a majority of the city's voters who vote in that election ("simple majority" approval), during an election held in May or November, or as part of another election for which a majority of registered voters cast ballots ("double majority" approval).[297] As a practical matter, a majority of registered voters infrequently cast ballots at city elections, so general obligation bond elections are usually held in May or November.

General obligation bonds may only be issued to finance "capital costs." Capital costs are defined as costs of land and of other assets having a useful life of more than one year, including costs associated with acquisition, construction, improvement, remodeling, furnishing, equipping, maintenance or repairing real or personal property that has a useful life of more than one year. The Oregon Constitution also specifically states that "capital costs" does not include costs of routine maintenance or supplies.[298]

The weighted average maturity of general obligation bonds may not exceed the weighted average life of the capital costs that are financed with those bonds.[299] This means that cities cannot issue long-term bonds to finance short-lived assets (i.e. cannot use all of the proceeds of bonds that mature over 30 years to finance computers that have a useful life of five years). However, because the limit is based on averages, it rarely affects bond issues that finance a variety of projects, including long-life assets such as land or buildings.

Oregon election laws require that the ballot measure approving the bonds state, in clear and simple language: the amount of the bonds that will be authorized; the purposes for which the

---

[296] Article XI, Section 9 of the Oregon Constitution says "No… city…, by vote of its citizens, or otherwise, shall… raise money for, or loan its credit to, or in aid of, any [joint] company, corporation or association." This poorly understood provision of the Oregon Constitution prevents cities from using general obligation bonds to finance certain kinds of projects that involve corporations or other artificial entities such as most private businesses.
[297] OR Const Art XI, § 11k; OR Const Art XI § 11(8).
[298] OR Const Art XI, §11L(1) and (5).
[299] OR Const Art. XI § 11L(4).

bond proceeds will be spent; and that property taxes may increase.[300] Oregon election laws do not require the ballot to contain an estimate of the taxes or tax rates that will be imposed to pay the bonds, but estimates are commonly included in the ballot.[301]

2. Full faith and credit bonds.

Full faith and credit bonds are used to finance many city projects that do not have their own revenue streams; they are almost always used to finance local improvement projects, and they are often used when a city borrows from a state agency.

Full faith and credit bonds are secured by a pledge of the city's full faith and credit.[302] Such a pledge commits the city to pay the bonds from all lawfully available funds of the city, and any taxes that are within the authority of the city to levy. The full faith and credit pledge allows a city to use a basket of revenues to secure or repay the debt, rather than one revenue stream as with revenue bonds.

Full faith and credit bonds can be secured with permanent rate levies, local option levies, and other revenues such as gas taxes, income taxes, and sales taxes. However, unlike general obligation bonds, full faith and credit bonds are not secured by the power to levy a property tax outside the limits of Article XI, Sections 11 and 11b of the Oregon Constitution. Local option levies, because of their short term and compression risk, may not provide substantial security for full faith and credit bonds.

No single statute places an overall limit on city full faith and credit bonds. However, city charters may impose limits on full faith and credit bonds. The most common charter limits on full faith and credit bonds require that city voters approve those bonds.

A city may issue revenue bonds for any lawful purpose, but the city must either authorize the bonds by non-emergency ordinance and wait at least 30 days, or publish a notice describing the bonds and wait 60 days.[303] While the city is waiting, citizens may file a petition to refer the question of issuing the bonds to an election.[304] A city may pledge its full faith and credit to secure those bonds.[305]

A city may issue bonds in the form of financing agreements, but only to finance costs of real or personal property that is needed by the city.[306] A city may

---

[300] *See* ORS 250.037; Oregon Department of Revenue, *A Guide to Writing Ballot Measures for Property Taxing Authority* (July 2022), available at: https://www.oregon.gov/dor/forms/FormsPubs/tax-election-ballot-measures_504-421.pdf (last accessed Dec. 29, 2023).
[301] *Id*.
[302] ORS 287A.315.
[303] ORS 287A.150.
[304] *Id*.
[305] ORS 287A.315.
[306] ORS 271.390.

pledge its full faith and credit to secure those financing agreements.[307] The weighted average life of the financing agreement cannot exceed the weighted average life of the real and personal property that is financed. A financing agreement is a single borrowing and may be for a large amount. Investors in the bond market are accustomed to buying bonds in increments of $5,000. Those $5,000 increments have a variety of names but are often called "certificates of participation "or "full faith and credit obligations."

3. Revenue bonds.

Revenue bonds come in many types, including sewer, water or electric utility revenue bonds, urban renewal or "tax-increment" bonds, and conduit revenue bonds for private projects. Revenue bond" they usually mean a bond that is payable solely from a specified type of revenue.

The types of revenues that can be used to secure revenue bonds vary substantially. As a result, some revenue bonds are very secure and credit-worthy (sometimes even better than an issuer's full faith and credit bonds), and some are so poorly secured they cannot be sold on reasonable terms.

Similar to full faith and credit bonds, revenue bonds may be issued for any lawful purpose, but the city must either authorize the bonds by non-emergency ordinance and wait at least 30 days, or publish a notice describing the bonds and wait 60 days. [308] While the city is waiting, citizens may file a petition to refer the question of issuing the bonds to an election.[309] Cities may revenue bonds in the form of financing agreements and "revenue obligations," and only for costs of real or personal property that is needed by the city.[310]

Revenue bonds are usually payable solely from the revenues of the system that is financed with the bonds. Purchasers of revenue bonds usually require the city to make many promises (called "covenants") about how the city will operate the utility system that produces the committed revenues and how the city will impose rates and charges for services from that system. Since the covenants affect the operating decisions, it is important to understand the covenants and to seek alternatives if the covenants will impede the city's ability to operate the system. For instance, investors and rating agencies often want to see pledged revenues exceed the debt service requirement by 10-25% (referred to as debt service coverage). This may cause rates to increase substantially and put a strain on rate payers.

Revenue bonds can sell on favorable terms if they are issued for essential services for which the city faces little or no effective competition such as sewer, water and electric systems. Revenue bonds may not sell on favorable terms if they are issued to finance non-essential

---

[307] ORS 287A.315.
[308] ORS 287A.150.
[309] *Id*.
[310] ORS 271.390.

services such as golf courses, internet services or cable television, because customers may stop purchasing services if the rates get too high.

4. Bonds for a Particular Purpose – Local Improvement Districts

Local improvement district bonds are issued when a city constructs public improvements that benefit nearby property and forms a local improvement district. To fund the improvements, the city will be able to assess the properties that benefit from the improvements. However, a city is not able to assess the costs until the projects are complete and state law allows property owners to pay those assessments with interest over 10 years. A city may choose to issue LID bonds to finance the costs of improvements.

LID assessments are the first lien on the property that is assessed, subject only to state and federal tax liens. Since LID assessments are hard for investors to understand, cities usually pledge their full faith and credit to attract investors and lower the bond interest cost.

5. Refunding Bonds

"Refunding bonds" are bonds a city issues to refinance and pay off bonds the city previously issued. Oregon law broadly authorizes cities to issue refunding bonds for outstanding general obligation, full faith and credit, and revenue bonds by simply passing a resolution. Refundings are typically undertaken to reduce interest costs if current market rates are less than the rates on the outstanding bonds. However, cities may also issue refunding bonds to restructure debt service, adjust covenants or change the security.

Refunding bonds are typically secured in the same way as the bonds that are being refunded. However, a city often can change the security for the refunding bonds. In order to achieve debt service savings, the refunded bonds must have a call feature that is a provision that allows the bonds to be prepaid prior to their original maturity. Most municipal bonds are callable beginning approximately 10 years after they are issued. The date on which the bonds can be prepaid is often referred to as the "call date."

ii. Other types of borrowing

- **Certificates of Participation** (sometimes referred to as COPs) on which annual debt service payments are subject to annual appropriation. Borrowings that are subject to appropriation usually have higher interest rates than borrowings that are not. Recent changes in Oregon law allow most cities to do general fund obligations, and certificates of participation have become relatively uncommon.

- **General Fund Obligations, or Limited Tax Obligations**, which are similar to COPs but are a binding obligation payable from all resources of the general fund rather than to annual appropriation. Some city charters do not permit this kind of borrowing.

- **Loan Agreements** are often used when a city borrows from a bank.

- **Lease-Purchase Agreements** are commonly used to purchase equipment from vendors.

- **Tax Anticipation Notes (TANs)** are short-term instruments sold in anticipation of tax receipts and assist in cash flow needs between July and November when property tax payments are received.

- **Bond Anticipation Notes (BANs)** are similar to TANs but are sold in anticipation of selling a bond and provides interim funds for financing the project.

- **Lines of Credit** allow a city to borrow money in increments, and only pay interest on the amount that is borrowed. They are popular for interim financing when the city cannot invest its borrowed money at the rate the city pays on the borrowing.

B. Tax-exemption and other federal subsidies

The United States Internal Revenue Code allows local governments to borrow at low, tax-exempt interest rates. An investor who purchases a tax-exempt bond does not have to pay federal income tax on the interest, and therefore is willing to accept a lower interest rate.

The tax-exemption is controlled by the U.S. Congress and the Internal Revenue Service and the regulations relating to the tax-exemption are very long and complex. Those regulations generally place substantial restrictions on the ability of borrowers to invest the proceeds of tax-exempt borrowings (the "arbitrage regulations") and substantial restrictions on the ability of borrowers to allow special private use of facilities financed with tax-exempt obligations (the "private activity bond rules").

The availability of the tax-exemption or subsidy bonds can have a dramatic effect on the cost of a city borrowing. The tax-exemption is often estimated to reduce the annual interest rate on a borrowing by two percent.

Nationally recognized bond counsel helps cities and other local government borrowers determine whether a particular project is eligible for tax-exempt or subsidy bond financing. Because the difference in cost is so substantial, it is usually very important to have bond counsel determine whether a project will qualify for tax-exempt or subsidy bond financing as soon as possible.

C. Debt Limits

The principal amount of outstanding general obligation bonds of a city cannot exceed three percent of the real market value of the taxable property in the city. However, that limit does not apply to general obligation bonds that are issued to finance local improvement districts.

There is no general statutory limitation on the amount of revenue bonds that a city may issue. However, individual city charters may impose special limitations. The amount of bonds that may be issued to finance local improvement districts under ORS Chapter 223 is separately limited to 3% of the real market value of the city.

The city charter may also contain debt limits, either on long-term or short-term financing. Consult your city attorney when the governing body wishes to obtain debt financing.

D. Disclosure

Bonds and other borrowings of a city are securities. When a city sells securities in the public securities markets, the city is obligated to prepare a document (called an "Official Statement") that must describe all the important factors that an investor should consider when deciding whether to purchase the city's securities. The Official Statement is usually prepared by an outside expert, but the city is legally responsible for the content of the document. Preparation of an Official Statement can be a significant expense.

If the city makes inaccurate or incomplete statements in connection with an offering of securities it may constitute "securities fraud" under federal and state securities laws Securities fraud can subject public officials to personal liability and, in dramatic cases, criminal penalties.

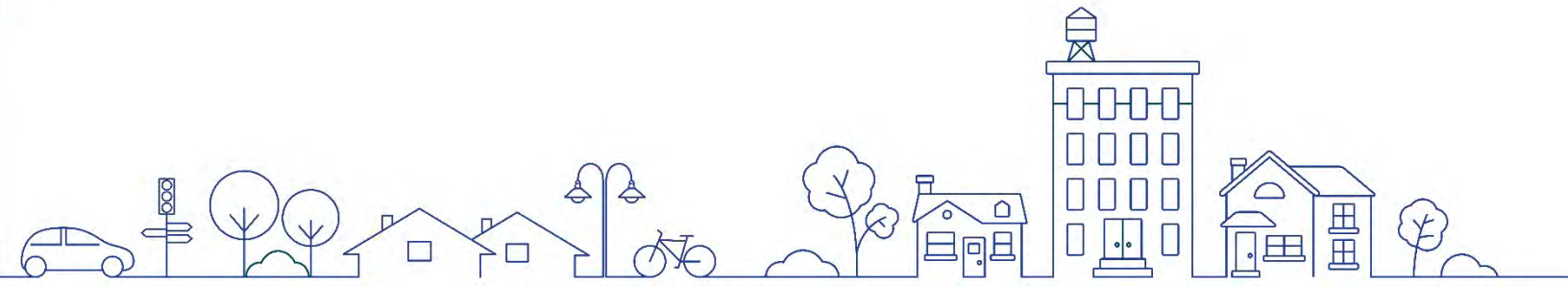
Because investors will use the Official Statement to make decisions about purchasing the city's securities, and because inaccuracies and omissions can be grounds for liability claims against the city and its public officials, it is important that the Official Statements be prepared carefully and accurately.

Many cities that have issued securities recently are required to post annual updates of financial and operating information with the Municipal Securities Rulemaking Board, through its internet data base called "EMMA." You can find recent securities disclosures for your city at emma.msrb.org. Public officials should try to ensure that their cities are complying with their obligations under the federal and state securities laws Official statements and other disclosure documents are not usually required when a city borrows from a state agency or a commercial bank.

Oregon Municipal Handbook

CHAPTER 13:

PURCHASING & PUBLIC CONTRACTS



League of Oregon Cities

Published by the League of Oregon Cities

January 2021

Table of Contents

Chapter 13:

Purchasing and Public Contracts

I. INTRODUCTION

In the private sector, organizations are generally free to contract however and with whomever they choose with the focus often on the organization's profit. In the public sector, public contracting is founded on the principle of fully advertised, open, and fair competition with the focus on transparency and fairness. Public contracts are generally the purchase, sale or lease of goods or services, or contracts for the construction of public improvements. The authority to enter into a public contract and the limits to that authority are governed primarily by state statute, state administrative rules, and to a lesser extent by the Oregon Constitution and local charters.

This chapter will provide an overview of Oregon's public contracting laws, identify the various types of public contracts subject to the laws, and describe how to legally procure a public contract. For ease of understanding, the chapter will be divided in to two primary categories of public procurements: 1) the procurement of goods and services; and 2) the procurement of public improvements and construction services.

Disclaimer: These materials are not intended to substitute for obtaining legal advice from a competent attorney. Rather, these materials are intended to provide general information regarding public contracting for public officials to allow the public official to have a working knowledge of the topic.

II. OVERVIEW

The public contracting code refers to the entity procuring the contract as the "contracting agency." The contracting agency may be the city acting through its city council, or acting through a city manager, or a department head to whom the city council has delegated or permitted delegation of authority. The discussion below uses the term "contracting agency" to refer to either the city council or the person with delegated authority under the local code.

A. Sources of Law

Public contracting in Oregon is governed by the Oregon public contracting code codified in ORS chapters 279, 279A, 279B, and 279C. All city contracting agencies must comply with the requirements of the contracting code in their public contracting.

ORS chapter 279 exists as a shell of the former contracting code prior to its 2005 amendment. In its current state, the chapter primarily focuses on the state qualified rehabilitation facilities program which is discussed further below.

ORS chapter 279A sets out the general provisions for the entire public contracting code including many terms and their definitions, describes the types of contracts and entities subject to the code, and addresses local rulemaking authority and obligations under the code. This chapter also addresses various policies embodied within the code, affirmative action, contract preferences, and cooperative procurement; and establishes substantive legal requirements applicable to all public contracting.

ORS chapter 279B addresses the procurement of goods and services (excluding professional services). The topics covered include permitted methods of procurement or "source selection" (including exceptions and exemptions), procurement document specifications, and legal remedies.

ORS chapter 279C addresses the procurement of public improvement contracts—generally covering public construction projects that are not emergencies, minor repairs or for maintenance. ORS chapter 279C also addresses the procurement of architectural, engineering and land surveying services from which a local contracting agency can opt out through rulemaking. Lastly, ORS chapter 279C contains provisions pertaining to public works contracts, covering the prevailing wage laws, hours of labor, etc.

Resource:

LOC's **Model Policy for Public Contracting and Purchasing**, available in the LOC's online Reference Library.

To ensure transparency in public purchasing, the Oregon Legislative Assembly requires all contracting agencies to establish, implement, and follow standardized procurement rules. ORS 279A.065 gives cities three choices in their establishment of standardized procurement rules:

- Follow the model rules adopted by the Oregon Attorney General contained in Oregon Administrative Rules (OAR) chapter 137, divisions 46, 47, 48, and 49;
- Prescribe their own rules; or
- Prescribe their own rules which include portions of the model rules adopted by the Oregon Attorney General.

If a contracting agency decides to adopt its own local rules, those rules must still comply with the provisions of ORS chapters 279, 279A, 279B, and 279C. A local contracting code can be adopted by ordinance, resolution or charter. The most common and preferred method is by ordinance. In determining what the local code should look like, each city will need to evaluate its own form of government and needs. If a city chooses to adopt its own rules, it is required to do two things. First, it must specifically state that the model rules adopted by the Oregon attorney general are not applicable to the city. Second, each time the Oregon Attorney General's office modifies its model rules, the city is required to review the modified rules to ensure its own locally created and adopted rules are still compliant with all applicable state regulations. For the ease of explanation, this chapter presumes that a city has not adopted its own local rules and is following the model rules adopted by the Oregon Attorney General. Where the model rules are

referenced herein, a city may adopt its own local rules that differ from the referenced model rule so long as the local rules comply with the state statutes.

B. What is a Public Contract?

Not every agreement is considered a public contract under the public contracting code. In technical terms, a public contract means "a sale or other disposal, or a purchase, lease, rental or other acquisition, by a contracting agency of personal property, services, including personal services, public improvements, public works, minor alternations, or ordinary repair or maintenance necessary to preserve a public improvement."[1]

Thus, a public contract is the purchase of office supplies, equipment, construction services, paving, consultant services, software, cleaning services, to name a few. It is also important to note that that some contracts are excluded from the provisions of the public contracting code. Some of the more common or important exceptions to keep in mind are:

- Intergovernmental agreements under ORS Chapter 190;
- Grants;
- Contracts for purchase or sale of real property;
- Contracts made with qualified nonprofit agencies providing employment opportunities for individuals with disabilities under ORS 279.835 to 279.855;
- Sole-source expenditures when the rates are set by law or ordinance;
- Contracts for professional or expert witnesses or consultants for existing or potential litigation; and
- Certain investment contracts and employee benefit plan contracts under ORS 279A.025(2)(q)&(r).

Contracts that are exclusively among or between governmental bodies, including governmental bodies of other states or countries, are not public contracts subject to the code, although if a private entity is a party to the agreement, then the exclusion for contracts between contracting agencies likely does not apply.

There are many more agreements excluded from the definition of a public contract under ORS 279A.025 which is always a good starting place to review to determine the applicability of the code.

[1] ORS 279A.010 (1)(z).

C. Who is Who

The contracting code uses a number of terms to reference the various entities involved in the public contracting process.

The "contracting agency" is defined as "a public body authorized by law to conduct a procurement. 'Contracting agency' includes, but is not limited to, * * * any person authorized by a contracting agency to conduct a procurement on the contracting agency's behalf."[2]

A city's "local contract review board" is the city council, unless the city designates an alternative "[public] body, board or commission."[3] The local contract review board may then delegate some, most, but not all of its authority through rulemaking.[4] Therefore, the city council may delegate some or all authority to a city manager or administrator or to department heads, and so on. How much delegation is appropriate will depend on the size of the city and the contracting limits adopted by the city council.

D. General Provisions

As mentioned above, ORS chapter 279A is applicable to all chapters of the public contracting code. The model rules adopted under it in OAR chapter 137, division 46 are likewise applicable to all public contracts except where the contracting agency has opted out of the rules. Below are various provisions that apply to all solicitations for public contracts.

1. Permissible Limitations on Competition for Affirmative Action, Minorities, Women and Emerging Small Businesses; Disabled Veterans.

While the public contracting code is focused on the principle of competitive procurement, if a contracting agency has an established affirmative action goal, policy or program, it may limit competition for any public contract for goods or services, or any other public contract estimated to cost $50,000 or less, to pursue that goal, policy or program.[5] An affirmative action goal, policy or program is one that is "designed to ensure equal opportunity in employment and business for persons otherwise disadvantaged by reason of race, color, religion, sex, national origin, age or physical or mental disability or a policy to give a preference in awarding public contracts to disables veterans."[6]

A contracting agency may favor business enterprises certified as disadvantaged, minority, women or emerging small business enterprises under ORS 200.055 or business enterprises own or controlled by a disabled veteran in three ways:

[2] ORS 279A.010(1)(b).
[3] ORS 279A.060.
[4] ORS 279A.075.
[5] ORS 279A.100(3)
[6] ORS 279A.100(1).

- By requiring a contractor to subcontract with or obtain materials for use in performing the contract from, a certified disadvantaged, minority, women or emerging small business enterprise or business enterprise owned or controlled by a disabled veteran;

- By requiring a contractor to subcontract with or obtain materials for use in performing the contract from, a certified disadvantaged, minority, women or emerging small business enterprises that are located or draw their workforce from areas classified as economically distressed by the Oregon Economic and Community and Development Department; and

- By requiring that a contractor be a "responsible bidder" as defined in ORS 200.005(6) and have undertaken good faith efforts to comply with ORS 200.045(3).[7]

2. Contract Preferences

There are a few preferences that a contracting agency must apply to its selection of a contractor.

a. Preferences for Oregon Goods and Services

The public contracting code requires a contracting agency to give preference to goods and services manufactured and produced in Oregon if "price, fitness, availability and quality are otherwise equal." This means that a preference for Oregon goods and services may be given only when there is a tie low bid, or two identical proposals or offers. Except for construction contracts described in ORS 279C.320, cities are allowed to give a 10% price advantage to Oregon-produced goods and services. This preference is only available for contracts for goods and services procured under ORS chapter 279B.[8,9]

When evaluating bids under ORS chapters 279B and 279C, contracting agencies must give the preference by applying a percentage increase to the bids of out of state bidders equal to the percentage of the preference that would be given to the bidder in the state in which the bidder resides.[10] The National Association of Procurement Officials manages a list of states that give such preferences and the amount of the preference that the local contracting agency can refer to without liability.[11]

When evaluating offers other than bids, the identical offer that uses Oregon goods or services wins. If two or more offers use Oregon goods or services, lots are drawn between or among those offers. If none use Oregon goods or services, lots are drawn among all offers.[12]

---

[7] ORS 279A.105.
[8] ORS 279A.128
[9] Contracts described in ORS 279C.320 are those for emergency work, minor alternations, ordinary repair or maintenance of public improvements, as well as any other construction contract that is not defined as a public improvement under ORS 279A.010, in accordance with the provision of ORS chapter 279B.
[10] ORS 279A.120(2).
[11] The NAPO state preference repository is available at https://www.naspo.org/research-innovation/state-preference-repository/.
[12] OAR 137-046-0300.

b. Preferences for Local Goods and Services

Apart from the statuary preference for Oregon goods and services, local preferences are not expressly permitted under the public contracting code. Local preferences likely cannot be approved as an exemption to competitive bidding under ORS 279C.335 because use of a local preference would result in favoritism or could substantially diminish competition, contrary to the findings required to approve the exemption. Even when a contract award is not required to be based on the lowest bid and factors other than cost can be considered, such as in a request for proposals, it may be possible to favor local goods and services but such favoritism would not be consistent with the policies articulated in ORS 279A.015.[13]

When using a less formal contracting procedure, such as the intermediate procurement process under ORS chapter 279B and the competitive quote process under ORS chapter 279C, nothing in the public contracting code prevents the contracting agency from contracting only local contractors. Applications of local preferences have not been tested in the Oregon courts. There are many legal arguments to be made against doing so, such as preemption, and the U.S. Constitution's Commerce Clause, to name a few. Therefore, if considering local preferences, the local contracting agency should consult with legal counsel and proceed with caution.

[13] ORS 279A.015 provides:

> "It is the policy of the State of Oregon, in enacting the Public Contracting Code, that a sound and responsive public contracting system should:
>
> (1) Simplify, clarify and modernize procurement practices so that they reflect the marketplace and industry standards.
>
> (2) Instill public confidence through ethical and fair dealing, honesty and good faith on the part of government officials and those who do business with the government.
>
> (3) Promote efficient use of state and local government resources, maximizing the economic investment in public contracting within this state.
>
> (4) Clearly identify rules and policies that implement each of the legislatively mandated socioeconomic programs that overlay public contracting and accompany the expenditure of public funds.
>
> (5) Allow impartial and open competition, protecting both the integrity of the public contracting process and the competitive nature of public procurement. In public procurement, as set out in ORS chapter 279B, meaningful competition may be obtained by evaluation of performance factors and other aspects of service and product quality, as well as pricing, in arriving at best value.
>
> (6) Provide a public contracting structure that can take full advantage of evolving procurement methods as they emerge within various industries, while preserving competitive bidding as the standard for public improvement contracts unless otherwise exempted."

c. Preferences for Recycled Goods

The public contracting code also includes a preference for recycled goods and requires local contracting agencies to give preference to the procurement of goods manufactured from recycled materials on any public contract for goods if: (1) the recycled good is available; (2) the recycled good meets applicable standards; (3) the recycled good can be substituted for a comparable nonrecycled good; and (4) the recycled good's costs do not exceed the costs of the nonrecycled good by more than 5%, or a higher percentage if a written determination is made by the contracting agency.[14] Unless the findings in (1) to (4) cannot be made, the contracting agency must award a higher priced contract that includes recycled goods instead of a lower priced contract that does not.

Resource:

For sample language for the adoption of preferences such as for recycled materials and supplies, see LOC's **Model Policy for Public Contracting and Purchasing**, beginning on page 11.

ORS 279B.025 requires contracting agencies to "establish procurement practices" for public contracts for goods and services that "ensure, to the maximum extent feasible, the procurement of goods that may be recycled or reused when discarded." Therefore, a local contacting agency should adopt rules under ORS 279B.025 to meet this obligation to give preference to recycled goods.

3. Non-Competitive and Alternative Procurement Methods

Prior to choosing a procurement method, the contracting agency may want to look to non-competitive or alternative procurement methods which do not have the same strict competitive requirements as "traditional" public contract procurement methods. The non-competitive procurement methods outlined below may save the contracting agency time, money and frustration.

a. Qualified Rehabilitation Facility

Pursuant to state policy, a contracting agency must first look to whether a qualified rehabilitation facility or "QRF" is available for the products and services the contracting agency is seeking. The Oregon Department of Administrative Services maintains a list of QRF providers, products, and services.[15] This list is available at: https://qrf.dasapp.oregon.gov/. QRF contract pricing is determined through the QRF statewide coordinator. The contracting agency should evaluate if the available QRF product or service meets the agency's needs of form, fit, and function.

[14] ORS 279A.125.
[15] ORS 279.840 and 279.850.

b. Personal Services Procurements

A local contracting agency has authority to "designate certain service contracts or classes of service contracts as personal services contracts."[16] Generally, these are contracts for services that require specialized skill, knowledge, and resources in the application of technical or scientific expertise or in the exercise of professional, artistic, or management discretion or judgment. In other words, a local contracting agency does not have to apply ORS chapter 279B or the model rules adopted under ORS chapter 279B to these types of personal services contracts if it has adopted its own personal services contracts rules. The local rules must designate the contracts or classes of contracts as personal services contracts and provide for the source selection method(s) to be used.

Personal Services

Examples of services a contracting agency may designate as "personal services" may include:

- Services of an accountant, attorney, auditor, information technology consultant.
- Services of expert witnesses or consultants.
- Services of a photographer, film maker, painter, sculptor.

Architectural, engineering and land-surveying services contracts are treated a little differently than other personal services and must generally be procured through the qualifications-based selection (QBS) process outlined in ORS 279C.110. See section V below for further discussion on these types of service contracts.

c. Cooperative Purchasing

Contracting agencies are granted cooperating authority to conduct certain public contracting activities on behalf of other contracting agencies, participate in contracts and contracting activities conducted by other contracting agencies, or rely on membership in a cooperative procurement group as the basis for selection of contractors to provide certain goods or services. ORS 279A.205. These contracts may include contracts made by out of state agencies.

The public contracting code describes three types of cooperative or "piggy-back" procurements that are allowed and establishes the conditions under which a local contracting agency may participate in or administer each. The three types of cooperative procurements are: (1) joint cooperative procurement; (2) permissive cooperative procurement; and (3) interstate cooperative procurement. The conditions that must be met to participate in these contracts mostly address the procurement process of the original contract, notice requirements when choosing to participate in certain cooperative procurements, and protest procedures. In all cases, the cooperative procurement must have been procured using source selection methods that are substantially equivalent to the competitive sealed bid, proposal, or special procurement process in the public contracting code. Cooperative purchasing allows contracting agencies to avoid a having to go through their own tedious procurement process and benefit from group discounts.

[16] ORS 279A.055(2).

(1) Joint Cooperative Procurement – ORS 279A.210

Joint cooperative procurements are cooperative procurements in which the estimated contract volumes are set forth in the solicitation documents, and the contracting agencies or cooperative procurement groups are specifically identified in the solicitation documents and in the original contract or price agreement. A joint cooperative procurement can be used to establish contracts or price agreements for goods, services (including personal services) and contracts for public improvements. There can be no material change in terms, conditions, or price of the original contract. Use of a joint cooperative procurement requires the participants to enter into a formal agreement with the administrator executing the agreement on behalf of the cooperative procurement group. A joint cooperative procurement cannot be a permissive cooperative procurement. An example of a joint cooperative procurement is where two cities both are looking to procure the same services. The cities would first need to enter into a formal agreement establishing a solicitation administrator. The administrating city will then issue a single solicitation wherein each city is identified and the contractor agrees to provide goods and services under the same terms and conditions to both cities.

(2) Permissive Cooperative Procurement – ORS 279A.215

A permissive cooperative procurement is one in which the contract volumes and contracting agencies are not specifically identified in the solicitation documents or original contract, but which do permit other contracting agencies to establish contracts or price agreements under the terms, conditions, and prices of the original contract. A permissive cooperative procurement can be used to establish contracts for goods and services (including personal service services), but not public improvements. There can be no material change in the terms, conditions, or price of the original contract. If a contracting agency estimates that the permissive cooperative procurement contract will be more than $250,000, then it must advertise its intent to enter into the contract, provide vendors the opportunity to submit comments, and respond to any comments it receives. An example of a permissive cooperative procurement are the various statewide price agreements to purchase goods and services under the Oregon Cooperative Procurement Program (OrCPP). The agreements available under this the OrCPP are administered by the Oregon Department of Administrative Services. Each negotiated contract requires that the contractor allow ORCPP members to establish contracts or price agreements under the same terms, conditions, and prices of the original contract.

Resource:

Oregon Cooperative Procurement Program

Website: https://www.oregon.gov/das/Procurement/Pages/Orcpp.aspx

Email: info.orcpp@oregon.gov

(3) Interstate Cooperative Procurement – ORS 279A.220

An interstate cooperative procurement is a cooperative procurement in which one or more of the participating agencies are located outside of Oregon. An interstate cooperative procurement may be a joint procurement or permissive procurement. An interstate cooperative procurement does not have to but may specifically identify contracting agencies permitted to participate. If not identified, the procurement must permit other contracting agencies or cooperative purchasing groups to establish contracts or price agreements under the terms, conditions, and prices of the original contract. A contracting agency desiring to enter into a contract or price agreement under an interstate cooperative procurement must advertise its intent to do so, provide vendors the opportunity to submit comments, and respond to any comments it receives. An interstate cooperative procurement does not have to identify contract volumes. An interstate cooperative procurement can be used to establish contracts for goods and services (including personal services), but not public improvements. An example of an interstate cooperative procurement are those agreement available under the National Purchasing Partners (NPPGov). NPPGov is based in Washington but partners with various government entities nationwide to provide government entities – including cities in Oregon – with access to a variety of contracts.

Resource:

NPPGov

Website: https://nppgov.com/

Email: customerservice@nppgov.com

(4) Cooperative Procurement Protests and Disputes – ORS 279A.225

Protests regarding the procurement process for a cooperative procurement or the award of an original cooperative contract can be directed only to the originating contracting agency. Likewise, protests regarding the use of a cooperative procurement can be directed only to the local contracting agency and are limited in scope to the local contracting agency's authority to enter into the cooperative procurement. The protest procedure to be followed is the one used for public contracts for goods and services described in ORS chapter 279B. Any disputes regarding contract performance that arise after the contract is entered into can be resolved only between the local contracting agency and contractor – in other words, the originating administrating agency is not involved.

d. Federal Purchasing Programs

Local contracting agencies may enter into contracts through federal purchasing programs under the Electronic Government Act of 2002 (10 U.S.C. 381) for the purchase of automated data processing equipment (including firmware), software, supplies, support equipment, and related services. In order to do so, the local contracting agency must have adopted rules for that type of procurement.[17]

[17] ORS 279A.180.

e. Contracts to Transfer Fire Protection Equipment

A local contracting agency may enter into a public contract to transfer fire protection equipment between fire departments without using a competitive procurement process if the procedures in ORS 279A.190(2) are followed, which includes a public hearing. There is no requirement to adopt local rules to use this process.

Disposal of Real Property

The disposal of real property is governed by two state statutes:

ORS 221.725
Sale of city real property; publication of notice; public hearing

and

ORS 221.727
Alternative procedure for sale of city real property; public notice and hearing

4. The Disposal of Surplus Property

The disposal of surplus property – except real property – is a public contract to which the policy of preserving competitive bidding as the standard contracting method applies.[18] The disposal of surplus property may be exempt from the competitive bidding requirements if the local contracting agency adopts its own rules.[19] Typically, local codes will designate the person or persons authorized to declare property "surplus," if that authority is not retained by the local contract review board. The local code will then provide for various methods of disposal. The most common is a publicly advertised auction to the highest bidder but may also include a liquidation sale, fixed price sale, trade-in, donation or as a last resort, disposal as waste.

III. THE PROCUREMENT OF GOODS AND SERVICES

Contracts for goods and services are governed by ORS chapter 279B and OAR chapter 137, division 47. The contract may be for goods, services, or both. Goods are supplies, equipment, materials, personal property, and includes any tangible, intangible and intellectual property, rights and licenses. [20] Services are all other services not designated as personal services under ORS 279A.055 or under local code.[21] Generally, these types of services are non-professional services such as a short term consultant or services for office maintenance.

The public contracting code provides for two primary methods for procuring a contract for good and services: (1) the competitive sealed bid or invitation to bid (ITB); and (2) competitive sealed proposal or request for proposals (RFP). There are no statutory guidelines or preferences as to either method and the choice is the local contracting agency's to make.

[18] Real versus personal property. Real property is considered land and anything growing on, attached to, or erected on land such as soil and buildings. Personal property is considered any movable or intangible thing that is subject to ownership and not classified as real property such as a firetruck or trademark.
[19] ORS 279A.185.
[20] ORS 279A.010(1)(i).
[21] ORS 279A.010(1)(kk).

An ITB typically defines the scope of work with detailed plans and specifications and will be awarded to the lowest and best bid. On the other hand, an RFP will more broadly define the scope of work, often by identifying a program or requesting a solution. An RFP will be awarded based on the level of technical ability shown as well as cost.

Resource:

LOC's **FAQ on Disposing of Surplus Property**, available in the LOC's online Reference Library.

The public contracting code and model rules also provide for a variety of alternative contracting methods such as a multistep bids or proposals. In addition, a local contract review board such as the city council may adopt its own contracting methods, as "special procurements" under ORS 279B.085, setting different dollar thresholds for the variety of different methods available.

A. Pre-Solicitation Considerations

Prior to deciding on the solicitation method to secure a contract for goods or services a contracting agency may want to consider a number of pre-solicitation items.

1. Consultation

Prior to proceeding with an ITB or RFP for goods and services, the contracting agency may choose to consult with outside experts, technical experts, suppliers, consultants and contractors to develop clear, precise and accurate specifications in its solicitation for public contracts.[22] Often times this is helpful for the contracting agency to determine how to best develop a solicitation to meet to needs of the contracting agency when the contracting agency is unclear about how to proceed. However, the contracting agency must take reasonable measures to ensure that no one who assists with the preparation of solicitation documents realized a material competitive advantage in a procurement that arises from the contracting agency's use of such experts and consultants.

2. Prequalification

A contracting agency may also choose to utilize the prequalification process to determine a prospective contractor's eligibility to submit an offer prior to the procurement process. A contracting agency many require prospective contractors to prequalify under ORS 279B.120 and ORS 279B.125. The prequalification process enables the contracting agency to apply criteria that reflect the standards of responsibility under which prospective contractors are measured in terms of their ability to perform the contracted work at the level of expertise and efficiency required to meet the contracting agency's needs. If prequalification is desired, the contracting agency will need to adopt prequalification rules setting out the procedure for submitting a prequalification application, the information required to determine prequalification, and the prequalification criteria. Although prequalification cannot

Resource:

A sample feasibility determination form created by DAS is available on the DAS website.

[22] ORS279B.210.

be revoked once an ITB or RFP is issued under ORS 279B.120(3), the contracting agency may still make a determination of nonresponsiblity under ORS 279B.110 as discussed below in section III.B.4 *Evaluation*.

3. Feasibility Determinations for Service Contracts over $250,000

Prior to beginning a procurement or entering into a service contract with an estimated price of more than $250,000, the contracting agency must demonstrate that it would incur less cost in conducting the procurement versus performing the service with the agency's own personnel and resources, or that performing the services within the agency would not be feasible.[23] An example of a service contract is a contract between a city and a graphic design firm to update a the city's logo and website.

This provision effects service contracts only, not professional services or those services to which ORS chapter 279B does not apply. In addition, the following public bodies do not have to comply with this provision:

- Cities with a population of 15,000 or less;
- Counties with a population of 30,000 or less;
- Community colleges that enroll 1,000 or less full-time equivalent students;
- Special districts, diking districts, and soil and water conservation districts;
- The Port of Portland; and
- Procurements for client services by state agencies.[24]

If contracting agency wishes to procure the services of an independent contractor, the contracting agency must:

- Conduct a written cost comparison analysis showing that the contracting agency would incur less cost in contracting with an independent contractor; or
- Conduct a cost comparison analysis and make a written determination that using the contracting agency's own personnel and resources to perform the services is not feasible under ORS 279B.036(1); or

[23] ORS 279B.030 to 279B.036.
[24] ORS 279B.030.

- Make a written determination that using the contracting agency's own personnel and resources to perform the services is not feasible under ORS 279B.036(1)(a) or (1)(b) (no cost comparison analysis required).[25]

Thus, under the second option above, even if the cost comparison analysis does not show that it will result in less cost to the contracting agency to contract with an independent contractor, the contracting agency may nevertheless make the feasibility determination to conclude that it would not be feasible to use the contracting agency's own personnel and resources.

Under the third option above, a contracting agency may proceed without conducting a cost comparison analysis if it can make findings that agency personnel lack the "specialized capabilities, experience or technical or other expertise necessary to perform the services."[26] Findings are required comparing the contracting agency's capabilities, experience or expertise with a potential contractor's capabilities, experience or expertise in the same or a similar field.[27]

The alternative findings permitted under the third option allow the contracting agency to rely on one or more of the "special circumstances" set forth in ORS 279B.036(1)(b) to make a determination that using the contracting agency's own personnel and resources is not feasible. These circumstances include but are not limited to:

- Grant terms require outside procurement of independent contractor;
- State or federal law require outside procurement of independent contractor;
- Service and maintenance services incidental to a contract for purchasing or leasing real or personal property;
- Emergency contracts under ORS 279B.080;
- Contracts that will be accomplished within six months after the date of contract execution;
- Policy goals, avoiding conflicts of interest, or ensuring unbiased findings; and
- Urgent or temporary need for services when delay would "frustrate purpose for obtaining services.

Resource:

Department of Administrative Services Procurement Manual

A contracting agency may enter into a contract with a contractor for the services only if the cost comparison analysis shows that it would cost the contracting agency more to use its own personnel and resources than it would incur in procuring the services from a contractor *and* the reason the costs are higher is not due solely to higher wage and benefit costs.[28] Thus, if the cost

[25] ORS 279B.036.
[26] ORS 279B.036(1)(a).
[27] *Id.*
[28] ORS 279B.033(2)(a).

is higher due solely to higher wage and benefit costs, the contracting agency must nevertheless use its own personnel and resources. However, the statute gives the contracting agency one more out and will allow it to enter into a contract with a contractor for the services if the contracting agency determines that it lacks personnel and resources to perform the services, even if the cost is higher, regardless of the reason.[29] If the contracting agency chooses this latter course, ORS 279B.033(2)(b) sets forth some record keeping requirements that must be followed.

The cost comparison analysis and feasibility determinations along with the supporting records are public records subject to disclosure.[30] In addition, the decision under this process is exempt from the judicial review process of ORS chapter 279B and will be overturned only if it is "clearly erroneous, arbitrary, capricious or contrary to law."[31] Review would be by writ of review to the circuit court under ORS chapter 34.

The Oregon Department of Administrative Services (DAS) has prepared forms and other tools for state agency use under these provisions that can be easily adopted for local contracting agency use. Contact the department for additional tools.

B. Competitive Sealed Bid – ITB for Goods and Services

ORS 279B.055 and OAR 137-047-0255 provide a detailed checklist for developing the solicitations documents for an ITB. The model rule does not duplicate what is in statute, so a contracting agency who has not opted out of the model rules must follow both when drafting a solicitation document. A multi-stepped sealed bidding process is also permitted under ORS 279B.055(12) & (13) in which necessary information or unpriced technical bids are solicitated in the first phase, and the competitive sealed bids are solicitated in the second phase from those who submitted eligible bids in the first phase. OAR 137-047-0257 provides the framework for this process.

1. ITB Contents

The ITB must include all requirements on which the bid award will be based. Many criteria are set out in ORS 279B.055(2), but additional criteria to determine minimum acceptability, such as inspection, testing, quality and suitability for intended use or purpose are permitted under ORS 279B.055(6)(a). OAR 137-047-0255 also requires the ITB to include all applicable contractual terms and conditions, including the form of contract and the consequences for failure to perform the work or meet established performance standards.

The solicitation documents must include a description of the goods or services to be secured under the procurement. The procurement description requirement in ORS 279B.055(2)(c) provides that "the contracting agency shall identify the scope of work included within the procurement, outline the contractor's anticipated duties and set expectation for the contractor's performance. Unless the contracting agency for good cause specifies otherwise, the scope of

[29] ORS 279B.033(2)(b).
[30] ORS 279B.033(3) and 279B.036(2).
[31] ORS 279B.145.

work shall require the contractor to meet the highest standards prevalent in the industry or business most closely involved in providing the appropriate goods or services." Public Notice

Public notice of an ITB is required.[32] The notice must be published in a newspaper of general circulation in the area where the contract is to be performed (usually the local paper).[33] The notice of an ITB must be published at least seven days before the solicitation closing date. Under the model rules, notice must also be sent to contractors who have "expressed an interest in the [c]ontracting [a]gency's [p]rocurements," if not posted on an electronic procurement system or the agency's web site.[34] Notice must be published at least once in at least one newspaper of general circulation in the area where the contract is to be performed.[35] Lastly, the model rules require the notice must be posted at the "principal business office" of the contracting agency.[36]

Resource:

A sample checklist for the development of an ITB for goods and services is available in Appendix A.

2. Disclosure of ITB Records

Until the notice of intent to award is issued, bids are not public records subject to disclosure, although the amount of a bid, bidder name, and other relevant information the contracting agency may determine by rule are subject to disclosure as a public record. After the notice of intent to award is issued, bids are public records subject to disclosure, although trade secrets and information submitted in confidence may be withheld from disclosure in accordance with ORS 192.345 and 192.355 of the Oregon Public Records Law.[37, 38]

3. Evaluation

The contracting agency must evaluate all bids received before the closing date based on the requirements set forth in the ITB, but cannot consider any bids received after the closing date.[39] The contract must be awarded to the lowest "responsible" bidder whose bid "substantially complies" with the requirements and criteria of the ITB.[40] "Responsibility" is defined in ORS 279B.110 and OAR 137-047-0640(1)(c)(F). If the bidder is not responsible, the contracting

Resource:

The Standards of Responsibility as provided in ORS 279B.110 are available in Appendix B.

[32] ORS 279B.055(4).
[33] *Id.*
[34] OAR 137-047-0300(1); see also ORS 279B.055.
[35] ORS 279B.055(4)(a).
[36] OAR 137-047-0300(4).
[37] ORS 279B.055(5)(b)&(c).
[38] Under ORS Chapter 279C.365, bids are public records subject to disclosure upon opening, as opposed to not until after notice of intent to award for bids submitted in the public contract for goods and services procurement process. Note that in order for information to be considered confidential and not subject to disclosure under the public records laws, it must have been submitted in confidence and the contracting agency must have committed itself to maintain confidentiality. A good place to do this would be in the solicitation documents.

[39] ORS 279B.055(6).
[40] ORS 279B.055(10).

agency must reject the bid and issue a written determination of non-responsibility.[41]

4. Negotiations

Negotiations are not permitted, although a contracting agency may seek clarification of a bid.[42] Note that "clarification" does not supplement, change, correct, or otherwise alter what is already there.[43]

5. Mistakes

Sometimes mistakes in a bid are discovered before the contract is awarded and sometimes a mistake may be waived or corrected, or the bid may be withdrawn. The contracting agency will need to consider the type of mistake before waiving the mistake, permitting correction, allowing withdrawal of the bid, or canceling the award of the contract. Under the model rules, errors in judgment cannot be corrected.[44] Decisions pertaining to mistakes must be given in writing.[45] After the contract is awarded, the bid becomes binding on the bidder and can be withdrawn or corrected only in accordance with the rules of contract law.[46]

C. Competitive Sealed Proposal – RFP for Goods and Services

The public contracting code permits a much wider range of methods of contractor selection using RFPs rather than ITBs, including the opportunity to negotiate the scope of work or contract terms. These include, but are not limited to, serial negotiations, competitive simultaneous negotiations, competitive range, and multi-stepped proposals.[47] Competitive range is the designation of a proposer group with whom the contracting agency will conduct discussions or negotiations after it has evaluated and ranked all proposers. OAR 137-047-0262 sets forth the procedures for conducting competitive range, discussions, and negotiations, as well as a best and final offer process. The procedures for multistep proposals are contained in OAR 137-047-0263.

ORS 279B.060 and OAR 137-047-0260 provide a detailed checklist for developing the solicitation documents for an RFP. The model rule does not duplicate what is in the statute, so a contracting agency who has not adopted its own local rules must follow both when drafting a solicitation document.

Resource:

A sample checklist for the development of an RFP for goods and services is available in Appendix C.

[41] OAR 137-047-0500.
[42] ORS 279B.060(7); OAR 137-047-0600(2).
[43] *See*, *Matter of On-Line Gaming Services Contract*, 279 NJ Super 566 (1995).
[44] OAR 137-047-0470.
[45] ORS 279B.055(7).
[46] Note that a bid is irrevocable and binding for 30 days after closing, unless the solicitation documents specify otherwise or a longer period of time. OAR 137-047-0480.
[47] ORS 279B.060(8)(b).

1. RFP Contents

The RFP must include all requirements on which a proposal will be evaluated, including the method of contractor selection. The RFP must also include all applicable contractual terms and conditions (which can be done by including the form of a draft contract) and can identify any terms and conditions that could be negotiated.[48]

The RFP must include a description of the procurement and the contracting agency must "identify the scope of work included within the procurement, outline the contractor's anticipated duties and set expectations for the contractor's performance * * * [,] require the contractor to meet the highest standards prevalent in the industry or business most closely involved in providing the appropriate goods or services" and set clear consequences of a contractor's failure to perform the work or meet established performance standards.[49]

2. Notice

Public notice of an RFP is required.[50] The notice is given in the same manner as the notice of an ITB and must be published at least seven days before the solicitation closing date, sent to contractors who have expressed an interest if not posted on an electronic procurement system or the agency's web site, and posted at the contracting agency's principal business office.[51]

A notice of intent to award a public contract procured through the RFP process must also be given at least seven days prior to award, although a shorter period is permitted if justified under the circumstances.

3. Disclosure of RFP Records

Until the notice of intent to award is issued, proposals are not public records subject to disclosure, although the name of the proposer is subject to disclosure as a public record after the proposals are opened. After the notice of intent to award is issued, proposals are public records subject to disclosure, subject to any applicable exemptions in the Oregon Public Records Law.[52]

4. Evaluation and Award

The contract must be awarded to the "responsible" proposer whose proposal is the "most advantageous to the contracting agency" based on: (1) the evaluation process and criteria in the RFP; (2) any applicable preferences required by ORS 279A.120 and ORS 279A.125; and (3) the outcome of negotiations, if any, authorized by the RFP.[53] As previously addressed above, "responsibility" is defined in ORS 279B.110 and OAR 137-047-0640(1)(c)(F). As with bidders, if the proposer is not responsible, the contracting agency must reject the proposal and issue a

[48] ORS 279B.060(2)(h).
[49] *Id.*
[50] ORS 279B.060(5).
[51] *Id.*; OAR 137-047-0300.
[52] ORS 279B.060(6). Compare ORS 279C.410 which does not contain a similar requirement to disclose the names of the proposers prior to notice of intent to award.
[53] ORS 279B.060(8).

written determination of non-responsibility.[54] The contracting agency is required to obtain "the proposer's agreement to perform the scope of work and meet the performance standards set forth in the final negotiated scope of work" before executing the contract.[55]

D. Other Solicitation Considerations

Once the solicitation is issued, there may be a number of additional items and steps for the contracting agency to consider such as cancellation, debarment, and amendments.

1. Cancellation, Rejection, Delay

Any solicitation may be cancelled, suspended or delayed, or all offers may be rejected when the contracting agency determines that it is "in the best interest of the contracting agency."[56] Additional criteria may include:

- The content of or an error in the solicitation document or the procurement process unnecessarily restricted competition for the contract.
- The price, quality or performance presented by the prospective contractors are too costly or of insufficient quality to justify acceptance of any offer.
- Misconduct, error, or ambiguous or misleading provisions in the solicitation document threaten the fairness and integrity of the competitive process.[57]

Any or all bids or proposals submitted in response to an ITB or RFP may be rejected in whole or in part for the same reasons. The reasons must be documented and placed in the solicitation file. The ability to cancel, reject or delay is a valuable tool for the contracting agency and can protect it from entering into an uneconomical contract (due to offers being higher than anticipated or budgeted), or from entering into a contract that will not meet the agency's needs (due to defects in the specifications, flaws in the award criteria, or misconduct by contractors). There is no liability to the contracting agency for cancelling, suspending, delaying a solicitation or rejecting any bid or proposal. The contracting agency, however, must give written notice of the cancellation. If the cancellation is made prior to opening, the contracting agency must simply give written notice to all potential contractors who submitted offers and the contracting agency should return all submitted offers.[58] If the solicitation is cancelled after opening, the contracting agency must keep all bids submitted in response to an ITB but may return proposals submitted in response to an RFP.[59] If all offers are rejected in response to an ITB or RFP, the contracting agency must keep all bids and proposals.[60]

[54] ORS 279B.110; OAR 137-047-0500.
[55] ORS 279B.060.
[56] ORS 279B.100(1).
[57] OAR 137-047-0650.
[58] OAR 137-047-0660(3); OAR 137-047-0670.
[59] ORS 279B.060(6)(c).
[60] OAR 137-047-0670(3).

2. Debarment

A contracting agency may debar prospective contractors from consideration for award of the contracting agency's contracts for reasons listed in ORS 279B.130(2). These reasons include:

- The prospective contractor has been convicted of a criminal offense as an incident in obtaining or attempting to obtain a public or private contract or subcontract or in the performance of a public or private contract or subcontract.

- The prospective contractor has been convicted under state or federal statutes of embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property or any other offense indicating a lack of business integrity or business honesty that currently, seriously and directly affects the prospective contractor's responsibility as a contractor.

- The prospective contractor has been convicted under state or federal antitrust statutes.

- The prospective contractor has committed a violation of a contract provision that is regarded by the contracting agency or the Oregon Construction Contractors Board to be so serious as to justify disqualification.

- The prospective contractor does not carry workers' compensation or unemployment insurance as required by statute. The contracting agency must issue a written decision to debar a prospective contractor and the decision must state the reasons for the action taken and inform the debarred prospective contractor of their appeal rights under ORS 279B.425. A copy of the written decision must be mailed or otherwise immediately furnished to the debarred prospective contractor.[61]

3. Contract Amendments

If the contracting agency has not adopted its own local rules pertaining to contract amendments, the model rule provisions regarding contract amendments will apply. Under the model rules, a contracting agency may amend a contract to (1) add additional goods or services within the scope of the solicitation, contract or special procurement; or (2) renegotiate terms and conditions if it is advantageous to the contracting agency, subject to several limitations.[62] As discussed below, small and intermediate procurements may be amended so long as the amendments do not increase the total contract price of more than $12,500 for small procurements and $150,000, or 25% of the original contract price, whichever is greater, for intermediate procurements.[63]

[61] ORS 279B.120(3) & (4).
[62] OAR 137-047-0800.
[63] ORS 279B.065 to 279B.070; OAR 137-047-0265 to 137-047-0270. Effective September 23, 2023, SB 1047 alters the thresholds for small procurements for goods and services from $10,000 up to $25,000 and intermediate procurements for goods and services from $150,000 up to $250,000.

E. Alternatives to ITB and RFP for the Procurement of Goods and Services

Certain contracts for goods and services may be procured utilizing alternatives to the ITB or RFP processes. Generally, these are determined by the estimated contract cost.

1. Small Procurements

Small procurements for goods and services may be awarded "in any manner the contracting agency deems practical or convenient, including by direct selection or award."[64] Contracts for goods or services are considered a small procurement if the procurement does not exceed $10,000.[65] Contracts awarded under this method may amended to exceed $10,000 so long as the contract does not exceed a total cost greater than $12,500.[66] However, contracts for goods and services may not be artificially divided so as to constitute small procurements.[67]

2. Intermediate Procurements

An intermediate procurement is a contract for goods or services for more than $10,000 but not more than $150,000.[68] The process for intermediate procurements is set out in ORS 279B.070 and OAR 137-047-0270. All intermediate procurements may be procured by a written or verbal solicitation, but regardless of method, the contracting agency must keep a written record of the source of the quotes or proposals received. At least three competitive quotes or proposals are required, although if that is not possible, fewer will suffice if a written record of the effort to get more than three is kept. Contracts awarded under the intermediate procurement may be amended up to $150,000, or 125% of the original contract price, whichever is greater.[69] Just like small procurements, a contract cannot be artificially divided so as to constitute an intermediate procurement. If the contract is awarded, it must be awarded to the offeror whose quote or proposal "will best serve the interests of the contracting agency, taking into account price as well as considerations including, but not limited to, experience, expertise, product functionality, suitability for a particular purpose and contractor responsibility under ORS 279B.110."[70]

3. Sole Source Procurements

A public contract for goods and services can be awarded without any competition if a determination is made that "the goods or services, or class of goods or services, are available

---

[64] ORS 279B.065.
[65] Effective September 23, 2023, SB 1047 alters the thresholds for small procurements for goods and services from $10,000 up to $25,000.
[66] ORS 279B.065(b); OAR 137-047-0265. Effective September 23, 2023, SB 1047 alters the thresholds for small procurements for goods and services from $10,000 up to $25,000.
[67] ORS 279B.065(2).
[68] ORS 279.070. Effective September 23, 2023, SB 1047 alters the thresholds for small procurements for goods and services from $10,000 up to $25,000 and intermediate procurements for goods and services from $150,000 up to $250,000.
[69] *Id.*; OAR 137-047-0270. Effective September 23, 2023, SB 1047 alters the thresholds for small procurements for goods and services from $10,000 up to $25,000 and intermediate procurements for goods and services from $150,000 up to $250,000.
[70] ORS 279B.070(4).

from only one source."[71] The determination must be made by the local contract review board, or person delegated authority to do so under the local code. Neither the public contracting code nor the model rules contain a definition of "sole source," but ORS 279B.075(1) requires a written determination that the goods or services "are available from *only one* source."[72]

The written determination must include findings that address:

- That the efficient utilization of existing goods requires the acquisition of compatible goods or services;
- That the goods or services required for the exchange of software or data with other public or private agencies are available from only one source;
- That the goods or services are for use in a pilot or experimental project; or
- Other findings that support the conclusion that the goods or services are available from only one source.[73]

The findings should not try to justify or select the best source; that is done competitively. Rather, the findings must justify that there is only one source.

4. Emergency Procurements

> **Resource:**
>
> LOC's **Emergency Procurement FAQ**, available in the LOC's online Reference Library.

A public contract for goods or services may be awarded without competition if an emergency exists.[74] An emergency contract for construction services must be awarded following "reasonable and appropriate competition" except in a case of "extreme necessity."[75] The contracting agency or other person with authority under a local code must authorize the emergency procurement and must document the nature of the emergency and method of contractor selection.[76] Neither the public contracting code nor model rules specify when this written record must be created; therefore, it can be created after the contract is entered into if the nature of the emergency warranted such swift action.

An emergency is defined in ORS 279A.010(1)(f) as circumstances that "(A) could not have reasonably been foreseen; (B) create a substantial risk of loss, damage or interruption of services or a substantial threat to property, public health, welfare or safety; and (C) require prompt execution of a contract to remedy the condition." Although the existence of an emergency will be self-evident in many situations as unforeseeable occurrences, this may not be so clear in less

[71] ORS 279B.075(1).
[72] *Id.* (emphasis added).
[73] ORS 279B.075(2).
[74] ORS 279B.080.
[75] *Id.*
[76] *Id.*

obvious emergency situations. Therefore, the contracting agency should take care to adequately document the circumstances that could not have reasonably been foreseen.

5. Special Procurements

Special procurements are basically exemptions from the statutorily defined ITB, RFP, intermediate and small procurement methods for goods and services discussed above.

A special procurement can be for a class of contracts—a "class special procurement," or for a single contract—a "contract-specific special procurement."[77] A class special procurement would permit a series of contracts for specified goods or services to be entered into without using the prescribed contracting process. For example, a city may wish to designate a class-special procurement for copyrighted material and creative works where the copyrighted materials or creative works is only available from one source. Other examples of class-special procurements may include manufacturer direct supplies and employee benefit contracts. After approval of a class special procurement, the contracting agency may award contracts that fall within the class pursuant to the process adopted by the special procurement process without having to go back to the local contract review board for special procurement authority. The specified goods or services may be defined specifically as to type of goods or services, or as to dollar amounts of goods or services.

A contract-specific special procurement would permit a specific contract or a number of related contracts to be entered into without using the prescribed contracting process. For example, a city may wish to enter designate a contract-specific special procurement for time-sensitive yet non-emergency disaster cleanup services after its city hall suffered damage from a windstorm. The approval of a contract-specific special procurement is valid for that one contract or related contracts only.

Special procurements must be approved by the local contract review board, which must make the findings set forth in ORS 279B.085(4) justifying the special procurement. The findings must address that the use of the special procurement:

- Is unlikely to encourage favoritism in the awarding of public contracts or to substantially diminish competitions for public contracts; and

- Is reasonably expected to result in substantial cost savings to the contracting agency or to the public, or otherwise substantially promotes the public interest in a manner that could not practicably be realized by complying with requirements that are applicable under the ITB, RFP, small or intermediate procurement source-selection methods or under any rules adopted thereunder. A special procurement can be adopted into the local code or adopted as needed under the local code by ordinance or resolution. The required findings should be attached to or within the body of the resolution or ordinance. The findings should be based on specific facts and address each of the four factors above. This is necessary not only to comply with the public contracting code but also to withstand

[77] ORS 279B.085.

judicial review, which will be held on the record established by the local contract review board.[78]

Lastly, public notice of the approval of a special procurement is required. The notice must follow the requirements for an ITB notice under ORS 279B.055(4), which generally requires publication in a local newspaper at least once, as well as mailing and posting.[79]

6. Price Agreements

Price agreements are specifically authorized under ORS 279B.140 and defined in ORS 279A.010(1)(v). Price agreements are a type of contract under which the contractor agrees to provide goods and services at a set price with no minimum or maximum purchase amount, although an initial order may be included.

IV. The Procurement of Public Improvements

The procurement of public improvement contracts is governed by ORS chapter 279C and OAR chapter 137, division 49. Public improvement contracts are generally known as construction contracts. These contracts are for the "construction, reconstruction or major renovation on real property by or for the contracting agency."[80] Contracts for emergency work, minor alterations, or ordinary repair and maintenance are specifically excluded from the definition of a public improvement contract and as such, those contracts are subject to the provision of ORS chapter 279B and generally follow the rules governing contracts for goods and services.[81]

The underlying policy of the laws governing public improvement contracts is to construct public improvements at the least cost to the contracting agency.[82] Therefore, the primary method for procuring a public improvement contract is the ITB in which the contract is awarded to the bidder with the lowest price.[83] If a contracting agency does not want to follow the ITB process for a public improvement contract, an exception must apply or the contracting agency must adopt an exemption.

A. Pre-Solicitation Considerations

As with the procurement of goods and services a contracting agency should consider a number of items prior to beginning a solicitation for a public improvement contract such as prequalification and disqualification.

[78] Review is to the circuit court by writ of review pursuant to ORS chapter 34.
[79] *See also* OAR 137-047-0300.
[80] ORS 279A.010(1)(dd).
[81] *Id.* Effective September 23, 2023, SB 1047 alters the thresholds for small procurements for goods and services from $10,000 up to $25,000 and intermediate procurements for goods and services from $150,000 up to $250,000. Additionally, for public improvement small procurement threshold from $10,000 to $25,000.
[82] ORS 279C.305.
[83] ORS 279C.300.

1. Prequalification

A contracting agency may require prospective contractors to prequalify under ORS 279C.430. There are two types of prequalification – mandatory and permissive. Under mandatory prequalification, the contracting agency can limit distribution of a solicitation to those contractors who have prequalified.[84] Under permissive prequalification, the distribution cannot be so limited.[85]

If mandatory prequalification is desired, the contracting agency must adopt a process by ordinance, resolution or rule and prescribe the forms and manner for submitting prequalification applications.[86] Unless the contracting agency's local contract review board has delegated this authority, an ordinance or resolution of the local review board will be required.[87] Permissive prequalification does not need to be adopted or authorized by the local contract review board and may be implemented for all or some public improvement contractors through the contracting agency's policies and own applications forms. The standards for determining prequalification are the same as determining responsibility as provided in ORS 279C.375(3)(b) and discussed below in section IV.D.7.[88]

2. Disqualification

A contracting agency may disqualify a contractor who has previously been prequalified under ORS 279C.430.[89] This is similar to the debarment process for contracts for goods and services. The grounds for disqualification are a little different than the groups for prequalification and criteria to determine responsibility. The groups for disqualification due to responsibility issues are limited to:

- The person has been convicted of a criminal offense as an incident in obtaining or attempting to obtain a public or private contract or subcontract, or in the performance of such contract or subcontract.

- The person has been convicted under state or federal statutes of embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property or any other offense indicating a lack of business integrity or business honesty that currently, seriously and directly affects the person's responsibility as a contractor.

- The person has been convicted under state or federal antitrust statutes.

- The person has committed a violation of a contract provision that is regarded by the contracting agency or the Oregon Construction Contractors Board to be so serious as to justify disqualification. A violation may include, but is not limited to, a failure to perform

[84] OAR 137-049-0220(1)(a).
[85] OAR 137-049-0220(1)(b).
[86] ORS 279C.430.
[87] *Id*.
[88] ORS 279C.430(4).
[89] ORS 279C.440.

the terms of a contract or an unsatisfactory performance in accordance with the terms of the contract. However, a failure to perform or an unsatisfactory performance caused by acts beyond the control of the contractor may not be considered a basis for disqualification.

- The person does not carry workers' compensation or unemployment insurance as required by statute.[90]

In addition, it is possible to disqualify a contractor under ORS 200.065 and ORS 200.075 for engaging in any specified fraudulent or prohibited conduct related to obtaining certification as or subcontracting with a disadvantaged, minority, women or emerging small business enterprise. The same notice, hearing and appeal rights apply to disqualification under these provisions.

The disqualification cannot last more than three years and the contracting agency must provide written notice and opportunity for the contractor to have a hearing to response to the disqualification.[91] The decision to disqualify must be in writing, personally served or sent by certified mail, state the reasons for the disqualification, and advise the contractor of their rights to appeal the decision under ORS279C.445 and 279C.450.[92] In lieu of going through the disqualification process itself, a contracting agency may also submit a request to the Oregon Construction Contractors Board to disqualify a contractor.[93]

B. Primary Solicitation Method for Public Improvement Contracts – ITB

The standard process for procuring public improvement contracts is by issuing an ITB because it is designed to result in a contract with the lowest responsible bidder.

1. ITB Contents

The required contents for ITBs are set out in ORS 279C.365 and OAR 137-049-0200. The required contents are:

- A designation for or description of the public improvement project;
- The office where the specifications for the project may be reviewed;
- The date that prequalification applications must be filed and the class or classes of work for which bidders must be prequalified if prequalification is a requirement;

Resource:

A sample checklist for the development of an ITB for a public improvement is available in Appendix D.

[90] *Id.*
[91] *Id.*
[92] *Id.*
[93] *Id.*

- The date and time after which bids will not be received, which must be at least five days after the date of the last publication of the advertisement, and may, in the sole discretion of the contracting agency, direct or permit bidders to submit and the contracting agency to receive bids by electronic means;

- The name and the title of the person designated to receive bids;

- The date on which and the time and place at which the contracting agency will publicly open the bids;

- A statement that, if the contract is for a public works project subject to prevailing rates of wage, the contracting agency will not receive or consider a bid unless the bid contains a statement by the bidder that the bidder will comply with applicable state and federal prevailing rates of wage;

- A statement that each bid must identify whether the bidder is a resident bidder;

- A statement that the contracting agency may reject a bid that does not comply with prescribed public contracting procedures and requirements and that the contracting agency may reject for good cause all bids after finding that doing so is in the public interest;

- Information addressing whether a contractor or subcontractor must be licensed for asbestos abatement; and

- A statement that the contracting agency may not receive or consider a bid unless the bidder is licensed by the Oregon Construction Contractors Board or the Landscape Contractors Board.[94]

All submitted bids are required to be:

- In writing;

- Filed with the person designed by the contracting agency to receive bids; and

- Opened publicly by the contracting agency immediately after the deadline for submitting bids.[95]

If the public improvement project has a value, estimated by the contracting agency, of more than $100,000, or $50,000 for transportation projects, a bidder must submit or post a surety bond, irrevocable letter of credit issued by an insured institution, cashier's check or certified check for all bids as bid security unless the contracting agency has exempted the contract for which the

[94] ORS 279C.365; OAR 137-049-0200.
[95] *Id.*

bidder submits a bid from this requirement under ORS 279C.390.[96] The security may not exceed 10% of the amount bid for the contract.[97] After the contracting agency opens the bid, the contracting agency shall make the bids available for public inspection.

2. Advertisement

The procurement of all public improvement contracts must be advertised.[98] The advertising requirements require publication at least once in a local newspaper of general circulation in the area where the contract is to be performed[99] The contracting agency's local contract review board by rule or order may authorize advertisements for public improvement contracts to be published electronically instead of in a newspaper of general circulation if it determines that electronic advertisements are likely to be cost-effective.[100] If the estimated cost of the project exceeds $125,000, the advertisement must also be published in at least one trade newspaper of general statewide circulation.[101]

The advertisement must state:

- The public improvement project;
- The office where the specifications for the project may be reviewed;
- The date that prequalification applications must be filed under ORS 279C.430 and the class or classes of work for which bidders must be prequalified if prequalification is a requirement;
- The date and time after which bids will not be received, which must be at least five days after the date of the last publication of the advertisement;
- The name and title of the person designated for receipt of bids;
- The date, time and place that the contracting agency will publicly open the bids; and
- If the contract is for a public works subject to ORS 279C.800 to 279C.870 or the Davis-Bacon Act (40 U.S.C. 3141 et seq.).[102]

3. Addenda, Clarification and Contract Specific Protests

Changes to the ITB are made by written addenda. The model rules require changes to be in writing and be provided in accordance with OAR 137-049-0250. Addenda should be issued at

[96] *Id.*
[97] *Id.*
[98] ORS 279C.360.
[99] *Id.*
[100] *Id.*
[101] *Id.*
[102] *Id.*

least 72 hours prior to closing to give prospective offerors an opportunity to review the addenda and make any changes to an offer. Contracting agencies should have procedures pursuant to which prospective offerors provide written acknowledgement of receipt of addenda. Sometimes it may be necessary to extend closing to accommodate an addendum.

Prospective offerors have the opportunity under the model rules to submit requests for clarification or changes to the solicitation documents, including any addenda. Similarly, prospective offerors may submit protests to any specifications or contract terms. A specification or contract term protest must specify the legal and factual grounds, why the terms prejudice the offeror, and how the term could be changed.

OAR 137-049-0260 sets out the process for submitting and processing these requests and provides an administrative review process for protests that must be followed prior to seeking judicial review. Both a request for clarification and protest must be submitted at least 10 days prior to closing. If the contracting agency agrees with or approves a request or protest, it may issue an addendum and may extend the closing date if necessary.

If the contracting agency has opted out of the model rules, the local code or the contract documents will need to be consulted to determine the process for requests for clarification and protests.

If care has been taken in drafting the solicitation documents and following the appropriate procedures, there is little a contracting agency can do to otherwise avoid contract specific protests. However, if a protest is received the following steps can help resolve the protest successfully.

First, the contracting agency should review the solicitation documents to determine if the objection is related to a clause or information inadvertently or mistakenly included in the solicitation documents. This easily happens when documents from a prior solicitation are used for the next. Next, if the clause of information is meant to be included, the contracting agency should determine whether it can be clarified instead of issuing an addendum. It is permissible to speak with the protester to understand the nature of the protest. Regardless of the outcome, the contracting agency should make sure to properly document the protest and response in the event of an appeal later, or award protest.

4. Pre-Offer Conference

Contracting agencies may hold mandatory or optional pre-offer conferences prior to closing the ITB.[103] Statements made at a pre-offer conference do not change the solicitation documents and are not binding on the contracting agency unless a confirming written addendum to the solicitation document is issued.[104]

[103] OAR 137-049-0240.
[104] *Id.*

5. First Tier Subcontractor Disclosure and Subcontractor Substitution

First-tier subcontractor disclosure applies only to public improvement contracts that are procured through the ITB process and that are anticipated to cost more than $100,000. ORS 279C.370 specifies which subcontractors must be disclosed and the form of the disclosure. If first-tier subcontractor disclosure is required, then special rules apply regarding the closing and bid opening date and time.[105] The first-tier subcontractor disclosure is submitted with the bid or within two hours after closing.[106] A bid that does not include the required disclosure is considered nonresponsive and must be rejected.[107] The disclosures become public records after bid opening along with the remaining bid documents.

A contractor may substitute an undisclosed first-tier subcontractor for another subcontractor only in accordance with ORS 279C.585. The statute makes it clear that the contracting agency does not have any authority to review, approve or resolve disputes regarding substitutions. A complaint procedure is provided for subcontractors under ORS 279C.590.

6. Bid Evaluation

The evaluation of submitted bids must be made in accordance with the evaluation process described in the ITB documents. As previously mentioned, bids are awarded to the lowest responsible bidder based on price. The price can be provided as a lump sum or as a unit price.[108] The total bid price can be altered if the contracting agency has elected to include "additive or deductive alternates."[109] These are the elements of work that can be included, or not, at the discretion of the contracting agency, so long as the contracting agency has included provisions in the ITB documents providing as such. How to calculate the lump sum or unit price is described in OAR 137-049-0380.

The model rules describe the basic elements of the bid evaluation process that should be described in the ITB documents and permits the inclusion of various "special evaluation factors" that may be considered in determining actual cost.[110] A special evaluation factor is a "predictor[] of actual future costs" and must be an "objective, reasonable estimate[] based upon information the contracting agency has available concerning future use."[111] Examples of special evaluation factors include conversion costs, transportation costs, cash discounts, and depreciation allowances.

7. Negotiations

Negotiations are generally prohibited. However, ORS 279C.340 provides that negotiations with bidders may proceed if all of the responsive bids exceeded the contracting agency's cost estimate and budget. Negotiations are permitted with the lowest responsive and responsible bidder "in

[105] *See* ORS 279C.370; OAR 137-049-0360.
[106] *Id.*
[107] *Id.*
[108] OAR 137-049-0380.
[109] *Id.*
[110] OAR 137-049-0200.
[111] OAR 137-049-0200(1)(b)(C)(i).

order to solicit value engineering and other options to attempt to bring the contract within the contracting agency's cost estimate."[112] However, in order to do so, the contracting agency must follow the model rules or its own rules prescribing a negotiation process.

The model rule setting out a negotiation process is at OAR 137-049-0430. It includes a number of definitions of terms unique to this process, such as "value engineering." The negotiations cannot consider altering the scope of the project significantly or the resulting contract award would be in violation of this provision. Lastly note that ORS 279C.340 only provides for authority to negotiate with the lowest responsive, responsible bidder. Thus, unlike with respect to the RFP process, if negotiations with the lowest responsive, responsible bidder are not successful, the contracting agency cannot negotiate with the next lowest.

C. Alternatives Solicitation Methods for the Procurement of Public Improvement Contracts

1. Public Improvements Constructed by the Contracting Agency

The public contracting code does not prohibit a contracting agency from constructing public improvements using its own personnel and equipment but there are a few restrictions. First before proceeding in house, the contracting agency must follow the state's least cost policy. [113] The least cost policy generally requires a contracting agency to file certain reports with the Oregon Bureau of Labor and Industries (BOLI) before constructing a public improvement with the contracting agency's own equipment and personnel.[114] These reports include an annual summary of planned public improvements and a least cost analysis.[115]

Resource:

LOC's **FAQ on Public Improvement Least Cost Contracting Requirements**, available in the LOC's online Reference Library.

A contracting agency is exempt from filing an annual summary of planned public improvements if:

- No public improvement projects are planned for the upcoming budget period; or
- Planned public improvements projects only entail the placing of maintenance patching, chip seals or other seals as a maintenance treatment on highways, roads, streets or bridges.[116]

[112] ORS 279C.340.
[113] ORS 279C.305.
[114] *Id.*
[115] *Id.*
[116] *Id.*

Additionally, a contracting agency does not have to list on its summary, any public improvement projects that are for resurfacing highways, roads or streets at a depth of two inches or less, or have an estimated cost of $125,000 or less.[117]

ORS 279C.305(5) identifies when certain public improvements are exempt from the least cost policy in its entirety:

- A public improvement for distributing or transmitting electric power.

- When the contracting agency did not receive a responsive bid or proposal for constructing the public improvement from a responsible bidder or proposer after soliciting bids or proposals and the solicitation occurred within one year before the date on which the construction began and allowed a commercially responsible reasonable time in which to perform the construction.

2. Competitive Proposals as an Alternative to ITB

The RFP process may be utilized in lieu of the ITB process only as provided in ORS 279C.400 to 279C.410. This means that unless there is a statutory exception in ORS 279C.400 to 279C.410 permitting the use of the RFP process for procuring a public improvement contract, an exemption must be obtained under ORS 279C.335. If the RFP process is used for a contract or class of contract with value of over $100,000, the contracting agency must prepare a written report evaluating how well the RFP process worked, including ultimate costs and how the outcome compared to the findings providing for the exemption.[118] The report must be prepared within 30 days of the date the contracting agency accepts the work under the contract or, in the case of a class of contracts, accepts the work under the last contract in the class. The report is submitted to the contracting agency's local contract review board except in the case of certain transportation improvement contracts described in ORS 279A.050(3)(b), which are submitted to the state's director of transportation.

Unlike with respect to ITBs, negotiations are permitted with more than just the highest ranked proposer so long as the solicitation documents included provisions permitting negotiations. If the solicitation documents did not address negotiation, the contracting agency is limited to negotiating with only the highest ranked proposer.[119] Negotiations can also occur during the competitive range process and the model rules provide a process in OAR 137-049-0650(6).

3. Intermediate Procurements – Competitive Quotes

Another procurement method for public improvement contracts permitted by the public contracting code is the competitive quote process for "intermediate" procurements in ORS 279C.412 to 279C.414. An "intermediate" procurement is one that is estimated not to exceed

[117] *Id.*
[118] ORS 279C.355.
[119] ORS 279C.410; OAR 137-049-0650(3)(a)(B).

$100,000.[120] This process is less formal than the ITB process and allows evaluation based on price alone, or on price and other factors such as contractor experience, expertise, availability, project understanding, and contractor capacity.[121]

The offers may be solicited in writing or orally. However, for public improvement contracts that are considered public works under the prevailing wage laws, the quotes must be requested in writing unless written copies of the prevailing wage rates are not required by BOLI.[122] More than three quotes are not required, but if less than three are obtained, the contracting agency must keep a written record of why it could only obtain three quotes.[123]

When awarding a public improvement contract procured through the competitive quote process, the contracting agency must award the contract "to the prospective contractor whose quote will best serve the interests of the contracting agency," taking into account price and responsibility as well as any other selection criteria announced by the contracting agency.[124] Note that if the award is not based on price alone, the contracting agency must make a written record of the basis for the award.[125]

Given the marked departure from the ITB process afforded by the competitive quote process, smaller jurisdictions may find the $100,000 threshold too high for such an informal procurement process and can provide for a lower limit in its local rules. Also, because public improvement contracts valued at less than $5,000 are not required to be procured using the ITB process, a contracting agency can nevertheless require a competitive quote or similar process for those contracts as well.

4. Alternative Methods Provided in Model Rules

While not specifically mentioned in the public contracting code, the model rules discuss some of the more common types of alternative procurement methods used other than the RFP or competitive quote process. These include design-build, energy savings performance contracts (ESPC), and construction manager/general contractor (CM/GC) methods. With the exception of the ESPC method, which is statutorily exempted, these methods require the contracting agency to adopt a separate exemption prior to proceeding.

a. Design Build

A design-build contract is a contract under which the same contractor provides design services, participates on the project team with the contracting agency, provides construction services, and manages both design and construction. The design-build form of contracting is available as an alternative to the traditional ITB method under the model rules.[126] The model rules warn that

[120] Effective September 23, 2023, SB 1047 alters the threshold for intermediate procurements for goods and services from $150,000 up to $250,000 and a small procurement for small public improvements from $10,000 to $25,000.
[121] ORS 279C.414.
[122] OAR 137-049-0160(3).
[123] OAR 137-049-0160(4).
[124] ORS 279C.414.
[125] OAR 137-049-0160(5).
[126] ORS 279C.335; OAR 137-049-0670.

design-build contracts have technical complexities that are not readily apparent and should be used only with the assistance of knowledgeable staff or consultants.[127]

The benefits of using the design-build method are listed in the rule as follows:

- Obtaining, through a design-build team, engineering design, plan preparation, value engineering, construction engineering, construction, quality control and required documentation as a fully integrated function with a single point of responsibility;

- Integrating value engineering suggestions into the design phase, as the construction contractor joins the project team early with design responsibilities under a team approach, with the potential of reducing contract changes;

- Reducing the risk of design flaws, misunderstandings and conflicts inherent in construction contractors building from designs in which they have had no opportunity for input, with the potential of reducing contract claims;

- Shortening project time as construction activity (early submittals, mobilization, subcontracting and advance work) commences prior to completion of a "biddable" design, or where a design solution is still required (as in complex or phased projects); or

- Obtaining innovative design solutions through the collaboration of the contractor and design team, which would not otherwise be possible if the contractor had not yet been selected.[128]

b. Energy Savings Performance Contracts (ESPC)

An ESPC is a public improvement contract that provides for the identification, evaluation, recommendation, design and construction of energy conservation measures that guarantee energy savings or performance.[129] Similar to design-build contracts, the ESPC method is available as an alternative to the formal ITB process under the model rules.[130] The contract must be entered into between the contracting agency and a “Qualified Energy Services Company” or ESCO. ESCOs generally are experienced and financially secure entities with proven track records of providing and implementing energy conservation measures. The model rules define additional terms unique to ESPCs and provide a detailed procurement process for the use of ESPCs at OAR 137-049-0610 and 137-049-0680.

c. Construction Manager/General Contractor (CM/GC)

A CM/GC (also known as a construction manager at risk contract) contract is similar to a design-build contract, except that the contractor takes on much more responsibility and risk. CM/GC

[127] OAR 137-049-0670(1).
[128] *Id.*
[129] OAR 137-049-0610(10).
[130] ORS 279C.335(1)(f); OAR 137-049-0620(2).

services are construction-related services that a contracting agency procured by means of an alternative contracting method under ORS 279C.335 that:

- Include a construction manager/general contractor's:
    - Functioning as a member of a project team that includes the contracting agency, the architect or engineer that designs the public improvement under a separate contract with the contracting agency and other contractors and consultants; and
    - Reviewing and analyzing a design for a public improvement in order to:
        - Suggest changes in the design that minimize potential errors, delays, unexpected costs and other problems during construction;
        - Recommend means by which the contracting agency may achieve the functions of the public improvement or a component of the public improvement safely, reliably, efficiently and at the lowest overall cost;
        - Improve the value and quality of the public improvement; and
        - Reduce the time necessary to complete the public improvement; and
- May include, depending on the specific terms of the public improvement contract and on whether the contracting agency decides to proceed with construction, a construction manager/general contractor's:
    - Devising a schedule for constructing the public improvement;
    - Estimating construction, materials, labor and other costs for the public improvement;
    - Establishing a fixed price, a guaranteed maximum price or other maximum price;
    - Constructing portions of the public improvement and subcontracting portions to other contractors;
    - Coordinating and overseeing the construction process; or
    - Performing other services related to constructing a public improvement in accordance with the terms of the public improvement contract.[131]

Like its cousin the design-build contract, the CM/GC contract method is technically complex and the model rules again advise proceeding with this method only with knowledgeable staff or consultants.[132] The skills needed to manage this type of contract extend from design and

[131] ORS 279C.332(3).
[132] OAR 137-049-0690(1).

construction to cost control, accounting, legal, and project management. In addition, unlike the design-build contract, there is no single contractor in charge, or single contract. Contracting agencies may not adopt its own local rules for procuring CM/GC contractor services.[133]

5. Exempt Contracts

ORS 279C.335 contains the few exceptions to the ITB process required for public improvement contracts. In addition to the Intermediate procurements and ESPCs described above, additional exceptions include:

- Contracts made with qualified nonprofit agencies providing employment opportunities for individuals with disabilities under ORS 279.835 to 279.855.
- A public improvement contract exempted by the contracting agency under ORS 279C.335.
- A public improvement contract with a value of less than $5,000.
- A public improvement contract with a contract price that does not exceed $100,000 made under the procedures for competitive quotes in ORS 279C.412 and 279A.414.
- Contracts for repair, maintenance, improvement or protection of property obtained by the Department of Veterans' Affairs under ORS 407.135 and 407.145 (1).
- An energy savings performance contract that a contracting agency enters into in accordance with rules of procedure adopted under ORS 279A.065.

Of note are contracts that are exempted under ORS 279C.335. A contract or class of contracts may be exempted from the competitive bidding process under ORS 279C.335 if an exception does not otherwise apply. Notice, a public hearing, and written findings are required.[134]

Similar to the findings required for special procurements of public contracts for goods and services, the findings for exemptions for public improvement contracts must affirmatively determine that:

- It is unlikely that the proposed exemption will encourage favoritism in the awarding of public improvement contracts; or
- It is unlikely that the proposed exemption will substantially diminish competition for public improvement contracts; and

[133] ORS 279A.065.
[134] ORS 279C.335.

- The awarding of the public improvement contract(s) will likely result in substantial cost savings to the contracting agency.[135]

The model rules provide additional guidance when addressing cost savings, favoritism and competition.[136] In addition, the model rules suggest that the contracting agency provide a detailed description of the alternative contracting method that will be used in lieu of competitive bidding.[137]

If the exemption is for a class of contracts, the defining characteristics of the class must be clearly identified.[138] The characteristics must: (a) be reasonably related to the exemption criteria above; and (b) include "some combination of project descriptions or locations, time periods, contract values, methods of procurement or other factors that distinguish the limited and related class of public improvement contracts from the agency's overall construction program."[139] The class cannot be defined solely by funding source or method of procurement.

The public hearing required by ORS 279C.335 must be noticed by publication in at least one trade newspaper of general statewide circulation. This is typically the *Daily Journal of Commerce*. The notice must be published at least 14 days before the hearing, state the purpose of the hearing, and state that the draft findings are available for review. Thus, findings must be prepared and ready for review by the first date of publication.

In situations when the contracting agency "is required to act promptly due to circumstances beyond the agency's control that do not constitute an emergency," the contracting agency may publish notice of the public hearing simultaneously with the procurement notice, so long as the closing date is at least five days after the public hearing date.[140]

A challenge to an exemption under these provisions is made directly to circuit court via the writ of review process.[141]

D. Other Solicitation Considerations for Public Improvement Procurements

In addition to the items discussed above, there may be additional items for the contracting agency to consider throughout the public improvement solicitation process such as offer requirements, mistakes, security, cancellation, contract award, contractor eligibility, contractor responsibility, and contract oversight services.

[135] *Id.*
[136] OAR 137-049-0630.
[137] OAR 137-049-0630(5).
[138] ORS 279C.335(3).
[139] *Id.*
[140] ORS 279C.335(5).
[141] ORS 279C.350(3).

1. Offer Requirements

OAR 137-049-0280 sets out the offerors' responsibilities and content requirements for offers submitted in response to a solicitation for a public improvement contract whether in response to an ITB, RFP, or alternative process. As with public contracts for goods and services, an offer conditioned on the contracting agency agreeing to change any terms and conditions is not considered a responsive offer, unless the solicitation document authorizes the offer to do so. ORS 279C.365(3) sets out only three requirements for offers received under an exempt procurement process or under the competitive proposal process in ORS 279C.400. These three requirements are that the offer be in writing, filed with the person designated to receive the offers, and be opened publicly by the contracting agency immediately after the closing.[142] Unless the contracting agency has opted out of the model rules, the longer list in OAR 137-049-0280 will apply.

Except as discussed above for bids submitted pursuant to an ITB and in ORS 279C.410 for proposals submitted pursuant to an RFP, all other offers should be considered public records subject to disclosure following opening. The exceptions with respect to trade secrets and confidential information will, however, still apply.

All offers for contracts with an estimated value of over $100,000 or, for highways, bridges or other transportation projects with an estimated value of more than $50,000, must be submitted with bid security, unless the contracting agency has exempted the procurement from the bid security requirement under ORS 279C.390. ORS 279C.365(5)&(6). Otherwise, bid security is at the option of the contracting agency.[143]

2. Mistakes – Waiver, Correction or Withdrawal of Offers After Opening

Sometimes, mistakes in offers are discovered after the offer is opened. When the mistake is considered a "minor informality," the contracting agency may waive the mistake or allow the offeror to correct it. A "minor informality" is defined under the model rules as a matter of form rather than substance that is evident on the face of the offer, or an insignificant mistake that can be waived or corrected without prejudice to other offerors.[144] Example of minor informalities include an offeror's failure to (1) return the correct number of signed offers or other documents as required by the solicitation documents;(2) sign in the correct place so long as a signature appears elsewhere indicating the offeror's intent to be bound by the offer; or (3) acknowledge receipt of an addenda so long as it is clear in the offer that it was received and the offeror intended to be bound by it. A clerical error is another type of minor informality that the contracting agency can allow to be corrected.

Only offers containing one or more clerical errors that cannot be waived as minor informalities can be withdrawn after opening but before contract award. However, the offeror must get

[142] ORS 279C.365(3).
[143] ORS 279C.390(2).
[144] OAR 137-049-0350(2)(a).

approval from the contracting agency and submit a written request showing that all of the criteria in OAR 137-049-0350(2)(c) are met. The same criteria used to then determine whether the offeror will forfeit bid or proposal security. The bid security would be used to compensate the contracting agency for the difference between the amount of the offer being withdrawn and the amount of the contract the contracting agency ends up awarding, whether by awarding it to the runner up, or by resorting to a new solicitation process.

When an offer contains an obvious mistake that cannot be corrected by looking at the remaining offer documents, the contracting agency must reject the offer.[145] Mistakes discovered after the contract is awarded cannot be corrected, or the contract rescinded, except by mutual agreement of the contractor and contracting agency, or as contracting law may otherwise provide.[146]

3. Bid and Proposal Security

A contracting agency must require bid security for public improvement contracts with an estimated value of more than $100,000 or, in the case of contracts for highways, bridges and other transportation projects with a value of more than $50,000, unless the contracting agency has exempted the contract under ORS 279C.390.[147] For all other public improvement contracts, the contracting agency, while not required, may require offer security.

If the contract is procured through the ITB or RFP process and bid or proposal security is required, the amount cannot be more than 10% or less than 5% of the bid or proposal. In addition, the contracting agency can accept only the following forms of security: (a) surety bond; (b) irrevocable letter of credit; or (c) cashier's or certified check.[148]

For all other contracts, the contracting agency may require bid security in an amount set by the contracting agency and determine the form of security. This should be done through the local code.

4. Cancellation and Rejection of Offers

As with public contracts for goods and services, a public improvement contract procurement may be cancelled at any time for any reason the contracting agency determines is in the public interest.[149] This is to protect the contracting agency from proceeding with a procurement that may have legal defects, or from entering into a contract that will ultimately not meet the contracting agency's' needs.

If the procurement is cancelled prior to closing, notice is required to be provided in the same manner as the solicitation was noticed.[150] There is no parallel rule for rejection of all offers prior to closing, unless rejection is made on the ground in OAR 137-049-0270. If the procurement is

[145] OAR 137-049-350.
[146] *Id*.
[147] ORS 279C.365(5) & (6).
[148] Id.; OAR 137-049-290(3).
[149] ORS 279C.395; OAR 137-049-0270.
[150] *Id*.

cancelled prior to opening the opening of any offers, the offers are returned and If the cancellation is made after the offers are opened, the offers are retained in the file.[151]

Any or all offers may be rejected for a variety of reasons. ORS 279C.395 and OAR 137-049-0440 describe when an offer or all offers may be rejected. Any offer may be rejected if it "may impair the integrity of the [p]rocurement process" or if rejecting the offer is in the public interest.[152] Offers may also be rejected if they are late, do not substantially comply with the solicitation documents or procedures, are contingent on acceptance of alternate contract terms, take exception to contract terms or specifications, or describe work that does not meet the specifications.[153]

With respect to compliance with documents or procedures, there is some leeway to accept the offer if the noncompliance is not substantial; however, with respect to compliance of the work offered with the specifications, the work must meet the specifications or the offer may be rejected. No written notice of rejection under these grounds is required and a contracting agency can simply include such offers with the remaining losing offers.

Offers must be rejected if the contractor has not met any prequalification and eligibility standards, has not met the responsibility standards, has not provided required bid or proposal security, is not eligible as a contractor on a public work if the contract is for a public work, or has not provided the certification of non-discrimination required by ORS 279A.110(4). If an offer is rejected for any of these reasons, the reason must be documented in writing.

All of the offers may be rejected if it is in the public interest to do so. The model rule requires written findings of good cause and provides the following examples of good cause:

- The content of or an error in the solicitation document, or the solicitation process unnecessarily restricted competition for the contract.

- The price, quality or performance presented by the offerors is too costly or of insufficient quality to justify acceptance of the offer.

- Misconduct, error, or ambiguous or misleading provisions in the solicitation document threaten the fairness and integrity of the competitive process.

- Causes other than legitimate market forces threaten the integrity of the competitive procurement process. These causes include, but are not limited to, those that tend to limit competition such as restrictions on competition, collusion, corruption, unlawful anti-competitive conduct and inadvertent or intentional errors in the solicitation document.

- The contracting agency cancels the solicitation in accordance with OAR 137-049-0270.

[151] *Id*.
[152] OAR 137-049-0440.
[153] *Id*.

- Any other circumstance indicating that awarding the contract would not be in the public interest.[154]

5. Contract Award

Written notice of intent to award a public improvement contract is required under the model rules, regardless of the procurement method used.[155] Because notice of intent to award is only for ITBs and RFPs in the public contracting code – as opposed to the model rules – a contracting agency can adopt local rules that limit this requirement.

Notice of intent to award must be posted electronically or provided in writing to each offeror at least seven days before the contract is to be awarded. The contracting agency can provide less notice, but only if seven days is impractical and the contracting agency documents the decision and provides notice as soon as reasonably practical.

The model rules provide an administrative review procedure for protesting the contract award in OAR 137-049-0450. The protest process timeline starts when the contracting agency issues the notice of intent to award, after which an aggrieved offeror may file a protest within seven days.

As with offer protests, award protests can be avoided by carefully following the procurement process and sticking to the selection criteria. The first things to look at in evaluating a bid protest are responsibility and responsiveness. If the offer does not meet responsibility or responsiveness, the offer must be rejected.

6. Contractor Eligibility

Oregon law requires contractors to have a valid certification of registration issued by the Oregon Construction Contractors Board to work as a contractor. Landscape contractors must also be licensed with the State Landscape Contractors Board to work as a landscape contractor. Thus, a contractor who is not registered or licensed, as applicable, is not eligible to submit an offer on a public improvement contract (or on public contract for emergency work, maintenance or repair of a public improvement) or, if an offer is submitted, the offer must be considered nonresponsive and rejected.[156] Non-resident education service districts are ineligible to enter into public improvement contracts in Oregon.[157] If the contract is federally funded, different rules may apply and ineligibility in Oregon may not mean ineligibility under federal law.

7. Contractor Responsibility

ORS 279C.375 provides that a public improvement contract must be awarded to the lowest "responsible" bidder. By its terms, this provision will apply only if the contracting agency is procuring the contract through the ITB process. However, the model rules apply this provision to procurement through both the ITB and RFP process. A contracting agency can adopt its own

[154] OAR 137-049-0440(6).
[155] OAR 137-049-0450.
[156] See ORS 279C.365(1)(k).
[157] ORS 279C.325.

rules regarding responsibility and extend the responsibility determination to all public improvement contract procurements.

The responsibility determination is made during the bid or proposal review process. The bidder or proposer should have submitted sufficient information for the contracting agency to determine whether the contractor meets the standards of responsibility. The standards are set out in ORS 279C.375(3)(b).

To meet the standards of responsibility, a contractor must show that it:

- Has available the appropriate financial, material, equipment, facility and personnel resources and expertise, or has the ability to obtain the resources and expertise, necessary to meet all contractual responsibilities.

- Holds current licenses that businesses or service professionals operating in this state must hold in order to undertake or perform the work specified in the contract.

- Is covered by liability insurance and other insurance in amounts the contracting agency requires in the solicitation documents.

- Qualifies as a carrier-insured employer or a self-insured employer under ORS 656.407 or has elected coverage under ORS 656.128.

- Has made the disclosure required under ORS 279C.370.

- Completed previous contracts of a similar nature with a satisfactory record of performance. For purposes of this subparagraph, a satisfactory record of performance means that to the extent that the costs associated with and time available to perform a previous contract remained within the bidder's control, the bidder stayed within the time and budget allotted for the procurement and otherwise performed the contract in a satisfactory manner. The contracting agency shall document the bidder's record of performance if the contracting agency finds under this subparagraph that the bidder is not responsible.

- Has a satisfactory record of integrity. The contracting agency in evaluating the bidder's record of integrity may consider, among other things, whether the bidder has previous criminal convictions for offenses related to obtaining or attempting to obtain a contract or subcontract or in connection with the bidder's performance of a contract or subcontract. The contracting agency shall document the bidder's record of integrity if the contracting agency finds under this subparagraph that the bidder is not responsible.

- Is legally qualified to contract with the contracting agency.

- Supplied all necessary information in connection with the inquiry concerning responsibility. If a bidder fails to promptly supply information concerning responsibility that the contracting agency requests, the contracting agency shall determine the bidder's

responsibility based on available information, or may find that the bidder is not responsible.

Contracting agencies must document their compliance with ORS 279C.375 by using the form, or substantially the same form, as set out in ORS 279C.375(3)(c). Note that to comply with this requirement and complete the form in full, cities will need to check the Construction Contractors Board list of contractors who are qualified to enter into public improvement contracts.[158] In addition, the form must be submitted to the Construction Contractors Board within 30 days after the date the contract is awarded.

Generally, contracting agencies have broad, although not unlimited, discretion to determine responsibility.[159] Thus, a court will not overturn a responsibility determination unless the contracting agency acted fraudulently or grossly abused its discretion.

8. Procurement of Contract Oversight Services

A contracting agency is prohibited from entering into a personal services contract for the oversight of public improvement contracts with a contractor who is the contractor or affiliate of the contractor under the public improvement contract to be overseen.[160] The service also cannot be procured through the public improvement contract itself.[161] There are exceptions for construction manager/general contractor and design-build contracts as defined in the model rules.

E. Contract Specifications and Conditions Applicable to all Public Improvement Contracts

The following list of contract specifications and conditions are drawn from ORS chapter 279C. Refer to ORS chapter 279A for additional specifications that may be included, such as with respect to recyclable and used goods, minority, women, or emergency small businesses.

1. Required Contract Conditions

The following contract conditions, where applicable must be included in all public improvement solicitation documents:

- Prompt payment to all persons supplying labor or material; contributions to Industrial Accident Fund; liens and withholding taxes (ORS 279C.505(1));

- Demonstrate that an employee drug testing program is in place (ORS 279C.505(2));

- If the contract calls for demolition work described in ORS 279C.510(1)), it must require the contractor to salvage or recycle construction and demolition debris, if feasible and

[158] *See* ORS 279C.375(3)(c).
[159] *See Hanson v. Mosser,* 247 Or 1, 9-10 (1967), *overruled in part on other grounds, Smith v. Cooper,* 256 Or 485 (1970).
[160] ORS 279C.307.
[161] *Id.*

cost effective;

- If the contract calls for lawn or landscape maintenance, a condition requiring the contractor to compost or mulch yard waste material at an approved site, if feasible and cost effective (ORS 279C.510(2));

- Payment of claims by public officers (ORS 279C.515(1));

- Contractor and first-tier subcontractor liability for late payment on public improvement contracts pursuant to ORS 279C.515 (2), including the rate of interest;

- Person's right to file a complaint with the Construction Contractors Board for all contracts related to a public improvement contract (ORS 279C.515 (3));

- Hours of labor in compliance with ORS 279C.520;

- Environmental and natural resources regulations (ORS 279C.525);

- Payment for medical care and attention to employees (ORS 279C.530 (1));

- A contract provision substantially as follows: "All employers, including Contractor, that employ subject workers who work under this Contract in the State of Oregon shall comply with ORS 656.017 (Employer required to pay compensation and perform other duties) and provide the required Workers' Compensation coverage, unless such employers are exempt under ORS 656.126 (Coverage while temporarily in or out of state). Contractor shall ensure that each of its subcontractors complies with these requirements." (ORS 279C.530 (2));

- Maximum hours, holidays and overtime (ORS 279C.540);

- Time limitation on claims for overtime (ORS 279C.545);

- Prevailing wage rates (ORS 279C.800 to ORS 279C.870);

- BOLI public works bond (ORS 279C.830 (2));

- Retainage (ORS 279C.550 to ORS 279C.570);

- Prompt payment policy, progress payments, rate of interest (ORS 279C.570);

- Contractor's relations with subcontractors (ORS 279C.580);

- Notice of claim (ORS 279C.605);

- Contractor's certification of compliance with the Oregon tax laws in accordance with ORS 305.385);

- Contractor's certification that all subcontractors performing work described in ORS 701.005(2) will be registered with the Construction Contractors Board or licensed by the State Landscape Contractors Board in accordance with ORS 701.035 to 701.055 before the subcontractors commence work under the contract; and

- If the contract resulting from a solicitation will be a public improvement contract, and if the public improvement that is the subject of the solicitation will have a value of $20,000,000 or more and will be located within Multnomah County, Clackamas County or Washington County, State Contracting Agencies must include provisions in the Public Improvement Contract that meet the requirements of HB 2007 (2019 Oregon Laws, Chapter 645) for diesel engines and non-road diesel engines.[162]

2. Brand Names

A public improvement contract cannot expressly or implicitly include any brand name or manufacturer specification, unless the contracting agency obtains an exemption. The contracting agency's local contract review board may exempt certain projects or classes or products from the prohibition against brand name or manufacturer specification upon any of the following findings:

- It is unlikely that the exemption will encourage favoritism in the awarding of public improvement contracts or substantially diminish competition for public improvement contracts.

- The specification of a product by brand name or mark, or the product of a particular manufacturer or seller, would result in a substantial cost savings to the contracting agency.

- There is only one manufacturer or seller of the product of the quality required.

- Efficient utilization or existing equipment or supplies requires the acquisition of compatible equipment or supplies.[163]

The contracting agency must justify any findings by relying on information regarding:

- Operational, budget and financial data;

- Public benefits;

- Value engineering;

[162] See OAR 137-049-0200(1)(c) and all statutes implemented within the rule.
[163] ORS 279C.345.

- Specialized expertise required;
- Public safety;
- Market conditions;
- Technical complexity; and
- Funding sources.[164]

Under the model rules, it is permissible, however, to identify products by brand names so long as "approved equal" or "equivalent" is included in the solicitation documents.[165] A contracting agency could also adopt a local rule stating that when a brand name is inadvertently or impliedly used, the work "or approved equal" are implied.

3. Waiver of Damages for Delay

A public improvement contract cannot contain a clause that causes a contractor to waive its rights to monetary damages for an unreasonable delay caused by the contracting agency. If the contract includes such a clause, ORS 279C.315 provides that the contract is void and unenforceable. This provision does not limit any clause setting a reasonable amount of damages that might be paid in such circumstances such as liquidated damages.

4. Assignment or Transfer Restricted

OAR 127-049-0200 provides that unless the contract specifies otherwise, the contractor cannot assign, sell, delegate or otherwise transfer its rights under the contract without the contracting agency's prior written consent and even if the contracting agency provides its consent, the contractor will not be relieved of its obligations under the contract. This provision automatically applies unless the contracting agency has opted out of this specific rule.

5. Green Energy Technology

Public improvement contracts with a total contract price of $5 million or more for constructing a public building and certain renovation or reconstruction contracts for public buildings the cost of which exceeds 50% of the value of the building must include an amount equal to at least 1.5% of the total contract price for the inclusion of green energy technology.[166] The contracting agency must make a determination prior to entering into the contract as to whether the inclusion of green energy technology in the project is "appropriate" under ORS 279C.527(5). If the contracting agency determines that it is not appropriate to include green energy technology in the project, obligations will follow with respect to subsequent public building improvement projects.[167] If

[164] ORS 279C.330.
[165] OAR 137-049-0870.
[166] ORS 279C.527.
[167] ORS 279C.537(6).

the contract is subject to green energy technology, additional rules and specifications adopted by the Oregon Department of Energy will apply.[168]

F. Contract Amendments and Changes to Work

It is important to be aware of the difference between a contract amendment and changes to work because different rules apply to each. Amendments modify the terms and conditions of the contract, although they must still be within the original scope of work of the contract. Any amendments that change the scope of work are not permitted and would require a new procurement, or an exemption from a new procurement process.

OAR 137-049-0910(4) provides that contract amendments may be made only when:

- They are within the general scope of the original procurement;
- The field of competition and contractor selection would not likely have been affected by the contract modification. Factors to be considered in making that determination include similarities in work, project site, relative dollar values, differences in risk allocation and whether the original procurement was accomplished through competitive bidding, competitive proposals, competitive quotes, sole source or emergency contract;
- In the case of a contract obtained under an [exemption], any additional work was specified or reasonably implied within the findings supporting the competitive bidding exemption; and
- The amendment is made consistent with [OAR 137-049-0910] and other applicable legal requirements.

Generally, an amendment will require a more formal process. The contract will usually require that for any amendment to be enforceable, it must be in writing and signed by both the authorized representative of the contracting agency and the contractor.

On the other hand, changes to work (known variously as change of work orders, change orders, or construction change directives) are less formal and are changes that are typically anticipated in the construction process. Public improvement contracts must contain provisions addressing how change orders will be handled and who is authorized to approve them.[169] Local rules can limit who in the contracting agency is authorized to approve change orders and setting any dollar limits.

G. Retainage

Retainage is a percentage of the contract price for work completed that the contracting agency withholds or retains until certain conditions are met. Retainage in the public improvement contract context is defined in ORS 279C.550 and is governed by ORS 279C.555 to ORS

[168] ORS 279C.528.
[169] OAR 137-049-0910(2).

279C.570, ORS 701.420, ORS 701.430, and OAR 137-049-0820. The state retainage statutes and rules do not apply when federal funds are used.[170]

The amount that may be withheld as retainage is set by ORS 701.420 and cannot exceed 5% of the contract price of the completed work. This maximum amount cannot be exceeded unless the city's charter requires otherwise.[171] However, for public works contracts, the contracting agency *must* withhold 25% of the contract price of completed work when the contractor has failed to file certified payroll statements with the contracting agency if the contractor is required to do so under the prevailing wage laws.[172] The retainage is released within 14 days after the contractor files the certified statements.

The forms of retainage a contracting agency must accept are:

- Bonds, securities or other instruments specified in ORS 279C.560; and
- A surety bond.

A contracting agency may refuse to accept a bond or other instrument if it makes written findings that accepting the bonds in lieu of retaining funds "poses an extraordinary risk that is not typically associated with the bond or instrument."[173]

Both ORS 279C.560 and OAR 137-049-0820 contain specifications for the form the bonds or other instruments must take and the deposit requirements. If instruments are bonds or securities, they may now also be in the form of general obligation bonds issued by the State of Oregon or any of its political subdivisions, or an irrevocable letter of credit issued by a bank or trust company insured by the FDIC.[174]

As the work progresses, the contracting agency may reduce the amount of retainage on any remaining payments after 50% of the work is completed, or sooner if the contracting agency chooses.[175] However, the contracting agency is not obligated to consider reducing or eliminating retainage unless requested by the contractor.[176] The request must be in writing and signed by the contractor's surety. Once the contract work is 97.5% complete, the contracting agency may reduce the retainage to 100% of the value of the remaining work, whether or not the contractor requests that it do so. If the contractor submits a written request for a reduction in retainage at any time, the contracting agency must respond in writing in a reasonable time.

[170] ORS 701.440.
[171] ORS 279C.555.
[172] ORS 279C.845(7); OAR 137-049-0820(6).
[173] ORS 279C.560(1).
[174] ORS 279C.560(6).
[175] ORS 279C.570(7).
[176] *Id.*

The remainder of the retainage is released (or paid) after final inspection and acceptance of all of the work. The retainage is released (or paid) with interest if not paid within 30 days of acceptance of all of the work.[177]

Regardless of the form of retainage, the contracting agency is entitled to reduce the final payment by the costs incurred by the contracting agency in handling the retainage in accordance with the public contracting code and model rules.[178]

H. Performance Security and Payment Security

ORS 279C.380 requires the contractor to provide performance and payment security on all public improvement contracts with an estimated value of more than $100,000, or in the case of transportation projects with an estimated value of more than $50,000. However, the contracting agency may waive both security requirements in the event of an emergency order.[179] A contracting agency may require performance and payment security for all other public improvement contracts, but these requirements should be clearly identified in the solicitation documents.

Performance security is security that is usually required to be provided in the full amount of the contract price that guarantees the complete and faithful performance of the contract in accordance with the terms and conditions and plans and specifications of the contract.

Payment security is also required to be provided in the full amount of the contract price to guarantee payment of materials and labor suppliers, including subcontractors under the contract. In the event the contracting agency fails to require a contractor to provide a payment security bond as required by law, the contracting agency and those officers who authorized the contract are jointly liable for payment for the labor and materials used in performing the contract and for workers compensation claims, unemployment claims, and tax claims.

I. Final Inspection

At the completion of the work, the contractor must notify the contracting agency that the work is complete so that the contracting agency can undertake a final inspection.[180] Notification must be submitted in writing. Within 15 days of receiving the notice the contracting agency must inspect the work and the records and either accept the work or notify the contractor of any defects or remaining work to be done. Final acceptance is provided in writing once the contracting agency determines that all of the work has been done satisfactorily.[181]

[177] ORS 279C.570(8).
[178] ORS 279C.560(3).
[179] ORS 279C.380(4).
[180] ORS 279C.570.
[181] *Id.*

J. Contract Payments and Interest

ORS 279C.570 contains a statewide policy applicable to all contracting agencies requiring prompt payment of all payments due on public improvement contracts. Along with that, contracting agencies must make progress payments based upon estimates of the completed work.[182] However, progress payments do not constitute an acceptance of the work.

Interest must be included with the payment if the payment is made 30 days after receipt of the invoice, or within 15 days after approval of the payment, whichever is *earlier.* The final payment must be paid within 30 days of acceptance of the work with an interest rate of 1.5% until paid.[183]

Lastly, interest is also provided by statute on payments due under a settlement or judgment of a dispute regarding compensation due the contractor. The interest accrues as of the date the payment was due or the contractor submitted a claim for the amount due, whichever is later. equal to two times the discount rate on 90-day commercial paper in effect on the date the payment is due but not to exceed 30%.[184]

K. Contract Termination for Public Interest

A contracting agency may terminate or suspend a contract for any reason considered by the contracting agency to be in the public interest.[185] Termination for public interest is also known as termination for convenience. The public interest does not include a labor dispute or a third-party judicial proceeding relating to the work.[186]

If the contracting agency suspends the contract, the contractor is entitled to a reasonable extension of time and to reasonable compensation on account of the delay, including overhead.[187]

If the contracting agency terminates the contract, the contractor will not be entitled to any compensation unless the contract contains provisions providing for compensation in that event.[188]

If the parties mutually agree to terminate the contract for any reasons considered to be in the public interest, other than a labor dispute or any judicial proceeding related to resolve a labor dispute, and circumstances or conditions are such that it is impracticable within a reasonable time to proceed with a substantial portion of the work, the contractor will be entitled to a reasonable amount of compensation for preparatory work completed, and for costs and expenses

[182] ORS 279C.570(2).
[183] ORS 279C.570(8)
[184] ORS 279C.570(9).
[185] ORS 279C.655 to 279C.670
[186] ORS 279C.655.
[187] *Id.*
[188] *Id.*

arising out of termination.[189] The contracting agency shall also pay for all work completed, based on the contract price.[190]

Care must be taken, however, when terminating for public interest to make sure the procedures are carefully followed so that the contracting agency does not then find itself in default of the contract.

V. Architectural, Engineering, Photogrammetric Mapping, Transportation Planning, and Land Surveying Services

The procurement of architectural, engineering, photogrammetric mapping, transportation planning, and land surveying services (A&E or related services) is governed by ORS chapter 279B, chapter 279C, and OAR chapter 137, division 48.

The procedures that a contracting agency creates to screen prospective consultants and make a selection are at the contracting agency's sole discretion. The contracting agency may adjust the procedures to accommodate the contracting agency's scope, schedule or objectives for a particular project if the estimated cost of the services does not exceed $250,000.[191]

The model rules require a contracting agency to maintain a list of consultants who are interested in provided A&E or related services. OAR 137-048-0120 permits consultants to annual submit a statement describing their qualifications and related performance information for the list and requires the contracting agency to update the list every two years.

The default method for solicitating the procurement of these A&E or related services in the model rules is the "qualification based selection" (QBS) process.[192] However, note that a contracting agency may adopt its own provisions consistent with ORS 279C.100 to ORS 279C.124 and designate certain personal services contracts or classes or personal service contracts as contracts for A& E or related services.

A. Formal Selection Procedure

Under the formal selection procedure outlined in OAR 137-048-0220, the contracting agency may either obtain contracts through public advertisements of RFPs or requests for qualifications (RFQ) followed by RFPs.[193] The formal selection procedure requires advertising notice of the procurement in a manner similar to advertising public contracts for goods and services. Negotiation under the formal selection procedure must proceed serially with the highest ranked proposers based on qualifications.

There are two QBS processes available to cities. The traditional QBS process is a process under which a contractor is selected on the basis of qualifications alone; the consideration of price for

[189] *Id.*
[190] *Id.*
[191] ORS 279C.110.
[192] *Id.*
[193] OAR 137-048-220(2).

those services cannot be considered. However, once the contractor is chosen, on the basis of qualifications, the contracting agency may discuss and negotiate price.

The alternative QBS process recently adopted by the Oregon Legislature in 2019 provides contracting agencies with the ability to consider cost. Under this alternative QBS process, a contracting agency must select up to three prospective consultants based on qualifications. Pricing information could then be received from all three firms but could be weighted no more than 15% in the final evaluation and score.

However, if agreement is not reached upon the conclusion of negotiations with any proposer, the contracting agency may then terminate the solicitation.[194] The model rule specifies the contents and process required of the RFQ and RFP process.[195]

B. Informal Selection Procedure

A contracting agency may enter into a contract for A&E or related services using the informal selection procedure in OAR 137-048-0210 if the contract amount will not exceed $250,000.[196] The informal selection procedure requires a written RFP that must be provided to at least five prospective consultants.[197] If less than five prospective consultants are available, the contracting agency must provide the RFP to all available prospective consultants and maintain a written record of the contracting agency's efforts to locate available prospective consultants for the RFP.[198] The model rule specifies the contents of the RFP and how to determine the consultants to whom the request will be given. After receipt of the proposals, negotiations must proceed serially with the three highest ranked proposers until the contracting agency reaches agreement with the proposer.[199] If agreement is not reached upon the conclusion of negotiations with the third highest ranked proposer, the contracting agency may then terminate the solicitation.[200]

If it becomes clear that the contract price will exceed $250,000, the contracting agency must terminate the procurement and use the formal selection procedure described in OAR 137-048-0220.[201]

C. Direct Appointment

A contract for A&E or related services may be entered into directly without solicitation:

- In the case of an emergency;
- If the contract amount will not exceed $100,000; or

[194] OAR 137-048-0220
[195] *Id.*
[196] OAR 137-048-0210.
[197] OAR 137-048-0210(2).
[198] OAR 137-048-0210(3)
[199] OAR 137-048-0210(4).
[200] OAR 137-048-0210(5).
[201] OAR 137-048-0210(8).

- If the contract is for continuation of a project.[202]

If the contract is for continuation of a project where the estimated fee does not exceed $250,000 the following must apply:

- The services "have been substantially described, planned or otherwise previously studied" in an earlier contract with the same consultant and are rendered for the same project; and

- The contracting agency used a formal procurement process available to the contracting agency under OAR 137-048-0220 to select the consultant for the earlier contract.[203]

If the contract is for continuation of a project with an estimated fee that exceeds $250,000, the following must apply:

- The services "have been substantially described, planned or otherwise previously studied" in an earlier contract with the same consultant and are rendered for the same project;

- The contracting agency used a formal procurement process available to the contracting agency under OAR 137-048-0220 to select the consultant for the earlier contract; and

- The contracting makes written findings that entering into a contract with the consultant, is an efficient use of public funds and resources and results in substantial cost savings for the contracting agency and protect the integrity of the public contracting process and competitive nature of procurement by not encouraging favoritism or substantially diminishing competition in the award of the contract.[204]

D. Selection for Local Public Improvements Procured Through a State Agency

When a public improvement is owned and maintained by a city or other local government and the Oregon Department of Transportation, Department of Administrative Services or another state contracting agency will serve as the lead state contracting agency and will execute personal services contracts for A&E or related services, a two-step solicitation process governed by the state agency's own rules will apply.[205] The state agency will be responsible for selecting no fewer that the three most qualified consultants and the city or local government is responsible for the final selection of the consultant from the state agency list provided.[206]

[202] OAR 137-048-0200.
[203] *Id.*
[204] *Id.*
[205] ORS 279C.125.
[206] *Id.*

E. Ties, Protests, and Cancellation

If a tie occurs between proposers selected based on qualifications alone, the model rule allows that contracting agency to select the winning contractor through any process it believes will "result in the best value" for the contracting agency and that "instill[s] public confidence through ethical and fair dealing, honest and good faith" in the contracting agency.[207] If the tie occurs between proposers selected base on qualification and price, the contracting agency must follow the local preferences procedures in OAR 137-046-0300 to determine the winning contractor.[208]

Solicitation and award protests are governed by OAR 137-048-0240. OAR 137-048-0240 establishes a seven-day deadline for submission of solicitation document protests prior to closing. Contract award protests must be submitted within seven days after the date of the selection notice.[209] In either case, the contracting agency may provide for a longer period in the solicitation document.

The contracting agency may cancel, delay, or suspend a solicitation at any time if it is in the public interest to do so, with no liability to the contracting agency for costs incurred by responding consultants.[210]

VI. Public Works

A public works contract is a construction contract that is valued at over $50,000 to which prevailing wages will apply.[211] Note that a public works contract is a type of construction contract that is not always a public improvement contract governed by ORS chapter 279C. A contract for maintenance, repair, or emergency work on a public improvement that falls under the provisions of ORS chapter 279B may also be a public works contract.[212] This $50,000 threshold applies to the original contract plus any change orders or amendments. Thus, a contract that was originally below the limit could exceed the limit could become subject to prevailing wage, in which case BOLI will require application of the prevailing wage rate to all of the contract work, not just the work that caused the contract to exceed the $50,000 limit. A contract less than $50,000 could also exceed the limit due to site of work provisions wherein off-site work causes the price to go up.[213] Artificially splitting a project into $50,000 or less component contracts is not permissible and neither can the components of a single project be divided so that the exemption applies to some of the contract.

---

[207] OAR 137-048-0230(1).
[208] OAR 137-048-0230(2).
[209] OAR 137-048-0240
[210] OAR 137-048-0250.
[211] ORS 279C.810(2)(a).
[212] Effective September 23, 2023, SB 594 requires payment of prevailing wage rate for demolition or removal of hazardous waste from a road, highway, building, structure, or improvement in a public improvement contract that uses $750,000 or more of public funds, or that occurs on property owned by a public agency, including demolition or removal of hazardous waste that occurs in connection with construction, reconstruction, renovation or painting of road, highway, building, structure or improvement. This clarifies hazardous waste removal is subject to prevailing wage rates.
[213] *See* OAR 839-025-0004(25).

"Public works" includes, but is not limited to:

- Roads, highways, buildings, structures and improvements of all types, the construction, reconstruction, major renovation or painting of which is carried on or contracted for by any public agency to serve the public interest;

- A project that uses $750,000 or more of funds of a public agency for constructing, reconstructing, painting or performing a major renovation on a road, highway, building, structure or improvement of any type;

- A project that uses funds of a private entity for constructing a privately owned road, highway, building, structure or improvement of any type in which a public agency will use or occupy 25% or more of the square footage of the completed project;

- Notwithstanding the provisions of ORS 279C.810 (2)(a), (b) and (c), a device, structure or mechanism, or a combination of devices, structures or mechanisms, that:

    - Uses solar radiation as a source for generating heat, cooling or electrical energy; and

    - Is constructed or installed, with or without using funds of a public agency, on land, premises, structures or buildings that a public body, as defined in ORS 174.109, owns; or

- Notwithstanding paragraph ORS 279C.800(b)(A) and ORS 279C.810 (2)(b) and (c), construction, reconstruction, painting or major renovation of a road, highway, building, structure or improvement of any type that occurs, with or without using funds of a public agency, on real property that a public university listed in ORS 352.002 owns.[214]

"Public works" does not include:

- Reconstructing or renovating privately owned property that a public agency leases; or

- A private nonprofit entity's renovation of publicly owned real property that is more than 75 years old if:

    - The real property is leased to the private nonprofit entity for more than 25 years;

    - Funds of a public agency used in the renovation do not exceed 15% of the total cost of the renovation; and

[214] ORS 279C.800(6)(a).

- Contracts for the renovation were advertised or, if not advertised, were entered into before July 1, 2003, but the renovation has not been completed on or before July 13, 2007.[215]

Note the exclusion above for reconstruction and renovation. There is a fine line distinction between reconstruction and renovation on the one hand and construction or new construction on the other. BOLI's rules define these terms and they should be consulted when considering this type of project and determining whether it is a public works project. When in doubt, consult with legal counsel or obtain a determination from BOLI.

There is one additional important definition for purposes of determining whether the contract is a public works and this is "funds of a public agency." ORS 279C.810(1) defines this term as to what it does not include. What "funds of a public agency" are is well worth being familiar with in the event the funding for a public improvement public works contract is not coming from the contracting agency. Examples of funds that are not funds of a public agency include funds provided in the form of a government grant to a nonprofit organization (which is also defined in ORS 279C.810) unless the grant is for the purpose of construction, reconstruction, major renovation, or painting; building or development permit fees waived by the contracting agency; and certain staff resources.

A. Prevailing Wage Rates

Prevailing wage rates are minimum hourly rates a contractor must pay its employees under public works contracts. There are federal and state prevailing wage rates. These rates vary by occupation and region. Current prevailing wage rates are available on BOLI's website at: https://www.oregon.gov/boli/employers/Pages/prevailing-wage-rates.aspx.

B. Contract Specifications

The contracting agency must provide information regarding the payment of prevailing wages with the contract specifications.[216] When federal funds are involved in a public works contract, the contracting agency must provide information that also identifies which rates are higher.[217]

Inclusion of the following information will meet this obligation:

- The prevailing state rate of wage, as required by ORS 279C.830(1)(a):
    - Physically contained within or attached to hard copies of procurement specifications;
    - Included by a statement incorporating the applicable wage rate publication into the specifications by reference, in compliance with OAR 839-025-0020; or,

[215] ORS 279C.800(6)(b).
[216] ORS 279C.830(1).
[217] *Id.*

- When the rates are available electronically or by Internet access, the rates may be incorporated into the specifications by referring to the rates and providing adequate information on how to access them in compliance with OAR 839-025-0020.

- If applicable, the federal prevailing rate of wage and information concerning whether the state or federal rate is higher in each trade or occupation in each locality, as determined by BOLI in a separate publication. The same options for inclusion of wage rate information stated in OAR 137-049-08603(a) of this rule apply.[218]

The applicable prevailing wage rates are those that are in effect at the time the contracting agency first advertises the solicitation for the contract.

The contracting agency or contractor may request a determination from BOLI regarding the extent to which prevailing wage rate requirements will apply to a public improvement contract under ORS 279C.817. This is particularly useful if the project involves funding from mixed private and public sources.

C. Notice of Award and Fee

The contracting agency is required under ORS 279C.835 to notify BOLI when it has awarded a public works contract. The notice must be submitted on the appropriate BOLI form no later than 30 days after the date of the award and must include a copy of the first-tier subcontractor disclosure form.

The contracting agency is required to pay a per-project fee to BOLI under ORS 279C.825. The fee is used to cover certain BOLI administrative expenses. The fee is 0.1% of the contract price, but cannot exceed $7,500 or be less than $250.[219] The fee is payable when the contracting agency provides notice to BOLI that it has awarded a public works contract under ORS 279C.835.[220] Lastly, the contracting agency must determine the final contract price, recalculate the fee, and send in any balance due or request a credit within 30 days of making the final payment to the contractor.[221]

VII. Conclusion

Public contracting and the related laws and rules can appear complicated. Taking the time to review each procurement document to ensure compliance with the public contracting code and model rules, if applicable will ensure a streamlined process and reduce the likelihood of complications later on in the project. Where feasible, cities should adopt their own local rules to address and meet their unique needs so long as those local rules do not contradict the provisions of ORS 279, 279A, 279B, and 279C.

[218] OAR 137-049-0860.
[219] ORS 279C.825.
[220] *Id.*
[221] OAR 839-025-0210.

APPENDIX A: CHECKLIST FOR ITB DOCUMENT GOODS & SERVICES

Use this checklist to ensure you comply with ORS 279B.055 & OAR 137-047-0255 in developing an ITB.

MUST INCLUDE:

- ☐ Notice of any pre-offer conference which includes:
  - The time, date and location of any pre-Offer conference;
  - Whether attendance at the conference will be mandatory or voluntary; and
  - (A provision that provides that statements made by the Contracting Agency's representatives at the conference are not binding upon the Contracting Agency unless confirmed by Written Addendum.
- ☐ The form and instructions for submission of Bids and any other special information, e.g., whether Bids may be submitted by electronic means (See OAR 137-047-0330 for required provisions of electronic Bids).
- ☐ Specify a time and date by which the bids must be received and a place at which the bids must be submitted.
- ☐ Specify the name and title of the person designated to receive bids and the person the contracting agency designates as the contact person for the procurement, if different.
- ☐ Describe the procurement.
  - Identify the scope of work included within the procurement,
  - Outline the contractor's anticipated duties and set expectations for the contractor's performance.
  - Unless the contracting agency for good cause specifies otherwise, the scope of work shall require the contractor to meet the highest standards prevalent in the industry or business most closely involved in providing the appropriate goods or services.
- ☐ Specify a time, date and place for prequalification applications, if any, to be filed and the classes of work, if any, for which bidders must be prequalified in accordance with ORS 279B.120.
- ☐ State that the contracting agency may cancel the procurement or reject any or all bids in accordance with ORS 279B.100.
- ☐ All applicable preferences pursuant to ORS 279B.055(6)(b)
- ☐ State that “Contractors shall use recyclable products to the maximum extent economically feasible in the performance of the contract work set forth in this document.” if a state contracting agency issues the invitation to bid.
- ☐ Require the contractor or subcontractor to possess an asbestos abatement license, if required under ORS 468A.710.
- ☐ A statement that each Bidder must identify whether the Bidder is a “resident Bidder,” as defined in ORS 279A.120(1).
- ☐ Bidder's certification of nondiscrimination in obtaining required subcontractors in accordance with ORS 279A.110(4). (See OAR 137-046-0210(2)).
- ☐ Contractor’s certification of compliance with Oregon tax laws in accordance with ORS 305.385.
- ☐ Contracting Agency Need to Purchase. The character of the Goods or Services the Contracting Agency is purchasing including, if applicable, a description of the acquisition, Specifications, delivery or performance schedule, inspection and acceptance requirements.
- ☐ Include all contractual terms and conditions applicable to the procurement. The contract terms and conditions shall specify clear consequences for a contractor's failure to perform the scope of work identified in the invitation to bid or the contractor's failure to meet established performance standards. The consequences may include, but are not limited to:
  - Reducing or withholding payment; Requiring the contractor to perform, at the contractor's expense, additional work necessary to perform the identified scope of work or meet the established performance standards; or Declaring a default, terminating the public contract and seeking damages and other relief available under the terms of the public contract or other applicable law.
- ☐ The time, date and place of Opening.
- ☐ The office where the Solicitation Document may be reviewed.
- ☐ How the Contracting Agency will notify Bidders of Addenda and how the Contracting Agency will make Addenda available (See OAR 137-047-0430).

APPENDIX B: STANDARDS OF RESPONSIBILITY

Under the standards of responsibility, a prospective contractor must demonstrate to the contracting agency that the prospective contractor:

- Has available the appropriate financial, material, equipment, facility and personnel resources and expertise, or has the ability to obtain them, to meet all contractual responsibilities.
- Has completed previous contracts of a similar nature with a satisfactory record of performance.
- Has a satisfactory record of integrity. The contracting agency in evaluating the contractor's record of integrity may consider, among other things, whether the contractor has previous criminal convictions for offenses related to obtaining or attempting to obtain a contract or subcontract or in connection with the contractor's performance of a contract or subcontract.
- Is legally qualified to contract with the contracting agency.
- Has complied with the tax laws of the state or a political subdivision of the state, including ORS 305.620 and ORS chapters 316, 317 and 318 and demonstrate compliance by attesting to the bidder's or proposer's compliance in any way the contracting agency deems credible and convenient.
- Possess an unexpired certificate that the Oregon Department of Administrative Services issued under ORS 279A.167 if the bidder or proposer employs 50 or more fill-time workers and submitted a bid or proposal for a procurement with an estimated contract price that exceeds $500,000 in response to an advertisement or solicitation from a state contracting agency.
- Has supplied all necessary information requested by the contracting agency to make the responsibility determination.
- Has not been debarred under ORS 279B.130.

See ORS 279B.110.

APPENDIX C: CHECKLIST FOR RFP DOCUMENT

Use this checklist to ensure you comply with ORS 279B.055 & OAR 137-047-0260 in developing an RFP.

MUST INCLUDE:

- ☐ Notice of any pre-Offer conference as follows:
  - The time, date and location of any pre-Offer conference;
  - Whether attendance at the conference will be mandatory or voluntary; and
  - A provision that provides that statements made by the Contracting Agency's representatives at the conference are not binding on the Contracting Agency unless confirmed by Written Addendum.
- ☐ The form and instructions for submission of Proposals and any other special information, e.g., whether Proposals may be submitted by electronic means. (See OAR 137-047-0330 for required provisions of electronic Proposals).
- ☐ Specify a time and date by which the bids must be received and a place at which the bids must be submitted. The contracting agency, in the contracting agency's sole discretion, may receive bids by electronic means or direct or permit a bidder to submit bids by electronic means.
- ☐ Specify the name and title of the person designated to receive bids and the person the contracting agency designates as the contact person for the procurement, if different.
- ☐ Describe the procurement. In the description, the contracting agency shall identify the scope of work included within the procurement, outline the contractor's anticipated duties and set expectations for the contractor's performance. Unless the contracting agency for good cause specifies otherwise, the scope of work shall require the contractor to meet the highest standards prevalent in the industry or business most closely involved in providing the appropriate goods or services.
- ☐ Specify a time, date and place for prequalification applications, if any, to be filed and the classes of work, if any, for which bidders must be prequalified in accordance with ORS 279B.120.
- ☐ State that the contracting agency may cancel the procurement or reject any or all bids in accordance with ORS 279B.100.
- ☐ Require the contractor or subcontractor to possess an asbestos abatement license, if required under ORS 468A.710.
- ☐ The time, date and place of Opening.
- ☐ The office where the Solicitation Document may be reviewed.
- ☐ Proposer's certification of nondiscrimination in obtaining required subcontractors in accordance with ORS 279A.110(4). (See OAR 137-046-0210(2)).
- ☐ How the Contracting Agency will notify Proposers of Addenda and how the Contracting Agency will make Addenda available. (See OAR 137-047-0430).
- ☐ Contracting Agency Need to Purchase. The character of the Goods or Services the Contracting Agency is purchasing including, if applicable, a description of the acquisition, Specifications, delivery or performance schedule, inspection and acceptance requirements. As required by ORS 279B.060(2)(c), the Contracting Agency's description of its need to purchase must:
  - Identify the scope of the work to be performed under the resulting Contract, if the Contracting Agency awards one;
  - Outline the anticipated duties of the Contractor under any resulting Contract;
  - Establish the expectations for the Contractor's performance of any resulting Contract; and
  - Unless the Contractor under any resulting Contract will provide architectural, engineering, photogrammetric mapping, transportation planning, or land surveying services, or related services that are subject to ORS 279C.100 to 279C.125, or the Contracting Agency for Good Cause specifies otherwise, the scope of work must require the Contractor to meet the highest standards prevalent in the industry or business most closely involved in providing the Goods or Services that the Contracting Agency is purchasing.
- ☐ The anticipated solicitation schedule, deadlines, protest process, and evaluation process.
- ☐ The Contracting Agency shall set forth selection criteria in the Solicitation Document in accordance with the requirements of ORS 279B.060(3)(e). Evaluation criteria need not be precise predictors of actual future costs and performance, but to the extent possible, the criteria shall:
  - Afford the Contracting Agency the ability to compare the Proposals and Proposers, applying the same standards of comparison to all Proposers;

- Rationally reflect Proposers' abilities to perform the resulting Contract in compliance with the Contract's requirements; and

- Permit the Contracting Agency to determine the relative pricing offered by the Proposers, and to reasonably estimate the costs to the Contracting Agency of entering into a Contract based on each Proposal, considering information available to the Contracting Agency and subject to the understanding that the actual Contract costs may vary as a result of the Statement of Work ultimately negotiated or the quantity of Goods or Services for which the Contracting Agency contracts.

- If the Contracting Agency's solicitation process calls for the Contracting Agency to establish a Competitive Range, the Contracting Agency shall generally describe, in the Solicitation Document, the criteria or parameters the Contracting Agency will apply to determine the Competitive Range. The Contracting Agency, however, subsequently may determine or adjust the number of Proposers in the Competitive Range in accordance with OAR 137-047-0261(6).
- Applicable Preferences, including those described in ORS 279A.120, 279A.125(2) and 282.210.
- For Contracting Agencies subject to ORS 305.385, the Proposers' certification of compliance with the Oregon tax laws in accordance with ORS 305.385.
- All contractual terms and conditions the Contracting Agency determines are applicable to the Procurement.
- As required by ORS 279B.060(2)(h), the Contract terms and conditions must specify the consequences of the Contractor's failure to perform the scope of work or to meet the performance standards established by the resulting Contract.

APPENDIX D: CHECKLIST FOR ITB DOCUMENT PUBLIC IMPROVEMENTS

Use this checklist to ensure you comply with ORS 279C.365 & OAR 137-049-0200 in developing an ITB.

MUST INCLUDE:

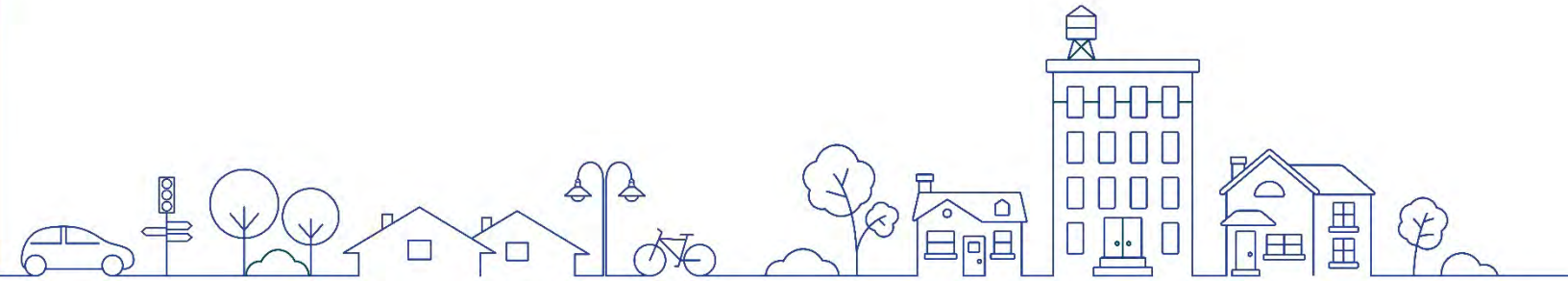
- ☐ General Information:
  - Identification of the Public Improvement project, including, a designation or description of the project, the character of the Work, and applicable plans, Specifications and other Contract documents;
  - Notice of any pre-Offer conference as follows:
    - The time, date and location of any pre-Offer conference;
    - Whether attendance at the conference will be mandatory or voluntary; and
    - That statements made by the Contracting Agency's representatives at the conference are not binding upon the Contracting Agency unless confirmed by Written Addendum.
  - The deadline for submitting mandatory prequalification applications and the class or classes of Work for which Offerors must be prequalified if prequalification is a requirement;
  - The name and title of the authorized Contracting Agency Person designated for receipt of Offers and contact Person (if different);
  - Instructions and information concerning the form and submission of Offers, including the address of the office to which Offers must be delivered, any Bid security requirements, and any other required information or special information, e.g., whether Offers may be submitted by facsimile or electronic means (See OAR 137-049-0300 regarding facsimile Bids and OAR 137-049-0310 regarding electronic Procurement);
  - The time, date and place of Opening;
  - The time and date of Closing after which a Contracting Agency will not accept Offers, which time shall be not less than five Days after the date of the last publication of the advertisement. Although a minimum of five Days is prescribed, Contracting Agencies are encouraged to use at least a 14 Day solicitation period when feasible. If the Contracting Agency is issuing an ITB that may result in a Public Improvement Contract with a value in excess of $100,000, the Contracting Agency shall designate a time of Closing consistent with the first-tier subcontractor disclosure requirements of ORS 279C.370(1)(b) and OAR 137-049-0360. For timing issues relating to Addenda, see OAR 137-049-0250;
  - The office where the Specifications for the Work may be reviewed;
  - A statement that each Bidder to an ITB must identify whether the Bidder is a “resident Bidder,” as defined in ORS 279A.120;
  - If the Contract resulting from a solicitation will be a Contract for a Public Work subject to ORS 279C.800 to 279C.870 or the Davis-Bacon Act (40 U.S.C. 3141 to 3148), a statement that no Offer will be received or considered by the Contracting Agency unless the Offer contains a statement by the Offeror as a part of its Offer that “Contractor agrees to be bound by and will comply with the provisions of 279C.838, 279C.840 or 40 U.S.C. 3141 to 3148.”
  - A statement that the Contracting Agency will not receive or consider an Offer for a Public Improvement Contract unless the Offeror is registered with the Construction Contractors Board, or is licensed by the State Landscape Contractors Board, as specified in OAR 137-049-0230;
  - Whether a Contractor or a subcontractor under the Contract must be licensed under ORS 468A.720 regarding asbestos abatement projects;
  - Contractor's certification of nondiscrimination in obtaining required subcontractors in accordance with ORS 279A.110(4). (See OAR 137-049-0440(3));
  - How the Contracting Agency will notify Offerors of Addenda and how the Contracting Agency will make Addenda available (See OAR 137-049-0250); and
  - When applicable, instructions and forms regarding First-Tier Subcontractor Disclosure requirements, as set forth in OAR 137-049-0360.
  - The date on which and the time and place at which the contracting agency will publicly open the bids.

- Evaluation Process:
  - A statement that the Contracting Agency may reject any Offer not in compliance with all prescribed Public Contracting procedures and requirements, including the requirement to demonstrate the Bidder's responsibility under ORS 279C.375(3)(b), and may reject for good cause all Offers after finding that doing so is in the public interest;
  - The anticipated solicitation schedule, deadlines, protest process and evaluation process, if any;
  - Evaluation criteria, including the relative value applicable to each criterion, that the Contracting Agency will use to determine the Responsible Bidder with the lowest Responsive Bid (where Award is based solely on price) or the Responsible Proposer or Proposers with the best Responsive Proposal or Proposals (where use of competitive Proposals is authorized under ORS 279C.335 and OAR 137-049-0620), along with the process the Contracting Agency will use to determine acceptability of the Work;
    - The Contracting Agency shall set forth any special price evaluation factors in the Solicitation Document.
- Contract Provisions. The Contracting Agency shall include all Contract terms and conditions, including warranties, insurance and bonding requirements, that the Contracting Agency considers appropriate for the Public Improvement project. The Contracting Agency must also include all applicable Contract provisions required by Oregon law as follows:
  - Prompt payment to all Persons supplying labor or material; contributions to Industrial Accident Fund; liens and withholding taxes (ORS 279C.505(1));
  - Demonstrate that an employee drug testing program is in place (ORS 279C.505(2));
  - If the Contract calls for demolition Work described in ORS 279C.510(1), a condition requiring the Contractor to salvage or recycle construction and demolition debris, if feasible and cost-effective;
  - If the Contract calls for lawn or landscape maintenance, a condition requiring the Contractor to compost or mulch yard waste material at an approved site, if feasible and cost effective (ORS 279C.510(2);
  - Payment of claims by public officers (ORS 279C.515(1));
  - Contractor and first-tier subcontractor liability for late payment on Public Improvement Contracts pursuant to ORS 279C.515(2), including the rate of interest;
  - Person's right to file a complaint with the Construction Contractors Board for all Contracts related to a Public Improvement Contract (ORS 279C.515(3));
  - Hours of labor in compliance with ORS 279C.520;
  - Environmental and natural resources regulations (ORS 279C.525);
  - Payment for medical care and attention to employees (ORS 279C.530(1));
  - A Contract provision substantially as follows: “All employers, including Contractor, that employ subject workers who work under this Contract in the State of Oregon shall comply with ORS 656.017 and provide the required Workers' Compensation coverage, unless such employers are exempt under ORS 656.126. Contractor shall ensure that each of its subcontractors complies with these requirements.” (ORS 279C.530(2));
  - Maximum hours, holidays and overtime (ORS 279C.540);
  - Time limitation on claims for overtime (ORS 279C.545);
  - Prevailing wage rates (ORS 279C.800 to 279C.870);
  - BOLI Public Works bond (ORS 279C.830(2));
  - Retainage (ORS 279C.550 to 279C.570);
  - Prompt payment policy, progress payments, rate of interest (ORS 279C.570);
  - Contractor's relations with subcontractors (ORS 279C.580);
  - Notice of claim (ORS 279C.605);
  - Contractor's certification of compliance with the Oregon tax laws in accordance with ORS 305.385; and
  - Contractor's certification that all subcontractors performing Work described in ORS 701.005(2) (i.e., construction Work) will be registered with the Construction Contractors Board or licensed by the State Landscape Contractors Board in accordance with ORS 701.035 to 701.055 before the subcontractors commence Work under the Contract.
  - If the Contract resulting from a solicitation will be a Public Improvement Contract, and if the Public Improvement that is the subject of the solicitation will have a value of $20,000,000 or more and will be located within Multnomah County, Clackamas County or Washington County, State Contracting Agencies must include provisions in the Public Improvement Contract that meet the requirements of HB 2007 (2019 Oregon Laws, Chapter 645) for diesel engines and non-road diesel engines.

Oregon Municipal Handbook

CHAPTER 14:

PUBLIC RECORDS



League of Oregon Cities

Published by the League of Oregon Cities
February 2021

Table of Contents

Chapter 14: Public Records

Oregon law protects the public's right to information regarding the business of public bodies such as cities. Under these laws, the records of a public body's business are available for review by any person regardless of the person's identity, motive, or need. All public records are subject to disclosure unless an exemption to disclosure under the Oregon Public Records Law applies. Through the Archives division of the Oregon Secretary of State's office, the state provides guidelines for records management. Public bodies must follow the records management and disclosure laws in order to appropriately manage records, maintain records, and respond to requests for disclosure. This chapter of the handbook will provide an overview of Oregon Public Records Law, public records management, public records requests, and sample forms. This chapter is not intended to be a substitute for legal advice. LOC members with additional questions about public records are encouraged to contact their city attorney. Please note that this chapter is based extensively on materials in the Oregon Attorney General's Public Records and Meetings Manual (2019). LOC strongly recommends that cities purchase the print version of this manual, which is updated every two years. A free online version is available at: https://www.doj.state.or.us/oregon-department-of-justice/public-records/attorney-generals-public-records-and-meetings-manual. Finally, note that the Oregon Department of Justice (ODOJ) reserves its legal advice for the state of Oregon and its agencies; as such, cities with specific questions on the Oregon Public Records Law again should consult their legal counsel.

The Basics

Entities Subject to Oregon Public Records Law

Oregon Public Records Law applies to any "public body" within the state. "Public body" is defined under the Oregon Public Records Law as "every county and city governing body, school district, special district, municipal corporation, and any board, department, commission, council, or agency thereof; and any other public agency of this state."[1] Essentially, all public officials and employees are subject to the public records law.

Private entities may also be subject to the Oregon Public Records Law depending on the "character of [the] entity and the nature and attributes of [the] entity's relationship with government and governmental decision-making."[2] The Oregon Supreme Court has articulated the following six-part test to determine whether a private entity is a public body for the purposes of the public records law:

- The entity's origin (Is the entity created by government?).

[1] ORS 192.311(4).
[2] *Marks v. McKenzie High School Fact-Finding Team*, 319 Or 451, 463 (1994).

- The nature of the function assigned to and performed by the entity (Does the entity perform a traditional governmental function?).

- The scope of the authority granted to and exercised by the entity (Is the entity authorized to make decisions that bind a governmental entity or does it only serve an advisory function?).

- The nature and level of governmental financial involvement with the entity (Does the entity receive governmental funds?).

- The nature and scope of government control over the entity's operation (How much discretion does the entity have on operations?).

- The status of the entity's officers and employees (Are the officers and employees government officials or employees?).[3]

Determining Public Status:

- Origin
- Function
- Authority
- Funding
- Control
- Officer/Employee Status

These factors are not exclusive but are helpful in determining whether a private entity is subject to Oregon Public Records Law provisions.

Records Covered by Oregon Public Records Law

Oregon Public Records Law defines a public record as "any writing that contains information relating to the conduct of the public's business * * * regardless of physical form or characteristics."[4] The term "writing" is defined to mean "handwriting, typewriting, printing, photographing and every means of records, including letters, words, pictures, sounds, or symbols, or combination thereof, and all papers, maps, files, facsimiles or electronic recordings."[5] This means that written documents, audio or visual recordings, or electronically stored communications, including emails, text messages or social media posts, are public records.

Content not Format

The question is whether the record relates to the business of the public—not the format of the record.

Public Records Include:

- Emails
- Text messages
- Social media posts

…regardless of where they are created or stored:

Only the content—a relationship to the public's business—matters.

Public records are not limited to those prepared by the public body. Public records may include records that were prepared outside government but contain "information relating to the public's business," so long as the record was "owned, used or retained" by the public body. The Oregon Attorney General has concluded that while a record need not be in a public body's possession to be a public record, "a document prepared by a private entity does not

[3] *Marks*, 319 Or at 463-64.
[4] ORS 192.311(5)(a). Compare with the definition of "public record" for retention purposes under ORS 192.005(5) which excludes the following from the definition of "public record": records of the Legislative Assembly; library and museum materials; records or information concerning the location of archeological sites or objects; duplicate copies; a stock of publications; and voicemail messages.
[5] ORS 192.311(7).

become a public record merely because a public official reviews the document in the course of official business so long as the official neither uses nor retains the document." [6]

> **Resource:**
>
> Oregon Secretary of State, Archives Division's **Email Policy Manual for Local Government**

What does this mean? Any record that relates to the public's business is a public record regardless of where it was created or stored. Many public body staff may not realize that emails or other records created on their personal electronic devices may be subject to the Oregon Public Records Law. Furthermore, the treatment of social media content under the Oregon Public Records Law is can be confusing. It is important for public bodies to inform and adequately train their staff to avoid the unintentional creation of public records. The Oregon Secretary of State has published guidance for Oregon government agencies on the Oregon Public Records Law and social media. The guide is proved herein in the appendix.

Records Management – Storage, Retention and Disposition

Public bodies are required to store, retain, and dispose of their public records in accordance with state law.[7] Public bodies are responsible for the public records in their custody, wherever deposited.[8] Public bodies "must ensure access to all public records * * * for the entire length of the retention schedule."[9] It is important to note that the term "public record" is defined differently for retention purposes than as defined for disclosure purposes.

> **Resource:**
>
> Oregon Secretary of State, Archives Division's **Oregon Public Records Law and Social Media Guide**

For the purposes of public records retention, a "public record" is defined as "any information that: [i]s prepared, owned, used or retained by a state agency or political subdivision[10]; [r]elates to an activity, transaction or function of a state agency or political subdivision; and [i]s necessary to satisfy the fiscal, legal, administrative or historical policies, requirements or needs of the state agency or political subdivision."[11] For the purposes of retention, public records do not include: library and museum materials that are acquired and preserved solely for library or museum purposes; records concerning the location of archaeological sites or objects; duplicate copies of records; a stock of publications; and voicemail messages.[12] Thus, while considered public records under the Public Records Law – and potentially subject to disclosure – public bodies are not required to retain records specifically exempt from retention. Voicemail messages are a common example of a public record exempt from retention. Voicemail messages relating to the public's business are public records under the Public Records Law. Because the public body is not required to retain those messages, public bodies are free to delete their voicemail

---

[6] ODOJ, ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL 8 (2019). *See also* Attorney General Public Records Order, December 11, 1992, Smith (concluding a contract giving the public body ownership of everything created by a contractor was a public record, even though the record was never in the public body's possession).
[7] ORS 192.005.
[8] OAR 166-020-0010(2).
[9] OAR 166-017-0005.
[10] For the purposes of the public records law, a city is a political subdivision of the State.
[11] ORS 192.005(5)(a).
[12] ORS 192.005(5)(b).

messages as they deem fit. However, if a public body saves a voicemail message and the content of that message is subject to a public records request, the message could be subject to disclosure.

The Importance of Proper Records Management

Proper storage and retention allows a public body to access and retrieve public records when necessary. The Archives division of Oregon Secretary of State's office has issued records retention schedules. Following the applicable retention schedules allows a public body to dispose of records that are no longer useful. The critical nature of proper record management is highlighted by law. It is a crime to unlawfully tamper, alter, or destroy a public record.[13] Penalties include up to one year in prison and up to $6,250 in fines.[14] Public bodies are encouraged to provide information and training to their officials and employees on the proper storage, retention, and disposition of public records.

Retention and Disposition

Resource:

Oregon Secretary of State, Archives Division's **Retention Schedule for Cities**

Retention schedules assist with records management and allow for the disposition of records after they pass their usefulness. The Archives division has created a general records retention schedule applicable to cities. The retention schedule "prescribes minimum retention periods for public records created and maintained by the cities of Oregon."[15] The retention schedule addresses accounting records, building records, procurement records, personnel records, public safety records, public works, and others. For example, the retention schedule provides that cities must retain copies of budget preparation records for a minimum of two years.[16] The copy of the adopted budget must be maintained permanently.[17] Duplicate copies do not need to be retained.[18]

Records must be retained ***regardless of the records' format***. Written notes related to public business must also be properly retained. Unless the note is a duplicate copy of another record, it must be retained according to the proper retention schedule. Except as otherwise specified by the applicable retention schedule, public bodies may destroy public records which have met the terms and conditions of their retention period.[19] A helpful flowchart created by the Archives division of the Oregon Secretary of State's office outlining whether a record must be properly retained is included in the appendix at the end of this chapter.

It is important that city employees and elected officials keep their records custodian informed of the location of all public records in their possession. Equally important is the ability of the records custodian to quickly and easily access all public records. In the event that a city receives

[13] ORS 162.305.
[14] ORS 161.615, 161.635.
[15] OAR 166-200-0200.
[16] OAR 166-200-0245(2).
[17] OAR 166-200-0245(1).
[18] "Retention periods apply to the ***record copy*** of all public record, regardless of medium or physical format[.]" OAR 166-200-0200 (emphasis added); "'Public record' * * * [d]oes not include: * * * [e]xtra copies of a document, preserved only for convenience of reference." ORS 192.005(5)(b)(D).
[19] OAR 166-030-0027(2).

a public records request, the records custodian may not be aware of the existence of records stored on an employee's personal email or computer. As a result, the records custodian may not be providing the requester with all the public records subject to the request. In such a case, the city may have unintentionally violated the public records law.

Storage

The Archives division of the Oregon Secretary of State's office has adopted administrative rules on the proper storage of records.[20] "Public records should be stored in secure, fire-resistant structures in areas in which the temperature and humidity are maintained at levels required to ensure optimum longevity of the paper, film or medium on which they are recorded."[21] The storage area should have "[a]dequate ventilation and protection against insect or mold invasion."[22] Electronic records are highly susceptible to accidental destruction or tampering. The Archives division recommends a separate set of standards for the maintenance and storage of electronic records.[23]

Resource:

Oregon Secretary of State, Archives Division's **Guidelines for Electronic Records**

Inspection and Public Records Requests

Members of the public may inspect public records by means of making a public records request. A public body is not required to allow a free-for-all inspection wherever and whenever a requester desires. Public bodies may establish rules and guidelines on how public records requests may be made. "The custodian of the records may adopt reasonable rules necessary for the protection of the records and to prevent interference with the regular discharge of duties of the custodian."[24]

The protective rules must be reasonable and "[a] rule designed solely to make public access to records more difficult is not valid, while a rule carefully designed to prevent destruction of public records or to expedite staff identification of the requested records is lawful."[25] Examples of reasonable protective rules include requiring that public records requests must be made in writing and identify specific records or subject matter of the records being sought.[26] The Oregon Attorney General recommends that when public bodies establish protective rules, that they do so with notice and the opportunity for public comment. Notice and the opportunity for public comment avoids the appearance of arbitrary action.[27] While not legally required, it is highly recommended that protective rules are adopted at a public city council meeting.

---

[20] See OAR 166, divisions 17, 20 & 25. The Secretary of State maintains an up-to-date record of all OARs. A copy of the OARs specifically mentioned in this chapter and all others may be accessed online by visiting: http://sos.oregon.gov/archives/Pages/oregon_administrative_rules.aspx.
[21] OAR 166-020-0015(1).
[22] *Id.*
[23] OAR 166, division 17.
[24] ORS 192.318(2).
[25] ODOJ, ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL 19 (2019).
[26] Attorney General Public Records Order, July 7, 1989, Baker.
[27] ODOJ, ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL 19 (2019).

Making a Request

A public body must make available a written procedure for making public records requests.[28] The procedure must include the name of the individual or individuals to whom a request may be sent, and the amounts and manner in which the city calculates and charges fees for responding. Public bodies may choose to utilize a public records request form. Requests may be directed to individual council members or other officials. However, it is advisable that the records custodian be notified of all requests, however received, in order to properly record and track all requests. A model public records request form is included in the appendix.

Clarifying the Request

A public body may request additional information or clarification from the requester in order to expedite the public body's response to the request. Requests for clarification may also serve to narrow requests and to pinpoint what specifically the requester is seeking. Once a public body makes a request for additional information or clarification, its obligation to complete its response to the request is suspended until the requester provides the information, clarification or affirmatively declines to provide additional information or clarification. If the requester fails to respond to the public body's request for additional information or clarification within 60 days, the public body may close the request.

Identifying Exempt Records

Prior to responding to a records request, a public body must review the records for exempt materials – those records that are not subject to disclosure. Often a record will contain both exempt and nonexempt material. A public body may redact or otherwise separate records that are exempt. A public body should notify the requester when it exempts information. The various exemptions available under the Oregon Public Records Law are discussed in more detail below.

Responding to a Public Records Request

A response to a public records request is deemed completed when the public body:

- Provides access to or copies of the requested records that are within the public body's possession or custody;

- Asserts any exemptions from disclosure that the public body believes applies to the requested records, and identifies the applicable federal or state law in which the exemption is asserted;

- Separates any exempt material from nonexempt material and makes all nonexempt material available;

[28] ORS 192.324(7).

- If the public body is not the custodian of the records requested, provides a written statement to that effect;

- To the extent that any state or federal law prohibits the public body from acknowledging whether any of the requested records exist or acknowledging whether the requested record exists would result in the loss of federal benefits or imposition of another sanction, the public body must provide a written statement to that effect, citing the applicable state or federal law; and

- Includes a statement that the requester may seek review of the public body's determination that one of more requested records are exempt from disclosure, by petitioning the district attorney of the county in which the city is located, or by instituting a proceeding for injunctive or declaratory relief in the appropriate circuit court if the records request is for records in custody of an elected official.[29]

A public body shall provide the records requested in the form requested. If the records are not available in the requested form, the city must provide the records in the form in which they are maintained by the public body. Otherwise converting the records to a different from than one in which they are stored, creates a new record. Requests to create a new record are not a public records request and public bodies are not obligated under the Oregon Public Records Law to create new records where none exists in order to respond to requests for information.

Timelines

A public body must acknowledge receipt of the request or provide a copy of the requested record within five business days of the public body's receipt of the request.[30] An acknowledgment must confirm that the public body is the custodian of the requested record or notify the requester that the public body is not the custodian of the record. A sample acknowledgement letter is attached.

Within 10 business days after the date by which a public body is required to acknowledge receipt of a public records request, the public body must either complete its response to the request, or provide a written statement that the public body is still processing the request and provide an estimated date by which the public body expects to complete its response.[31] The timeframes established to acknowledge and respond to a request do not apply to a public body if compliance would be impracticable due to staffing unavailability, the public body's ability to perform other necessary services, or the volume of other public records requests being simultaneously processed. A public body who cannot comply with the established timeframes must complete the public records request as soon as practicable and without unreasonable delay.

Important Public Records Request Timelines

5 business days after receipt - Acknowledge the request

10 business days after the date acknowledgment is due - Provide records or status update

[29] ORS 192.329.
[30] ORS 192.324(2).
[31] ORS 192.329(5).

Exemptions from Disclosure

Oregon Public Records Law provides exemptions to disclosure. Records that are exempt from disclosure are not necessarily confidential. Rather, the exemptions allow the public body to withhold the exempt record from disclosure in response to a public records request. The Public Records Law separates exemptions into two general categories: conditional and unconditional. For helpful information on how to apply each exemption listed below, cities should review the Attorney General's Public Records and Meetings Manual (2019) and seek the advice of their city attorney.

Conditional Exemptions

Application of the conditional exemptions found in ORS 192.345 depend on whether the public interest requires disclosure.

> [T]he policy [underlying the conditional exemption statutes] is that disclosure decisions should be based on balancing those public interests that favor disclosure of governmental records against those public interests that favor governmental confidentiality, with the presumption always being in favor of disclosure.[32]

A public body's decision to apply a conditional exemption must show why the need for confidentiality outweighs the public interest in disclosure. The Oregon Court of Appeals has characterized the public interest in disclosure as "the right of the citizens to monitor what elected and appointed officials are doing on the job."[33]

ORS 192.345 provides for 40 conditional exemptions. They are:

- Public records pertaining to litigation;
- Criminal investigatory material;
- Business records required to be submitted;
- Employee representation cards;
- Unfair labor practice complaints;
- Archaeological site information;
- Information about threatened or endangered species;
- Computer programs for the use of public bodies;
- Unsafe workplace investigation materials;
- Telecommunications utility audits;
- Housing authority and urban renewal agency records;
- Security measures;
- Trade secrets;
- Tests and examination material;
- Real estate appraisal information;
- Civil rights investigation material;
- Debt consolidating agency investigation records;
- Personnel disciplinary actions;
- Faculty research;
- Agricultural producer indebtedness mediation data;
- Public safety plans;
- Residence address of an elector;
- Records that would allow interference with property or services;
- OHSU and OUS donation records;

[32] *Turner v. Reed*, 22 Or App 177, 187 (1975).
[33] *Jensen v. Schiffman*, 24 Or App 11, 17 (1976).

- OUS donation records not held by OUS officials;
- Financial transfer information;
- OHSU and OUS student email addresses;
- Personal information of public safety officers appearing in certain records;
- Land management plans;
- Public safety officer investigations;
- Ongoing audits of public bodies;
- Personal information of civil code enforcement officers; and
- Commodity commission filers;
- Social security numbers in particular court records;
- OHSU medical researcher records;
- Personal information of certain government attorneys;[34]
- SAIF corporation business records;
- Medical examiner records;
- Personally-identifiable information collected as part of an electronic fare collection system;
- Audio and video records from law enforcement officer body cams.

In addition to the conditional exemptions listed under ORS 192.345, ORS 192.355(1)-(6) contains six additional exemptions that require a separate balancing of the public interest in disclosure:

- Internal advisory communications;
- Personal privacy;
- Public employee and volunteer addresses, social security numbers, birth dates and telephone numbers;
- Confidential submissions;
- Corrections and parole board records; and
- Lending institution records.

The Personal Privacy Exemption

ORS 192.355(2)(a) exempts:
"Information of a personal nature such as but not limited to that kept in a personal, medical or similar file, if public disclosure would constitute an unreasonable invasion of privacy, unless the public interest by clear and convincing evidence requires disclosure in the particular instance. The party seeking disclosure shall have the burden of showing that public disclosure would not constitute an unreasonable invasion of privacy."

Each exemption under ORS 192.355(1)-(6) provides its own separate factors to consider when balancing the public interest in disclosure. Further, HB 4031 (2024 session) added a local governments to divulge information related to particulars of a tax return.[35]

Unconditional Exemptions

In contrast, application of the remaining 36 unconditional exemptions found in ORS 192.355(7)-(42) do not require the balancing of the public interest in disclosure. The applicability of the

[34] The personal information of certain government attorneys exemption under ORS 192.345(32) only conditionally exempts personal information of a city attorney or deputy city attorney who engages in the prosecution of criminal matters. Thus, the exemption would not apply to a city attorney or deputy city attorney who does not engage in criminal prosecution matters.
[35] ORS 314.835; *see also* HB 4031 (2024 – effective March 27, 2024).

following exemptions is presumed, and the burden is on the requester to show that disclosure of the otherwise exempt material is in the public interest:

- Presentence and probation reports;
- Federal Law prohibition;
- Other Oregon Law exemptions;
- Transferred records;
- Security programs for the transportation of radioactive material;
- PERS nonfinancial information about members;
- Records relating to the State Treasurer or Oregon Investment Council publicly traded investments;
- Records relating to the State Treasurer or Oregon Investment Council investment in private fund or asset;
- Public Employees Retirement Fund and Industrial Accident Fund monthly reports;
- Abandoned property records;
- Economic development information;
- Transient lodging tax records;
- Information for obtaining court-appointed counsel;
- Workers' compensation claim records;
- OHSU sensitive business records;
- OHSU candidates for university president;
- Library records;
- Housing and community services department records;
- Forestland GIS databases;
- Public sale or purchase of electric power;
- Klamath Cogeneration Project records;
- Public utility customer information;
- Alternative transportation addresses;
- Oregon Corrections Enterprises records;
- Confidential submission to DCBS;
- County elections security plans;
- Security programs;
- Paternity or support judgments or judicial orders;
- SAIF Corporation employer account records;
- SAIF Corporation claimant records;
- Military discharge records;
- Domestic violence service or resource center records;
- Prescription drug monitoring records;
- Email address lists;
- Personal information of DPSST licensees; and
- Personally identifiable and contact information of veterans and service members.

Application of Other Protective Laws

ORS 192.355(8) and (9)(a) incorporates other state and federal confidentiality and disclosure provisions into the Oregon Public Records Law. For example, ORS 40.225 protects communications between a public body and its legal counsel.[36] ORS 279B.060(6) protects

[36] The attorney-client privilege is subject to additional special treatment under ORS 192.355(9)(b). Otherwise privileged attorney-client information is not exempt from disclosure if: (1) the factual information is not otherwise prohibited from disclosure; (2) "[t]he factual information was not compiled by or at the direction of an attorney as part of an investigation * * * in response to information of possible wrongdoing by the public body; (3) "[t]he factual information was not compiled in preparation of litigation, arbitration or an administrative proceeding that was reasonable likely to * * * or that has been initiated by or against the public body;" and (4) the holder of the

competitive sealed proposals until after the notice of intent to award a contract is issued by the public body. Records that contain "protected health information" under the HIPAA "Privacy Rule" are exempt from disclosure under ORS 192.558(1) and ORS 192.355(9)(a).[37] ORS 192.650(2) protects materials contained in the minutes of a meeting held in executive session if "disclosure of certain material is inconsistent with the purpose for which a[n] [executive session] is authorized to be held".

Resource:

The Oregon Attorney General has published an online catalog of Oregon statutory exemptions found outside of the Public Records Law.

Records More than 25 Years Old

The exemptions to disclosure provided in ORS 192.345 and 192.355 do not apply to records more than 25 years old.[38] However, the following older records remain subject to possible exemption from disclosure:

- Records less than 75 years old which contain information about the physical or mental health or psychiatric care or treatment of a living individual, if the public disclosure thereof would constitute an unreasonable invasion of privacy. The party seeking disclosure shall have the burden of showing by clear and convincing evidence that the public interest requires disclosure in the particular instance and that public disclosure would not constitute an unreasonable invasion of privacy.

- Records less than 75 years old which were sealed in compliance with statute or by court order. Such records may be disclosed upon order of a court of competent jurisdiction or as otherwise provided by law.

- Records of a person who is or has been in the custody or under the lawful supervision of a state agency, a court or a unit of local government, are exempt from disclosure for a period of 25 years after termination of such custody or supervision to the extent that disclosure thereof would interfere with the rehabilitation of the person if the public interest in confidentiality clearly outweighs the public interest in disclosure. Nothing in this subsection, however, shall be construed as prohibiting disclosure of the fact that a person is in custody.

- Student records required by state or federal law to be exempt from disclosure.[39]

Separation of Exempt and Nonexempt Material

Once exempt materials are identified, they must be separated in order to make the nonexempt material available for disclosure. The most common method is to redact the exempt materials, as it is often interlaced with nonexempt material. A public body should notify the requester when

---

privileged * * * has made or authorized a public statement characterizing or partially disclosing the factual information compiled by or at the attorney's direction." ORS 192.355(9)(b).

[37] *OSHU v. Oregonian Publishing Co., LLC*, 362 Or 68, 80 (2017).

[38] ORS 192.390.

[39] ORS 192.398.

material is being withheld and the applicable exemptions that have been relied upon. When there are large quantities of material being withheld, it may be helpful to create an exemption log that identifies the material being withheld and the statutory authority relied upon.

Voluntary Disclosure of Exempt Materials

Public bodies may voluntarily disclose records that are exempt under the public records law, so long as disclosure is not otherwise prohibited by law. However, public bodies must use caution when doing so in order to avoid an unintended blanket waiver of the applicable exemption. While the Oregon Attorney General has concluded, "where limited disclosure of a public record does not thwart the policy supporting the exemption, the public body does not thereby waive its prerogative not to disclose the record to others[,]" the Oregon Court of Appeals "has determined that public disclosure of information from exempt records can operate as waiver of the exemption for the records themselves."[40] As a safeguard, cities are encouraged to limit who has authority to voluntarily disclose otherwise exempt records. The League strongly encourages members to consult with their city attorney prior to disclosing otherwise exempt material.

Fees

The public body may assess reasonable fees required to reimburse the public body for its actual cost of making the requested records available to the requester.[41] Fees may include reimbursement for any of the following:

- The actual cost of making the public records available;
- Actual costs incurred by the public body in separating exempt and nonexempt material;
- Costs to reimburse staff's time in locating the requested records, regardless if the requested records are located;
- Costs incurred for summarizing the public records;
- Costs incurred for compiling the public records;
- Costs incurred for tailoring the public records to the request that was made;
- Costs incurred by a person responsible for supervising a person's inspection of original documents (so the originals are protected from damage, destruction, or theft);
- Costs incurred for certifying public records as true copies of the original documents;

[40] ODOJ, ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL 35 (2019) (citing AG Letter of Advice, dated March 29, 1988, to W.T. Lemman, Executive Vice Chancellor (OP-6217) at 4-5); page 120 (citing *Oregonian Publishing Company v. Portland School Dist.*, 152 Or App 135, 142 (1998)).
[41] ORS 192.324(4)(a).

- Costs incurred in sending requested records by special methods like FedEx; and/or

- Costs incurred for the city attorney's time in reviewing the public records, redacting material from the records, or segregating the public records into exempt and nonexempt records.[42]

Limitations on Fees

If the public body wishes to charge a fee greater than $25, the public body must notify the requester in writing of the estimated amount of the fee. While not mandatory, it is recommended that the fee estimate be provided as part of the public body's 5-day acknowledgment letter. The requester must then confirm in writing that it wishes the public body to proceed. The public body may require the requester to provide prepayment of the fees. If the requester fails to pay the fee within 60 days from the date on which the public body informed the requester of the fee, the public body shall close the request. If the actual costs incurred by a public body are less than what is prepaid, the public body must promptly refund any overpayment.[43]

While public bodies may recover costs incurred for attorney time in reviewing the public records, redacting materials and segregating the records, public bodies are prohibited from assessing fees that attempt to reimburse the public body for its attorney's time spent determining the applicability of the public records law. Federal law prohibits public bodies from assessing fees for costs incurred to provide public records in a format to persons with vison or hearing impairments.[44]

Fee Waivers

A public body may "furnish copies without charge or at a substantially reduced fee if the custodian determines that the waiver or reduction of fees is in the public interest because making the record available primarily benefits the general public."[45] The Oregon Department of Administrative Services (DAS) has issued a statewide policy addressing public records request fees.[46] While not applicable to cities, the policy serves as a helpful guide when making a determination of whether a fee waiver or reduction is in the public interest. The criteria include:

- Whether the disclosure of the records directly impact, affect, or serve an identified interest of the general public;

- Whether the requested information would advance the welfare or well-being of the general public;

[42] ORS 192.324(4)(b); 39 Op Atty Gen 61, 68 (1978).
[43] ODOJ, ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL 20 (2019).
[44] 42 U.S.C. § 12131.
[45] ORS 192.324(5).
[46] DAS Statewide Policy 107-001-030.

- Whether the requester will be able to meaningfully disseminate the requested information;

- Whether the public benefit is greater than the individual benefit derived from disclosure;

- Whether there is a specifically identified purpose for which the public records are being sought that is wholly unrelated to:

    - Commercial purposes; or

    - Actual or possible use in connection with administrative, judicial or legal proceedings;

- Whether the request is targeted at a specifically identified matter;

- Whether the city can grant a waiver or reduce fees without causing an unreasonable burden on city resources; and

- Whether the public interest served by disclosure is greater than the burden on the city such as the amount of staff time diverted to fulfilling a request and the costs of subsidization.

The public body's obligation to complete its response to the public records request is suspended until the requester pays the requested fee or the fee is waived. If the requester fails to respond to a notice of fees or fails to pay the requested fees within 60 days, the public body may close the request.

Appeals

When a public body refuses to disclose requested records, the requester may appeal the public body's denial. How the appeal is handled depends on whether the public records request was denied by a public body or an elected official. Review of a local public body's decision to deny disclosure of a public record is done either by petitioning the district attorney for the county in which the public body is located, the Marion County Circuit Court, or the circuit court for the county in which the public body is located.

Appeals of Public Records Requests Denied by Public Bodies

Appeals of a local public body's denial of a public records request may be made by petitioning the district attorney in the county in which the public body is located for an order compelling disclosure of the responsive records.[47,48] The petition must include:

[47] ORS 192.415(1).
[48] Except for decisions made by state agencies, which are appealed to the Attorney General.

- The identity of the requester;
- The public body that has the records being sought;
- The records that are sought;
- A statement that inspection was requested; and
- A statement that the request was denied including the person denying the request and the date of the denial, if known.[49]

Upon receipt of a petition, the district attorney must promptly notify the public body.[50] The public body must transmit the requested records, or the nature or substance of the records if appropriate, for review by the district attorney and provide a statement of its reasons to believe the public record should not be disclosed.[51] The district attorney must grant or deny the petition in whole or in part within seven days of receipt.[52] If the district attorney orders disclosure if the records, the public body has seven days to comply or give notice that it intends to seek review in circuit court.[53] Copies of the public body's notice must be delivered to the district attorney and sent by certified mail to the requester. If any part of a petition for disclosure is denied by the district attorney, the requester may seek review in Marion County Circuit Court or the circuit court of the county in which the public body is located.[54]

Appeals of Public Records Requests Denied by Elected Officials

When an elected official denies a public records request, review of that denial is sought by petitioning the Marion County Circuit court or the circuit court in which the elected official is located.[55] Review by the court is also available once the district attorney issues an order on a petition for review of a city's denial of a public records request. The court does not review the order of the district attorney but rather reviews the decision of the public body or elected official de novo – meaning "anew". During review by the court, "[t]he public body carries the burden to sustain its denial of a records request.[.]"[56]

If the requester prevails in full, the public body is required to compensate the requester for the cost of the litigation at trial and on appeal, including costs and attorney fees.[57] If the request prevails only in part, an award of costs and attorney fees is discretionary.[58]

---

[49] ORS 192.422(1)); ODOJ, ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL 41 (2019).
[50] ORS 192.422(2).
[51] *Id.*
[52] ORS 192.418(1).
[53] ORS 192.411(2); 192.415.
[54] *Id.*
[55] ORS 192.427.
[56] ODOJ, ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL 49 (2019); ORS 192.431(1).
[57] ORS 192.431(3).
[58] *Id.*

Office of the Public Records Advocate

> **Resource:**
>
> Office of the Public Records Advocate
>
> Website

Created in 2017 by Senate Bill 106, the Office of the Public Records Advocate provides dispute resolution services to assist disputes relating to public records disclosure.[59] Either the requester or the city may request assistance, but only if both parties agree to have the advocate facilitate resolution of the dispute and the advocate consents.[60] Facilitated dispute resolution will be available by submitting a written request and the facilitated dispute resolution process shall be conducted and completed within 21 days following the advocate's receipt of the request for services.[61] If the dispute resolution process results in an agreement between the requester and the city, the advocate will prepare a written document memorializing the agreement and the agreement shall control the resolution of the public records request.[62] In addition to dispute resolution services, the public records advocate provides public records request training.[63] Further information on the Office of the Public Records Advocate may be found on its website: https://www.oregon.gov/pra/Pages/advocate.aspx.

[59] ORS 192.464(1)(b).
[60] ORS 192.464(6)
[61] ORS 192.464(7).
[62] ORS 192.464(8).
[63] ORS 192.475.

Frequently Asked Questions

May the public inspect original records?

The public may inspect original records to the extent the public body does not need to separate the records into exempt and nonexempt materials, where the public body does not place restrictions in order to safeguard the original record, or where inspection would not interfere with the public body's work. Where original records are unavailable, the public body must provide copies.

Are public bodies required to provide a requester with transcripts of audio recordings?

No. Public bodies are not required to create records in response to a public records request. However, persons who require an audio or video recording in an alternative format due to a disability, may be entitled to the record in an alternative format under the Americans with Disabilities Act.

Are notes and memos subject to retention and disclosure?

Yes. Notes taken by public employees and officials that relate to the public body's business are subject to proper retention and disclosure.

Are draft records subject to retention and disclosure?

Yes. The fact that a document is in draft form does not by itself warrant a basis to withhold from disclosure.

Is a public body required to make public records available to inspection or copying on periodic basis, or as records come into the possession of the public body, in response to a "continuing request" for records?

No. The Oregon Attorney General has concluded:

> A public body is only required to make nonexempt records that are in the public body's possession at the time the request is made. Persons seeking to inspect or to obtain copies of records of a public body on a continuing basis may be required to make successive requests for records.[64]

Is the public body obligated to disclose the personal addresses, or personal telephone numbers of public employees?

No. ORS 192.355(3) exempts public employee and volunteer residential addresses, residential and personal telephone numbers, personal email addresses, driver license numbers, employer-issued identification card numbers, emergency contact information, Social Security numbers, and

[64] ODOJ, ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL Appendix A-1 (2019).

dates of birth. The exemption does not apply to certain elected officials, substitute teachers, or in cases where the requester shows by a clear and convincing evidence that the public interest requires disclosure.

Are job candidate records subject to disclosure?

Probably not. The personal privacy exemption under ORS 192.355(2) exempts:

> Information of a personal nature such as but not limited to that kept in a personal medical or similar file, if public disclosure would constitute an unreasonable invasion of privacy, unless the public interest by clear and convincing evidence requires disclosure in the particular instance.[65]

"The party seeking disclosure shall have the burden of showing that public disclosure would not constitute an unreasonable invasion of privacy."[66] A public body must show that disclosure would unreasonably invade the personal privacy of the job candidate(s). Once the public body has met that threshold, the burden is placed on the requester. The Oregon Attorney General has concluded that the names of non-finalist candidates for high-profile management positions were exempt under the personal privacy exemption because disclosure "may unreasonably threaten the person's current employment relationship and professional standing."[67] The Attorney General has also concluded that release of such information would harm the public interest by prompting "many qualified applicants to refrain from applying" and "unduly interfere with the work of appropriate selection committee."[68]

Are records discussed during executive session protected from disclosure?

Yes, so long as the records are consistent with the purposes for which the executive session was authorized to be held. Discussion during executive session does not automatically exempt a record from disclosure. The Public Records Law, not the Public Meetings Law, governs the disclosure of records. Unless the records are protected under a separate exemption, they remain subject to disclosure. However, ORS 192.650(2), as incorporated into the Public Records Law by ORS 192.355(9), protects material contained within the minutes of the executive session from disclosure to the extent disclosure would be inconsistent with the purposes for which the executive session was authorized to be held.

[65] ORS 192.355(2).
[66] *Id.*
[67] Attorney General Public Records Order, August 12, 1988, Dean.
[68] *Id.*

APPENDIX A

MODEL RESOLUTION ADOPTING RECORDS MANAGEMENT POLICY

CITY OF [Insert name of City], **OREGON**
[Insert name of city], **CITY COUNCIL**

RESOLUTION NUMBER: [Insert appropriate number]

A resolution of the [Insert name of city] City Council adopting a citywide public records management policy.

WHEREAS, the State Archivist grants authorization to cities for the retention and disposition of public records in their custody; and

WHEREAS, the City Council wishes to adopt a city-wide public records management policy to ensure public records are managed and maintained appropriately within the City of [Insert city name].

NOW, THEREFORE, BE IT RESOLVED by the [Insert name of city] City Council approval of the following public records management policy:

SECTION 1: GENERAL INFORMATION. The goal of this Policy is to ensure public records are managed and maintained appropriately within the City of [Insert name of city]. This City of [Insert name of city] Public Records Management Policy addresses the following components:

- Public Records Maintenance
- Roles and Responsibilities
- Education and Training
- Access and Ownership
- Integrity
- Retention Generally
- Storage and Retrieval
- Disposition and Destruction
- Public Records Requests

The City shall develop and implement internal processes and procedures that support compliance, deter abuse and detect violations of this Policy.

SECTION 2. Definitions.

2.1 "**CITY**" refers to the City of [Insert name of city] and all employees, appointees and elected officials associated therewith.

2.2 "**CLOUD-COMPUTING**" has the same meaning as defined in the National Institute of Standards and Technology (NIST) Special Publication 800-145.

2.3 "**CUSTODIAN**" refers to the City of [Insert name of city] or its designee mandated, directly or indirectly, to create, maintain, care for or control a public record. "Custodian" does not include the City of [Insert name of city] or its designee that has custody of a public record as an agent of another public body that is the custodian, unless the public record is not otherwise available.

2.4 "**INSTANT MESSAGING**" refers to real-time text communications between or among computers or mobile devices over the Internet or a functionally similar communications network.

2.5 "**METADATA**" is data that provides information about other data. Metadata assists in resource discovery by allowing resources to be found by relevant criteria, identifying resources, bringing similar resources together, distinguishing dissimilar resources, and giving location information.

2.6 "**PUBLIC RECORD**" has the meaning established in ORS 192.005. In general, it refers to information that is prepared, owned, used or retained by the City; related to an activity, transaction or function of the City; and is necessary to satisfy the fiscal, legal, administrative or historical policies, requirements or needs of the City.

2.7 "**SOCIAL MEDIA**" refers to web-based and mobile communication technologies that allow the creation and exchange of user-generated content such as comments or responsive postings. Examples of "social media" as of the time this Policy is adopted include but are not limited to Twitter, Flickr, blogging sites, Facebook, YouTube and Instagram.

2.8 "**TEXT MESSAGING**" refers to messages exchanged between fixed-line phones or mobile phones and fixed or portable devices over a network. Excluded from the definition of "text messages" are electronic mail ("email") communications whether such messages are exchanged among or between official City email accounts or email accounts maintained by private entities.

SECTION 3. Public Records Maintenance. Public records shall be maintained and managed in a manner that protects the integrity of the records within the City without regard to the technology or medium used to create or communicate the record, from the time of creation of a public record to the time of final disposition of the public record as determined by their authorized records retention schedule.

SECTION 4. Roles and Responsibilities. The City will ensure public records are managed in accordance with their authorized records retention schedules, from the time of

creation to final disposition, by assigning designated staff/positions with the following responsibilities:

4.1 Records Officer. The City Recorder is hereby designated as the records officer for the City. The records officer will serve as primary liaison with the State Archivist and receive training from the State Archivist in performing their duties.

4.2 Custodian. The City Recorder shall be the custodian of all permanent records of the City.

4.3 All Other Elected Officials, Appointees and Employees. All other elected officials, appointees and employees shall be responsible for maintaining all records in accordance with this Policy and shall seek the assistance and direction of the City Recorder if needed.

SECTION 5. Education and Training. Basic public records training will be completed as a component of the City new employee orientation training; and incorporated as part of regular employee training, completed once a biennium.

SECTION 6. Access and Ownership. Without regard to how public records are being stored, the City will have custody and control over public records. Through on-going review of technological advances, the City shall ensure all public records are maintained and accessible for as long as required by applicable retention schedules, or litigation holds that may require that the City retain records longer than otherwise required.

Disaster mitigation processes are addressed in the city's disaster preparedness and recovery plan and incorporated by reference here.

SECTION 7. Integrity. The City will ensure appropriate access and version controls are applied to all electronically stored records from record creation to final disposition. The authenticity of each record can be demonstrated either by certified copy of paper records or via accompanying metadata for all electronic records.

SECTION 8. Retention Generally. The City will preserve and classify public records in accordance with ORS chapter 192 and OAR chapter 166-200.

8.1 Cloud-Computing. If cloud-computing is utilized, the City practices and procedures with respect to public records management in the Cloud will ensure compliance with OAR chapter 166.

8.2 Email

8.2.1 Official Email Accounts. In most circumstances, email sent to or from City-provided elected official, appointee and employee email accounts will meet the definition of a public record. It is therefore the City's policy that virtually all email messages composed or sent using City-provided official equipment and/or official e-mail addresses be for primarily business purposes.

When the City receives a public records request, all official email accounts and systems used for official City business are subject to search and production.

8.2.2 Personal Email Accounts. If private email accounts must be used to conduct City business, it is City policy that elected officials, appointees and employees copy their City-provided email account (if separate) on all such outgoing communications, and forward any received messages on which their official e-mail accounts are not copied immediately or as soon as practicably possible.

8.3 Instant Messaging

The City policy regarding Instant Messages shall be the same as that recited below regarding Text Messaging.

8.4 Social Media

Any content placed on any Social Media platform by the City shall be an accurate copy of an official record that is retained elsewhere by the City per the authorized records retention schedules.

8.5 Text Messaging. City elected officials, appointees and employees may use text messaging to communicate factual and logistical information that: is not part of or relating to conducting official city business, unless that information has been documented elsewhere; or will be documented and retained as a separate public record according to OAR chapter 166-200.

In absence of separate documentation, city elected officials, appointees and employees are not to use text messages for official purposes other than for routine communications that do not meet the definition of a "public record."

City employees' personal electronic devices should not be used to transmit text messages related to city business. Personal devices are subject to search if used to transmit text messages regarding official city business and/or information related to the employee's work that rises to the level of creating a public record.

8.5.1 Examples of Acceptable Uses:

- Scheduling
- Requesting a call or email on a matter, without substantive discussion;
- Requesting or offering logistical assistance ("Can you help me get these boxes to the courthouse?");
- Forwarding any person's contact information;
- Explaining your current whereabouts, or inquiring about someone else's (We're at the meeting discussing this morning's announcement. Are you around?");
- Describing facts or events that do not relate to the substance of the City's work ("Spilled coffee all over myself right before the meeting!"), or that have been or necessarily will be separately recorded ("Mr. Jones just testified to the committee that the bill would cost taxpayers $2 million."); and/or
- Inquiring about events like those in the previous bullet ("Has Mr. Jones testified in committee yet?").

8.5.2 Unacceptable Use. City employees must avoid communicating official city business or engaging in discussions regarding the primary business of employee's work over text message.
As noted above, relevant facts pertaining to official city business may be reported only if they are already documented in separate public records or they necessarily will be documented in a separate public record.

If a text message is used to communicate information (not otherwise documented) relating to official city business or primary business of the employee's work, such discussion is to be immediately converted and saved in a separate public record format (e.g. by forwarding the relevant text messages to an employee's official email).

Because the City requires that no text message-based public records be created – or if they are created, that they be converted and saved in an alternate form, which would serve as the official copy of the record – the City will not retain text messages.

8.6 Voicemail

Unless otherwise required, the City will not retain messages on voicemail. In the event email transcriptions of voicemails are made, the transcriptions will be retained in accordance with authorized retention schedules and may be subject to public disclosure upon request.

SECTION 9. Storage and Retrieval

9.1 **Paper Records.** The City will maintain a filing system of the city's paper records based on authorized retention schedules. The filing system will include the location of records retention periods and procedures for retrieval to ensure accessibility of agency records.

9.2 **Electronic Records.** The City will maintain a filing system and naming conventions for all city records stored in electronic format based on the city's authorized retention schedules. The filing system and naming conventions will include the location of records in city directories, retention periods, access controls and privacy conditions to support management of the city's inventory of electronic records.

SECTION 10. Destruction of Records. City records covered by this Policy shall be destroyed according to the retention schedule established by the State Archivist. In general, records shall not be retained beyond the prescribed retention period.

SECTION 11. Public Records Requests. The City will respond to all official requests for public records under the following timeframes:

11.1 **Within 5 business days after receipt of request.** The City will acknowledge the request in writing and confirm that the City is the custodian of the requested record or notify the requester that the City is not the custodian.

11.2 **Within 10 business days after the date in which the city was required to acknowledge receipt.** The City will either complete its response to the request or provide a written statement that the City is still processing the request and provide an estimated date by which the City expects to complete its response.

11.3 If the City cannot comply with the above timeframes, the City must complete the public records request as timely as possible, consistent with the proper exercise of judgment relating to the City's other duties, staffing ability, volume of other public records requests being simultaneously processed, and in accordance with Oregon law.

11.4 Additional policies and procedures related to requests for public records are subject to separate city policies and statewide protocols, processes and procedures.

SECTION 12: This Resolution is effective immediately upon passage.

PASSED: This [ ] day of [Month, Year]

APPENDIX B

MODEL RESOLUTION ADOPTING PUBLIC RECORDS REQUEST POLICY

CITY OF [Insert name of city], **OREGON**
[Insert name of city], **CITY COUNCIL**

RESOLUTION NUMBER: [Insert appropriate number]

A resolution of the [Insert name of city] City Council adopting a citywide public records request policy.

WHEREAS, Oregon Public Records Law (ORS 192.311 to 192.478) requires that a public records policy be in place; and

WHEREAS, the [Insert name of city] City Council wishes to adopt a city-wide public records request policy; and

WHEREAS, Oregon Public Records Law allows the city to establish fees reasonably calculated to reimburse the city for its actual cost of making public records available;

NOW, THEREFORE, BE IT RESOLVED by the [Insert name of city] City Council approval of the following Public Records Request Policy:

SECTION 1: General Information. Oregon Public Records Law (ORS 192.311-192.478) gives members of the public the right to inspect and copy public records that are not otherwise exempt from public disclosure. It is the policy of the City of [Insert name of city] to respond to public records requests in an orderly, consistent and reasonable manner in accordance with the Oregon Public Records Law. The purpose of this Policy is to:

- Establish an orderly and consistent procedure for responding to public records requests;
- Establish the basis for a fee schedule designed to reimburse the City for the actual costs incurred in responding to public records requests; and
- Inform individual staff and officials of the procedures and guidelines that apply to public records requests.

This City of [Insert name of city] Public Records Request Policy addresses the following components:

- Roles and Responsibilities; and
- Public Records Requests

The City shall develop and implement internal processes and procedures that support compliance, deter abuse and detect violations of this Policy.

SECTION 2: Definitions.

2.1 "**City**" refers to the City of [Insert name of city] and all employees, appointees and elected officials associated therewith.

2.2 **"Custodian"** refers to the City Recorder or his or her designee mandated, directly or indirectly, to create, maintain, care for or control a public record.

2.3 "**Public Record**" has the meaning established in ORS 192.311(4). In general, it refers to any writing containing information relating to the conduct of the public's business, including but not limited to court records, mortgages, and deed records, prepared, owned, used or retained by a public body regardless of physical form or characteristics. A record may be handwritten, typed, photocopied, printed, microfilmed, or exist in an electronic form such as email or a word processing document, or other types of electronic recordings.

SECTION 3: Procedures.

3.1.1 Public Records Request.

All public records requests must identify the public records requested and be submitted in writing and directed to:

City of [Insert name of city]
Attention: Public Record Custodian
Public Records Request
123 Main Street
City, OR 97000

Note: Requests to create a new record are not public records requests. The City is not obligated under the Oregon Public Records Law to create new public records where none exist in order to respond to requests for information.

3.2 **Initial Response to Public Records Request**. After receiving a request for a public record, the City will reply to the requester within five business days with one or more of the following responses:

- A statement that the City does or does not have custody of the requested public record(s);
- Copies of all requested public records for which the City does not claim an exemption from disclosure under ORS 192.311 to 192.478;
- A statement that the City is the custodian of some responsive records, an estimate of time in which copies will be provided or inspection will be available, and an estimate of the fees the

requester must pay prior to receiving the records;

- A statement that the City is uncertain whether it possesses any requested records and that it will search for the requested records and respond as soon as practicable; or

- A statement that state or federal law prohibits the City from acknowledging whether the record exists and a citation to the relevant state or federal law.

3.3 **Clarification of Request**. If the City receives an unusual request, or the scope of the request is unclear, the City may request additional clarification before responding to the request. Once the City makes a request for additional information or clarification, its obligation to complete its response to the request is suspended until the requester provides the information or clarification or affirmatively declines to provide additional information or clarification. If the requester does not respond to the City's request for clarification or additional information within 60 days, the City will close the request.

3.4 **Completed Response Deadline.** Within 10 business days after the date by which the City is required to acknowledge receipt of a public records request, the city will either complete its response to the request, or provide a written statement that the City is still processing the request and provide an estimated date by which the City expects to complete its response. The timeframes established to acknowledge and respond to a request do not apply if compliance would be impracticable due to staffing unavailability, the City's ability to perform other necessary services, or the volume of other public records requests being simultaneously processed. If the City cannot comply with the five-business day acknowledgement or 10-business day response deadlines, the City must complete the public records request as soon as practicable and without unreasonable delay.

SECTION 4: Fees. The Oregon Public Records Law allows the City to recover its actual costs in fulfilling a public records request. If the estimated fee is greater than $25, the City will provide the requester with written notice of the estimated amount of the fee and request written confirmation. In such instances, the City will not fulfill the public records request until the requester makes a deposit in an amount of the estimated fee. If a requester fails to provide written confirmation of the estimated fees within 60 days of the City's estimate, the city will close the request.

4.1 Fee Schedule. The fees listed below are reasonably calculated to reimburse the City for its actual costs in making the records available, and may include:

- Charges for the time spent by City staff to locate the requested public records, to review the records in order to determine whether any requested records are exempt from disclosure, to segregate exempt records, to supervise the requester's inspection of original records, to copy records, to certify records as true copies and to send records by special or overnight methods such as express mail or overnight delivery;
- Charges for the time spent by the city attorney reviewing, redacting and segregating records at the City's request;
- A per-page charge for photocopies of requested records; and
- A per-item charge for providing CDs, DVDs, audiotapes, or other electronic copies of requested records.

The City's public records fee schedule is as follows:

Copies	8.5x11 Black and white	0.25 cents/page
	8.5x11 Color	0.50 cents/page
	11x17 Black and white	0.50 cents/page
	11x17 Color	$1.00/page
	Nonstandard documents	Actual costs incurred by the City to reproduce them
	CD or DVD	$5.00 each
	Audio tape	$7.50 for the first tape and $5.00 for each additional tape
Research Fees	Up to 30 minutes	Copy cost only
	30 minutes to 2 hours	Copy cost plus $25/hour
	Over 2 hours	Employee cost plus overhead
Delivery	The actual cost for delivery of records such as postage and courier fees	
True Copy Certification	$5.00	
Attorney Review	Actual attorney fees charged to the City for the cost of the time spent by an attorney in reviewing the public records, redacting material from the public records or segregating the public records into exempt and nonexempt records.	

4.2 Application of Fees. All time for public records requests will be recorded in 10-minute increments. If the requester was required to make a deposit, fees will be debited against that deposit. If the fees are less than the deposit, the City will provide the records along with a refund of the deposit, less the fee. If the deposit is insufficient to cover the entire costs of completing the public records request, or the requester was not required to pay a deposit, the City will generate an invoice for the unpaid costs of completing the public records request. The requester must pay the amount owing before the City will deliver the requested records or make them available for viewing.

SECTION 5: Fee Waivers. Requests for fee waiver or reduced fees may be made in writing to the City's contact address listed above. The City may decide whether to furnish copies without charge or at a substantially reduced fee if providing the records for free or at a reduced cost is of the public's interest.

SECTION 6: This Resolution is effective immediately upon passage.

PASSED: This [ ] day of [Month, Year]

APPENDIX C

SAMPLE Public Records Request Form

Requester information

Name: _____

Organization: _____

Address: _____

Email: _____

Telephone: _____

**** PLEASE READ ****

Have you already contacted someone within the city about this request? □ Yes □ No

Name:_____

Dept:_____

Details of request

Date of request: _____

Detailed description of documents requests:

(*Please be as specific as possible. Clearly provide the type of record(s) requested, subject matter, approximate date(s), and names of businesses and/or people involved. Attach additional sheet if necessary.)*

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

How would you like the requested records to be delivered?

□ By Mail □ Electronically (if available) □ Onsite inspection

Send completed form by email, mail, or fax:

Email: publicrecords@yourcity.gov

Address: Your City Office, 123 Main St, Your City, OR 12345

Fax: (555) 555-5555

Fees

Per ORS 192.324(4), the City may establish fees reasonably calculated to reimburse the city for its actual cost of making public records available, including costs for summarizing, compiling or tailoring the public records to meet the person's request. The City may require prepayment of estimated fees before taking further action on a request.

Copies:

8.5x11 Black and white……..	0.25 cents/page
8.5x11 Color…….....	0.50 cents/page
11x17 Black and white……	0.50 cents/page
11x17 Color……..	$1.00/page
Nonstandard documents……	Actual costs incurred by the City to reproduce them
CD or DVD……	$5.00 each
Audio tape…….	$7.50 for the first tape and $5.00 for each additional tape

Research Fees: If the request for records requires City personnel to spend more than 30 minutes searching or reviewing records prior to their review or copying, the fee will be as follows:

Up to 30 minutes……...	Copy cost only
30 minutes to 2 hours……..	Copy cost plus $25/hour
Over 2 hours……..	Employee cost plus overhead.

Delivery: The actual cost for delivery of records such as postage and courier fees.

True copy certification: $5.00

Attorney review: Actual attorney fees charged to the City for the cost of the time spent by an attorney in reviewing the public records, redacting material from the public records or segregating the public records into exempt and nonexempt records.

APPENDIX D

SAMPLE five-day response acknowledging public records request

To: [Requester]

This letter is to acknowledge our receipt of your public records request dated [date] and received by our office on [date]. You have requested the following records: [describe records requested]

Having reviewed your request, we are able to inform you that:

_ Copies of all requested public records for which the City does not claim an exemption from disclosure under ORS 192.311 to 192.478 are enclosed.

_ The City [does not possess/is not the custodian of] the requested record(s).

_ The City is uncertain whether we possess the requested record(s). We will search for the record and make an appropriate response as soon as practicable.

_ The City is the custodian of at least some of the requested public records. We estimate that it will require [estimated time] before the public records may be inspected or copies of the records will be provided.

_ We estimate that the fee for making the records available is $_____, which you must pay as a condition of receiving the records. Please confirm in writing that you wish for us to proceed.

_ The City is the custodian of at least some of the requested public records. We will provide an estimate of the time and fees for disclosure of the public records within a reasonable time.

_ [State/federal] law prohibits the City from acknowledging whether the requested record(s) exist(s). [Cite relevant state or federal law.]

_ The City is unable to acknowledge whether the requested record(s) exist(s) because that acknowledgment would result in the [loss of federal benefits/other sanction]. [Cite relevant state or federal law.]

APPENDIX E

SAMPLE Public Records Request Response Checklist

Within five business days of receipt:

- ☐ Confirm whether the requester previously contacted an employee or other city official.
- ☐ Confirm whether the City is the custodian of some or all of the requested records.
  - If not, who is the custodian?
- ☐ If the request is ambiguous, overly broad or misdirected, contact the requester for clarification.
  - If the requester does not respond to a request for clarification within 60 days, close the request.
- ☐ Estimate fees.
  - Provide fee estimate with the acknowledgement letter.
  - If estimated fees are greater than $25, request requester confirm in writing that they wish to proceed.
  - If requester does not respond to the fee estimate within 60 days, close the request.
- ☐ Send acknowledgment letter.
  - Confirm that the City has received the request and that the City:
    - is the custodian of the records,
    - is not the custodian of the records, or
    - is not sure if the City is the custodian of the records.
  - Provide fee estimate,
  - Provide estimate of when records will be delivered, if available.

Within 10 business days* of the date by which the City is required to acknowledge receipt of the request:

- ☐ Review records and identify possible exempt materials.
- ☐ Separate and redact exempt materials.
  - Provide to City Attorney for review, if necessary.
  - Create privilege log if redactions are voluminous.
- ☐ Finalize nonexempt records and provide to requester.
- ☐ Calculate actual cost of completed response.
  - Send invoice for additional fees, or
  - Refund any outstanding prepaid fees.

*If it is impracticable to complete a response within 10 business days due to the nature of the request, staffing schedules or other concerns, provide requester with an estimate of when a response can be expected.

APPENDIX F

SAMPLE – Public Records Log Sheet

Date Received	**Name of Requestor**	**Description**	**Person in Charge of Request**	**Acknowledgment Due (**5 business days from receipt**)**	**Response Due (**10 business days from date acknowledgement due**)**	**Date of Completed Response**	**Form of Response**	**Pages Provided**	**Fee**
11/2/2020	John Smith	All contracts regarding street maintenance from July 6, 2017 to Present	Sally Jones	11/9/2020	11/16/2020	11/22/2020	PDF via email	30	$25.00

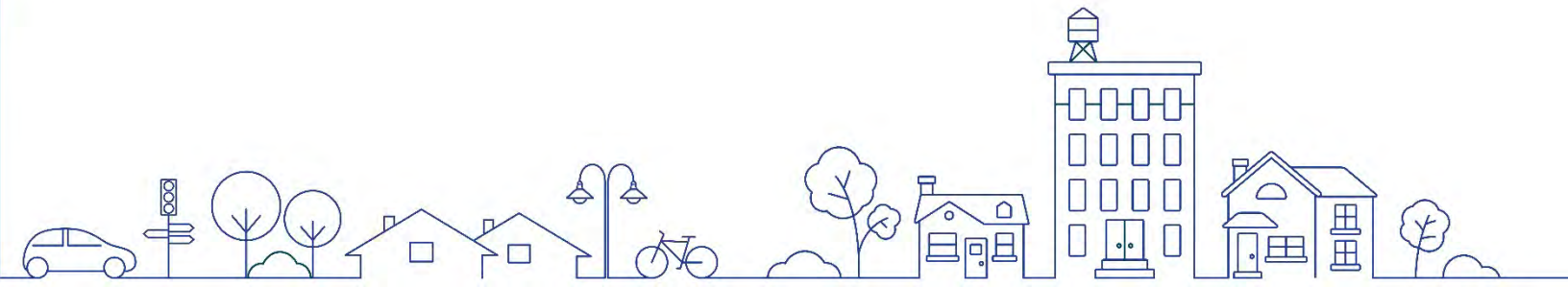
APPENDIX G

Secretary of State Social Media Guide

APPENDIX H

Secretary of State's Public Record Flowchart

CHAPTER 15:
RISK MANAGEMENT AND INSURANCE



League of Oregon Cities

Published by the League of Oregon Cities
December 2024

Chapter 15: Risk Management and Insurance

This chapter was written and prepared by Scott Moss MPA, CPCU, ARM-E, ALCM. Scott served for 13 years as the Property/Casualty Trust Director for CIS in Oregon, overseeing CIS property, liability, and workers' comp programs. Prior to CIS, Scott worked for 20 years in local government. Currently, Scott is working part-time for CIS overseeing Oregon Public Entity Excess Pool (OPEEP) and the cyber insurance program. Scott holds a master's degree in public administration and has taught risk management classes at the collegiate level for 29 years. Scott was the founder and is the current administrator for the OPEEP. Scott served on the National PRIMA Board and on the United States TAG for ISO 31000.

The LOC sincerely thanks Scott for his work on this chapter.

Table of Contents

Chapter 15: Risk Management and Insurance

Cities have unique risk management and insurance needs that differ from other entities. Understanding the various types of risks, best practices and insurance options is essential to responsible city governance.

I. Risk Management

A. What is Risk?

Risk: The impact of uncertainty on achieving objectives. An impact is a deviation from the expected outcome—positive or negative.

Many think of "risk" as anything that **threatens** to meeting objectives. But risk can also be **opportunities** that help achieve objectives.

Risk Assessment: The process of risk identification, risk analysis, and risk evaluation.

Risk Appetite: Level of risk a city is willing to accept based on the expected reward.

Risk Tolerance: Measure of the level of risk a city is willing to accept. Risk can be assumed, avoided, reduced, or transferred.

- **Assume the risk**. Perhaps this is a risk we elect to live with—or that is unavoidable. For example, if a city decides to have a skateboard park, there will be some level of associated risk.

- **Avoid the risk**. In the example of the skateboard park, the city could elect to avoid the risk altogether by simply not having the facility.

- **Reduce the risk**. This often involves "loss control" and safety measures. The risk of a skateboard park can be reduced substantially by means such as ensuring proper design and construction, rules of use, and not charging a fee for use (in order to preserve "recreational use" immunity).

- **Transfer the risk**. Risk can be either partially or wholly transferred to others. This can be done, for example, through an indemnity agreement, where one party ("indemnitor") agrees to defend and pay on behalf of ("indemnify") the other party ("indemnitee") in the event a claim is asserted by a third party against the indemnitee. But the most common method of risk transfer is through insurance or pooling.

B. Risk Management Best Practices

City management would be wise to implement some risk management best practices.

1. Appoint a Risk Management Coordinator who is trained on risk management techniques and own risk management duties.
2. Have a current Employee Handbook which has been approved by a labor attorney. Provide regular training on hiring practices, harassment training, and employment laws.
3. Implement a city-wide Safety Manual and assign safety responsibilities.
4. Implement a Fleet Program in which driver's license records are checked and employees trained in defensive driving.
5. Review all ordinances, resolutions, and policies on a regular basis.
6. Have an Emergency Plan and practice the plan annually.
7. Have a legal and insurance review of all contracts.
8. Use a local insurance agent to provide insurance, risk management, and loss control advice.
9. Maintain an up-to-date schedule of all properties and vehicles.
10. Implement internal financial controls.
11. Carefully consider all possible unexpected outcomes in new activities.
12. Don't go it alone. The LOC, CIS, your local agent, and others are happy to provide advice on how to reduce the uncertainty in managing a city.

C. Risk Management Duties

Cities should clearly assign risk management duties, so ownership of risk is clear. The following list of risk management duties will be helpful in assigning ownership. Citycounty Insurance Services (CIS) can help!

RISK MANAGEMENT DUTIES - CITY

Risk Management Administration

Responsibility	***Employee***
Risk Management Policy & Procedures	_____
CIS Best Practices Survey	_____
RM Budget	_____
Cost Allocation	_____
Special Events	_____
Maintain Insurance Schedules (Property & Auto)	_____

Deductible and Limits Decisions _____

Contract Administration

Insurance & Indemnity in Contracts _____
Certificate of Insurance Management _____

Risk Management Policies

Vehicle Use Policy _____
Policy Review and Maintenance or Practical Drift _____
Risk Related Policies: (review & approve)

- Sidewalk
- Snow removal
- Weed Control
- Club Activities
- Cross walks
- Youth & Senior Centers
- Youth & Senior Activities
- Foreign Travel
- Food Services
- Health Clinics
- Waivers
- School to work programs
- Red Flag & Oregon Consumer Protection Act
- Record Management & IT Security
- Financial Controls
- Pursuit

Volunteer Policy & Management _____
Risk Identification in Construction Projects _____
Workplace Violence Policy/Team _____
Environmental Compliance _____
Facility Use Agreements _____

Incident & Claims Tracking & Reporting

Incident Tracking & Reporting _____
Auto Claims Management: _____
General Liability claims _____
Claims Review _____

Workers' Compensation

Training & Employee Consultation _____
801 completion and reporting _____
Communications with adjustor _____
Return to Work _____

EAIP Funds _____
Leave Management _____
OSHA 300 Log _____

Safety

Safety Coordinator _____
Safety Policy _____
Safety Committee Management _____
Employee Orientation on Policy _____
Air & Noise Monitoring _____
Hearing Conservation _____
First Aid & CPR Training _____
Posting of Labor Notices _____
Fire Extinguishers _____
Hazardous Communication Program _____
Lockout/Tagout Program _____
Respirator Protection _____
Personal Protective Equipment _____
Inspections _____
General Office Safety _____
Equipment Use _____
Confined Spaces _____
Fall Protection _____
Emergency Response _____
Bloodborne Pathogens _____
Forklift _____
Fire Drills _____
Fire extinguisher inspections _____
Playground Inspections _____
Asbestos Policy & Management _____
Ergonomics _____
Driving Training _____
Bleacher & Grandstand Inspections _____
Back Safety _____
Ladder Safety _____
Welding _____
Utility Locates _____

Emergency Management

Emergency Management Policy _____
Emergency Management Exercises _____
Business Continuity Planning _____
Pandemic Management _____

Security Management

Key cards management _____

Security training _____

Security contractors _____

II. INSURANCE

For most individuals and businesses, insurance has been the accepted method for transferring risk to another party (the insurance company) in exchange for payment of insurance premiums. In the 1970's, due to the legal environment at the time, combined with other "market forces" affecting insurance companies it became increasingly expensive for public bodies to find insurance coverage, especially liability insurance—if indeed they could find it at all. In response, public bodies all over the country began to explore alternatives, including the idea of "pooling" their resources to either collectively "self-insure" their risk exposures or attempt to purchase insurance as a group, thereby exercising more purchasing clout. Self-insurance pools began to emerge.

Though born of necessity, the idea of "pooling" public entity risk has proven to be both popular and successful. In 1981, the LOC and Association of Oregon Counties (AOC) agreed to form a trust, known as City County Insurance Services (CIS), that would not only act as a pool to collectively "self-insure" or purchase insurance at group rates, but would also provide risk management services to its members.

CIS is governed by a Board of Trustees consisting of elected or appointed city and county officials. All cities and counties in Oregon, and many affiliated public entities, are eligible to become members of CIS provided they are also members of LOC or AOC. CIS currently provides either pooled self-insurance coverage or group purchase insurance for liability, property, vehicle and equipment physical damage, workers' compensation, boiler and machinery, crime, and employee benefits. When coverage is provided under a pooling arrangement, the document describing the coverage, and any exclusions, conditions, etc. is referred to as a "coverage agreement" rather than an insurance policy. For more information about CIS, see www.cisoregon.org.

I. Loss Control

As noted above, one of the important risk management tools is "loss control." Loss control training, various risk management publications, and visits by loss control representatives all help avoid or minimize potential losses by highlighting areas of concern. In some cities, employees with risk management responsibilities may also be available to help. If your city is a member of CIS you have a designated Risk Management Consultant to assist with risk management. CIS also

provides its members with “pre-loss” legal assistance (especially useful in employment matters) and other resources, including risk management grants.

Oregon state law requires all public entities to have a safety committee. Safety committees must be trained in responsibilities including performing quarterly inspections on all facilities.

Losses can be controlled by following a number of practices. For example, improving personnel practices reduces claims for wrongful termination, sexual harassment, discrimination, and other employment-related matters. A thorough review of city contracts, including intergovernmental agreements and mutual aid agreements, will help avoid common contract liability exposures when working with other individuals or organizations. In addition, there are many preventative measures cities can take, classified under the broad title of ergonomics, to reduce or avoid repetitive-work injuries. Driver training, preventive maintenance, and internal controls to reduce the likelihood of embezzlement are just a few other examples of areas that can be addressed.

In addition to the direct costs of losses (whether the actual cost of the loss, or the cost of insurance premiums or self-insurance pool contributions), there are other reasons to control losses. Frequent accidents and injuries reduce employee morale. Poor personnel policies affect employee performance. And frequent claims against a city may reflect poorly on its management and even impact council members at election time.

Elected officials and management should provide staff with clear safety expectations and hold staff accountable when safety rules are not adhered too.

II. Workers’ Compensation

Generally, cities must pay workers’ compensation benefits to their employees for all injuries or diseases arising out of, and in the course of, their city employment. The law is designed to ensure the quick and efficient delivery of benefits to injured workers. This coverage is typically obtained through the purchase of insurance or participation in a self-insurance program, such as CIS. Some larger cities elect to “self-insure” this exposure.

Self-insurance should only be undertaken with the advice and recommendation of an actuary, and with proper preparations in place, including provisions for claims administration, return to work assistance, and properly funded claims reserves. Because of the potential magnitude of a claim, the LOC strongly recommends that almost all cities purchase insurance. One of the advantages to maintaining workers compensation is that it is the “exclusive remedy” available to injured workers, meaning they cannot sue the city for damages even if the injury was the result of the city’s negligence.

A. Volunteers

Municipal volunteer personnel, and elected officials or officials appointed for a regular term of office, such as members of boards and commissions, are not considered to be employees of a city and, thus, are not covered by the Workers' Compensation Act unless a city passes a resolution extending coverage to these individuals. When such coverage is extended by resolution, the city is required to maintain separate official membership rosters for each category of volunteers.[1]

B. Inmate Workers

Cities and counties may also elect to have inmates performing authorized employment (including workers performing court-ordered community service work) covered for workers' compensation. Again, the city would be required to maintain a roster of such inmates or community service workers.[2]

C. Contractors

It is important that any contractor doing business with the city provide evidence of compliance with the statutes that require employers to have workers' compensation insurance. This could be achieved by showing the contractor has insurance, showing that he or she does not have employees and thus is not an employer, or by showing that he or she is self-insured. Although the workers' compensation laws do not create any liability on the city's part for providing workers' compensation benefits for the employees of contractors who do not have coverage, there are ways the city might be required to pay workers' compensation benefits to these uncovered employees.

A court could determine the contractor was really a subcontractor and the city was a general contractor, and therefore, is liable for providing workers' compensation benefits to the subcontractor's employees. Or an independent contractor, who is a sole proprietor with no employees, might be found to meet the criteria of an "employee," and be entitled to benefits. When dealing with independent contractors who are sole proprietors, the city must be extremely careful to make sure the person meets the criteria of an independent contractor or purchases workers' compensation coverage. An employee cannot waive the right to be covered by the Workers' Compensation Act.

III. Property Coverage

The risk of loss to city property includes loss of or damage to buildings, contents, mobile equipment, and motor vehicle due to perils such as fire, wind, theft, vandalism, earthquake and

[1] ORS 656.031.
[2] ORS 656.041.

flood. The “catastrophic” perils of earthquake and flood are typically treated separately by underwriters and may be covered on separate polices or coverage agreements and may be subject to separate coverage limits and/or deductibles.

Property coverage should provide broad in scope and should be easy for the city to administer and should minimize the potential for errors that result in inadvertent gaps in coverage. To best protect the city, coverage should, to the extent possible, be on a “replacement-cost” basis, meaning there is no deduction for depreciation in the event of a loss.

Cities should also consider “boiler and machinery” or “machinery breakdown” coverage. As the name suggests, this type of coverage can protect the city from losses caused by machinery breakdowns. Standard property-insurance policies typically would not cover that type of loss.

IV. Liability Coverage

As discussed in detail in the preceding chapter, cities face numerous exposures to liability in their everyday activities. Liability coverage is coverage for claims someone else makes against the city, an officer or employee, or another covered party. Such coverage, whether through purchase of commercial insurance policy or participation in a self-insurance pool such as CIS, should be tailored to address the unique liability exposures faced by cities. The cost of defending a lawsuit for damages is normally included in liability coverage.

A lawsuit that demands a city do something (like issue a building permit) rather than pay damages is typically not covered by liability insurance.

A. Who Should be Covered?

Covered parties in a liability policy should include the city and its officers, employees, agents, and volunteers.

B. Types of Coverage to Include.

The following are some types of liability that may be excluded under many conventional insurance policies, but which represent important liability exposures for cities. Cities should make sure their liability coverage includes these risks:

- Libel, slander, defamation, and invasion of privacy arising out of comments made at a public meeting or in the performance of an employee’s duties, especially arising out of the operation of a public-access or city cable TV channel, or a cable broadcast of council meetings.
- Claims that a police officer used unreasonable force.
- Liability for employment actions such as hiring, firing, disciplining, or promoting, including back wages awarded as damages for wrongful termination.

- Liability for claims of sexual or racial harassment.
- Claims for punitive damages to the extent permitted by law.
- Violations of civil rights, including payment of attorney's fees.
- Claims arising from the failure to supply utilities.
- Liability coverage for fireworks displays, if the city owns, sponsors or operates fireworks displays, or if city employees, such as firefighters, volunteer to set off fireworks.

Excluding certain types of claims from coverage should be a conscious decision and should not be made by purchasing the least expensive policy. Every claim made against a city that is not covered by insurance is a potential loss to the taxpayers. Retaining these risks may save money on premiums, but a better and more predictable way to reduce costs by retaining risk is to use deductibles by which the city retains the financial responsibility for all claims or certain claims up to a certain dollar amount each year. The city can always budget for this type of loss.

C. Intergovernmental Entities

Intergovernmental agreements (IGA) are authorized by ORS Chapter 190, which provides in part: "A unit of local government may enter into a written agreement with any other unit or units of local government for the performance of any or all functions and activities that a party to the agreement, its officers or agencies, have authority to perform."[3] The statute goes on to provide that the actual performance of such intergovernmental functions or activities may be carried out in one or more of several listed ways, such as by jointly providing for administrative officers.

One of the listed options is to create a new and separate "intergovernmental entity."[4] When such an entity is created the liability exposures associated with that entity must be considered. If the agreement does address the issue of liability, then each participating entity is "jointly and severally" responsible for any debts, liabilities, and obligations of the intergovernmental entity (meaning any one or more of the entities may be held responsible, either individually or collectively). As an alternative, one of the participating entities may assume that responsibility, thereby eliminating the "joint and several" liability.[5] The recommended "best practice" from a risk management perspective is to either have one of the parties expressly assume that responsibility (and be sure it is covered under their insurance or coverage agreement), or obtain separate coverage for that intergovernmental entity.

[3] ORS 190.010.
[4] ORS 190.010(5).
[5] ORS 190.080(4).

D. Amounts of Coverage

Claims against Oregon public entities and their employees are subject to statutory "caps" on damages under the Oregon Tort Claims Act. However, as noted these caps may be found unconstitutional in certain cases. In addition, these caps do not apply at all with respect to "Section 1983" civil rights claims and certain other federal claims, such as Title VII discrimination and Americans with Disabilities Act) (ADA) claims. Accordingly, the statutory tort caps do not mean those amounts would reflect adequate coverage limits for liability coverage. It is recommended that cities and counties carry at least $5,000,000 per claim, with a $15,000,000 annual aggregate. The CIS liability coverage program automatically provides those limits to all participating members, with higher limits also available.

V. Automobile Insurance

The liability of the city and its employees for the operation of motor vehicles in the course and scope of city business is, of course, an important liability exposure that must be covered. Conventional insurance policies typically cover this "auto liability" under a policy separate from the general liability policy. The CIS coverage agreement does not distinguish the two and covers auto liability, along with the city's other covered liability exposures, under a single Liability Coverage Agreement. This also includes Uninsured/Underinsured Motorist coverage as required by law.

VI. Contractual Liability

This is NOT a coverage for damages awarded against the city for breach of contract. Instead, it covers certain "indemnity" obligations that are assumed by contract. A typical example is where the city might enter into a contract to lease a building from a private party ("Lessor"). Lessor would likely want a provision ("indemnity clause") in the lease agreement providing that if Lessor gets sued by some third party as a result of City's negligence in connection with the building occupancy, then city will "defend and indemnify" Lessor.

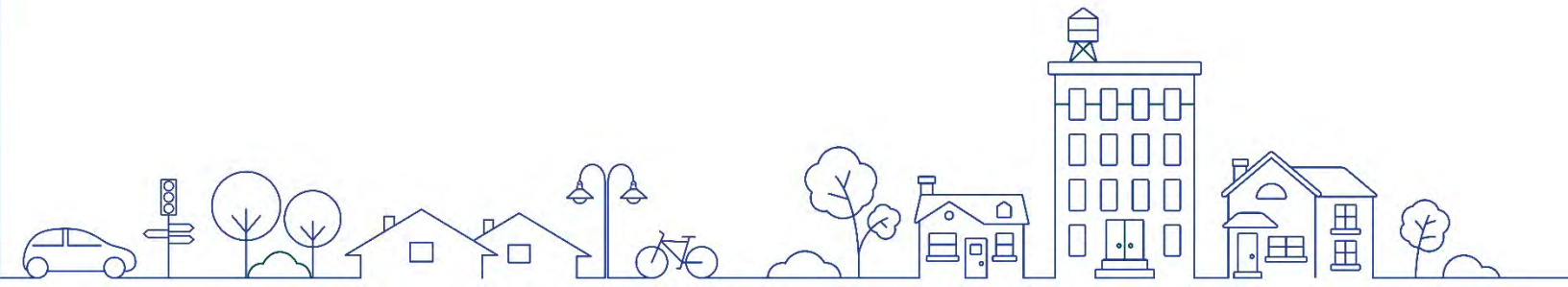
For example, say the leased building is used as a public works shop. A citizen comes into the shop and is injured when he trips over a hazard on the floor. He sues the City and Lessor/building owner. The tripping hazard was actually related to some alterations the city had done to the building. The liability claim arose out of City's negligence, but Lessor, as building owner, ends up getting sued. Under the indemnity clause, Lessor can simply "tender" the claim and legal defense to City, and City is obligated under the contract clause to provide the indemnity and legal defense. Insurers typically cover this indemnity obligation. It is referred to as "contractual liability." CIS covers this exposure by the way it defines "Additional Member" as including this contractual indemnity exposure.

CAVEAT: This coverage is intended to cover agreements to indemnify the other party against claims arising out of the negligence of the city or its employees. It does not apply to claims arising out of the sole negligence of the other party.

VII. Fidelity and Faithful Performance Bonds

Public employee bond coverage is required for certain city positions, but it is a good idea to cover all employees of the city in order to minimize the risk of loss. The Crime Coverage included in the CIS Property Coverage Agreement includes both employee dishonesty (theft, embezzlement, etc.) as to all employees ($50,000 limit unless excess crime coverage is included) and "faithful performance" as to "any of your officials who are required by law to give bonds for the faithful performance of their duties."

CHAPTER 16:
TORTS



League of Oregon Cities

Published by the League of Oregon Cities
October 2024

Chapter 16: Torts

This chapter was written and prepared by Kirk Mylander General Counsel for Citycounty Insurance Services (CIS). As a member of executive team, Kirk is responsible for advising the CIS Executive Director, Board of Directors, and department heads on all legal issues to build and enhance CIS's products, services, and customer relations. Kirk developed trust with other company leaders to enable the legal department to effectively serve the organizational mission in the following areas: corporate governance and compliance; supervise internal and external counsel and manage litigation; negotiate and draft contracts including SaaS and HIPPA BAAs; government relations, including testifying before legislative committees and recruiting industry support for amicus briefing; labor and employment; compliance, insurance and enterprise risk management; and, frequently presents seminars to elected officials, supervisors and other insurance executives at national conferences on the topics of employment law, litigation management, governmental relations, insurance, and contract negotiation.

The LOC sincerely thanks Kirk for his work on this chapter.

Table of Contents

Chapter 16: Torts

Newly elected councilors brim with energy and good intentions. Sometimes, however, a new council person's enthusiasm can lead them to make avoidable mistakes and wind up being individually named in a lawsuit. This chapter aims at highlighting the top mistakes made by elected officials. We hope you are entertained by the foibles of those who went before you, and, that you will learn how to avoid becoming a future example in this guide yourself.

I. Common Mistakes Made by Elected Officials

A. Assuming you are the leader.

You ARE a leader, and you deserve to be commended for that. But many City Councilors mistakenly assume that they are THE LEADER and forget that their power only comes from acting together with their fellow councilors.

Remember, you are part of a leadership *group*. Stay away from individually managing city staff and resist the urge to make quick changes by taking management duties upon yourself.

Success Hint: You are a Councilor now, you get to leave the day-to-day stuff to others!

B. Anyone who votes against you commits an ethics violation.

Of course, you are right on this issue that you care so much about! But keep in mind that even though you were chosen by the voters, reasonable people may still disagree.

Remember, the best way to implement the agenda you campaigned on is to convince other councilors of the benefits of voting in concert with you. Scaring your co-councilors into following your lead by reporting them to the Oregon Government Ethics Commission (OGEC) is not a strategy for long term success.

Success Hint: Oftentimes, honey really <u>is</u> better than vinegar.

C. Protecting the public from unpleasantness with executive sessions.

Of course <u>you</u> can handle the truth. And, as an elected official you will now be a part of what goes on behind the closed doors of executive sessions.

Remember, though, that Oregon's "Open Meetings" law means that aside from a few narrow exceptions (staff discipline, litigation, purchasing property) the public gets to observe you in action, taking care of the people's business.

Success Hint: Before going into executive session, don't turn to the audience and shout "You can't handle the truth!"

D. Not protecting staff from unpleasantness with executive sessions.

Hey, we do not doubt that your staff member messed up… and you are totally justified in being upset. But be careful where you express that sentiment.

Remember, one of the exceptions to the open meetings law is staff discipline, and unless the staff member in question wants a public discussion, it is there for a reason. If you have a problem with staff, get an executive session put on the agenda more than 24 hours before the next council meeting, and say your piece then.

Success Hint: The "public comment" period is not designed for councilors to comment publicly on the job performance of city staff.

E. Starting a blog / Facebook page / Instagram / TikTok to publicize all of the above.

You absolutely are allowed to communicate with your constituents. Of course, that is a dignified aim of any public servant. But be careful of what communications you stamp with your political Seal of Approval, which happens when you "approve" comments to your social media wisdom. Remember, social media is a magnet for the disaffected to anonymously vent their frustrations with city management, city staff, councilor ethics, and "what really happens" during Executive Sessions.

Success Hint: When you host their post, their words are your bond.

F. Terminating Staff on Your First Day/ Week/ Month

We at CIS watch city council elections closely, as we are very interested in who we will be working with, and working for, the next few years. In the not-too-distant past, I received a call in late December from a person whom I knew had won his race for mayor.

"Congratulations on your election!" I said. "That's great. You must be very excited."

"Well, I am excited to make some changes," he told me. "That's why I'm calling you, because I have asked the city manager for his resignation."

There was a pause. A long pause. Mr. Mayor-Elect had not even been sworn in yet and he was firing the city manager? The mayor continued.

"I know you have this PreLoss program at CIS, so that's why I'm calling. So, you know, to give you guys the heads up. Because if the city manager doesn't resign, then I'm going to fire him at our first meeting."

After 20 years of legal practice, not much can catch me off guard. This totally caught me off guard. I didn't know where to start.

"But you're not sworn in… you don't have the authority to fire someone by yourself, it requires a majority vote, and…"

"Oh, I got the votes!" the mayor interrupted. "City manager resigns, or he's gone. This is why I ran for office."

So, then I had to explain to the mayor-elect how we could not support this termination, and his city would be required to pay the Pre-Loss deductible if he went through with it now. However, CIS could support a termination where he and other new councilors take some time to observe the city manager after they get into office. And if they see deficiencies in his job performance, then to provide the city manager with a specific list and give him a certain amount of time to improve, like 90 to 120 days.

Also, provide the city manager with training and the support he needs to do the job the correct way; demonstrate that the city council is there to help the city manager succeed. Then, with the clear expectations, training, support, and additional time, if the city manager does not raise his job performance to meet your metrics, let him go.

And really, that's the pattern we want to see for all terminations at any level—where someone is told what's wrong, given the time and tools to improve, but for whatever reason they decide not to make a change. That's a winning, defensible scenario that is fair to everyone. But my new mayor friend wasn't having it.

"We're just going to have to agree to disagree on this one. The people elected me to make a change, two other councilors agree with me, and we're going to do what we were elected to do."

And sure enough, at Mr. Mayor's very first meeting he made a motion to fire the city manager. The city manager had waived his right to an open meeting, so council chambers was packed with his supporters. When the vote started, those supporters of his were LOUD. The people were so loud that the mayor couldn't even hear how the councilors were voting. The mayor then shouted at the people, "Come on people, act like adults!" People in the audience shouted back, "YOU act like adults, terminating our city manager on your first day!" It was a circus.

When all the yelling and shouting was over, the city manager was fired and the citizens were mad mad mad—so mad, in fact, can you guess what happened exactly six months later?

That's right, the mayor and the two other councilors who voted to terminate the city manager were all three recalled. And do you know why it was exactly six months later? Yes, because there is a six-month "safe harbor" during which a newly sworn in elected official cannot be recalled. Which shows how the people in this town were just waiting for those six months to be up.

G. Believing you are the city CEO and causing a "hostile work environment" for staff: (or, doing the city manager's job instead of your own).

There is a type of person who often runs for a city council or mayor position on the basis of their experience and success in the private sector. And their success is to be commended; their skills and leadership learned in the business world can absolutely contribute to their success as an elected official.

Occasionally, however, a councilor who is used to being the CEO of their own organization, forgets that the public sector is very different. The power of a city council comes from acting as a group. Individual councilors and mayors have no power at all. If you're newly elected and you want to effect the mandate of your election, you do that by convincing a majority of the council to join you in voting for new resolutions or ordinances. Alone, you can't do much of anything. As a group, you can make law.

Like I was saying, some people who have been a successful CEO and who have strong leadership skills move too fast after being elected. They don't take the time to learn how the "new company" (the city) is different from their old company, and that they must follow different rules. Instead, they start individually managing city staff, and start ordering quick changes to staffers' duties, titles, and job locations. This makes the permanent city staff feel stressed. They start complaining of a "hostile work environment" caused by the micromanaging city councilor.

Here is where this can get dangerous for you as an elected official: managing staff is outside your scope of authority. You do not have the power to manage the daily activities of staff. Those duties belong to the city manager or city administrator. City staff typically know this, and so they may threaten to file, or actually file, a "hostile work environment" claim against you.

There is good news and bad news when it comes to staff filing lawsuits against you. The good news is that Oregon statutory law requires your city to "indemnify and defend" you for any lawsuits that are filed against you for actions taken "within the scope of your authority" as an elected official. Your own personal checkbook will never be on the line for lawsuits that flow from your official duties. However, like I said, there is bad news, too. In the example above, the councilor who is micromanaging staff is NOT acting within the course and scope of their official duties. Managing staff is the city manager's job. So, if you cause a lawsuit by micromanaging

staff, you will be getting sued for actions that you took outside of your authority. And you will have to pay to defend yourself, most likely.

There is nothing to get scared about here. It is an easy fix: just let the city manager manage the staff. If you see an issue that simply must be addressed, talk to your city manager about it. That's all you need to do. You are a city councilor now—leave that day-to-day stuff to others.

H. Using your office for personal gain — the six words you never want to hear yourself say.

Now that you are a city councilor, people are going to treat you differently around town. That is unavoidable. When you have the power (when acting with your co-councilors) to make laws, people will view you in a different light than they used to. But you should not view yourself in a different light. It leads to all sorts of problems. Here is one example.

There is a city in Oregon, just large enough to have parking meters in its downtown core. Just the main drag downtown. Well, a person who had just successfully run for city council had a business that fronted that metered boulevard. This fellow owned an auto body shop, and he liked to park his own personal hot rod right out in front. So, what did he stop doing the day after he was sworn in as a new city councilor? You guessed right again —he stopped paying the parking meter in front of his shop.

So that day, the city meter reader began her shift by working her way down that city's primary downtown street. And the new councilor started watching her while he worked. He saw her moving from one car to another, checking meters and writing tickets. He watched until she reached his hot rod, parked directly in front of his store.

Now this meter reader, she was not a big imposing person like the councilor. She was petite and barely five feet tall.

The new city councilor saw the meter reader check his meter, get out her ticket book, and start writing out a ticket. Well, he rushed toward the street, burst out the front door of the store, threw his hand up and yelled. He yelled the six words that you never want to hear come out of your mouth as long as you are a city councilor: "DO YOU KNOW WHO I AM!?"

You never want to hear yourself say those six words, because that will be the beginning of the end for your time in public service. It never ends well after that. The meter reader burst into tears as the councilor continued yelling about how his position at the city compared to hers. She left and went back to her manager.

Her manager did all the right things. He told her how she had nothing to worry about, that she was only doing her job, and how the councilor was out of line. The manager told her to take the rest of the day off, and he would talk to his own boss, the city manager. When the city manager

heard what the councilor had done, he also said all the right things. He said he would talk to the councilor, that the meter reader had nothing to worry about, and that she had done the right thing when she ticketed the councilor's car.

Now just as the manager was leaving, who comes storming into City Hall and goes straight into the city manager's office and slams the door closed? The councilor with the shop on main street. And he was still mad. He was yelling loud enough that staff could hear him shouting that he wanted the city manager to fire the meter reader, and to do it now! Who do you suppose the staff shares this with? The meter reader. The next day she emails her boss and says that the city councilor has created a hostile work environment, based upon her applying the parking regulations to the councilor the same as she applies them to everybody else. So, she got a lawyer and sued the councilor and the city.

CIS had to settle this case because the meter reader was right. The councilor did expect her to bend the rules for him, just because he was a councilor. And when she didn't, he demanded that she be fired. In a perfect world, she would have got her job back and the councilor would have been the one who got fired. But councilors can't be fired. You are in a unique position that way, and you do have a lot of responsibility. Use it judiciously and go out of your way to make sure that everyone knows you expect to live by the same rules as everyone else in town.

And never, ever, say to anyone, "Do you know who I am?!"

We want your tenure in office to be a success, and hope that you can now avoid these three common potholes that have made the wheels come off a few elected officials who have gone before you. Remember that your power comes from acting as a group, not alone; you're free of the day-to-day stuff, which belongs to the city manager alone; and never act or talk like you deserve special treatment because of your position, or you're going to wind up all alone.

II. The Most Common Questions

Next, we are going to cover some of the most common questions we received from elected officials about the legal risks and liabilities that come with their office.

A. Are you "covered" by the city if you are individually names in a lawsuit?

This frequently asked question come from city councilors, city managers, police officers, public works people, and even a city receptionist. Mentioned above, any city employee, officer, or agent is protected from liability when they are carrying out their official duties. We had one police chief was very concerned that if he got sued in the course of telling his patrol officers how

to handle a high stakes situation (such as confronting an armed suspect or a high speed chase), he could be personally liable and forced to pay a plaintiff out of the chief's retirement savings. For this chief, and for every elected official and city staff person, here is the test for determining whether the city will pay the defense of a lawsuit and for any judgment.

1. If the person is acting within the scope of the authority of their job, then ORS 30.285 mandates that the city indemnify and defend the person. You will always be defended for your official decisions. Police will always be defended for how they arrested someone. Public works will always be defended if they get into an auto accident while driving to a job site.

2. CIS' Coverage Agreement pays the cost to the city of indemnifying and defending any employee who is sued for actions taken within the scope of their official duties or authority.

3. For example, if a police chief is directing officer how to best handle a high speed chase, then there is precious little doubt that the chief is acting within the scope of the chief's official duties and authority.

The point of separating out #1 and #2 is to emphasize that this is not a matter of "insurance." The city is required by law to "cover" any employee who is sued in their individual capacity, as long as the employee is doing their job at the time in question. Even if the city did not purchase insurance (like Portland and Salem), the city would still have to cover the employee.

The fact that your city has coverage with CIS just means that it will be easier for the city to pay for its statutorily mandated obligation to defend you. CIS insurance in no way changes or alters the fact that the law requires cities to cover their employees' official acts.
More than one elected official has been named in a lawsuit because a disruptive citizen was trespassed from a city council meeting. Believe me, you *will* want to do this, and it may very well be justified. So, next we cover how to do it the right way.

B. Excluding disruptive citizens from city property and council meetings.

While there are right and wrong ways to legally exclude a resident, there is also the issue of public perception. Reviewing the following scenarios and the suggested action steps will help your city to be prepared and proactive in working first to avoid issuing an exclusion, and then if necessary, doing it the legal way.

1. Scenario #1: "Fred's Snorting"

Fred, who owns multiple properties in town, is concerned that a potential zoning change adjacent to one of his lots will diminish his property values. Fred starts attending every city council meeting. While Fred sits in the back and does not say anything during the public comment periods,

he often sighs loudly, rolls his eyes, shakes his head, makes indignant snorting sounds, and mumbles unintelligible words under his breath. Fred engages in this type of behavior most frequently when the city manager or mayor are speaking.

Before the next city council meeting, which is expected to go long, the mayor informs the councilors that he is worried that Fred's "disruptions" will drag out the meeting, and that he is actually becoming fearful that Fred, who is a well-known hunting enthusiast, may even become violent. The mayor then asks the police chief to talk to Fred, and "see if he'll voluntarily skip this one. I don't want to deal with having to trespass him if he gets disruptive again."

The police chief then waves Fred out of the council chamber and into the lobby area and asks Fred to skip the meeting. "If you don't, I'm going to have to arrest you for trespassing." Fred rolls his eyes, goes back in to grab his coat, and tells a friend, "They're trespassing me from the meeting." Fred peaceably leaves the building.

Two months later Fred files a lawsuit against the city for violating his constitutional rights.

Suggested approach:

Although the mayor honestly felt threatened by Fred, and the city manager believed that Fred's sighs and snorts were disruptive, neither perception was enough to legally bar Fred from the city council meeting. A city official is not entitled to prevent an individual from attending a city council meeting that is open to the public unless the person disturbs the meeting.[1]

The U.S. Supreme Court has explained that "in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression."[2]

There is a difference between someone who distracts attention from the councilor who is speaking at the front of the room with a sigh or snicker, and someone who stands up and interrupts the speaker, effectively halting the meeting by insisting on speaking out of turn. Ninth Circuit case law has embraced the principle that "[e]ven in a limited public forum like a city council meeting, the First Amendment tightly constrains the government's power; speakers may be removed only if they are actually disruptive."[3]The law draws a distinction between a person who is a distracting nuisance, and someone who interrupts the official speaker.[4]

In the above scenario, the city loses the lawsuit because, in part, there was no actual disturbance. The police chief asked Fred to leave before the meeting even started. Fred's history of shaking his head and making disapproving facial expressions do not show that Fred actually interrupted a

---

[1] *White v. City of Norwalk*, 900 F2d 1421 (9th Cir. 1990).
[2] *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 US 503, 508 (1969).
[3] *Norse v. City of Santa Cruz*, 629 F3d 966, 979 (9th Cir 2010) (Kozinski , J., concurring), *cert denied*, 2011 WL 4530331 (Oct 3, 2011).
[4] *See also Norwalk*, 900 F2d at 1426 (holding that an ordinance is not facially overbroad so long as it only permits city council officials to eject a person who disturbs or impedes the meeting).

meeting. Council members' honest belief that Fred would become disruptive if he were allowed to stay is not an actual disruption, and thus cannot support legally removing Fred from the meeting.[5]

Further, the mayor and police chief sought to get Fred to agree to leave before giving Fred "fair warning" that a second actual disruption would result in the city excluding Fred from the meeting. This is what the city's policy stated would happen, but no one stopped to consult the policy in the moments before the meeting was to start. Fred's lawyer, however, quoted the city's policy at length in Fred's lawsuit.

The mayor and city manager should not have used the city's police power, via the police chief, to pressure Fred to leave the meeting before it started because they perceived that Fred was likely to be distracting or embarrassing. Excluding a citizen from a meeting requires that the citizen actually interfere and disrupt the meeting. Merely being a distraction is not enough. Absent threats of violence, a citizen should be given a warning that further distractions will result in their removal. And while it's good to have a policy outlining what types of behavior will lead to having a citizen removed from a council meeting, the citizens and the councilors must follow the policy.

Finally, keep in mind that this scenario only addressed excluding Fred from a single meeting. If the city wished to exclude Fred from multiple future meetings then the city would need to provide Fred with due process and an ability to appeal the decision to trespass him. Before taking such actions, be sure to consult with your city attorney.

Scenario #2: "Library Love Notes"

A resident proclaims his romantic desire for a member of the library staff. Although his advances are unwanted, and the employee has made this known, the resident regularly follows the employee around and routinely sends love notes. The resident is polite but persistent. The behavior does not rise to the level where the employee could get a protective order from a court. However, the behavior does violate the city's policy on harassment. The library director wants to exclude the resident from the library.

Suggested approach:

Violating the city's policy on harassment is reason enough for a department head to speak directly to the patron. The patron should be told that his behavior is interfering with the employee's ability to perform her job. The department head should explain to the patron that he can use the library to check out reading material, but cannot leave notes or gifts for any employee, nor follow any employees around the library. Finally, the patron should be given a final warning: any further gifts, following employees, or behavior that is in any way threatening will result in being trespassed from the library. In addition to verbally warning the patron, the

[5] See *Tinker*, 393 US at 508; Norse, 629 F3d at 976.

patron should be handed a written letter which makes the same points in writing. A copy should be kept for the city's own file.

If the patron's behavior continues, it is important to narrowly tailor any trespass of the patron. For instance, do not trespass the patron from all city property for all time. Such an order would be overbroad.

Assuming the patron's behavior is directed toward only one library employee, the city could protect the employee by trespassing the patron from only the library, and only during the hours the harassed employee usually works. And provisions can be made to allow the patron to continue checking out material. The patron can be allowed to call ahead, come straight to the counter, check out a book that has been pre-retrieved, and then immediately leave. Even if it is known that the patron will never utilize this procedure, putting this in writing at the time the patron is trespassed will strengthen the city's legal position if the patron eventually gets tired of the trespass order and seeks to file a suit in court.

Scenario #3: "No Beverages Please"

Another library patron, this time an avid computer user, consistently disregards the "no food or beverage" rule in the library's computer lab. One day while using the computer lab the patron spills coffee on a keyboard, ruining it. The library director wants to exclude the patron from the library for a period of 30 days as punishment for breaking the rule.

Suggested approach:

Was the patron given a final written warning that they would be trespassed from the lab if they continued bringing in beverages? If so, then the library director must be reminded that the city needs to keep any exclusion of a citizen as narrowly tailored as possible. In this example, asking the patron to pay for the keyboard may be a better incentive to change their behavior than excluding them from the entire library for 30 days. If the patron refuses to pay for the keyboard, then the city should exclude the patron from only the computer lab for 30 days. After 30 days if the patron reoffends, they should be excluded from the computer lab for an extended period of time (90-180 days), but not from the library entirely. If the patron is excluded for an extended period of time, the library director needs to work with the city attorney to offer the patron due process and a way to appeal the decision to trespass her.

Scenario #4: "Unfair Termination"

A previously terminated city employee comes into city hall and waits for the city manager to walk out of their office. When the city manager leaves their office and enters the hallway, the former employee approaches the city manager and launches into a tirade about how their termination was unfair. The former employee does not make any threats but is loud and disruptive. After this occurs, on two separate days, the city manager wants to have the former employee banned from city hall.

Suggested approach:

This former employee wants to be heard and does not believe the city is listening. City officials should start by offering to meet with the former employee and provide them with an exit interview. It is important to make sure two people from the city are present. This offer should be in writing to the former employee, even if he will likely turn down the offer.
If the employee comes back again, the city's representative should tell them (again, verbally and in writing) that they have disrupted city business and must now leave. It must be specifically stated that if the former employee disrupts city business again they will be trespassed. However, the city should be sure to state that the former employee is welcome to come back and speak their mind when they have an appointment. If the ex-employee still will not leave, the city should then have the police remove them from the premises. City officials should also make sure that at this same time the city is still offering to set up a specific time to meet with the ex-employee and hear them out.

After the ex-employee has been removed once, if they refused to set up an appointment but still returns looking for the city manager, then the city can prove that the person does not just want to be heard, but is intent on causing disruption as a type of retaliation. In this case, the city should exclude the ex-employee from the portion of city hall where the city manager's office is located, but not from the entire building (if this is feasible). Again, the principle is to protect city personnel in a way that is the least restrictive possible to the citizen's rights. Cities should make sure to work with their city attorney to document that you have offered the citizen due process before any decision to trespass the ex-employee is finalized.

Disruptive citizens can frustrate staff and interfere with your ability to provide services to the public. The following action steps will help your city to issue an exclusion in a legal and defensible way:

1. A person cannot be excluded from a meeting or public place because the individual is a distraction—sighing and snorting loudly like Fred in the example above (Scenario #1).

2. In order to legally exclude someone from a council session, that person must actually interrupt the meeting and interfere with the progress of the official agenda. For example, if Fred had stood up and tried to shout down the mayor.

3. Absent threats of violence, a citizen should be given a warning that further distractions will result in their removal, whether the person will be removed from a council meeting, the library or city offices. Issue the warning verbally and, if at all possible, in writing as well.

4. If your city wants to exclude a disruptive citizen from multiple meetings or exclude a person from a specific city facility for an extended period of time, make sure the exclusion is narrowly tailored to fit the situation. Utilize the option that is the least restrictive of the citizen's rights. For instance, excluding a person from the library

computer lab but not the entire library.

5. If an exclusion will be issued for longer than a single event, such as excluding someone from all council meetings for 60 days, then the city will need to provide the citizen with due process and an ability to appeal the exclusion decision.

6. Before issuing any extended exclusion, be sure to consult with your city attorney.

The best way to stay out of legal trouble is to never get sued in the first place, and up until now that's been the focus of this section. However, you will witness firsthand that sometimes a citizen is so upset with a decision of the city council that they are determined to sue. You'll probably sense it, even before the final council vote is taken on the issue that has this citizen so fired up.

Fortunately, neither a city nor a councilor can be sued for voting the "wrong way" on an issue. This legal defense, called "discretionary immunity" is a powerful tool to protect you and your city, even before you get sued. Here's how it works and what you need to do.

III. DISCRETIONARY IMMUNITY: MAKING IT WORK FOR YOU AND YOUR CITY

Too often cities and counties are missing out on an important defense against liability: **discretionary immunity**. This can be an especially important tool in tough economic times when local governments are simply unable to fund important maintenance and other projects or staffing that might reduce exposure to risk.

For example, (and these are actual facts from a CIS claim in which the public body was found liable for the damage) a small city, with a small budget, has a sanitary sewer system that was installed about 80 years ago. The system has a 4-inch main. The city does a reasonable job of ongoing maintenance of its sewer lines but is well aware the lines are both undersized and in poor condition. As a result, the lines tend to become plugged.

The city's "policy" and practice has been to repair the system as it breaks down. However, there is no evidence this "policy" has been formally adopted by action of the city council. The city lacks the funds to upgrade the system. When the line becomes plugged through normal and foreseeable usage and backs up into houses causing damage, is the city liable? Under these facts, probably yes. But they likely could have avoided liability with a few simple (and cost free) steps to establish discretionary immunity.

Whenever a public body becomes aware of a hazard or condition that could potentially cause harm, there is arguably a duty to remedy the problem or face liability for resulting injuries. Often, in fact, the "notice" to the entity of such hazards comes by way of written safety recommendations from CIS risk management consultants. But the city may lack the funds to fix the problem or may have other needs they give a higher priority. If the problem is not fixed and there is an injury and claim, the safety recommendation (possibly now in the hands of the injured party's attorney through a public record or litigation discovery request) could actually aggravate the liability picture. Does that mean we should avoid making recommendations for fear they won't be complied with promptly? Not necessarily. Again, the best approach when circumstances do not allow immediate implementation of the recommendations might be steps to implement discretionary immunity.

A. What is "discretionary immunity"?

Public bodies historically were immune from liability altogether under the legal doctrine of "sovereign immunity" ("The King can do no wrong"). Oregon, like most states, has waived much of its sovereign immunity by passing a "Tort Claims Act" (OTCA), which provides the means and method for pursuing tort claims against public bodies. The OTCA also sets important conditions and limitations on public body liability, such as the 180-day notice requirement, caps on liability, and certain immunities, including discretionary immunity.

Specifically, public bodies are immune from liability for "any claim based upon the performance of or the failure to exercise or perform a discretionary function or duty, whether or not the discretion is abused."[6]

In practice this immunity has not proved to be as sweeping as it might sound. Courts have been fairly strict in their interpretation. Nonetheless, the immunity is available and the published court decisions provide good counsel on what needs to be in place for the immunity to apply…and it need not be that difficult in most cases.

B. What the courts have said.

The following is a short list of legal principles from some of the key cases that pretty well define the current state of discretionary immunity

1. Discretionary immunity defense requires evidence regarding actual consideration process by which decision was reached.[7]

2. A discretionary action requires the exercise of judgment involving public policy as opposed to the mere implementation of a judgment made by others.[8]

---

[6] ORS 30.265(c).
[7] *Sande v City of Portland*, 185 Or App 262 (2002).
[8] *Ramirez v Hawaii T and S Enterprises, Inc.*, 179 Or App 416 (2002).

3. Where a public body exercises consideration of alternative methods of fulfilling non-discretionary duty to act, the public body is immune from liability for failure to make discretionary choice among alternatives before injury occurred.[9]

4. Decisions such as the design, location, and installation of traffic signals, or the makeup of programs such as tree and sidewalk maintenance at the policy level of government are typically immune from liability.[10]

5. Where there is a failure to implement or perform established inspection or maintenance programs, discretionary immunity likely will NOT apply.[11]

6. To qualify for discretionary immunity, the public body must show that it made a decision involving the making of policy, as opposed to a routine decision made by employees in the course of their day-to-day activities.[12]

7. "The decision *whether* to protect the public by taking preventative measures, or by warning of a danger, if legally required, is not discretionary. However, the government's choice of *means* for fulfilling that requirement may be discretionary."[13]

C. Practical steps to make it work.

While there is no clear set of instructions guaranteed to establish discretionary immunity, the case law provides guidance on key elements that should be considered.

- Consider whether the matter involves the expenditure of public funds not already specifically budgeted. Consider also whether it involves a choice among competing alternatives, even if money is not the issue. (E.g., there are two types of warning devices available, each with its own advantages and disadvantages, and only one can be used.) If so, discretionary immunity should be available. In many sewer backup claims there is an allegation of failure to properly inspect and/or maintain the system. Setting a sewer maintenance protocol as a policy level (e.g., city council) action probably brings discretionary immunity into play, so long as the prescribed timelines and procedures are met.

- Be sure the decision is made at the proper policy-setting level. Typically, this will be the council or commission level unless there has been a clear and demonstrable delegation of policy setting authority on certain matters to lower administrative levels. Most likely it

---

[9] *Miller v Grants Pass Irrigation District*, 297 Or 312 (1984).
[10] *Morris v Oregon State Transportation Comm.*, 38 Or App 331 (1979), *Gallison v City of Portland*, 37 Or App 135 (1978), *Bakr v Elliott*, 125 Or App 1 (1993).
[11] *e.g., Tozer v City of Eugene*, 115 Or App 464 (1992), *Hughes v Wilson*, 345 Or 491 (2008).
[12] *Vokoun v Lake Oswego*, 335 Or 19 (2002).

[13] *Garrison v Deschutes County*, 334 Or, at 274.

will be up to staff to recognize these situations and take them to the appropriate policymaking level for consideration.

- Be sure the action is clearly documented, such as through a resolution, and that the documentation can be readily located to assist defense council in establishing the defense. It is important the documentation cover the decision maker's consideration of alternatives and/or competing interests, etc. It would be a good practice to keep copies of this type of documentation, along with any staff reports, recommendations, studies, etc. related to discretionary immunity matters in a separate file or binder for ready reference.

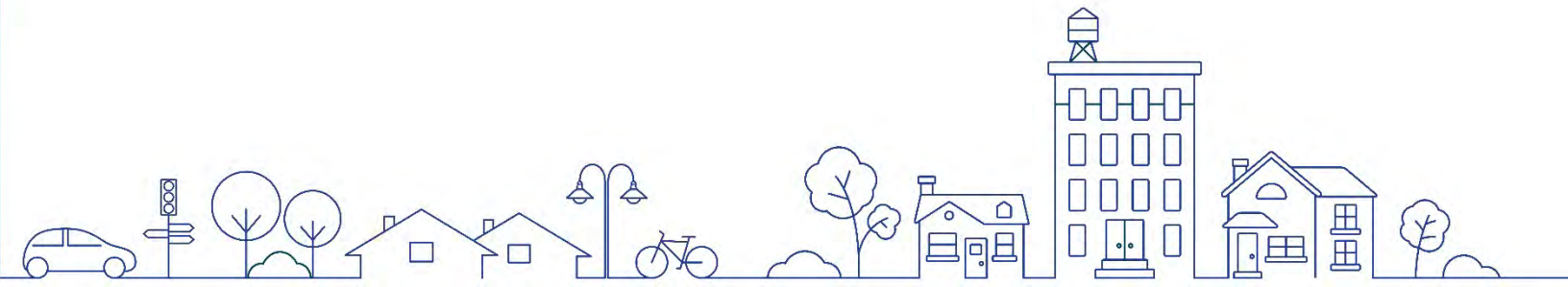
- Check with legal counsel if unsure about the applicability of discretionary immunity or the proper steps to establish this defense.

IV. CONCLUSION

You deserve a round of applause for reading all the way to the end of a chapter on law! Our goal here, though, is to set you up for success during your tenure as an elected official. Hopefully you now have a better understanding of what not to do, how to handle tricky situations the right way, know that you are protected as long as you act within the scope your position, and have an understanding of how to set your city up to defeat lawsuits by those who don't like the way you voted.

You do not need to be a master of any of this. Your city attorney, the LOC's small city direct legal program, and CIS' PreLoss legal program are all here to help you and your city succeed.

CHAPTER 17: PUBLIC WORKS AND UTILITIES



League of Oregon Cities

Published by the League of Oregon Cities
February 2025

Table of Contents

Chapter 17: Public Works and Utilities

The state of Oregon granted cities the right to regulate the city right-of-way.

Cities deliver public services through the management of city right-of-way. A city right-of-way is not only used to create a transportation system of streets, sidewalks, and bike lanes, but also the right-of-way contains the infrastructure to allow cities to provide utility services. These utilities can include wastewater treatment, drinking water services, telecommunication utilities, and electric power.

Cities also manage the right-of-way to allow other entities to provide services such as phone lines, cable and data lines, power, garbage and recycling collection, and natural gas. Cities often have agreements with third parties providing utility services to adjacent properties, in exchange for a fee to use the right-of-way.

This chapter will define rights-of-way, the creation and extinguishment of right-of-way, who manages the right-of-way, and who maintains the right-of-way.

City-operated utilities such as wastewater, water, and power are discussed below. For each utility, this chapter will discuss the basic operations, the regulatory authority overseeing the utility, the rate setting, and billing customers.

Lastly, this chapter will describe the agreements granted to businesses or investor-owned utilities to operate in the city rights-of-way. Agreements allow companies to use the public right-of-way for a fee or a tax. Businesses operating in the city rights-of-way include telecommunications companies, investor-owned, or consumer-owned utility companies such as gas, electric, water, and sewer.

I. Public Rights-of-Way

Most people are aware that city streets serve transportation purposes, providing streets for motor vehicles use, pedestrian movement and bicycle use. Historically, streets were built in newly established settlements when adjoining landowners "'dedicated' land for public thoroughfares as a convenient means of transportation and communication."[1] As described below, rights-of-way are generally larger than the travel surface and contain other public uses.

Cities are required to plan for the location and development of a street system.[2] Most

[1] *Northwest Natural Gas Co. v. City of Portland*, 300 Or 291 (1985).
[2] *See* OAR 660-012-0000 *et seq.* (Statewide Planning Goal requires transportation planning by all local governments); *see also* ORS 197.250 (requiring all local governments adopt regulations to carry out the State's land use planning goals).

cities designate streets as one of three service types or functional classes: (1) arterials, which are mainly for through traffic; (2) collectors, which connect internal traffic to arterials, and (3) local access streets, which serve traffic to and from adjacent properties.[3]

City streets are public roads controlled by cities are described in the county road section of the Oregon Revised Statutes.[4] The term *public road* means "means a road over which the public has a right of use that is a matter of public record.[5] Further, the term *road* "means the entire right-of-way of any public or private way that provides ingress to or egress from property by means of vehicles or other means or that provides travel between places by means of vehicles."[6] The term *road* also includes, "[w]ays described as streets, highways, throughways or alleys[,]" "[r]oad related structures that are in the right-of-way such as tunnels, culverts or similar structures[,]" and "[s]tructures that provide for continuity of the right-of-way such as bridges."[7]

This chapter will use the term *right-of-way* rather than *road* or *street* to describe the entire dedicated area of land to accurately describe the multiple uses of property dedicated to the public.

A. City Authority to Manage Right-of-way

Local governments' regulatory authority over their rights-of-way usually emanates from state constitutional or statutory authority granted to cities.[8] The state itself initially has title and authority to regulate the public streets and rights-of-way, as the property is dedicated for public use.[9]

Rather than delegating the authority to cities directly, Oregon's Constitution leave it to the city voters to decide what their city governments can do.[10] City charters grant broad powers such as "all powers that that this state expressly or impliedly grant or allow cities" and this power allows cities to manage the right-of-way.[11]

---

[3] *See, e.g.*, City of Eugene, *Eugene 2035 Transportation System Plan*, available at: https://www.eugene-or.gov/DocumentCenter/View/37739/2035-Transportation-System-Plan-Volume-Two-with-Appendices-?bidId= (last accessed on March 28, 2024).
[4] ORS chapter 368; ORS chapter 223; Association of Oregon Counties, *County Road Manual*, available at: https://oregoncounties.org/roads/#manual (last accessed on February 10, 2025). Although the focus of ORS chapter 368 is on county roads, many of the defined terms are applicable to city streets.
[5] ORS 368.001(5).
[6] ORS 368.001(6).
[7] *Id*.
[8] West, *The Information Highway Must Pay Its Way Through Cities: A Discussion of the Authority of State and Local Governments to be Compensated for the Use of Public Rights-Of-Way*, 1 MICH.TEL.TECH.L.REV. 2 (1995), available at: http://www.umich.edu/~mttlr/VolOne/West.html (last accessed on March 28, 2024).
[9] *Id*.
[10] OR Const Art XI § 2; OR Const Art IV § 1(5) (granting the power to "enact … any charter"); *See also* League of Oregon Cities, *Chapter 2: Home Rule and Its Limits*, MUNICIPAL HANDBOOK, available at: https://www.orcities.org/application/files/3715/9917/4968/Handbook_-_Chapter_2_Home_Rule_and_Its_Limits.pdf (last accessed on March 28, 2024).
[11] *Id*.

Although a city has broad authority to regulate its right-of-way, the Oregon Legislature limited a city's authority in a few areas relating to city rights-of-way. These limits include:

- Requires public bodies to coordinate with utilities when planning highway projects.[12]
- Limits on local government authority under the Oregon Vehicle Code.[13]
- Limits the designation of truck routes on state highways or county roads within city limits.[14]
- Requires public information campaign and report from cities operating photo red light cameras.[15]
- Preemption of authority to regulate the idling of primary engines in commercial vehicles.[16]

While the federal government may preempt state and local governments' regulatory role in the interstate telecommunications industry, Congress cannot, without compensation, appropriate or "give" the local public rights-of-way to telecommunications service providers without reasonable compensation for the use of the local public rights-of-way.[17]

B. What Are Rights-of-Way?

Right-of-way is the area of land dedicated for public infrastructure, such as bridges, streets, alleys, trails, bike lanes, park strips, sidewalks, sewer lines, water lines, electric lines, and gas lines.[18] Right-of-ways are available for use by the public at large and as discussed below, are administered by the jurisdiction (city, state, or county) in which they lie.[19]

Typically, the legal right-of-way is 50 to 100 feet wide, wider than the width of the road.[20] The right-of-way is wider than the road to provide room for:

- Proper drainage
- Maintenance
- Public utilities
- Sidewalks and bike lanes
- A landscaped terrace

---

[12] ORS 758.025.
[13] ORS 801.040.
[14] *Id*.
[15] ORS 810.434.
[16] ORS 825.615.
[17] US Const Amend V ("nor shall private property be taken for public use, without just compensation").
[18] *Id*.; *See also* City of Dallas, *Right-of-way Information*, available at: https://www.dallasor.gov/publicworks/page/right-way-information (last accessed on March 28, 2024).
[19] *Id*.
[20] *See* City of Tualatin, *Franchise Permits*, available at: https://www.tualatinoregon.gov/engineering/franchise-permits-frch (last accessed on March 28, 2024).

- Future improvement
- Traffic control[21]

Rights-of-way are different than easements. Right-of-way is the right to pass over, through, or across another's land.[22] Unlike an easement, the public holds the right to pass over the right-of-way.[23] An easement is a nonpossessory interest in the land of another that entitles the easement holder to limited use of another's land without interference.[24] An easement holder is an identified person(s) with a legal right to use the easement.[25] Easements can be used for building pipelines or constructing pipelines rather than using a right-of-way.[26]

In rights-of-way, fee ownership remains in the original landowner.[27] The public is granted an easement for the use of the streets and the municipality retains the power to improve, grade, pave, and regulate those streets.[28]

C. How Are Rights-of-Way Created?

Most city local streets come into existence when a property developer dedicates street right-of-way to provide for public street access to every lot. These dedications are established by either dedication deed or subdivision (or partition) plats.[29] Developers may be required to dedicate land to the public as a condition of land use approval, but the dedication of land as a development permit condition must be roughly proportional to the need created by the proposed development.[30]

To dedicate a right-of-way to the public by plat, the plat must state that the land is dedicated to the public and the plat must bear the approval of the city or county accepting the dedication.[31] After the plat is recorded, when the lots are conveyed lots by reference to the plat, the purchaser of the lot acquires by implication an easement in all streets, parks, or other open

---

[21] *Id.*
[22] See *Cappelli v. Justice*, 262 Or 120 (1972) (document of conveyance designated as a warranty deed granted a right-of-way, not fee-simple title).
[23] *Id*.
[24] ORS 105.170(1).
[25] *Id*.
[26] For easements to benefit the public, the easement holder is the local government such as the city of Tualatin.
[27] *Northwest Natural Gas Co. v. City of Portland*, 300 Or 291 (1985) (citing *Sharkey v. City of Portland*, 58 Or 353, 362, 106 P 331 (1910), 114 P 933 (1911)).
[28] *Id*. (citing *Huddleston v. City of Eugene*, 34 Or 343, 351 (1899); *Lankin v. Terwilliger*, 22 Or 97, 99 (1892); 3 Dillon, Commentaries on the Law of Municipal Corporations 1766 § 1120 (5th ed.1911)).
[29] ORS 92.175; Association of Oregon Counties, *County Road Manual*, available at: https://oregoncounties.org/roads/#manual (last accessed on February 10, 2025).
[30] *Dolan v. City of Tigard*, 512 U.S. 374 (1994) (when a government authority attaches a condition to a building permit, the burden on the property owner must be roughly proportionate to the benefit for the government).
[31] ORS 92.014(2); ORS 92.175(1).

areas shown on the plat.[32]

To dedicate a right-of-way to the public by dedication deed, the deed must adequately describe the land for the dedication, express the intent to dedicate the property, and the city must expressly accept the dedication.[33] Oregon courts have recognized implied dedications where the intention is "clearly and unequivocally manifested."[34]

Rights-of-way can also be established by prescriptive use by establishing the elements for a prescriptive easement plus demonstrate use by the public.[35] A prescriptive easement requires that the claimant establish by clear and convincing evidence that the use was: (1) 10 years; (2) open, notorious, and adverse to the rights of the servient owner; and (3) continuous and uninterrupted according to the nature of the use.[36] One downside to a prescriptive easement is that it requires a court to declare that the public has obtained the easement.[37]

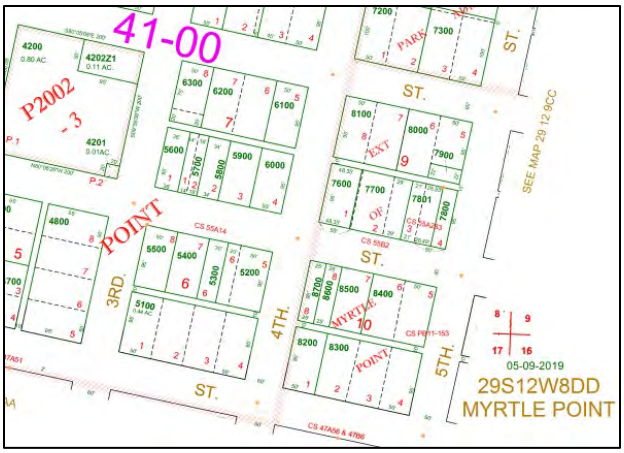
An alternative method to a prescriptive easement is to use legalization when there is a defect in the legal documentation of a public right-of-way.[38] Legalization is available when there is a defect or omission if the location cannot be accurately determined or if the road has been used for 10 years or more, and the road location does not conform to city records.[39] To legalize a road, the governing body provides notice to abutting property owners, holds a hearing to consider whether the legalization of the road is in the public interest, and to order compensation for property owners affected by the road legalization.[40]

Lastly, for property owners who are not willing to grant right-of-way, cities may use the condemnation process to acquire property for public use for compensation to the property owner.[41] The condemnation process is set forth in ORS chapter 25, General Condemnation Procedure Act.[42] Cities interested in using the condemnation procedure are strongly advised to contact their city attorney to consider issues such as compensation and attorney fees in acquiring properties.

---

[32] *Carter v. City of Portland*, 4 Or 339 (1873); *Christian v. City of Eugene*, 49 Or 170 (1907); WILLIAM B. STOEBUCK & DALE A. WHITMAN, THE LAW OF PROPERTY § 8.6 at 449–50 (3d ed 2000).
[33] ORS 92.175; *Mid-Valley Res., Inc. v. Foxglove Props.*, LLP, 280 Or App 784, 791 (2016).
[34] *Id*. (quoting *Muzzy v. Wilson*, 259 Or 512, 519 (1971).
[35] 1 OREGON REAL ESTATE DESKBOOK § 11.2-2(c) (OSB Legal Pubs 2015); *Huggett v. Moran*, 201 Or 105 (1954) (public road created by adverse use for prescriptive period); *Muzzy v. Wilson*, 259 Or 512 (1971); *Williams v. Harrsch*, 297 Or 1 (1984).
[36] 1 OREGON REAL ESTATE DESKBOOK § 11.2-2(c) (OSB Legal Pubs 2015); *Thompson v. Scott*, 270 Or 542, 546, (1974); *but see* ORS 105.692 (land used for "recreational purposes, gardening, woodcutting or the harvest of special forest products" does not give rise to a prescriptive easement).
[37] *Multnomah County v. Union Pacific Railroad*, 297 Or 341 (1984).
[38] ORS 223.935 to 223.950.
[39] ORS 223.935.
[40] ORS 223.940 to 223.950.
[41] ORS 223.005; ORS 223.930; ORS 226.380.
[42] ORS 223.005 to 223.105.

D. Where Are the Rights-of-Way?



Dedications are illustrated on the county assessor's maps.[43] To the right is an example of the Coos County Assessor's Maps demonstrating the city of Myrtle Point's right-of-way for Third, Fourth, and Fifth streets.[44]

It is common that the legal right-of-way overlaps with property that the abutting property owner uses as private property.[45]

Although the county assessor maps give a good idea where the right-of-way is located, the best way to determine where the right-of-way on the ground is to have the property surveyed.[46] Sometimes there are "right-of-way markers" or an iron rod in the ground to mark the location.[47] In some places, a sidewalk is placed about a foot from the right-of-way edge with all of the sidewalk in the right-of-way area.[48]

E. Who Controls the Right-of-Way?

All public streets and roads, regardless of the entity that controls what is allowed in a right-of-way, are part of a larger transportation system. The state of Oregon manages and maintains the thoroughfares known as *state highways*.[49] The counties manage the roads dedicated to the public in the unincorporated area of a county and maintains those roads accepted by the county as part of its maintenance system (also known as a *county road*).[50]

Most streets located in incorporated cities, known as *local access roads* in Oregon Revised Statutes, are generally in the jurisdiction of the city.[51] The exception is for county roads or highways unless the city has accepted the jurisdiction after proper notice and a hearing.[52] Cities generally do not accept county roads into their maintenance system because county roads

---

[43] *See* State of Oregon's statewide digital cadastral base map available at: https://ormap.net/ (last accessed on March 28, 2024).
[44] https://ormap.net/Services/OrMap/api/assessormaps/0629.00S12.00W08DD--0000/map (last accessed on March 28, 2024).
[45] *See* Oskar Rey, *Understanding Municipal Rights-of-Way: From Centerline to Edge (Part 2)*, Municipal Research and Services Center of Washington, available at: https://mrsc.org/stay-informed/mrsc-insight/november-2017/understanding-municipal-rights-of-way-from-center (last accessed on March 28, 2024).
[46] *Id*.
[47] *Id*.
[48] *Id*.
[49] ORS 366.005(8); ORS 373.010 to 373.060; ORS 374.015.
[50] ORS 368.001(1); ORS 368.062; ORS 368.031.
[51] ORS 368.001(3); 368.016(2)(b).
[52] ORS 373.270.

are usually less developed than city streets.

Unlike the State and counties, cities do not have the same express statutory authority to regulate their right-of-way. Rather, cities have home rule authority to regulate city right-of-way.[53] The handful of Oregon statutes touching on city right-of-way are to provide the State or county to connect to city right-of-way.[54]

Each entity that maintains streets or roads maintains their own standards for development and maintenance. These standards can include minimum widths, landscaping, lighting, access, types of sidewalks, curbs and gutters, storm drainage, and must include design standards that meet the Americans with Disabilities Act.[55] Many cities have ordinances that prohibit structures in the right-of-way unless approval from the entity with jurisdiction has been granted.[56] For example, in the city of Dallas, the city prohibits buildings or permanent structures in the right-of-way and the construction of fences or retaining walls in the right-of-way without a permit.[57]

F. Signs

Cities control whether signs are allowed in the city right-of-way. Many cities have adopted sign regulations to provide standards for residents and businesses to provide signage on their property or within the right-of-way.[58] City regulations should not consider the content of the sign to regulate the sign such as "for sale" or any social, or political commentary.[59]

For signs in the city right-of-way, cities may require persons seeking to place signs in the right to obtain permits.[60] These signs can include sandwich signs located the sidewalk, banners

---

[53] *See* League of Oregon Cities, *Chapter 2: Home Rule and Its Limits*, MUNICIPAL HANDBOOK, available at: https://www.orcities.org/download_file/1168/1852 (last accessed on March 28, 2024).
[54] ORS 373.210 to ORS 373.215; ORS 223.930; ORS 376.705 (allows cities to designate streets as pedestrian malls).
[55] *See* ORS 368.036; Americans with Disabilities Act of 1990, 42 USC § 12101 *et seq*. (1990); *see* City of Portland, *City Standards*, available at: https://www.portland.gov/transportation/permitting/city-standards-guidelines-requirements-impact-space-right-way (last accessed on March 28, 2024) *;* City of Ashland, *2006 Engineering Design Standards*, available at: https://www.ashland.or.us/Page.asp?NavID=9098 (last accessed on March 28, 2024).
[56] *See* City of Sandy, *Right-of-way Permits*, available at: https://www.ci.sandy.or.us/publicworks/page/right-way-permits (last accessed on March 28, 2024); City of Sherwood, *Right-of-way Permits*, https://www.sherwoodoregon.gov/engineering/page/right-way-permits (last accessed on March 28, 2024); *see also* ORS 374.305 *et seq*. (stating that permission is needed to build on right-of-way of any state highway or county road).
[57] *See* City of Dallas, *Right-of-way Information*, available at: https://www.dallasor.gov/publicworks/page/right-way-information (last accessed on March 28, 2024).
[58] *See* City of Ranier, City Code Section 18.110.090 (prohibiting signs in the public right-of-way), available at: https://www.codepublishing.com/OR/Rainier/html/Rainier18/Rainier18110.html (last accessed on March 28, 2024).
[59] *See* League of Oregon Cities, *A Guide to Drafting a Sign Code* (March 2018), available at: https://www.orcities.org/download_file/431/1852 (last accessed February 19, 2025).
[60] *See* City of Springfield, City Code Section 3.223, available at: https://library.qcode.us/lib/springfield_or/pub/municipal_code/item/chapter_3-streets-3_223 (last accessed on March 28, 2024).

that cross the street, and banners on street light poles.[61]

State highways can be located in city limits, and thus, the State's highway regulations apply to state highways, even if within city limits. Even if the State transfers jurisdiction to a county or city, the State may be required to continue to regulate signs.[62] This jurisdiction distinction is important because the State prohibits all signs in state highway right-of-way, even if temporary.[63] Further, even on private property, signs that are visible from state highways are subject to regulation for driver safety to reduce the visual safety distractions.[64]

G. Who Is Responsible for Maintenance Within the Right-of-Way?

Since cities control the city right-of-way, for most cities in Oregon, cities have adopted an ordinance stating that the homes and business abutting the street and within the city right-of-way are responsible for the maintenance to the curb of the street or along the edge of pavement along their street frontage.[65] This abutting property owner maintenance requirement extends to sidewalks, planting strips, parking strips and vegetation within the right-of-way.[66] Abutting landowners may be responsible to mow the grass or maintain the landscaping in the right-of-way.[67] Cities may have requirements on the type of trees that may be planted in the right-of-way or other landscaping specifications to keep the area attractive.[68]

To maintain the structures in the right-of-way, abutting property owners may be required to obtain a permit from the city.[69] The purpose of the permit is to require the property owners to repair the work in accordance with the city specifications.[70]

---

[61] *Id.*
[62] Oregon's Outdoor Motorist Information Act, ORS 377.780 *et seq.*; OAR 734-059-0015 to OAR 734-060-0190 (requiring a permit when compensation is exchanged for posting the sign and the sign is not located at a place of business or location open to the public).
[63] *Id*.
[64] Highway Beautification Act of 1965, 23 USC § 131 (j).
[65] *See* Oskar Rey, *Understanding Municipal Rights-of-Way: From Centerline to Edge (Part 2)*, Municipal Research and Services Center of Washington, available at: https://mrsc.org/stay-informed/mrsc-insight/november-2017/understanding-municipal-rights-of-way-from-center (last accessed on March 28, 2024); *see* City of Dallas, City Code Section 3.505 Duty To Repair, available at https://dallasor.municipalcodeonline.com/book?type=ordinances#name=SIDEWALKS_AND_DRIVEWAY_REPAIR (last accessed on March 28, 2024).
[66] *See* City of Tigard, City Code Section,15.12.010 Maintenance and Repair of Public Sidewalks, available at: https://ecode360.com/TI5024 (last accessed on March 28, 2024).
[67] *See* City of Corvallis, *Vegetation Obstructions*, available at: https://www.corvallisoregon.gov/publicworks/page/vegetation-obstructions (last accessed on March 28, 2024).
[68] *See* City of Salem, *Tree Care Resources*, available at: https://www.cityofsalem.net/community/natural-environment-climate/trees-and-plants/tree-care-and-resources (last accessed on March 28, 2024).
[69] *See e.g.*, City of Bend, City Code Chapter 3.40 (requiring permits for work in the right-of-way), available at: https://bend.municipal.codes/BC/3.40 (last accessed on March 28, 2024).
[70] *See* City of Fairview, *Sidewalk and Tree Maintenance Handbook* (2016), available at: https://fairvieworegon.gov/305/Forms (last accessed on March 28, 2024).

Trees in the right-of-way may be city property or otherwise regulated by the city.[71] If tree roots are causing damage to the sidewalk or nearby structures, abutting property owners are advised to call the city to determine mitigation and responsibility for repairs.

Shifting the maintenance to the abutting property owner does not necessarily relieve cities of responsibility to maintain the right-of-way.[72] However, a properly adopted ordinance can create liability on the abutting property for failing to maintain the improvements in the right-of-way.[73] Check with your city attorney about your city's responsibility to maintain the right-of-way.

H. How Are Rights-of-Way Extinguished?

A street vacation extinguishes the public's interest in the right-of-way.[74] Street vacations are usually requested by an abutting property owner through a petition document.[75] Cities may adopt a fee to cover the cost of processing the petition including publication of notice and hearing.[76] In a hearing, city governing bodies determine whether the vacation is in the public interest.[77] Generally, city councils will consider whether the right-of-way is needed for future development of public services such as transportation, utilities, viewpoints, and community or commercial uses.[78]

If a city vacates a right-of-way, control is passed to the underlying fee owner.[79] This underlying fee owner is most often the abutting property owner but not always.[80] The city may reserve or condition the vacation on actions such as granting any existing utilities an easement, moving the existing utilities at the petitioner's expense, dedication of areas in lieu of the area to be vacated.[81]

---

[71] *See* Oregon City, *Trees in Oregon City*, available at: https://www.orcity.org/1206/Trees-in-Oregon-City (last accessed on March 28, 2024).
[72] *See e.g., Landis v. Limbaugh*, 282 Or App 284 (2016) (citing *Papen v. Karpow*, 56 Or App 673 (1982) (city liable for icy sidewalk even though it had required abutting landowner to maintain sidewalk)); *Pritchard v. City of Portland*, 310 Or 235 (1990) (city could be liable for negligent maintenance at common law even though city required abutting landowner to maintain foliage in the right-of-way).
[73] *Papen v. Karpow*, 56 Or App 673 (1982); *Ramirez v. Hawaii T & S Enterprises, Inc.*, 179 Or App 416 (2002).
[74] ORS 271.080 to 271.230; for more information, see League of Oregon Cities, *FAQ: Vacating a Public Right-of-Way* (April 2019), available at: https://www.orcities.org/download_file/3f9951a8-654d-42be-b496-75b818854586/1852 (last accessed on March 29, 2024).
[75] ORS 271.080; *see also* ORS 271.130 (allowing street vacation on city governing body's own motion).
[76] ORS 271.110(3).
[77] ORS 271.120.
[78] *See e.g.*, City of Portland, Oregon City Code Section 17.84.025 (Approval Criteria for Vacating Streets), available at: https://www.portland.gov/code/17/84#toc--17-84-025-approval-criteria-for-vacating-streets- (last accessed on March 28, 2024).
[79] ORS 271.140.
[80] *Id*.
[81] *See e.g.* ORS 271.180 (allowing conditions as the city governing body may deem reasonable and for the public good).

II. CITY UTILITIES

Most cities in Oregon own and operate one or more types of municipal utilities. The authority to operate a municipal utility is derived from state law, city charter, or both.[82] Charter authority may be expressed in the form of a "general grant of power" or a "specific grant of power."[83] Cities lacking charter authority may rely upon statutory law that grants those cities organized under the 1893 Incorporation Act for the authority to "provide for lighting the streets and furnishing such city and its inhabitants with gas or other lights, and with pure and wholesome water."[84] Likewise, cities incorporated under the 1941 Incorporation Act, now codified at ORS 221.410 provides, "[e]xcept as limited by express provision or necessary implication of general law, a city shall have power to take all action necessary or convenient for the government of its local affairs."[85]

Once a city has authority to operate a utility, a city may build, own, operate, and maintain waterworks, water systems, railways and railroads, electric light and power plants, both inside and outside of its boundaries for profit.[86] A city may operate a telephone system, irrigation, and fire protection system.[87] A city may also create a sewer system, also known as wastewater system.[88] For cities that own or operate a water or electric utility, cities may provide such services outside its city limits.[89] Cities may "purchase, own, operate and maintain" such utilities in an adjoining state, if permitted by the adjoining state.[90]

Cities also have power to acquire private real property for any public or municipal use, or for the general use and benefit of the people.[91] Cities may acquire all, or part, of an existing private utility, but if the acquisition cost exceeds $10,000 the Public Utility Commissioner must approve the acquisition.[92]

In dealing with public ownership of utilities, the Oregon Constitution prohibits a city from becoming a "stockholder in any joint company, corporation or association whatever, or [raising] money or [loaning] its credit to, or in aid of any such company, corporation, or association."[93] This provision, however, has been construed to not preclude a city from raising money through revenue bonds to assist in planning, constructing, and operating a nuclear generating plant that it

---

[82] ORS 221.916(1).
[83] 36 Op Atty Gen 521 (Or 1973) (general grant of power authorizes city to own and operate utilities).
[84] ORS 221.916(1).
[85] *See also* Etter, *General Grants of Municipal Power in Oregon*, 26 OR L REV 141, 143 (1947).
[86] ORS 225.020.
[87] ORS 225.110; ORS 225.320.
[88] ORS 224.020.
[89] ORS 225.030.
[90] ORS 225.060.
[91] ORS 223.005; ORS 225.020(1)(c).
[92] ORS 757.480.
[93] OR Const Art XI §9.

would own jointly with a private corporation.[94]

A. Water Utilities

Water utilities are formed for furnishing water to the public for household or drinking purposes. Cities distribute water to customers through the city water distribution system.[95] The source of the water can be from wells or surface water. Groundwater supplied water systems are rare, but tend to be free of impurities and contaminates typically found in surface water systems.[96] Surface water supplies are treated by methods such as ozone, slow sand filtration, chlorine, soda ash, and acetic acid.[97]

To supply water, cities must obtain and develop water rights from the state of Oregon. Oregon's water rights for surface water is governed by the principle of prior appropriation, often described as "first in time is first in right."[98] The idea of prior appropriation is that those who develop water first have superior rights than those who develop water later and that water rights holder must use the water right or it is forfeited.[99] Water law is administered by the state of Oregon which monitors and administers water right claims.[100]

The Environmental Protection Agency (EPA) regulates drinking water through the Safe Drinking Water Act.[101] The EPA publishes water quality standards through regulations and sets legal limits on numerous contaminants in drinking water.[102]

Cities are responsible for regularly collecting potable water samples to be analyzed for over 123 listed potential contaminants as required by the EPA and the Oregon Department of Human Services Drinking Water Program.[103] Samples are analyzed for microbiological, organic,

---

[94] *Miles v. City of Eugene*, 252 Or 528 (1969).
[95] *See* US Environmental Protection Agency, Drinking Water Distribution Systems, available at: https://www.epa.gov/dwsixyearreview/drinking-water-distribution-systems#:~:text=Public%20water%20systems%20depend%20on,consumer%20when%20treatment%20is%20absen (last accessed on March 28, 2024).
[96] *See* City of Klamath Falls, *Water*, available at https://www.klamathfalls.city/229/Water (last accessed on March 28, 2024).
[97] See City of Salem, Salem's Drinking Water, available at: https://www.cityofsalem.net/community/household/water-utilities/drinking-water-treatment/salem-s-drinking-water (last accessed on March 28, 2024).
[98] For more information about municipal water rights, see Richard M. Glick, *Oregon Water Rights Basics*, LOCAL FOCUS (March 2018), available at: https://www.dwt.com/-/media/files/publications/2018/03/oregon-water-rights-basics-local-focus-league-of-o/files/oregonwaterrightsbasicsglickmarch18lf/fileattachment/oregonwaterrightsbasicsglickmarch18lf.pdf (last accessed on March 28, 2024).
[99] *Id*.
[100] *Id*.
[101] Clean Water Act, 33 USC § 1251 *et seq*.
[102] 40 CFR Part 141.
[103] *See* State of Oregon Department of Environmental Quality, *Water Quality Programs*, available at: https://www.oregon.gov/deq/wq/programs/pages/dwp.aspx (last accessed April 4, 2024).

inorganic, and radiological contaminates.[104] Maximum Contaminate Levels (MCL) are established for each contaminate based on the impact to human health.[105]

Cities may construct improvements to the water system and assess the properties that benefit from the improvements.[106]

Unless the city's rate setting is arbitrary and unreasonable, the city can choose how to set its water rates.[107] Under state law, a city may operate a water utility for profit.[108] It is common practice that customers are billed for a minimum amount as a service charge to capture the minimum expense of connecting to the utility.[109] Once the minimum quantity of water is reached, customers are billed for actual use that is measured with water meters.[110] Many cities are replacing manual read meters with automated meters that transmit the data to the city.[111]

Where a single water meter provides service to five or more units in a multifamily building or when a single water meter serves several parcels of real property owned by the same owner, if the water bill is not paid when due, the city may place a lien on the property in the local lien docket.[112] If, after 60 days, the lien is docketed and remains unpaid, the lien may be foreclosed in the manner provided under ORS 223.510 to 223.595.[113]

B. Wastewater Utilities

Wastewater utilities collect and treat wastewater received from residential, commercial, and industrial uses.[114] The wastewater travels through a series of pipes and pump stations to arrive at a wastewater treatment facility.[115]

Once at the wastewater facility, the facility screens out large debris like sticks, rocks, and litter.[116] The remaining wastewater continues to the clarifier where the solids sink to the bottom

---

[104] *See* U.S. EPA National Primary Drinking Water Regulations, available at: *https://www.epa.gov/ground-water-and-drinking-water/national-primary-drinking-water-regulations* (last accessed April 4, 2024).
[105] *Id*.
[106] ORS 225.080.
[107] ORS 225.020; *Kliks v. Dalles City*, 216 Or 160 (1959)
[108] *Id*.
[109] *Id*.
[110] *Id*.
[111] *See* City of Ashland, *Radio Frequency Meter FAQ*, available at: https://www.ashland.or.us/Page.asp?NavID=14604 (last accessed on March 28, 2024).
[112] ORS 223.594.
[113] *Id*.
[114] *See* City of Portland, *About the Wastewater Treatment Process*, available at: https://www.portland.gov/bes/resource-recovery/wastewater-treatment (last accessed on March 28, 2024).
[115] *Id*.
[116] *Id*.

or float to the top.[117] The solids are sent to the digesters and the remaining wastewater is sent to the aeration basins.[118]

In the aeration basins, the large, bubbling tanks are filled with microorganisms to eat the tiny particles in the water. The wastewater is then clarified for a second time.[119] Lastly, the wastewater is disinfected to kill more bacteria before the water is returned to the environment.[120] Often treated water is released into surface streams. In some cities, treated wastewater (also known as recycled water) is used to irrigate city landscaping, supply water to fire hydrants, recharge groundwater, or supply water for wetlands.[121]

The solids are sent to the digesters where the solids are heated, and anaerobic microorganisms are added to decompose the solids.[122] The solids are broken down into biosolids and biosolids can be used to return beneficial nutrients to the land.[123]

The state regulates several aspects of a wastewater utility including the treatment facility and the disposal of the treated water through the required Department of Environmental Quality (DEQ) permit.[124] Since many of Oregon's rivers and streams fail to meet existing water quality standards, DEQ regulates the maximum capacity of the water body to receive certain pollutants, also known as the total maximum daily load (TMDL).[125] Since most treated wastewater is discharged into rivers and streams, cities must adjust their discharges to comply with the TMDL.[126] Additional treatment and management measures may also be required if wastewater discharges may have an impact on federally listed threatened or endangered species.[127] If the city's discharge violates the water quality standards contained in the permit, the city is subject to third party lawsuits, where city officials may be prosecuted and the city is subject to substantial fines and/or imprisonment.[128]

DEQ has oversight of the city's system of charges and rates to assure that each recipient of treatment works services within the municipality's jurisdiction or service area will pay its

---

[117] *Id.*
[118] *Id.*
[119] *Id.*
[120] *Id.*
[121] *See* City of Prineville, *Crooked River Wetlands Complex*, available at: https://www.cityofprineville.com/wetlands (last accessed on March 28, 2024); *See* Oregon DEQ, *Water Reuse Program*, available at: https://www.oregon.gov/deq/wq/programs/Pages/Water-Reuse.aspx (last accessed on March 28, 2024).
[122] *Id.*
[123] *See* City of Portland, *Biosolids Return Nutrients to the Soil*, available at: https://www.portland.gov/bes/resource-recovery/biosolids (last accessed on March 28, 2024); *see* Oregon DEQ, *Biosolids Program Review*, available at: https://www.oregon.gov/deq/wq/programs/Pages/BioReview.aspx (last accessed on March 28, 2024).
[124] ORS 454.020; ORS 468B.050; ORS 468B.070 (for cities having a population of 250,000 or more).
[125] Clean Water Act, 33 USC § 1251 *et seq.*
[126] The Oregon Environmental Quality Commission adopted rule amendments to allow TMDLS to be adopted by rule. *See* Oregon DEQ, *Total Maximum Daily Loads*, available at: https://www.oregon.gov/deq/wq/tmdls/Pages/default.aspx (last accessed on March 28, 2024).
[127] Endangered Species Act, 16 USC § 1531 *et seq.*; OAR 340-041-0004.
[128] 33 USC § 1319(c)(1)(2); 40 CFR Part 122.

proportionate share of the costs of operation, maintenance and replacement of any treatment works facilities or services provided by the municipality.[129]

For wastewater, most cities measure wastewater based on the water consumption because of the harsh water conditions and small flow rates.[130] Unless prohibited by its charter, a city may impose a wastewater charge based on the usage of water measured by a water meter.[131]

Cities may require property owners to pay to connect to the utility even if required by law but must offer an installment plan for up to ten years.[132] Cities may construct improvements to the wastewater system and assess the properties that benefit from the improvements.[133]

C. Stormwater Drainage

As cities develop, natural drainage is replaced by impervious surfaces such as rooftops, roads, sidewalk and parking lots.[134] Cities develop stormwater drainage systems to mitigate flooding and to replace the natural drainage system replaced by the impervious surfaces.[135] The stormwater runoff often contains pollutants that could adversely affect water quality.[136]

Congress passed the Clean Water Act of 1972 (amended in 1987), which prohibits the discharge of pollutants into waters of the United States unless the discharge complies with a National Pollutant Discharge Elimination System (NPDES) permit.[137] Urbanized areas with populations over 50,000 are required to have a NPDES permit issued by DEQ for the stormwater and separated collection system.[138] DEQ has authority to determine if any smaller community in Oregon must obtain a permit.[139]

A stormwater drainage system starts at the edge of the street where the stormwater is directed into either catch basins or vegetated swales.[140] Bio-swales collect stormwater runoff

---

[129] ORS 454.030.
[130] *See e.g.*, City of Portland, *Sewer and Stormwater Rates and Charges*, available at: https://www.portland.gov/bes/pay-your-utility-bill/sewer-and-stormwater-rates-and-charges (last accessed on March 28, 2024).
[131] ORS 224.510.
[132] ORS 454.805; ORS 223.205 to 223.316.
[133] ORS 224.040.
[134] *See* U.S. EPA, *Urbanization and Stormwater Runoff*, available at: https://www.epa.gov/sourcewaterprotection/urbanization-and-stormwater-runoff (last accessed on March 28, 2024).
[135] *Id*.
[136] *Id*.
[137] Clean Water Act, 33 USC § 1251 *et seq.; see* State of Oregon Department of Environmental Quality, *Preparing Stormwater Planning Documents* (2019), available at:
[138] EPA's Phase II Stormwater Rule, 40 CFR Part 122; OAR 660-011-0000 *et seq.* (Statewide Planning Goal requires planning development of orderly and efficient public facilities by all local governments).
[139] *Id*.
[140] *See* the State of Oregon Department of Environmental Quality's planning, design and construction manuals for stormwater available at: https://www.oregon.gov/deq/wq/cwsrf/pages/cwsrf-planning.aspx (last accessed on March 29, 2024).

from roadways and then slowly filter it through layers of soil, sand, and stone.[141] Most stormwater is treated and returned to the rivers.[142]

Although stormwater collection is not a traditional service to the property owner, stormwater is the direct result of city development. To offset the costs of stormwater collection and treatment, cities often assess stormwater fees as part of the wastewater fees.[143]

D. Electric Utilities

There are 38 consumer or publicly owned electric utilities in Oregon, including 12 municipal electric utilities.[144] State law specifically grants cities the authority to operate an electric utility.[145] City-owned electric utilities are not regulated by the Public Utility Commission (PUC).[146]

Municipal electric utilities distribute electricity to residential, commercial, and industrial customers inside and outside of its city limits. Electric utilities are responsible for generating or purchasing power through power purchasing agreements.[147] Electric utilities usually purchase power on the wholesale market to balance resource output with customer needs.[148] Such electric utilities may have surplus wholesale electric energy to sell.[149]

The majority of power purchased by electric utilities is generated by hydroelectric plants. For example, Forest Grove Light and Power purchases 90% of its power from the federal non-profit agency, Bonneville Power Administration (BPA).[150] Nearly 80% of Eugene Water and Electric Board's power comes from hydroelectric plants with most of the power bought from the BPA.[151] BPA markets wholesale electrical power from 31 federal hydroelectric projects in the Northwest, one non-federal nuclear plant, and several small non-federal power plants.[152]

---

[141] *Id*.
[142] *Id*.
[143] *See* City of Eugene, *Stormwater Fees*, available at: https://www.eugene-or.gov/467/Fees-and-Charges (last accessed on March 29, 2024); City of Gresham, *Stormwater Utility Rates*, available at: https://greshamoregon.gov/Stormwater-Utility-Rates/ (last accessed on March 29, 2024).
[144] *See* Oregon Municipal Electric Utilities Association, available at: https://www.omeu.org/ (last accessed on March 29, 2024); State of Oregon Department of Energy, *Oregon Utilities*, available at: https://www.oregon.gov/energy/energy-oregon/Pages/Oregon-Utilities.aspx (last accessed on March 29, 2024).
[145] ORS 225.020.
[146] *See, e.g.*, ORS 758.505(6) ("nonregulated utility means…a municipal utility operating under ORS chapter 225").
[147] *See* Electric Water & Electric Board, *Where Your Power Comes* From, available at: https://www.eweb.org/your-public-utility/power-supply (last accessed on March 29, 2024).
[148] *Id*.
[149] *Id*.
[150] *See* City of Forest Grove, *Light & Power*, available at: https://www.forestgrove-or.gov/204/Light-Power (last accessed on March 29, 2024).
[150] *Id*.
[151] *See* Electric Water & Electric Board, *Where Your Power Comes* From, available at: https://www.eweb.org/your-public-utility/power-supply (last accessed on March 29, 2024).
[152] *See* Bonneville Power Administration, *Power Services*, available at: https://www.bpa.gov/energy-and-services/power (last accessed on March 29, 2024).

In 2007, the Oregon Legislature enacted legislation that requires all electric utilities, including municipal electric utilities, to decrease the utilities reliance on fossil fuels for electric generation and increase use of renewable energy sources.[153]

Cities set rates based on the estimated costs for providing the electrical services and future improvements.[154] Cities have the sole authority to determine rates.[155] After all expenses are paid, if there is surplus revenue, the city may pay to itself not less than three percent of the gross operating revenue of the electric utility for general fund purposes.[156]

Customers are usually billed for actual use through meters.[157] Many cities are replacing manual read meters with automated meters that transmit the data to the city.[158]

D. Miscellaneous Utilities – Solid Waste, Geothermal Heat, Fiber/Internet, Power Generation

Solid Waste**.** Except for the Metropolitan Service District, a local government serving cities and counties in the greater Portland area, no local governments directly provide solid waste collection.[159] Rather, as discussed below, cities regulate solid waste collection through franchise agreements with garbage and recycling haulers. Some local governments own and operate their own solid waste disposal sites or transfer stations. These governments are responsible for compliance with DEQ for solid waste disposal operation.[160]

Geothermal Heat. The city of Klamath Falls is the only Oregon city operating a geothermal heating utility, providing heating services to 23 facilities.[161]

Telecommunications. A number of cities have registered telecommunication utilities such as the cities of Ashland, Eugene, and Sandy.[162] These utilities are registered with the Public Utilities Commission.[163] In Ashland, the city owns, manages and maintains the telecommunications infrastructure, then leases it to preferred locally owned Internet Service Providers (ISPs) so customers can choose between going with utility directly or the partner ISP

---

[153] ORS 469A.005 to 469A.304 (Oregon Renewable Energy Act).
[154] ORS 225.230.
[155] ORS 225.240.
[156] ORS 225.270.
[157] *See* City of Ashland, *Radio Frequency Meter FAQ*, available at: https://www.ashland.or.us/Page.asp?NavID=14604 (last accessed on March 28, 2024).
[158] *Id*.
[159] Metro is a municipal corporation established and existing pursuant to Section 14 of Article XI of the Oregon Constitution, ORS chapter 268, and the Metro Charter.
[160] ORS chapter 459.
[161] *See* City of Klamath Falls, *Geothermal*, available at: https://www.klamathfalls.city/232/Geothermal (last accessed on March 29, 2024).
[162] ORS 759.570 (cities are not restricted from acquiring telecommunication franchises).
[163] ORS 759.005 to 759.060.

that best fits their needs.[164]

Power Generation. Cities may own and operate power facilities for an electric light and power system or an electric cogeneration facility.[165] In Oregon, the city of Klamath Falls developed a cogeneration facility that was later sold to a third party.[166]

E. Other Fees for City Services

Several cities have chosen to implement other fees for city services on the utility bills of water and sewer customers. Some of the fees are for transportation costs and may have the names of a street user fee or road maintenance fee.[167] Other fees added to utility bills are public safety fees. [168] These types of additional fees have been upheld as permissible by state courts.[169]

To determine whether such fees are permissible, a court looks at a city's charter to determine whether such fees are prohibited.[170] However, a broad grant of authority under a city's charter will allow the addition of such fees.[171]

III. FRANCHISES

A city holds public property as a benefit for the citizens of the community. Cities grant permission to specific governments or corporations to allow them to have their facilities in the public right-of-way. [172] As discussed below, the form of the permission may be a franchise or license, but for ease, the term *franchise* is used to discuss a cities limitations and powers below.

A franchise is a "special privilege granted by the government to a person or corporation, which privilege does not belong to the citizens of a [city] generally, of common right."[173] A franchise allows the grantee to exercise powers which, without the franchise, the grantee could

---

[164] *See* City of Ashland, About Ashland Fiber Network, available at: https://www.ashland.or.us/page.asp?navid=7 (last accessed on April 4, 2024).
[165] ORS 225.450 to 225.490.
[166] ORS 225.085; *see* State of Oregon Department of Energy, *Klamath Cogeneration Project*, available at: State of Oregon: Facilities - Klamath Cogeneration Project (last accessed on March 29, 2024).
[167] *See* League of Oregon Cities, *Water Rates Survey Report* (February 2024), available at: https://www.orcities.org/application/files/7217/0870/9731/WaterRatesSurveyReport.pdf (last accessed on March 29, 2024).
[168] *Id.*
[169] *See McPherson v. Coos Bay-N. Bend Water Bd.*, 318 Or App 582 (2022); *Knapp v. City of Jacksonville*, 342 Or 268 (2007).
[170] *McPherson*, 318 Or App at 584-85.
[171] *Id.*
[172] *Nw. Natural Gas Co. v. City of Portland*, 300 Or 291, 308 (1985) (citing 3 Dillon, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS 1766, at 1905-07 § 1210 (5th ed 1911).
[173] *Id.* (citing *Whitbeck v. Funk*, 140 Or 70, 73-74 (1932).

not exercise.[174] A franchise outlines the conditions of service and terms of compensation for the use of the public right-of-way.[175]

Franchise holders can be investor-owned or be operated by other local governments to provide public services. As discussed below, infrastructure can include phone lines, cable and data lines, power, garbage and recycling collection, and natural gas.

A. Power to Regulate and Impose Fees

Except where preempted or limited by federal or state law, cities have the authority regulate their own right-of-way and require business and investor-owned utilities to obtain permission to locate in the city's right-of-way.[176] This authority to regulate their own right-of-way is due to a city's charter and by statute.[177]

Cities may govern all conditions associated with utility's use of the public streets.[178] Cities may contract or prescribe the terms of the occupation by ordinance.[179] In interpreting franchises, courts will look at the terms of the franchise and "if the terms of the franchise are doubtful, they are to be construed strictly against the grantee and liberally in favor of the public."[180]

The United States Supreme Court held that cities could charge franchise fees based on the value of the public property used.[181] The Court stated such fees were not a "tax," but rental for the use of the public property.[182] As the custodian of these public rights-of-ways, local governments receive compensation for the "intrusion into and use of the limited resources of the public domain."[183] Oregon cities can impose taxes and fees in the manner the city deems appropriate to provide governmental services.[184] More specifically, the fees represent the increased costs for right-of-way maintenance, improvements, and administration, and indirect costs for increased travel time, loss of access and trade to local business, increased noise

---

[174] *Id*.
[175] *See* City of Corvallis, *Franchise Management*, available at: https://www.corvallisoregon.gov/publicworks/page/franchise-management (last accessed on March 29, 2024).
[176] ORS 221.420; *see City of Idanha v. Consumers Power*, 8 Or App 551 (1972) (upholding the city of Idanha's right to require a utility to be licensed and that the charter's general grant of powers conferred upon Idanha "the sum total of intramural powers available to municipalities in Oregon.")
[177] *Id*.; *see also Nw. Natural Gas Co.*, 300 Or at 308.
[178] *Id*.
[179] ORS 221.420.
[180] *Nw. Natural Gas Co.*, 300 Or at 308 (citing *City of Joseph v. Joseph Water Works Co*., 57 Or 586, 591, 111 P 864 (1910), 112 P 1083 (1911)).
[181] *St. Louis v. Western Union Tel. Co.*, 148 US 92 (1893); *Postal Tel. Cable Co. v. City of Newport*, 76 SW 159 (Ky 1903); *Western Union Tel. Co. v. City of Richmond*, 224 US 160 (1912); *Postal Tel.-Cable Co. v. City of Richmond*, 249 US 252 (1919); *see also Loretto v. Teleprompter Manhattan CATV Corp*., 458 US 419 (1982).
[182] *Id*.
[183] *Id*.
[184] *See Jarvill v. City of Eugene*, 289 Or 157 (1980).

pollution, and visual intrusion.[185] Cities can grant right-of-way access to other governments and charge them franchise fees for doing so.[186]

Fees are typically calculated by one of the following: a percentage of the revenues of a utility company to customers in a service area; or a fee assessed per linear foot, per attachment or per pole.[187] Cities collect other fees such as registration, permit, application, license or construction fees.[188]

B. Differences Between Franchise Agreements and Licenses

As discussed above, cities grant permission to other governments or companies to use the public right-of-way. The form of the permission may be either by a franchise agreement or a license.

i. Franchise Agreements

For many years, permission to install and operate in city rights-of-way was primarily granted by a franchise agreement.[189] Agreements can be a contract negotiated by a city or an ordinance approved by a city council.[190]

In a franchise agreement, fees are usually much like a gross receipts tax and are typically calculated on a percentage of the revenues derived from sales of the utility company to customers in that service area or territory.[191] The amount is ordinarily 5-7% of the gross revenues generated from customers in the city limits.[192] For example, the city of Wilsonville charges a 5% franchise fee off the gross revenues for garbage haulers to customers within the city limits to operate in the city rights-of-way.[193] Ordinarily, the franchisees pass that fee onto the customer so there is no out of pocket cost to the franchisee.[194]

---

[185] *See* City of Corvallis, *Franchise Management*, available at: https://www.corvallisoregon.gov/publicworks/page/franchise-management (last accessed on March 29, 2024).
[186] *Id*.
[187] *Id*.
[188] *See* League of Oregon Cities, *Right-of-way Related Fees*, available at: https://www.orcities.org/application/files/7016/4866/7026/ROW_Related_Fees.pdf (last accessed on March 29, 2024); *See* League of Oregon Cities, *Franchise Agreement Survey Report* (2019), available at: https://www.orcities.org/application/files/7615/7669/0101/2019FranchiseFeeROWSurveyReport12-13-19.pdf (last accessed on March 29, 2024).

[189] *Id*.
[190] *Id*.
[191] *Id*.
[192] *Id*.
[193] *See* City of Wilsonville, *Solid Waste Management Franchise and Rate Information*, https://www.ci.wilsonville.or.us/residents/page/solid-waste-management-franchise-and-rate-information (last accessed on March 29, 2024).
[194] *See e.g.*, CenturyLink, *Local Franchise Tax or Fees*, available at: Local Franchise Tax or Fees | CenturyLink (last accessed on March 29, 2024).

ii. Licenses

In recent years, licenses (also known as right-of-way permits) have become more popular as the rise of wireless providers seeking to operate in city rights-of-way.[195] Unlike franchise agreements, licenses are unilaterally imposed by the city.[196]

Cities requiring licensees to pay a unilaterally imposed right-of-way fee does not create a "franchise" and thus the fee is a privilege tax.[197] A privilege tax is a tax that allows service providers to use the right-of-way.[198] For certain types of local government franchisees like a public utility district, where there is no franchise, the privilege tax is limited to the statutory amount of 5%.[199]

C. Telecommunication Regulations

Telecommunication regulations once only included telephone services but now the industry includes local and long-distance telephone service, internet, broadcasting, and cable television.[200] A brief history of federal telecommunication regulation is provided below and is useful for cities to understand the laws and regulations impacting a city's right to regulate the right-of-way. Second, the current telecommunication regulations are provided below with specific discussion about telephone, cable, and small cell technologies.

The discussion below is intended to complement the League of Oregon Cities Model Cable Television Franchise Agreement and the more extensive forthcoming Telecom Toolkit. The forthcoming Telecom Toolkit is meant to assist cities in the complicated issues of telecommunication regulation. The League's Model Cable Television Franchise Agreement serves as guidance because the forthcoming Telecom Toolkit does not apply to cable providers, cable services, and non-cable services provided over cable systems.

Note that the case law and federal regulations continue to change. Local officials should consult with legal counsel when deciding how to utilize the Leagues' Toolkit or the information contained in this section.

---

[195] *See* League of Oregon Cities, Model Cable Television Franchise Agreement (July 2022), available at: https://www.orcities.org/download_file/2372/1852 (last accessed on March 29, 2024).
[196] *Nw. Natural Gas Co. v. City of Gresham*, 359 Or 309, 327 (2016) (holding that a license fee imposed is a privilege tax for purposes of ORS 221.450, limiting the tax to 5% against another local government if a utility is operating without a franchise).
[197] *Id.*
[198] *Id.*
[199] *Id.*; ORS 221.450.
[200] *See* ORS 221.510 to 221.515; League of Oregon Cities, *Telecom Toolkit* (available soon).

i. Brief History of Telecommunication Regulation[201]

In 1910, the United States started regulating telegraph and telephone companies when it declared the companies providing the service to be common carriers.[202] As a common carrier, the telecommunications companies had to offer their services without discrimination to all willing customers and they had to charge reasonable rates set by the federal Interstate Commerce Commission.[203] A few years later, the long-distance monopoly, AT&T, agreed to allow competing local providers (now called incumbent local exchange carriers or ILECs) to interconnect with AT&T's long-distance services.[204]

In 1927, Congress passed legislation to address broadcasting, a physically scarce commodity with competing frequencies, times, locations, and power levels.[205] With more than 1,000 radio stations broadcasting in a state of anarchy, the Radio Act regulated entry into broadcasting and would grant broadcasting licenses for the for the public convenience, interest and necessity.[206]

In 1934, Congress passed the Communications Act, establishing the Federal Communications Commissions.[207] The Federal Communications Commission ("FCC") was given authority to regulate radio, interstate, and international telegraph and telephone services.[208]

In the late 1940s, cable systems were designed to capture the broadcast television signals and transmit them to consumers in remote towns where the broadcasts would not have reached otherwise.[209] By the early 1950s, cable grew into a potential competitor to broadcast televisions and broadcasters sought to have the FCC regulate the arena because it would destroy the economic viability of free television.[210] In the late 1960s, the FCC limited cable growth by requiring that cable operators receive permission to enter urban markets.[211]

Beginning in the late 1960s, a series of FCC rulings allowed other users to attach to the telephone services as long as it did not harm either the network or others, introducing competition against AT&T.[212] Later, AT&T was forced to allow others to provide "information services"

---

[201] *See generally*, Tim Wu, *A Brief History of American Telecommunications Regulation*, OXFORD INTERNATIONAL ENCYCLOPEDIA OF LEGAL HISTORY, VOL. 5, p. 95, 2009 (2007), available at: https://scholarship.law.columbia.edu/faculty_scholarship/1461 (last accessed on March 29, 2024).
[202] *Id.*
[203] *Id.*
[204] *Id.*
[205] *Id.*
[206] *Id.*
[207] *Id.*
[208] *Id.*
[209] *Id.*
[210] *Id.*
[211] *Id.*
[212] *Id.*

over its phone lines, supporting the rise of internet service providers.[213]

Responding to the deregulatory movement of the 1970s and 1980s, in 1974, the U.S. Justice Department began an antitrust action against AT&T, seeking a breakup of the company and divesture of the regional bell operating companies from AT&T.[214] Eventually, AT&T agreed, and AT&T was split up.[215]

In the time of deregulation of the 1970s and 1980s, the FCC also stop enforcing the "fairness doctrine," a regulation that required that broadcasters give notice and time for advocates on both sides of an issue to be heard.[216] In the 1990s, the FCC auctioned off broadcasting licenses to the highest bidder rather than the previous practice of allocating licenses to whomever would best serve the public interest.[217]

ii. Current Telecommunication Regulation[218]

In 1996, Congress enacted the Federal Telecommunications Act of 1996.[219] The 1996 Act eliminated the legal boundaries between the previously distinct areas of local and long-distance telephone market, internet, broadcasting, and cable television.[220] The 1996 Act preempts cities that prohibit the provision of telecommunications services but preserves local authority to manage the rights-of-way and receive compensation for use of the rights-of-way.[221]

Since the 1996 Act, the recent industry trends have created a convergency of services so that former Incumbent Local Exchange Carrier ("ILEC") franchisees that once only provided landline phone service, now provide voice, wireless service, internet data services and even digital television. Further, cable providers have expanded to broadband internet, telephone, and wireless services.

Oregon state law authorizes cities to "[d]etermine by contract, or prescribe by ordinance, the terms and conditions, including payment of a privilege tax to the extent authorized by ORS 221.515 and other charges and fees, upon which any telecommunications carrier may be

---

[213] *Id.*
[214] *Id.*
[215] *Id.*
[216] *Id.*
[217] *Id.*
[218] *Id.*
[219] The Telecom Act, 47 USC § 151 *et seq.*
[220] *See, e.g., City of Eugene v. FCC*, 998 F 3d 701, 714 (6th Cir 2021).
[221] *See* 47 USC § 253(a) (preempting any state or local law or regulation that "prohibit[s] or has the effect of prohibiting" the provision of telecommunications services).

permitted to occupy the streets, highways or other public property . . . ."[222] ORS 221.515 caps the privilege tax for access to the ROW at 7% of annual gross revenues (less net uncollectibles).[223]

Telecommunication Services

Oregon has preempted cities from charging more than 7% cap on incumbent local exchange carriers (ILEC) telecom carriers limit but that limit does not include fees for "street openings, construction, inspection or maintenance of fixtures or facilities."[224] There are no restrictions on franchise fees charged to competitive local exchange carriers (CLEC), who are independent and geographically specific telephone providers.[225] Annual registration and application fees for construction permit are not included in the seven percent limit.[226] Oregon law does not necessarily limit additional taxes cities might impose on all utilities—including telecommunications utilities—that operate within the city limits, so long as the additional tax(es) do not duplicate the privilege tax for the right-of-way actual use by a telecommunications carrier.[227]

Under Oregon law, entities that do not actually use the right-of-way may not be charged a privilege tax. [228] Examples of such entities that are not allowed to be taxed by cities include entities that purchase services at wholesale rates from ILECs and resell them at retail rates to subscribers or voice over internet providers (VoIP) providers.[229]

Cable Services

Under the 1996 Act, cities may not charge more than 5% of its annual gross revenue on cable operators to provide cable services.[230] Incumbent cable providers, who generally did not provide telephone or broadband services as common carriers, also evolved to offer these non-cable services over the franchised cable system to compete with the ILECs. Controversies soon followed over whether the revenues from the non-cable services provided over the franchised cable system could be included in the franchise fees.

---

[222] ORS 221.510(2)(a).
[223] ORS 221.515(1); *see also* ORS 221.515(2) (defining "gross revenues" by reference to exchange access services as defined in ORS 403.105, minus "net uncollectibles from such revenues"); ORS 221.515(4) (defining "telecommunications carrier" by reference to ORS 133.721).
[224] ORS 221.515.
[225] *See* League of Oregon Cities, *Franchise Agreement Survey Report* (2017), available at: https://www.orcities.org/application/files/5815/6115/9585/Franchise_Agreement_Survey_Report_FINAL_3-6-17.pdf (last accessed on March 29, 2024).
[226] *See US West Communications, Inc. v. City of Eugene*, 336 Or 181, 186 (2003); *accord Qwest Corp. v. City of Portland*, 275 Or App 874, 884 (2015), *review denied* (2016).
[227] *See*, e.g., *Qwest Corp. v. City of Portland*, 275 Or App 874, 884 (2015), *rev den* (2016) (upholding city's "utility license fee" and privilege tax as charged to the same carrier because the "utility license fee" was not imposed as a tax for the use of the right-of-way).
[228] *Id*. at 888–89 (2015).
[229] *Id*.
[230] Telecommunications Act of 1996, 46 USC § 542 *et seq*.

The FCC attempted to resolve these controversies with its so-called "mixed-use rule" that interpreted the 1996 Act to prohibit franchise fees on non-cable services provided over cable systems by both common carriers and non-common carriers.[231] The FCC justifies this rule based on a provision from the 1996 Act that prohibits regulations on information services offered by cable providers.[232]

The city of Eugene, among other petitioners, asked the Sixth Circuit Court of Appeals (the federal court of appeals who had considered the FCC rule), whether local governments were prohibited from imposing fees on cable operators for providing broadband service.[233] The Sixth Circuit explained that local governments "cannot require payment of an information-services fee as a condition of obtain a [cable] franchise," and thus cannot "end-run" that prohibition by imposing the same kind of fee pursuant to their police power.[234]

Subsequent to the Sixth Circuit's decision, Comcast brought suit against the city of Beaverton and argued that the city's fees, 5% of gross revenue on all "utility" services provided in the public right-of-way, were preempted by the mixed-use rule.[235] The Oregon District Court agreed with Comcast and held that the City "has unlawfully circumvented § 544(b)(1) [of the Cable Communications Policy Act of 1984] by imposing a rights-of-way fee for broadband services via its police power.[236] Please see the League of Oregon Cities' Model Cable Television Franchise Agreement for guidance on cable providers: https://www.orcities.org/download_file/2372/1852.

Wireless Facilities

In the last few years, cellular technology has transformed from just large towers to adding small wireless installations.[237] These small wireless facilities serve smaller geographic areas and higher data capacity called *cells*.[238] Users and devices are connected within the cell to the broader communications network.[239] When the user or wireless device moves around the service area, the facilities hand off the connection as the user and device leaves one cell and enters another.[240]

---

[231] *See* 47 C.F.R. § 76.43; *see In re Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984*, Third Report and Order, MB Docket 05-311, 34 FCC Rcd. 6844, 6879, ¶ 64 (Aug. 2, 2019).
[232] *See* 47 U.S.C. § 544(b)(1) ("[T]he franchising authority, to the extent related to the establishment or operation of a cable system . . . may not . . . establish requirements for video programming or other information services . . . .").
[233] *City of Eugene v. FCC*, 998 F3d 701, 711, 715 (6th Cir 2021) (The Sixth Circuit had affirmed the "mixed use rule" promulgated by the FCC.).
[234] *Id*.
[235] *Comcast of Oregon II, Inc. v. City of Beaverton*, 609 F Supp 3d 1136 (D Or June 29, 2022).
[236] *Id*.
[237] National League of Cities, *Municipal Action Guide: Small Cell Wireless Technology in Cities* (2018), available at: https://www.nlc.org/wp-content/uploads/2018/08/CS_SmallCell_MAG_FINAL.pdf (last accessed on March 29, 2024); *see* League of Oregon Cities, Telecom Toolkit (available soon).
[238] *Id*.
[239] *Id*.
[240] *Id*.

Due to this evolution of cellular technology, cities have been asked to place small wireless facilities in the right-of-way. Cities may charge telecommunications providers to replace wireless attachments on utility poles in the right-of-way.

The 1996 Act addresses local authority over placement, construction and modifications to personal wireless service facilities.[241] Cities cannot: (1) unreasonably discriminate among functionally equivalent services; (2) prohibit or effectively prohibit personal wireless services; (3) fail to act within a reasonable time on a duly-filed request for authorization to place, construct or modify a personal wireless facility; (4) deny requests for authorization without a written decision based on substantial evidence; or (5) regulate personal wireless service facilities based on environmental effects from radio frequency emissions if those emissions comply with standards set by the FCC.[242]

Specifically, right-of-way access fees must be a reasonable estimate of the city's costs and no higher than fees charged to similar situated competitors.[243] The FCC has established presumptively reasonable fees under the Order.[244]

Wireless infrastructure is limited in scope and in only specific locations.[245] For example, a wireless company may use a cable company's fiber lines and an electric utilities power for an antenna on a city or utility pole in the right-of-way.[246] For these reasons, most cities require a license agreement to site wireless infrastructure within the city right-of-way.[247]

D. Natural Gas and Electric Service Franchises

In Oregon, all natural gas utilities are investor-owned.[248] Most cities franchise the use of public right-of-way to distribute natural gas to properties. There is very limited competition for natural gas distribution in Oregon. The Oregon legislature attempted to induce competition in this industry but with no apparent results to date.

---

[241] 47 USC § 332(c)(7).
[242] *Id*.
[243] *See In re Accelerating Wireline and Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Declaratory Ruling and Third Report and Order, WT Docket 17-79, 33 FCC Rcd. 9088 (Sep. 27, 2018).
[244] *Id*.
[245] *See* League of Oregon Cities, Telecom Toolkit (available soon).
[246] *Id*.
[247] *Id*.
[248] State of Oregon Department of Energy, *Oregon Utilities*, available at: https://www.oregon.gov/energy/energy-oregon/Pages/Oregon-Utilities.aspx (last accessed on March 29, 2024).

In Oregon, in addition to the municipal electric utilities, the following entities provide electric service: three investor-owned utilities, six peoples utility districts and 20 member-owned, not-for-profit electric cooperatives.[249]

Through Oregon's Administrative Rules, the Oregon Public Utility Commission (PUC) regulates investor-owned utilities including the rates the utilities may charge.[250] The regulations also provide the extent to which a city may cause electric utilities to limit use of above-ground facilities and to relocate them underground at the utility's expense.[251] Local consumer-owned electric utilities (municipals, people's utility districts and electric cooperatives) are regulated locally, not by the PUC.[252]

As discussed above, cities have the right to determine the conditions for the use of the public right-of-way and impose reasonable fees. For example, cities may require electric lines be placed underground in certain locations or that they be relocated underground in a street widening project.

E. Other Utilities – Solid Waste Collection, Water, Wastewater

Franchises can also be granted to other government entities. These government franchises can take the form of franchise fees to other governments (cities and special districts), or franchises charged to the city itself. This latter charge (often called an in-lieu-of franchise) is most often used for city business activities as an accounting practice. While 71% of cities do not charge government franchises, larger cities and those in the Metro region are most likely to have such arrangements.[253] Most common in-lieu-of franchises are charged for water, wastewater, and stormwater utilities.[254] All these are most often owned by the city.

For some services like solid waste collection, cities have a statutory responsibility to ensure services.[255] Most Oregon cities license or franchise private companies to collect garbage and other solid waste and transport it to an approved site such as landfill operated either privately

---

[249] *See* League of Oregon Cities, *Franchise Agreement Survey Report* (2019), available at: https://www.orcities.org/application/files/7615/7669/0101/2019FranchiseFeeROWSurveyReport12-13-19.pdf (last accessed on March 29, 2024).
[250] ORS 756.040; ORS 757.007 *et seq.*
[251] OAR 860-022-0047.
[252] ORS 757.006.
[253] *See* League of Oregon Cities, *Franchise Agreement Survey Report* (2019), available at: https://www.orcities.org/application/files/7615/7669/0101/2019FranchiseFeeROWSurveyReport12-13-19.pdf (last accessed on March 29, 2024).
[254] *Id*.
[255] ORS 459A.005 (requiring cities with a population of 4,000 must provide collection at least once a month of source separated recyclable material from collection service customers within the city's urban growth boundary, or provide an alternative method that complies with the rules of the Environmental Quality Commission).

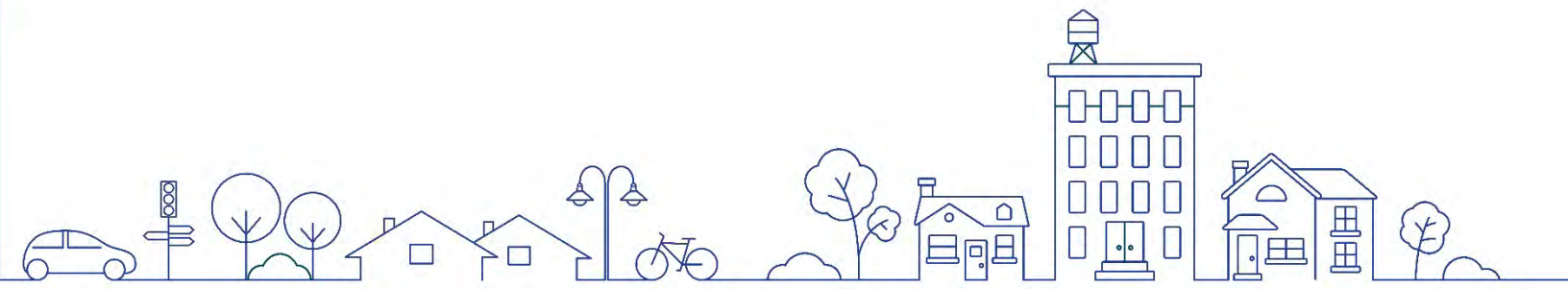
or by the county or regional government.[256] These franchises tend to be exclusive, at least in practical effect, to avoid duplication of service and excess truck traffic. Franchise exclusivity is usually justified on the basis of the substantial capital investment required in trucks and equipment and the hauler's need to make a return on that investment. City franchises typically limit the rates charged by franchised haulers to their customers in exchange for allowing the hauler to provide the service for a described area and to collect a certain rate of return, similar to the state's role in regulating other private utility providers.[257]

In a small number of cities, a licensing system exists where any number of haulers can be licensed and compete for customers.[258]

Cities must also provide collection services for recyclable material and an education/promotion program that encourages source separation of recyclable material and provides notice of opportunities to recycle.[259] State law frequently mandates certain features of solid waste disposal such as disposal of lead acid batteries, a subject typically governed by the local garbage franchise.[260] The law prohibits disposal of lead acid batteries in mixed municipal solid waste and requires battery retailers to accept used batteries as trade-ins.[261]

[256] *See* City of Wilsonville, *Solid Waste Management Franchise and Rate Information*, https://www.ci.wilsonville.or.us/residents/page/solid-waste-management-franchise-and-rate-information (last accessed on March 29, 2024).
[257] *Id*.
[258] *See* City of Eugene, *Licensed Haulers and Rates*, available at: https://www.eugene-or.gov/4504/Licensed-Haulers-and-Rates (last accessed on March 29, 2024).
[259] ORS 459A.010.
[260] ORS 459.420.
[261] ORS 459.426.

CHAPTER 18:
PUBLIC SAFETY



League of Oregon Cities

Published by the League of Oregon Cities
Published October 2024

Table of Contents

Chapter 18: Public Safety

Cities have a responsibility to provide for the safety, welfare, and morals of their residents.[1] For the safety of their residents, Oregon cities primarily provide law enforcement, but also may provide fire services. Emergency management, an essential component of fire and law enforcement response, helps to reduce threats to safety and cope with disasters.

This chapter is intended to provide an overview of a city's public safety functions in fire services and law enforcement and will only provide an overview of the current search and seizure law in Oregon. For specific questions on police procedure, including search and seizure law, please consult your city attorney or district attorney.

I. Fire Services

Fire services are essential to the safety of a city because fire poses a risk to life and property. Every 24 seconds, a fire department responds to a fire somewhere in the United States.[2] Although fire's toll has declined steadily over the past two decades, fire continues to cause major losses.[3]

According to National Fire Protection Association's (NFPA) latest reports, home fires and home fire deaths declined by about 50% since 1980.[4] However, the 7.8 deaths per 1,000 reported home fires reflects a 10% increase over the 7.1 rate in 1980.[5] In other words, while the number of U.S. home fires and home fire deaths has significantly declined over the past few decades, the death rate per 1,000 reported fires is actually a little higher.[6]

Fire services not only include extinguishing fire, but also include life safety services related to emergency medical, technical rescue, fire prevention, and fire code implementation.

A. Firefighting

In Oregon, city fire protection began in the 1850s for the cities of Portland and Salem and the 1870s for the city of Eugene.[7] Many cities started with volunteers but moved to professional

---

[1] ORS 30.315.
[2] *See* National Fire Protection Agency, *Reporter's Guide: The Consequences of Fire*, available at: https://www.nfpa.org/en/About-NFPA/Press-Room/Reporters-Guide-to-Fire/Consequences-of-fire (last accessed September 3, 2024).
[3] *Id.*
[4] *Id.*
[5] *Id.*
[6] *Id.*
[7] *See* City of Salem, *Fire Department History*, available at: https://www.cityofsalem.net/community/safety/fire/about-the-salem-fire-department/fire-department-history#:~:text=Salem%2C%20Oregon's%20first%20fire%20company (last accessed on September 3, 2024); Jackson County Fire District 1, *Oregon District History*, available at: https://www.rogueriverfd.com/history (last accessed September 3, 2024).

and paid fire departments. For example, Portland established its fire department when a huge fire in August 1873 destroyed 22 blocks of wooden buildings.[8]

Beginning in 1917, the state insurance commissioner served as the *ex officio* state fire marshal and oversaw the damages of property damages caused by fire.[9] Prior to 1930s, cities were not allowed to respond to fires outside of city limits because they would not have insurance therefore, there was little or no fire protection outside of the territory of cities.[10] In the 1929 legislative session, the Oregon Legislature authorized the formation of special districts called rural fire protection districts to provide services in unincorporated areas.[11]

Today, fire services can be provided by multiple governmental entities, including city fire departments, rural fire protection districts, or urban area special districts. For the best utilization of limited resources, the trend is for smaller cities to annex into rural fire protection districts or to enter into intergovernmental agreements to cooperate with other cities.[12]

City fire departments are focused on providing services within the city limits, but in some circumstances, can provide services to "unprotected areas."[13] Areas outside of a city limit, such as wildfire or urban areas and those that are outside the boundaries of recognized fire protection for the area, are examples of areas that are "unprotected."[14] For areas that are unprotected, a city's governing body may give authority to the fire chief to respond when such fires cause or may cause undue jeopardy to life or property.[15] When authorized by the governing body, a fire department may, upon request, respond outside the limits of its city to a fire or other public safety incident and to aircraft emergencies and other incidents on transportation routes.[16] Fire

---

[8] *See* John Killen, *Throwback Thursday: Portland's Old Fire Houses are Part of Legacy Going Back to 1851*, THE OREGONIAN (Jan. 22, 2015), available at: https://www.oregonlive.com/history/2015/01/throwback_thursday_portlands_o.html (last accessed September 3, 2024).

[9] *See* Office of the State Fire Marshal, *About Us*, available at: https://www.oregon.gov/osp/programs/sfm/pages/aboutus.aspx#:~:text=OSFM%20History%3A,and%20served%20under%20the%20governor; *Losses by Fire Totaled by Lee: State Fire Marshal Places August Damage in State as $341,700*, CORVALLIS GAZETTE-TIMES, Sep. 16, 1930 (last accessed September 3, 2024).

[10] *Milk Substitutes for Water When Flames Menace, Creation of Fire Districts Outside of Incorporated Towns Explained by State Marshal*, THE NEWS-REVIEW, June 28, 1930*; Communities Plan to Form Fire Districts*, THE WORLD, May 3, 1932.

[11] *Id.; Rural Owners to Get Lower Rate Lee Says*, CAPITAL JOURNAL, July 10, 1930.

[12] *See* e.g., City of Eugene, *Eugene/Springfield Merger*, available at: https://www.eugene-or.gov/331/Eugene-Springfield-Merger (last accessed September 3, 2024).

[13] ORS 476.280; see also Office of the State Fire Marshal, *Oregon Structural Fire Protection Map*, available at: https://www.oregon.gov/osfm/Docs/Oregon%20Structural%20Fire%20Protection.pdf (last accessed September 3, 2024).

[14] OAR 837-130-0010(1).

[15] ORS 476.280; see also Office of the State Fire Marshal, *Oregon Structural Fire Protection Map*, available at: https://www.oregon.gov/osfm/Docs/Oregon%20Structural%20Fire%20Protection.pdf (last accessed September 3, 2024).

[16] ORS 478.310.

departments may bill and collect for the costs of fire department response accordance with a State Standardized-Cost Schedule for areas outside of the departments service area.[17]

The National Fire Protection Association (NFPA) provides guides based on the science of fire dynamics to the response strategy, tactics and best practices for firefighters controlling fires within a structure.[18] According to the NFPA, firefighting tactics are changing based on modern construction, newer on-scene technology, and evolving fuel loads.[19] Current firefighting guidance addresses the health and safety of firefighters by reinforcing the need for personal protective equipment and methodologies for contamination control.[20] It is also is designed to help fire service organizations establish effective strategies that consider tactics, search, rescue, and fire suppression operations, as well as civilian and responder safety.[21]

The Oregon State Fire Marshal (OSFM) makes rules and regulations standardizing the equipment used for fire protection.[22] All fire protection equipment purchased by cities shall be equipped with standard thread for fire hose couplings and hydrant fittings as adopted by the OSFM.[23] Oregon law prohibits any person from selling in Oregon any fire protection equipment unless such equipment is fitted and equipped with the standard thread for fire hose couplings and hydrant fittings as adopted by the OSFM.[24]

The OSFM is responsible for the investigation of the cause of fire.[25] To investigate the fire, the OSFM has the authority to enter buildings and premises at reasonable hours to determine probable cause.[26] For just cause and to inspect the property, the OSFM may enter buildings and premises.[27] The OSFM appoints assistants, or where there is no such officer, the fire department chief are assistants to the OSFM.[28] The assistants to the OSFM aid in the administration and enforcement of inspections and investigations.[29]

B. Working With Other Agencies

i. Mutual Aid Assistance

Most cities with fire departments execute mutual aid agreements that provide for

[17] ORS 476.290; ORS 478.310; OAR 837-130-0000 to 837-130-0020.
[18] *See* National Fire Protection Association. *The Standards Development Process*, available at: https://www.nfpa.org/For-Professionals/Codes-and-Standards/Standards-Development (last accessed September 30, 2024).
[19] *Id*.
[20] *Id*.
[21] *Id*.
[22] ORS 476.030.
[23] ORS 476.410.
[24] ORS 476.440.
[25] ORS 476.210.
[26] ORS 476.070.
[27] *Id.*
[28] ORS 476.060.
[29] *Id.*

automatic assistance for structural and wildland protection within fire districts and cities, and for wildland protection in "unprotected" areas outside the boundaries of fire districts or cities.[30] For example, such agreements can provide that city provides fire protection services to neighboring rural fire protection districts and that rural fire protection district will provide the service in the city. This arrangement has become increasingly popular with small cities that can be served by large fire districts.

For example, the city of Ashland is a signatory along with all the other cities and fire protection districts of the Jackson/Josephine County Mutual Aid Agreement.[31] The agreement provides for automatic and/or mutual assistance with the other signatories.[32]

ii. State Conflagration Act

Under the State Conflagration Act, the Oregon State Fire Marshal has created the Oregon Fire Service Mobilization Plan.[33] Fire services may also be mobilized under powers of the governor, and the governor's direction, through the declaration of a state of emergency.[34] The Oregon Office of Emergency Management has the authority to establish priorities for the assignment and use of resources on a statewide basis in cases of emergency.[35]

Although the state of Oregon is responsible for activating the state response system, an effective statewide response is dependent on the local governments and their mutual aid agreements to allow the state to draw on the local resources. [36]

iii. National Incident Management System

On March 1, 2004, the U.S. Department of Homeland Security (DHS) published the first National Incident Management System (NIMS). [37] Fire services regularly use the NIMS and Incident Command System (ICS) to effectively manage firefighting activities in structural and wildfire emergencies.[38]

---

[30] ORS Chapter 190 (giving cities the authority to enter into agreements with other governments); ORS Chapter 402 (giving cities the authority to enter into agreements with other governmental entities for purposes of reciprocal emergency aid and resources).
[31] *See* City of Ashland, *Service Outside Ashland*, available at: https://www.ashland.or.us/Page.asp?NavID=13572 (last accessed September 3, 2024).
[32] *Id.*
[33] ORS 476.510 to ORS 476.610; ORS 476.990(4); *see also* OREGON STATE FIRE MARSHAL, OREGON FIRE SERVICE MOBILIZATION PLAN (2024), available at: https://www.oregon.gov/osfm/Docs/Fire-Service-Mobilization-Plan.pdf (last accessed September 3, 2024).
[34] ORS 401.165.
[35] ORS 401.062.
[36] *See* Rudy Owens, *The Oregon Mutual Aid System: Learning to Adapt and Confront Emerging Challenges* (Sept. 2019), available at: The Oregon Mutual Aid System: Learning to Adapt and Confront Emerging Challenges (iafc.org) (last accessed September 3, 2024).
[37] See FEDERAL EMERGENCY MANAGEMENT AGENCY, ICS REVIEW DOCUMENT (March 2018), available at: https://training.fema.gov/emiweb/is/icsresource/assets/ics%20review%20document.pdf (last accessed September 3, 2024).
[38] *Id*.

NIMS provides a consistent template enabling federal, state, Tribal, and local governments, the private sector, and nongovernmental organizations to work together to prepare for, prevent, respond to, recover from, and mitigate the effects of incidents regardless of cause, size, location, or complexity.[39] NIMS is a method of structuring response that can respond to single jurisdiction emergency but can rapidly expand to multijurisdictional efforts.[40] NIMS establishes common terminology that allows diverse incident management and support organizations to work together across a wide variety of functions and hazard scenarios.[41]

As part of NIMS, the Incident Command System (ICS) is a standardized approach to the command, control, and coordination of on-scene incident management that provides a common hierarchy within which personnel from multiple organizations can be effective.[42] The ICS specifies an organizational structure for incident management that integrates and coordinates a combination of procedures, personnel, equipment, facilities, and communications.[43]

The ICS includes five major functional areas, staffed as needed, for a given incident: (1) Command, (2) Operations, (3) Planning, (4) Logistics, and (5) Finance/Administration. A sixth ICS Function, Intelligence/ Investigations, is only used when the incident requires these specialized capabilities.[44]

The Federal Emergency Management Agency (FEMA) provides training for NIMS and ICS systems.[45]

C. Emergency Medical Services

For some cities, approximately 75% of emergency calls for service are for medical emergencies.[46] For this reason, 90% of cities providing fire services also provide emergency medical.[47] For example, a call to 9-1-1 often results in a dispatch of a fire apparatus staffed by firefighters and an ambulance staffed by paramedics, delivering emergency medical services. As a result, many Oregon cities require all firefighters to have a basic Emergency Medical Technician (EMT) license.[48]

---

[39] *Id*.
[40] *Id*.
[41] *Id*.
[42] *Id*.
[43] *Id*.
[44] *Id*.
[45] *See* https://training.fema.gov/emiweb/is/icsresource/ (last accessed September 3, 2024).
[46] *See* City of Hillsboro, *Emergency Operations*, available at: https://www.hillsboro-oregon.gov/our-city/departments/fire/operations (last accessed September 3, 2024).
[47] *See* UnitekEMT, *EMT to Firefighter: Career Guide fo Firefighter EMTs*, available at: https://www.unitekemt.com/blog/emt-to-firefighter-a-career-guide-for-aspiring-firefighter-emts/#:~:text=The%20majority%20of%20calls%20to,before%20jumping%20on%20the%20truck (last accessed September 3, 2024).
[48] *See* City of Portland, *Frequently Asked Questions*, available at: https://www.portland.gov/fire/join/frequently-asked-questions (last accessed September 3, 2024).

The Oregon Health Authority (OHA) is responsible for developing a comprehensive emergency medical services and trauma system.[49] The OHA oversees the law requiring counties to adopt an ambulance service area plan that establishes ambulance service areas for the county.[50] The OHA is charged with adopting rules for the types of emergency vehicles such as ambulances, including the supplies and equipment carried, the procedures for summoning and dispatching aid, and licensing of emergency medical services providers.[51]

All ambulance operators must be licensed.[52] Emergency medical service providers fit into five different types of licenses, depending on the training and experience: (1) Emergency Medical Responders (EMR); (2) Emergency Medical Technicians (EMT); (3) Advanced EMT (AEMT); (4) EMT-Intermediate (EMT-I), and (5) Paramedics.[53] Oregon uses the National Emergency Medical Services Education Standards (NEMSES) for educational course requirements.[54]

Cities are immune from liability when providing emergency medical assistance, unless the acts or omissions violate the standards of reasonable care under the circumstances.[55] Cities also have no liability for emergency transportation assistance such as an ambulance unless the city was grossly negligent.[56]

D. Special Skills in Emergencies

Some incidents require special skills, equipment, or apparatus to enable firefighters to handle the emergency. Some examples include aircraft rescue and firefighting, hazardous materials, swift water rescue, and technical rescue for confined spaces or structural collapse. For example, Eugene Springfield Fire service has numerous teams to conduct these special emergencies.[57]

For special circumstances like confined spaces, Oregon Occupational Safety and Health (Oregon OSHA) requires the employer to work with rescue service provider such as a fire department to adopt a written program and training for emergency rescue.[58]

---

[49] ORS 431A.050.
[50] OAR 333-260-0000 to OAR 333-260-0070.
[51] ORS 682.017.
[52] ORS 682.204.
[53] OAR 333-265-0000 to OAR 333-265-0170.
[54] OAR 333-265-0014; See also NATIONAL EMERGENCY MEDICAL SERVICES, EDUCATION STANDARDS (2021), available at: https://www.ems.gov/assets/EMS_Education-Standards_2021_FNL.pdf (last accessed September 3, 2024).
[55] ORS 30.805.
[56] ORS 30.807.
[57] *See* City of Eugene, *Technical Rescue Team*, available at: https://www.eugene-or.gov/4926/Technical-Rescue-Team (last accessed September 3, 2024).
[58] OAR 437-002-0146.

E. Fire Code

Tragic fires led to major improvements in codes and standards, including the 1908 Rhoades Opera House fire, which killed 170 people in Boyertown, Pennsylvania, and the 1911 Triangle Shirtwaist Factory fire, which killed 146 people in New York City.[59] As a result, local jurisdictions started to adopt regulations specify measures that we now take for granted—for example, that there be fire escapes and accessible exits.[60]

In Oregon, the SFM adopted its Oregon Fire Code, the minimum requirements related to fire prevention and standards for fire protection purposes.[61] Unlike the state building codes, local jurisdictions may adopt their own regulations, as long as the local regulations are consistent with the Fire Code.[62] The SFM reviews the local regulations and makes consistency findings.[63] For ease, most cities in Oregon default to the Oregon Fire Code.[64]

In 2018, the Oregon Building Codes Division Administrator and State Fire Marshal outlined best practices and suggestions to coordinate efforts with the state requirements such as providing code references and a plain statement of facts for citations and orders, providing electronic access to plans to local fire officials, schedule joint meetings with building and fire officials, develop a pre-application meeting with building and fire officials, and develop a parallel review process for the state building code and fire code.[65] Fire code matters pertaining to new construction are made by the building official with consideration for advice provided by the SFM or a fire official.[66]

One example is when the city of Hillsboro reviews the public infrastructure and private utility plans submitted through the building permit process.[67] Hillsboro reviews the submitted plans to ensure that the fire apparatus access roads meet the requirements of the Oregon Fire Code and that any required roads are serviceable during construction.[68]

---

[59] *See* National Fire Protection Association, *Reporter's Guide: About Codes and Standards*, available at: https://www.nfpa.org/en/About-NFPA/Press-Room/Reporters-Guide-to-Fire/About-codes-and-standards (last accessed September 3, 2024).
[60] *Id.*
[61] *See* OREGON FIRE CODE (2022), available at: https://codes.iccsafe.org/content/ORFC2022P1 (last accessed on September 3, 2024).
[62] *See* OAR 837-039-0006.
[63] *Id.*
[64] *See* https://www.oregon.gov/osfm/fire-service-partners/pages/oregon-fire-code.aspx (last accessed September 3, 2024).
[65] Building Codes Division Administrator and State Fire Marshal letter to building and fire officials dated May 1, 2018, available at: https://www.oregon.gov/bcd/codes-stand/Documents/20180515-joint-bcd-osfm-letter.pdf (last accessed on September 3, 2024).
[66] ORS 455.485.
[67] *See* City of Hillsboro, *Fire Department Access Standard*, available at: https://www.hillsboro-oregon.gov/our-city/departments/fire/fire-prevention/community-development/fire-department-access-3618 (last accessed September 3, 2024).
[68] *Id.*

F. Staffing

Small cities usually use volunteer firefighters while medium-sized cities often use a combination of full-time and volunteer personnel. In large cities, fire departments are staffed by full-time professionals.

Firefighters can be certified through the Oregon Department of Public Safety Standards and Training (DPPST), although it is not required.[69] The DPSST provides entry-level, specialized, leadership, and maintenance training to firefighters, although most firefighter training happens at the local level.[70] Firefighters train regularly so their skills are second-nature when a serious incident occurs.

To protect the life, safety and health of firefighters, it is important to note that there are specific Oregon OSHA rules for firefighters.[71] These rules include requirements regarding personal protective devices, fire apparatus operation, incident management, and many other rules to protect firefighters.[72]

G. Fire Prevention and Safety

Fire departments also work in the community to prevent fires and help with life safety. Most fire departments will actively work in their communities to help assess safety risks and emergency preparedness on issues such as smoke alarms, child safety seats, fire extinguishers and escape planning.[73] In addition, fire departments may issue burn permits with conditions to prevent fires, assist code enforcement to enforce weed abatement, and assist law enforcement with unlawful fireworks.[74]

The SFM has created tools to educate homeowners and renters about defensible space.[75] Creation of defensible space is a practice recommended to increase the chances of a home surviving a wildfire.[76]

---

[69] *See* OREGON DEPARTMENT OF PUBLIC SAFETY STANDARDS AND TRAINING, FIRE PROGRAM, available at: https://www.oregon.gov/dpsst/FirePrograms/Documents/Fire%20Program%20Book%20reduced.pdf (last accessed September 3,2024).
[70] *See* Oregon Department of Public Safety Standards and Training, *Fire Programs*, available at: https://www.oregon.gov/dpsst/fireprograms/pages/default.aspx (last accessed September 3, 2024).
[71] See OAR 437-002-0182.
[72] *Id.*
[73] *See e.g.* City of Hillsboro, *Community Risk Reduction*, available at: https://www.hillsboro-oregon.gov/our-city/departments/fire/community-risk-reduction (last accessed September 3, 2024).
[74] See City of Ashland, *Frequently Asked Questions*, available at: https://ashlandoregon.gov/faq.aspx (last accessed September 3, 2024).
[75] *See* State Fire Marshal, *Creating Defensible Space*, available at: https://oregondefensiblespace.org/(last accessed on September 3, 2024); STATE FIRE MARSHAL, OREGON DEFENSIBLE SPACE FOR HOMEOWNERS & RENTERS, available at: https://www.oregon.gov/osfm/Documents/OSFMDefensibleSpaceAssessmentTool.pdf (last accessed on September 3, 2024).
[76] *Id.*

II. LAW ENFORCEMENT

Law enforcement is among the most important public services provided to citizens in a community. Law enforcement agencies enforce laws, investigate crimes, and apprehend individuals who pose a threat to society. By deterring and preventing crime, policing helps create a safer environment for everyone.

Law enforcement is not just responding to police service calls, but includes investigating crimes, conducting patrols, assisting at accidents, performing first aid, assisting in emergency situations, conducting search and rescue operations, testifying in court, and working with schools as school resource officers.

Oregon cities are not legally required to provide law enforcement services, and some cities do not. When a city decides to provide police services, state and federal constitutional requirements relating to the rights of individuals become applicable.

This section is intended to give a general overview of law enforcement. For more general information, please see the U.S. Department of Justice's Police- Community Relations Toolkit: Policing 101, available at: https://www.justice.gov/file/1129671/dl?inline= (last accessed September 3, 2024).

Volumes of materials exist for each topic. For specific questions, please consult with your city attorney or district attorney.

Community Policing Strategies

1. Develop community partnerships with other government entities, private businesses, non-profits, service providers, and media.
2. Proactively identify and prioritize problems and develop innovative responses.
3. Create an organization that supports all ideas into an agency and provides line-level officers with decision-making authority and accountability.
4. Train and cross-train officers to increase knowledge and flexibility.

See Discover Policing, *What Is Community Policing*?, available at: https://www.discoverpolicing.org/explore-the-field/what-is-community-policing/ (last accessed September 3, 2024).

A. Community Policing

Law enforcement has evolved throughout the centuries. The first police department in the United States was established in New York City in 1844.[77] Other major cities followed and used the London Metropolitan Police as a model.[78] At that time, policing was decentralized to the level of political

[77] *See* POLICE DEPARTMENT CITY OF NEW YORK, THE HISTORY OF NEW YORK CITY POLICE DEPARTMENT (1993), available at: https://www.ncjrs.gov/pdffiles1/Digitization/145539NCJRS.pdf (last accessed September 3, 2024).
[78] *Id.*

wards and neighborhoods which developed relatively autonomous police units.[79] This was the predecessor to the current trend, *community policing*.[80]

In Oregon, the Portland Police Department started its law enforcement presence in 1851 with a single officer, the city marshal, and changed to a full-time force beginning in 1870.[81] The city of Eugene hired its first marshal in 1863 and in 1897, the first chief of police was appointed.[82]

Community policing is a philosophy that supports the systematic use of partnerships and problem-solving techniques to proactively address the immediate conditions that give rise to public safety issues such as crime, social disorder, and fear of crime.[83] Community policing, recognizing that police rarely can solve public safety problems alone, encourages interactive partnerships with relevant stakeholders.[84] These partnerships can be used to accomplish the two interrelated goals of developing solutions to problems through collaborative problem solving and improving public trust.[85]

Community advisory boards are one of the most common forms of police-community engagement bodies to help create community policing.[86] However, some boards suffer from various deficiencies that inhibit their ability to achieve their goals.[87] Some ways to ensure that an advisory board is utilized effectively include setting clear expectations with operating procedures and meeting protocols, providing necessary technical knowledge, provide sufficient resources.[88]

An example of innovative community policing in Oregon is Crisis Assistance Helping Out On the Streets, known as CAHOOTS.[89] This mobile crisis intervention program is dispatched for people who are intoxicated, mentally ill, or disoriented.[90] Each dispatch is staffed with a medic and an experienced crisis worker.[91] CAHOOTS diverts 3-8% of the calls from law enforcement and effectively provides an alternative to police.[92]

---

[79] *Id.*
[80] *Id.*
[81] *See* Portland Police Museum and Historical Society, *Portland Police 1870*, available at: https://portlandpolicemuseum.com/portland-police-to-1870.html (last accessed September 3, 2024).
[82] *See* Eugene Police Department, *History*, available at: https://www.eugene-or.gov/660/History (last accessed September 3, 2024).
[83] *See* U.S. Department of Justice, Community Policing Defined (2009), available at: https://www.cops.usdoj.gov/files/RIC/Publications/e030917193-CP-Defined.pdf (last accessed September 3, 2024).
[84] *Id.*
[85] *Id.*
[86] *See* Policing Project NYU School of Law, *Community Advisory Boards: What Works and What Doesn't*, available at: https://www.policingproject.org/cab (last accessed September 3, 2024).
[87] *Id.*
[88] *Id.*
[89] *See* City of Eugene Police Department, *CAHOOTS*, available at: https://www.eugene-or.gov/4508/CAHOOTS (last accessed September 3, 2024).
[90] *Id.*
[91] *Id.*
[92] *Id.*

B. Law Enforcement Since 2020

In 2020, two major events changed society: (1) the world-wide COVID-19 pandemic, which shut down businesses, schools, and travel; and (2) the death of George Floyd.

The societal impacts of the pandemic are likely reflected in the crime rates in Oregon. Since 1995, the number of violent crimes and property crimes in Oregon has dropped by nearly one-half.[93] However, coinciding with the COVID-19 pandemic shut down in 2020 and 2021, the number of violent crimes jumped 17%, and property crimes jumped 10 %.[94]

The Oregon Criminal Justice Commission believes that the 2022 data suggests crime levels could soon return to pre-pandemic levels.[95] The reasons for the spike in crime are complicated, but Washington County District Attorney Kevin Barton believes that a number of factors have contributed to the data, including the COVID-19 pandemic, the rise in unhoused persons, the impact of the addiction epidemic, and an increase in mental health issues.[96]

On May 25, 2020, Minneapolis Police Officer Derek Chauvin pressed his knee into African American George Floyd's neck for 9½ minutes, killing him.[97] Later, Chauvin was convicted of murdering Floyd and three other officers were convicted for not intervening to stop Chauvin or willfully violating Floyd's constitutional rights by not providing medical care when he lost a pulse.[98]

George Floyd's death sparked protests nationwide about police use of force and the role of racial inequality.[99] In Portland, there were more than 100 nights of protests.[100] As a result of the interaction between the protesters and Portland's Police Bureau's crowd management response with crowd munitions, tear gas and pepper spray, community members filed hundreds of complaints and multiple reviews were conducted into the Portland Police.[101] Demonstrators

---

[93] *See* Federal Bureau of Investigation, *Crime Data Explorer*, available at: CDE (cjis.gov) (last accessed September 3, 2024).
[94] *Id.*
[95] Conrad Wilson and Jonathan Levinson, *Crime in Oregon Starts to Trend Down, According to FBI Data Oregon Public Broadcasting*, OREGON PUBLIC BROADCASTING, April 19, 2023, available at: https://www.opb.org/article/2023/04/19/fbi-data-oregon-crime-starts-to-go-down-in-2022/ (last accessed September 3, 2024).
[96] *Id.*
[97] *How George Floyd Died, and What Happened Next*, THE NEW YORK TIMES, July 29, 2022, available at: https://www.nytimes.com/article/george-floyd.html (last accessed September 3, 2024).
[98] Press Release from U.S. Department of Justice, Feb. 24, 2022, available at: https://www.justice.gov/opa/pr/three-former-minneapolis-police-officers-convicted-federal-civil-rights-violations-death (last accessed September 3, 2024).
[99] Jayarti Ramakrishnan, *Protesters Take to Portland Streets Following Minneapolis Police Killing Of George Floyd*, OREGONIAN, May 28, 2020, available at: https://www.oregonlive.com/news/2020/05/protesters-take-to-portland-streets-following-minneapolis-police-killing-of-george-floyd.html (last accessed September 3, 2024).
[100] *100 Days of Portland Protests - Top Photos*, OREGONIAN, July 20, 2020, available at: 100 Days of Portland Protests - Top Photos - oregonlive.com (last accessed September 3, 2024).
[101] *See* City of Portland, *Lessons Learned: City's Response to Protests Exposed Vulnerabilities in Portland's Police Accountability System*, available at: https://www.portland.gov/ipr/news/2022/4/12/lessons-learned-citys-response-protests-exposed-vulnerabilities-portlands-police (last accessed September 3, 2024).

caused tens of millions of dollars of damage on public and private property.[102]

To address the wide-spread outrage, the Oregon Association Chiefs of Police and the League of Oregon Cities worked closely with the Oregon Legislature to pass more than 20 police reform measures designed to enhance the way cities screen, hire, train, and hold police officers accountable.[103]

In 2020, the Oregon Legislature passed the following police reform package:

- Limits the instances when a choke hold or other physical tactics that restrict the air and blood flow in the neck can be used to instances in which deadly force is authorized under existing law.[104] The practice will be banned as a means of securing custody or control of an individual.[105]
- Requires that all police and reserve officers must intervene in instances of excessive force and other serious misconduct and report that misconduct to a supervisor.[106]
- Creates state-level database or requires data maintenance on officer decertifications, disciplinary actions and/or misconduct; adds grounds requiring or allowing certification suspension or revocation.[107] Creates an online database of officers who have had actions taken against their police certifications and requires police agencies to keep the personnel records of police officers for 10 years and provide those records to any agency seeking to hire a police officer who works for has worked for them.[108] A city would also have immunity from civil action for releasing that information.[109]
- Bans the use of projectile fired tear gas or other irritants to disperse public disturbances but allows their use during a declared riot.[110] Aerosol sprayers, such as the containers an officer carries on their belt, which must be used in close proximity, are not addressed in the bill.[111]

In 2021, the Oregon Legislature approved the following police reform bills:

---

[102] Everton Bailey Jr., *$23 Million Cited as Portland Protest Damages Was Mostly Tied to Coronavirus Closures*, OREGONIAN, https://www.oregonlive.com/portland/2020/07/coronavirus-closures-inflated-23-million-reported-in-downtown-portland-protest-damages.html (last accessed September 3, 2024).
[103] Press Release from Oregon Association Chiefs of Police and League of Oregon Cities, Jan. 28, 2023, available at: https://www.orcities.org/download_file/533c38de-f59b-4654-917f-c1de9221bf0e/1852 (last accessed October 6, 2024).
[104] HB 4203 (2020).
[105] *Id*.
[106] HB 4205 (2020).
[107] HB 4207 (2020).
[108] *Id*.
[109] *Id*.
[110] HB 4208 (2020).
[111] *Id*.

- Modifies the crime of interfering with a police officer when an offense is charged for the same conduct.[112]
- Prohibits law enforcement agencies from releasing booking photographs unless necessary for a public safety interest and prohibits the practice requiring individuals to pay private websites to remove booking photographs.[113]
- Requires that all police officers be trained to identify, report and investigate crimes committed due to a person's perceived gender.[114]
- Imposes limitations on arbitrators' decisions concerning alleged misconduct by law enforcement officers. [115] Collective bargaining agreements entered into after July 1, 2021, and grievances related to misconduct allegations for law enforcement officers will be resolved pursuant to the new statutory requirements.[116] The burden of proof, upon the employer, is set at a "preponderance of the evidence" rather than the traditional "clear and convincing" evidence standard.[117] The appointed arbitrator shall uphold the disciplinary action unless the arbitrator finds that the disciplinary action is arbitrary and capricious.[118] The bill also creates a commission through the DPSST to build a non-bargainable statewide discipline guide to address significant misconduct in the specified areas of misconduct.[119]
- Requires police officers to be trained in airway and circulatory anatomy and physiology and certified in cardiopulmonary resuscitation. [120]
- Eliminates mandatory custody arrests of persons who fail to disperse when an unlawful assembly is declared.[121]
- Requires law enforcement agencies serving cities with populations greater than 150,000 to clearly identify officers engaged in crowd control activities by name or a unique identifying number.[122]
- Directs the Oregon Criminal Justice Commission to establish statewide database of reports of use of physical force by peace officers and corrections officers.[123]
- Clarifies the requirement that police officers report misconduct by other officers to supervisors with the authority to act on the report.[124]

[112] HB 3164 (2021).
[113] HB 3273 (2021).
[114] HB 2986 (2021).
[115] HB 2930 (2021).
[116] *Id.*
[117] *Id.*
[118] *Id.*
[119] *Id.*
[120] HB 2513 (2021).
[121] HB 3059 (2021).
[122] HB 3355 (2021).
[123] HB 2932 (2021).
[124] HB 2929 (2021).

- Declares legislative findings that racism has no place in policing and gives cities greater ability to investigate the background of police candidates.[125] Requires the DPSST to investigate person's character before accepting person for training and certification as police officer or reserve officer.[126] Law enforcement agencies must adopt policies that set standards for speech and expression by officers in and outside the course and scope of employment.[127]
- Requires police agencies with 35 officers or more to become accredited through an accrediting body determined by the state.[128] Police agencies with 100 or more officers must become accredited by July 1, 2025, and agencies with 35-99 officers must meet this standard by July 1, 2026.[129]

In 2022, the Oregon Legislature addressed administrative issues that arose from the passage of public safety reform legislation.[130] The legislation also addressed legal interpretations of changes to crowd control statutes.[131] Specifically, the bill does the following:

- Creates a definition of "crowd management" to help clarify when crowd dispersal tactics and tolls may and may not be utilized by law enforcement.
- Distinguishes handheld chemical incapacitants, such as belt cannister of pepper spray from tear gas.
- Prohibits the use of handheld chemical incapacitants for crowd control while ensuring that a police officer may use this tool in situations that would otherwise be allowed by law, thus preventing the indiscriminate use of chemical agents.
- Allows the deployment of tear gas only when "objectively reasonable" as opposed to only when a riot exists.
- Bans the use of kinetic projectile munitions for crowd management and prohibits an officer from targeting a person's head unless deadly force is authorized. Officers could still utilize these munitions when doing so would be otherwise allowed under Oregon's use of force statute.
- Requires local hospitals to be notified when tear gas and impact munitions are deployed in a crowded setting.
- Requires agencies to clean up spent munitions as soon as is practicable after their deployment.[132]

[125] HB 2936 (2021).
[126] *Id.*
[127] *Id.*
[128] HB 2162 (2021).
[129] *Id.*
[130] HB 4008 (2022).
[131] *Id.*
[132] *Id.*

As a result, Oregon law enforcement leaders, including Oregon Association Chiefs of Police and the League of Oregon Cities, worked closely with the Oregon Legislature to pass over 20 police reform measures designed to enhance the way cities screen, hire, train and hold accountable police officers.[133]

C. Legal Duties and Authorities

In Oregon, municipal police generally swear an oath to the United States Constitution, the Oregon Constitution, the laws of the state of Oregon, and the local laws such as city ordinances. There is no state statute that requires such an oath for local law enforcement, but the oath sets expectations for the role of law enforcement as holders of the public trust in our communities.

This section is intended to give a brief overview of the state and federal constitutions and the laws that govern policing. This section is *not* intended to duplicate the extensive training given to law enforcement officers. For more information about the latest training for the Oregon DPSST's, Basic Police Student Manual (2023), please see: https://www.oregon.gov/dpsst/CPE/Documents/BP432_student_manual_09272023.pdf (last accessed September 3, 2024).

In addition, the DPSST maintains a legal update bulletin that provides the latest legal updates for law enforcement, available at: https://www.oregon.gov/dpsst/cj/pages/announcements.aspx (last accessed September 3, 2024).

i. United States and Oregon Constitutions

The foundation of the American criminal justice system is located within the U.S. Constitution, specifically in the Bill of Rights, the first 10 amendments to the Constitution—which guarantees all citizen certain fundamental liberties and rights.[134] Separate and distinct from the U.S. Constitution, state constitutions, such as the Oregon Constitution, provide similar framework for protecting certain individual rights from government interference.[135]

The U.S. Constitution sets forth several provisions that directly related to law enforcement granting protection to citizens, including:

- The Bill of Rights, including those of the Fourth, Fifth, Sixth, and Eighth Amendments. Found within these amendments are protections relating to searches, the privilege against self-incrimination, the right to a speedy trial, the right to counsel, the ability to confront witnesses, and the right to avoid cruel and unusual punishment.[136]

---

[133] Press Release from Oregon Association Chiefs of Police and League of Oregon Cities (Jan. 28, 2023).
[134] U.S. DEPARTMENT OF JUSTICE, KNOW YOUR RIGHTS – A GUIDE TO THE UNITED STATES CONSTITUTION, available at: https://www.justice.gov/usao-ne/publications (last accessed on May 30, 2024).
[135] *E.g.*, Or Const, Art I, § 9 (prohibiting unreasonable searches or seizures).
[136] Constitution Annotated, Amendment 14 s1.5.5.1, available at: https://constitution.congress.gov/browse/essay/amdt14-S1-5-5-1/ALDE_00013759/ (last accessed September 3, 2024).

- The Fourteenth Amendment's guarantee of procedural due process affects procedures in state criminal cases in two ways. First, through the doctrine of incorporation, the U.S. Supreme Court has held that the Due Process Clause applies to the states nearly all the criminal procedural guarantees of the Bill of Rights. Second, the U.S. Supreme Court has held that the Due Process Clause prohibits government practices and policies that violate precepts of fundamental fairness, even if they do not violate specific guarantees of the Bill of Rights. [137]

State constitutions are separate and distinct from the federal constitution.[138] State constitutional provisions often grant more protection to individual defendants than that given by the federal constitution because state courts interpret their own constitutions with independent analysis.[139]

Similar to the U.S. Constitution, the state of Oregon also has a constitution, with its own bill of rights.[140] Directly relating to law enforcement are the following provisions in the Oregon Constitution that have corresponding provisions in the federal constitution:

- *Article I, Section 9 of the Oregon Constitution* is comparable to the Fourth Amendment of the US Constitution prohibiting unreasonable searches or seizures.[141]
- *Article I, Section 20 of the Oregon Constitution* is comparable to the 14th Amendment of the US Constitution.[142]

In Oregon, the Oregon courts interpret the Oregon Constitution and how the Oregon constitution grants certain rights to individuals.[143] It is notable that there is no comparable due process language in the Oregon Constitution.[144] Although neither the Equal Protection Clause nor Due Process rights are expressly provided for in the Oregon Constitution, Oregon courts have found similar or even greater protections in other guarantees.[145] However, the Oregon

---

[137] *Id*.
[138] Paul Marcus, *State Constitutional Protection for Defendants in Criminal Prosecutions*, WM & MARY FAC. PUB. (1988), available at: https://scholarship.law.wm.edu/facpubs/575 (last accessed September 3, 2024).
[139] *Id.*
[140] *Id.*
[141] Or Const, Art I, § 9 ("Unreasonable searches or seizures. No law shall violate the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search, or seizure; and no warrant shall issue but upon probable cause, supported by oath, or affirmation, and particularly describing the place to be searched, and the person or thing to be seized").
[142] Or Const, Art I, § 20 ("No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens").
[143] Thomas A. Balmer, *Does Oregon's Constitution Need a Due Process Clause? Thoughts on Due Process and Other Limitations on State Action*, 91 WASH. L. REV. ONLINE 157 (2016), available at: https://digitalcommons.law.uw.edu/cgi/viewcontent.cgi?article=1018&context=wlro (last accessed September 3, 2024).
[144] *Id.*
[145] Janet Hoffman, Shannon Riordan & Thalia Sady, *Making a Legal Record Under the*

Constitution analysis is different from the federal counterparts.[146] For example, this interpretation has created more free speech rights under the Oregon Constitution than the federal constitution.[147]

What does it mean if a law enforcement action violates either the rights granted by the U.S. Constitution or Oregon Constitution? It depends on the rights violated. For Fourth Amendment (search and seizure) violations, the evidence obtained may be excluded from consideration for the criminal or civil trial. For an illegally obtained confession obtained in violation of the Fifth Amendment, the confession would be excluded from consideration for the criminal trial.[148]

ii. Oregon Criminal Code and Local Laws

In addition to the U.S. and Oregon Constitutions, law enforcement is responsible for the enforcement of state and local laws. Law enforcement primarily enforces the offenses in the Oregon Criminal Code, which generally governs the prosecution of and punishment of any state offense, including crimes or violations.[149]

Cities may use law enforcement to enforce city ordinances. Most city ordinances are civil violations, because Oregon courts presume all local criminal laws to be preempted.[150] In larger cities, civil violations are enforced by code enforcement officers. For more information about preemption of local laws, please see League of Oregon Cities' Legal Guide to Oregon's Statutory Preemptions of Home Rule, available at: https://www.orcities.org/download_file/385/1852 (last accessed September 3, 2024).

iii. Community Caretaking

In addition to the enforcement of criminal laws, police officers are authorized to perform community caretaking functions. [151] These are actions and activities that may not directly include enforcement of the law, but that contribute to the overall wellbeing of the public.[152] These include, but are not limited to, such tasks as the following: welfare checks; death notifications; public assistance to persons who may be lost, confused, or affected by mental or physical illness;

Oregon Constitution, OREGON STATE BAR LITIGATION JOURNAL, Vol 29, No. 1 (Winter 2010), available at: https://jhoffman.com/wp-content/uploads/2011/07/Making_a_Legal_Record_Under_the_Oregon_Constitution1.pdf (last accessed September 3, 2024).

[146] *Id*.

[147] *See Lahmann v. Grand Aerie of Fraternal Order of Eagles*, 121 P 3d 671, 677 (2005).

[148] *Edwards v. Arizona*, 451 US 477 (1981); *Oregon v. Bradshaw*, 462 US 1039 (1983).

[149] *See generally*, ORS Chapters 161 to 167.

[150] *See* Or Const, Article XI, § 2; League of Oregon Cities, *Home Rule 101*, available at: https://www.orcities.org/download_file/1024/1852 (last accessed September 3, 2024).

[151] ORS 133.033.

[152] OREGON DEPARTMENT OF PUBLIC SAFETY STANDARDS AND TRAINING, MAINTENANCE TRAINING FOR POLICE CERTIFICATION EQUITY (2023), available at: https://www.oregon.gov/dpsst/CJ/Documents/EquityResourcesGuide.pdf (last accessed September 3, 2024).

traffic control; medical emergencies; lifesaving services; crime prevention; public information; and community engagement.[153]

iv. Stops

A police officer who reasonably suspects that a person has committed or is about to commit a crime may stop a person to make a reasonable inquiry.[154] The stop may only be made after the officer informs the person that the officer is a officer.[155] The detention must be in the vicinity of the stop and only for a reasonable time.[156] The questions are reasonable if the questions are limited to the circumstances that aroused the officer's suspicion, any other circumstances that arose during the course of the detention that gave rise to a reasonable suspicion of criminal activity, and ensuring the safety of the officer.[157]

Officers may obtain consent to search, but the consent shall be documented that the person gave informed and voluntary consent.[158] A police officer may frisk a stopped person for dangerous or deadly weapons if the officer reasonably suspects the person is armed and dangerous.[159]

A person who operates a motor vehicle on a public road or place open to the public is implied by law to have given consent to search for a breath or blood test to determine whether the driver is under the influence of intoxicants.[160]

v. Searches

Police officers execute search warrants issued by judges.[161] To obtain a warrant for a criminal case, law enforcement officers must show that there was probable cause to believe a search is justified, that a crime was committed, and evidence of that crime is available.[162]

Probable cause exists when the facts set out in the warrant would lead a reasonable person to believe that the sought things will probably be found in the location to be searched.[163] The warrant must specifically identify the persons and places to be searched.[164] The objects to be

---

[153] *Id*.
[154] ORS 131.615.
[155] *Id*.
[156] *Id*.
[157] *Id*.
[158] *Id*.
[159] ORS 131.625.
[160] ORS 813.100; ORS 813.131; ORS 813.135.
[161] ORS 133.545.
[162] *Id*.; *see also* OREGON DEPARTMENT OF PUBLIC SAFETY, BASIC POLICE ACADEMY STUDENT MANUAL (2023), available at: https://www.oregon.gov/dpsst/CPE/Documents/BP432_student_manual_09272023.pdf (last accessed September 3, 2024).
[163] Or Const, Art I, § 9; ORS 133.565(2)(c); *United States v. Grubbs*, 547 US 90, 95 (2006)
[164] *Id*.

seized must be described with particularity in the search warrant.[165]

Cities that seize property shall take reasonable steps to safeguard and protect things seized against loss, damage and deterioration.[166] Portable electronic devices may only be forensically searched with a search warrant or consent.[167]

vi. Issue Citations

Police officers may issue criminal citations if the officer has probable cause to believe that the person has committed a misdemeanor, felonies subject to misdemeanor treatment, or violations.[168] All citations must be on the Oregon Uniform Citation and Complaint form if a separate complaint will not be filed.[169]

The citation issued shall contain the following: (1) name of the court in which the cited person is to appear; (2) name of the person cited; (3) complaint containing at least name of court, name of public body bringing action and name of defendant; (4) readily understandable statement of the crime and date, time and place of alleged offense; (5) certification by the officer; and (6) time, date and place the person cited is to appear in court.[170]

vii. Arrests

An arrest means to place a person under restraint or take a person into custody for the purpose of charging them with an offense.[171] A police officer may make an arrest under an arrest warrant or without an arrest warrant if the officer has probable cause to believe that the person has committed a crime.[172] A police officer may make an arrest if the officer is notified by another officer of any state that there exists an arrest warrant.[173] Arrest warrants may be issued by a judge if there is probable cause to believe the person has committed the crime.[174]

When a police officer responds to incident of domestic disturbance and has probable cause to believe that an assault has occurred between family or household members, or to believe that one place the other in fear of imminent serious physical injury, the officer must arrest and take into custody the alleged assailant.[175] A police officer shall arrest a person without a warrant when the officer has probable cause to believe that there is a restraining order or protective order and

---

[165] *Id*.
[166] ORS 133.357.
[167] ORS 133.539.
[168] ORS 133.055(1).
[169] ORS 133.069; ORS 153.045.
[170] ORS 133.007; ORS 133.015; ORS 153.048; ORS 153.051.
[171] ORS 133.005
[172] ORS 133.220; ORS 133.310(1).
[173] ORS 133.310(2).
[174] ORS 133.120.
[175] ORS 133.055(2).

that the person to be arrest has violated the terms of the order.[176] A police officer shall arrest if the officer has probable cause to believe that the person has been released under a pretrial release order and the person has failed to comply with a no contact condition of the release agreement.[177]

The Oregon Supreme Court has held that unlike federal search and seizure law, a valid custodial arrest does not alone give rise to a unique right to search.[178] Such a warrantless search must be justified by the circumstances surrounding the arrest.[179] The three valid justifications for a search incident to a lawful arrest are the following: (1) to protect the officer's safety and/or prevent escape; (2) to prevent the destruction of evidence; and (3) to discover evidence relevant to the crime for which the defendant is being arrested.[180]

viii. Use of Force

A police officer is justified in using physical force upon another person only when it is objectively reasonable, under the totality of the circumstances known to the officer to believe: (1) the person poses an imminent threat of physical injury to the officer or to a third person; or (2) physical force is necessary to make a lawful arrest when the officer has probable cause to believe the person has committed a crime; or (3) to prevent the escape from custody.[181] The officer shall only use the physical forces that the officer reasonably believes is necessary to prevent injury, to make the arrest, or prevent escape.[182] A police officer may only use *deadly* physical force when the circumstances meet the above conditions *and* the officer has probable cause to believe a person has committed a violent felony.[183]

Knowing use of physical force that impedes breathing or circulation is not allowed, except in circumstances which physical force is justified in defense of a person under ORS 161.209 and not limited by ORS 161.215.[184]

ix. Custody and Interrogation

The U.S. Supreme Court held that if a person is subjected to custodial police interrogation, any statements obtained therefrom, whether incriminating or exculpatory, are not admissible unless the prosecution demonstrated that sufficient procedural safeguards were afforded the accused.[185] The reading of the person's *Miranda* warning is that procedural safeguard. *Miranda* warnings must have the following: (1) the accused person has the right to remain silent; (2) any

---

[176] ORS 133.310(3).
[177] ORS 133.310(6).
[178] See *State v. Caraher*, 293 Or 741 (1982)
[179] *Id*.
[180] *State v. Owens*, 302 Or 196 (1986); *State ex rel Juv. Dept. v. Singh*, 151 Or App 223 (1997); *State v. Crampton*, 176 Or App 62 (2001).
[181] ORS 161.233.
[182] *Id*.
[183] ORS 161.242; *Tennessee v. Garner*, 471 US 1 (1985).
[184] ORS 161.237.
[185] *Miranda v. Arizona*, 384 US 486 (1966)

statement made may be used against the accused; (3) the accused has the right to an attorney prior to and during questioning, and (4) an attorney may be appointed to represent the accused if accused is unable to afford one.[186]

A suspect may waive their constitutional rights if it is voluntary, knowing, and intelligent.[187] Except in rare circumstances, if a suspect is represented by counsel, there cannot be any further interrogation about the charged crimes.[188]

B. Employment Relations

The Oregon Department of Public Safety Standards and Training (DPSST) certifies all individuals as police officers and sets for the minimum requirements to be an officer.[189] As discussed below, candidates for law enforcement must pass a psychological evaluation, pass a background check for moral fitness, and be able to meet the physical demands of the position.

i. Recruitment

According to the FBI Law Enforcement Bulletin, law enforcement is having a record number of people leaving the profession, with a corresponding decrease in recruits.[190] The article states:

> A Police Executive Research Forum survey indicated that between 2020 and 2021, the law enforcement resignation and retirement rates increased by 18% and 45%, respectively. Four of the largest metropolitan police departments are collectively down over 5,400 officers during 2022 and 2023. Further, law enforcement is experiencing a drastic decrease in the number of recruits—27% to 60%, depending on the area.[191]

Local governments are struggling to retain and recruit new law enforcement officers. A decade ago, officers would typically remain on the job 20 years or more, but many now leave after six to 11 years for a variety of reasons.[192] In Oregon, Portland ranks 48th among 50 big

---

[186] *Id*.
[187] *State v. Vondehn*, 348 Or 462 (2010); *State v. McGrew*, 38 Or App 493 (1979); *State v. Collins*, 253 Or 74 (1969).
[188] *Fare v. Michael C.*, 442 US 707 (1979); *State v. Charboneau*, 323 Or 38 (1996).
[189] ORS 181A.490.
[190] *See* https://leb.fbi.gov/archives (last accessed September 3, 2024).
[191] Timothy Karch, *Playing the Long Game: Law Enforcement Recruitment*, FBI LAW ENFORCEMENT BULLETIN (March 7, 2024), available at: https://leb.fbi.gov/articles/featured-articles/playing-the-long-game-law-enforcement-recruitment (last accessed September 3, 2024).
[192] Maxine Bernstein, *State Basic Police Academy Seeks to Increase Class Sizes, Add Night Courses to Address Backlog*, OREGONIAN, May 6, 2023, available at: https://www.oregonlive.com/crime/2023/05/state-basic-police-academy-seeks-to-increase-class-sizes-add-night-courses-to-address-backlog.html#:~:text=While%20officers%20a%20decade%20ago,is%20currently%2C%E2%80%9D%20he%20said. (last accessed September 3, 2024).

cities for police officers per capita at 1.2 officers for every 1,000 people in the city.[193] As a result, many cities are struggling to recruit and train more people for law enforcement.

ii. Certification

The DPSST has established minimum requirements for hiring of law enforcement officers.[194] Applicants must be at least 21 years of age, submit fingerprints, and meet the academic proficiency standards.[195] After July 1, 2023, Oregon administrative rules require a standardized background checklist and personal history statements that meets the moral fitness for certification.[196]

The administrative rules require a pre-employment psychological evaluation for newly hired police officers and reserves.[197] The psychological evaluation is used to identify mental conditions, personality disorders, personality traits, or behavior patterns that may adversely affect the applicant's ability to perform the essential functions of the job with reasonable skill, safety, and judgment based upon the psychological evaluation criteria established by the hiring agency.[198] The evaluation is also used to conduct an assessment of the applicant's tendencies, feelings and opinions toward diverse cultures, races and ethnicities and differing social, political, economic and life statuses.[199]

Applicants must be able to meet the physical standards such as sufficient vision, depth perception, hearing resting blood pressure, and normal pulmonary capacity, and no prescribed medications with side effects that would interfere with the ability to perform the essential functions of the job.[200] Applicants are also required to pass the Oregon Physical Abilities Test—a 1235-foot obstacle run, a push pull machine, and a "dummy" drag.[201]

To attend basic training, the individual must be employed as a police officer at a public agency in Oregon.[202] Once hired, recruits report to the DPSST Oregon Police Academy in Salem,

---

[193] Lucas Manfield, *Portland Ranks 48th Among 50 Big Cities for Cops per Capital*, WILLAMETTE WEEK, Sept. 28, 2022, available at: https://www.wweek.com/news/2022/09/28/portland-ranks-48th-among-50-big-cities-for-cops-per-capita/ (last accessed September 30, 2024).
[194] OAR 259-008-0010.
[195] OAR 259-008-0010.
[196] *Id.;* OAR 259-008-0015.
[197] OAR 259-008-0010; see also OREGON DEPARTMENT OF PUBLIC SAFETY STANDARDS AND TRAINING, AGENCY BACKGROUND AND PSYCHOLOGICAL SCREENING REFERENCE GUIDE (2023), available at: https://www.oregon.gov/dpsst/CJ/Documents/BackgroundPsychReferenceGuide.pdf (last accessed September 3, 2024).
[198] *Id.*
[199] *Id.*
[200] *Id.*
[201] *See* Oregon Department of Public Safety Standards and Training, *Oregon Physical Abilities Test*, available at: https://www.oregon.gov/dpsst/cj/pages/orpat.aspx#:~:text=The%20ORPAT%20consist%20of%20a,power%20and%20general%20physical%20endurance (last accessed September 3, 2024) (describing the Oregon Physical Abilities Test (ORPAT)).
[202] OAR 259-008-0010.

Oregon to attend 16 weeks of basic instruction.[203] Upon graduation, officers are required to participate in a structured field training program.[204] Some city police departments also maintain their own instruction programs.

All Oregon full-time law enforcement officers must be certified by the DPSST within 18 months of hire.[205] Individuals working less than 80 hours a month and responsible for enforcing criminal law are considered reserves.[206] Reserve officers are not certified; however they are required to be reported to the DPSST and have a full background check.[207] Oregon maintains a searchable database of all the DPSST certification, training and employment records relating to public safety officers in Oregon.[208]

iii. Discipline

In 2021, the Oregon Legislature, as part of a police reform package, passed a bill that adopted statewide uniform rules for law enforcement standards of conduct and disciplinary standards. Previously, local governments had difficulty in disciplining officers for misconduct, because the discipline was often grieved and decided by an arbitrator. For example, there were many instances in which an arbitrator ordered the reinstatement of officers after the employer has imposed discipline that included termination of employment.[209]

Oregon law now establishes that a statewide commission adopts rules for disciplinary standards and procedures.[210] Employers, civilian oversight boards, and arbitrators are required to use the statewide standards and procedures.[211] Further, arbitrators, when determining the reasonableness of the disciplinary action imposed by a city, must uphold the discipline unless it is arbitrary and capricious.[212] An arbitrator is also prohibited from overturning or reducing discipline of termination if doing so would be inconsistent with the public interest. [213] However, the employer must prove, by a preponderance of the evidence, the following elements: (1) the officer engaged in misconduct; and (2) the discipline met the statutory just cause standard.[214]

---

[203] OAR 259-008-0085.
[204] *Id*.
[205] OAR 259-008-0060.
[206] OAR 259-008-0005.
[207] OAR 259-008-0015.
[208] See Oregon Department of Public Safety Standards and Training, *Criminal Justice Information Records Inquiry System (IRIS)*, available at: SMS Employee Search (bpl-orsnapshot.net) (last accessed on September 3, 2024).
[209] Maxine Bernstein, *Disciplining Portland Police Proves Challenging Task*, OREGONIAN, July 15, 2012, available at: https://www.oregonlive.com/portland/2012/07/disciplining_portland_police_p.html (last accessed September 3, 2024); Maxine Bernstein, *Arbitrator Overturns Portland Police Officer's Firing, Orders Reinstatement With Reprimand, Back Pay*, OREGONIAN, July 9, 2021, available at: https://www.oregonlive.com/crime/2021/07/arbitrator-overturns-portland-police-officers-firing-orders-reinstatement-with-reprimand-back-pay.html (last accessed September 3, 2024).
[210] ORS 243.812.
[211] *Id*.
[212] ORS 243.808.
[213] *Id*.
[214] *Id*.

Officers who witness another officer engage in violations of physical, emotional, intellectual, and moral fitness standards or misconduct shall report the violation as soon as practicable, but no later than 72 after witnessing it.[215] Such allegations that require investigations include the following:

- Unjustified or excessive force that is objectively uunreasonable under the circumstances or in violation of the use of force policy for the law enforcement unit employing the offending officer;
- Sexual harassment or sexual misconduct;
- Discrimination against a person based on race, color, religion, sex, sexual orientation, gender identity, national origin, disability or age; or
- Crime,[216]

Law enforcement agencies are required to investigate such allegations within three months of receipt of the report.[217]

Oregon law requires law enforcement agencies to report discipline imposed on a police officer that contains an economic sanction to the DPSST within 10 days after the discipline has become final and any arbitration process is complete.[218]

The DPSST maintains a searchable database of the DPSST Professional Standards Cases and an agency police officer discipline that includes economic sanctions.[219] The DPSST is required to publish the officer's name, their employer, and a description of the facts underlying the imposed discipline.[220] Officers remain on this list until five years after date closed.[221] The complete file can be requested by submitting a public records request.[222]

The DPSST reports revocations of public safety professional certifications to the National Decertification Index (NDI) and serves as Oregon's gatekeeper for public safety agencies to gain access to NDI data.[223] The NDI is a registry of certificate or license revocation actions involving police or correction officers.[224]

---

[215] *Id*.
[216] *Id*.
[217] ORS 181A.681.
[218] ORS 181.686.
[219] ORS 181A.684.
[220] *Id*.
[221] *See* Oregon Department of Public Safety Standards and Training, *Professional Standards*, available at: https://www.oregon.gov/dpsst/cj/Pages/ProfessionalStandards.aspx (last accessed September 30, 2024).
[222] *Id*.
[223] *See* Oregon Department of Public Safety Standards and Training, *Oregon Criminal Justice Background Resources*, available at: https://www.oregon.gov/dpsst/cj/pages/backgrounds.aspx (last accessed September 3, 2024).
[224] *Id*.

D. Jurisdiction and Working with Other Law Enforcement

Once certified, officers may enforce Oregon laws throughout the state, regardless of where they are employed.[225] For practical reasons, officers are unlikely to enforce laws outside their scope of work because an officer will not be compensated for the work.

Cities work with other state and local agencies for specific law enforcement purposes, such as narcotics task force, law enforcement records management systems, and sharing of criminal history information.[226] Smaller cities may choose to enter into an intergovernmental agreement with the county for them to provide police services.[227] Additionally, some cities choose to develop mutual aid agreements with neighboring jurisdictions if a city's police department needs assistance in managing a situation.[228]

Cities may operate their own local correctional facilities.[229] However, with the exception of a handful of cities such as Springfield, Florence, Cottage Grove, and Junction City, most local correctional facilities are operated by counties.

In emergencies, police officers maintain public safety by responding to emergency and non-emergency calls, patrolling designated areas, and enforcing laws and regulations. They also work closely with other public safety agencies, such as fire departments and emergency medical services, to ensure a coordinated emergency response. When local resources are exhausted, cities work with other governments to protect lives, property, the environment, and incident stabilization. This cooperation is also essential for the maximum use of available resources.

E. Accreditation

Accreditation is a procedure where an independent body reviews an agency's practices and procedures for compliance with accreditation standards.[230] Accreditation standards are considered the best practices for a specific policy or procedure. The standards relate to the operation of police agencies according to recognized industry benchmarks. Operating a police agency in compliance with accepted industry standards constitutes good, responsible administration, promotes the safety and efficiency of its officers, and mitigates liability.

---

[225] ORS 133.405.
[226] Press Release from US Attorney's Office District of Oregon, March 15, 2024, available at: https://www.justice.gov/usao-or/pr/three-sentenced-federal-prison-klamath-basin-drug-trafficking (last accessed September 3, 2024); City of Portland, *Regional Justice Information Network*, available at: https://www.portland.gov/police/divisions/regjin (last accessed September 3, 2024).
[227] *E.g.*, City of Fairview, Resolution 26-2017, available at: https://fairvieworegon.gov/Archive/ViewFile/Item/2314 (last accessed September 3, 2024).
[228] *E.g.*, City of Springfield, General Order 2.3.1 (2019), available at: https://springfield-or.gov/wp-content/uploads/2020/12/2-3-1.pdf (last accessed September 3, 2024).
[229] ORS 169.030.
[230] Northwest Accreditation Alliance, *Why Accreditation*, available at: https://www.oracall.org/why-accreditation/ (last accessed September 3, 2024).

The DPSST has designated the Oregon Accreditation Alliance (now known as Northwest Accreditation Alliance) and the Commission on Accreditation for Law Enforcement Agencies, Inc. as the accrediting bodies.[231] Northwest Accreditation Alliance standards are derived from the standards produced by the Commission on Accreditation for Law Enforcement Agencies.[232]

The first step to accreditation is for an agency to determine its own level of compliance with the accreditation standards. At that time, the agency reviews its own policies and procedures and revises as necessary. Second, an independent reviewer goes onsite to review the agency's policies, procedures, and practices to determine whether the agency is complaint with the accreditation standards. A report is drafted with a recommendation to award accreditation.

To maintain accreditation, local agencies need to be reassessed according to the requirements of the accreditation agency. No later than July 1, 2025, each law enforcement agency in Oregon with 100 or more sworn police officers must be accredited.[233] No later than July 1, 2026, each law enforcement agency in Oregon with 35 or more sworn police officers must be accredited.[234]

F. Public Records

A public record is defined as, "any writing that contains information relating to the conduct of the public's business…regardless of physical form or characteristics."[235] The term "writing" is defined to mean "handwriting, typewriting, printing, photographing and every means of records, including letters, words, pictures, sounds, or symbols, or combination thereof, and all papers, maps, files, facsimiles or electronic recordings."[236]

Some of the public records created by the police include police reports, emergency calls, body camera footage, vehicle camera footage, and photographs. All of these are considered public records and are subject to disclosure unless the information is exempt from disclosure or otherwise contains confidential or sensitive information. Examples of confidential, sensitive, or exempted information in police public records include, but are not limited to:

- Elder abuse;[237]
- Child abuse;[238]
- Physical and mental health information;[239]

[231] OAR 259-008-0500.
[232] Northwest Accreditation Alliance, *Why Accreditation*, available at: https://www.oracall.org/why-accreditation/ (last accessed September 3, 2024).
[233] ORS 181A.657.
[234] *Id*.
[235] ORS 192.311(5)(a).
[236] ORS 192.311(7).
[237] ORS 124.090.
[238] ORS 419B.035.
[239] ORS 192.355(2)(a).

- Information related to an ongoing investigation;[240] and
- Certain personal information.[241]

For police reports, if there is an ongoing criminal investigation, cities will not be able to release information related to an ongoing investigation unless the public interest requires disclosure in the particular instance.[242] However, the arrest record shall be disclosed unless there is a clear need to delay, including the need to protect the complaining party or the victim.[243]

G. Body Cameras

For video cameras worn by police officers (body cams), the disclosure of the video record is exempt from disclosure unless the public interest requires disclosure.[244] Regardless, the video will not be released if a court orders body camera footage to not be disclosed.[245] Requests for disclosure of video camera footage must identify the approximate date and time of an incident and must be reasonably tailored to request only that material for which a public interest requires disclosure.[246] The disclosed video must be edited to make the faces of the persons unidentifiable.[247]

Cities must establish a policy and procedure for the use of body cameras.[248] The recording will be retained for at least 180 days but no more than 30 months for a recording not related to a court proceeding.[249]

Officers are required to set the cameras to record continuously, beginning when the officer develops reasonable suspicion or probable cause to believe a crime or violation has occurred, is occurring or will occur, and the officer begins to make contact with the person suspected of committing the offense.[250] Officers may stop recording when it reasonably appears to the officer that such privacy may outweigh any legitimate law enforcement interest in recording.[251] Officers will activate the body-worn camera when privacy is no longer an issue, unless the circumstances do not require recording.[252]

---

[240] ORS 192.345(3); *see also Jensen v. Schiffman*, 24 Or App 11, 16 (1976) ("investigations connected with pending or contemplated proceedings will ordinarily remain secret because disclosure would likely interfere with enforcement proceedings.").
[241] ORS 192.355(2)(a).
[242] ORS 192.345(3).
[243] *Id*.
[244] ORS 192.345(40).
[245] *Id*.
[246] *Id*.
[247] *Id*.
[248] ORS 133.741.
[249] *Id*.
[250] *Id*.
[251] *Id*.
[252] *Id*.

The body camera footage may not be used for any purpose other than legitimate law enforcement.[253] For example, cities may not collect or maintain information about the political, religious, or social views, associations or activities of any individual group, association, organization, cooperation, business or partnership unless such information directly relates to an investigation of criminal activities and there are reasonable grounds to suspect the subject of the information is or may be involved in criminal conduct.[254]

H. Homelessness on Public Property

Traditionally, cities have prohibited camping on public property such as streets, sidewalks, and parks through local ordinances. The purpose of these no camping ordinances was to address the safety and public health risks created by unregulated camping on public property. Such safety and health risks may include inadequate facilities for the basic health and safety of the persons using public property for camping such as drinking water, trash disposal, restrooms and showers, and safe cooking facilities.

In 2018, in the case *Martin v. City of Boise*, the U.S. Ninth Circuit Court of Appeals ruled that homeless persons cannot be punished for sleeping outside on public property in the absence of practical access to a shelter, or unless the law imposes "reasonable time, place and manner" restrictions on the regulated activities in public space.[255] The Ninth Circuit found such ordinances as a violation of the Cruel and Unusual Clause of the Eighth Amendment to the U.S. Constitution because the city had criminalized "conduct that is an unavoidable consequence of being homeless – namely sitting, lying, or sleeping."[256]

In 2021, the Oregon Legislature enacted a law to codify some of the key holdings within the *Martin* case.[257] The law requires that any city or county law regulating the acts of sitting, lying, sleeping or keeping warm and dry outside on public property must be "objectively reasonable" based on the totality of the circumstances as applied to all stakeholders, including persons experiencing homelessness.[258]

In 2022, in the case *Johnson v. City of Grants Pass*, the U.S. Ninth Circuit Court of Appeals affirmed a U.S. District Court's decision ruling that the city of Grants Pass' ordinances that prohibited public sleeping and camping on public property violated the Cruel and Unusual Clause of the Eighth Amendment.[259] The city argued that the public ordinances are enforced through civil fines, not through criminal fines or jail terms.[260] The U.S. Ninth Circuit Court of Appeals opined that cities violate the Eighth Amendment if they punish a person for the mere act

---

[253] *Id*.
[254] *Id*.
[255] *Martin v. City of Boise,* 902 F3d 1031, 1048 (2018).
[256] *Id*.
[257] HB 3115 (2021).
[258] ORS 195.530.
[259] *Johnson v. City of Grants Pass,* 50 F4th 787 (9th Cir 2022) [formerly *Blake v. City of Grants Pass;* class representative Blake became deceased during pendency of the appeal].
[260] *Id*.

of sleeping outside or for sleeping in their vehicles at night when there is no other place in the city for them to go.[261] This decision expands the application of *Martin v. Boise* to civil fines, not just criminal penalties.

On January 12, 2024, the U.S. Supreme Court granted the city of Grants Pass Petition for Certiorari.[262] The League of Oregon Cities, as well as 24 other states, filed amicus briefs, arguing that that the Ninth Circuit's decisions applying the Cruel and Unusual Clause of the Eighth Amendment to prohibiting camping on public property should be reversed.[263] On June 28, 2024, the U.S. Supreme Court released its opinion[264] considering the question of whether the city of Grants Pass's ordinance regulating public property by prohibiting activities such as camping or parking overnight on city property or parks violated the U.S. Constitution's Eighth Amendment, particularly as it relates to people experiencing homelessness. The court held that it does not.

Despite the Supreme Court reversing and remanding the case, HB 3115 (2021) remains in effect and remains enforceable. The practical effects of the Grants Pass decision will not be significant. Municipal attorneys are still challenged in determining the answers to such questions as the following: what regulations are objectively reasonable and what qualifies as measures necessary for an individual to survive outdoors.

For more information, please see the League of Oregon Cities' Guide to Persons Experiencing Homelessness in Public Spaces (2024), available at: https://www.orcities.org/download_file/2308/1852 (last accessed September 3, 2024).

I. Measure 110

In November 2020, Oregon voters passed Ballot Measure 110, also known as the Drug Addiction and Treatment Recovery Act, making Oregon the first state to decriminalize the personal possession of illegal drugs.[265] The measure decriminalized possession of small amounts of street drugs, giving violators a choice of paying a $100 fine or undergoing drug screening by phone where they will be connected with optional treatment.[266] The measure also reduced penalties for possession of larger amounts of drugs down to a misdemeanor in most cases.[267]

---

[261] *Id*.
[262] *Johnson v. City of Grants Pass*, 50 F4th787 (9th Cir 2022), *cert. granted* (U.S. Jan. 12, 2024).
[263] *See* U.S. Supreme Court Docket, No. 23-175, available at: https://www.supremecourt.gov/docket/docketfiles/html/public/23-175.html (last accessed September 3, 2024).
[264] *See* https://www.supremecourt.gov/opinions/23pdf/23-175_19m2.pdf (last accessed September 3, 2024).
[265] Dianne Lugo, *Measure 110 Rollback: Oregon Senate Sends Bill Recriminalizing Drug Possession to Kotek*, SALEM STATESMAN JOURNAL, March 1, 2024, available at: https://www.statesmanjournal.com/story/news/politics/2024/03/01/oregon-senate-passes-bill-recriminalizing-drug-possession/72808436007/ (last accessed September 3, 2024).
[266] *Id*.
[267] *Id*.

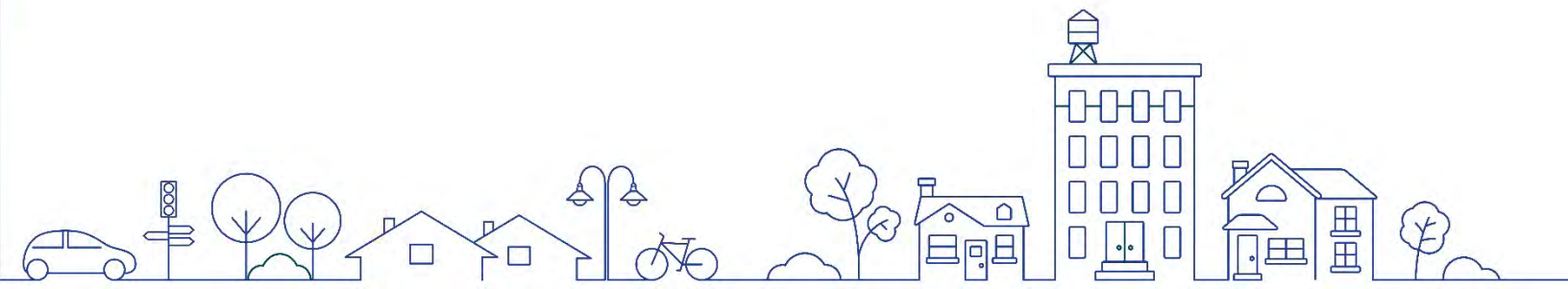
Critics of Measure 110 say it did little to incentivize drug users to seek treatment.[268] Further, there is an alarming rise in fentanyl overdose-related deaths.[269] As a result, the Oregon District Attorneys Association, the Oregon Association of Chiefs of Police, the Oregon State Sheriffs Association and the League of Oregon Cities released an 11-point outline to reform Oregon's substance abuse policies.[270]

In response of the statewide outcry about Measure 110, the 2024 Oregon Legislature passed a bill to recriminalize possession of a controlled substance, increase penalties for distribution of narcotics that leads to death, and create a criminal offense for the public consumption of drugs.[271] The bill also shifts financial authority over Measure 110 funds away from the Oregon Health Authority's Oversight and Accountability Committee to the Alcohol and Drug Policy Commission.[272]

[268] Oregon District Attorneys Association, the Oregon Association of Chiefs of Police, the Oregon State Sheriffs Association and the League of Oregon Cities, *A Comprehensive Approach to Addressing Oregon's Addiction and Community Livability Crisis*, available at: https://www.orcities.org/download_file/view/3086/1818 (last accessed September 3, 2024).
[269] *Id*.
[270] *Id*.
[271] HB 4002 (2024); *see also* League of Oregon Cities 2024 Legislative Session Summary available at: https://www.orcities.org/application/files/7317/1812/4416/2024_Legislative_Session_Summary_FINAL.pdf (last accessed September 3, 2024).
[272] *Id*.

Oregon Municipal Handbook

CHAPTER 19:
PARKS AND RECREATION



League of Oregon Cities

Published by the League of Oregon Cities
August 2021

Table of Contents

Chapter 19: Parks and Recreation

Introduction

Cities have authority by state statute and local charter to acquire, develop, maintain, and regulate their lands and structures for public recreation. Acquisition may be by gift, negotiated purchase, or eminent domain condemnation. Facilities may include parks, playgrounds, athletic and exposition grounds and buildings, stadiums, swimming pools, zoos, golf courses, bicycle paths, and other similar lands and structures.

The extent to which cities provide parks and recreation facilities varies with the population served, the characteristics of the area and ultimately, the city's values. Many small cities have no municipally owned parks and recreation facilities or maintain only a small park area. Most medium and large cities provide for a variety of recreation needs through a park and recreation systems managed by processional personnel. However, some larger cities do not have a parks or recreation system, while some small cities offer a variety of recreational programs. In a few cities, public recreational facilities and program are provided by a park and recreation district encompassing the city and surrounding areas. In general, city park facilities fill the public's need for open space, room for outdoor activities, as well as programing to fulfil activities desired by the community.

Park Facilities and Programming

Most cities that have park facilities have passed ordinances regulating their use. Typically, these ordinances regulate hours of use, animals in the parks, sales and concessions, littering, disorderly conduct, traffic control, picnicking and fires. Cities have authority to enforce regulations in municipally-owned parks outside the city to the same degree as in parks located inside the city.

In most cities with parks and recreational facilities, the responsibility for their improvement, design, development, operation, and maintenance is assigned to a department of parks and recreation, though it is not uncommon for cities with minimal facilities and programs to assign parks and recreation to their department of public works. Some departments, particularly in larger cities, have added responsibilities for development and administration of recreational programs such as tennis, swimming, craft classes and team sports leagues. Cities sometimes appoint individuals, park boards or commissions to advise the city council and the department of parks and recreation on planning, developing and operating park and recreational systems and programs.

Prior to determining what programs to offer, cities should look at whether there are already existing programs instituted by other entities such as a park district, school district, or non-profit such as the YMCA or Boys and Girls Club. Cities may look to partner with existing entities to bolster existing services or fill existing gaps in desired programing and vice versa. For example, if a city already has a pool as part of its parks program, it may want to partner with the local YMCA to offer youth swim lessons. As part of their programing, many park and recreation programs provide various recreational opportunities such as adult sports leagues, youth summer camps, senior events, aquatics, and special community events such as summer concerts, and foot

races. In addition to general recreation, programming can fill a need for education and safety, such as swim lessons or first aid certifications.

Partnerships and Joint Programs

Due to their nature, some park and recreational facilities are appropriate for development by both cities and school districts. Through cooperative agreements, cities and school districts sometimes opt for joint or adjacent ownership of facilities. Aquatic centers are often constructed and operated through an agreement between the city and the school district in order to intensify pool use and improve the level of service received from the investment. A city wishing to construct a new aquatic facility may work with the local school district to provide space for the district swim teams in exchange for a fee. Cooperative agreements may involve consolidated ownership of facilities, joint administration operation, one party performing administrative tasks for both city and district, or a combination of these methods. Many cities also have arrangements with school districts for the use of school buildings and sports fields when they are not being used for school programs.

Central Grant County Aquatics Center

Five cities in Grant County have partnered to replace the local aquatic center. The cities of Prairie City, Mt. Vernon, and Seneca, along with the John Day/Canyon City Parks and Recreation District will share the financing of the pool. More information is available on the city of John Day's website.

Financing of Park and Recreational Programs

In Oregon, the acquisition, development, operation and maintenance of parks and recreational programs are financed through the usual local government sources, such as general fund revenue, bonds, serial levies, and user fees. Among special sources are state grants, federal grants such as those available from the Heritage Conservation and Recreation System, and Community Development Block Grants.

Cities may also adopt system development charges (SDCs) for the acquisition and development of new park facilities. An SDC is a one-time fee imposed on new development to equitably recover the cost of expanding infrastructure capacity to serve new customers. SDCs are not taxes—they are collected for a specific purpose and provide a distinct benefit to the persons who pay the fee. SDC revenue is restricted by statute, and SDC revenue must be used to provide needed capital improvements.[1]

Resource:

LOC's *Model Policy System Development Charges Ordinance* available in the LOC's online Reference Library.

SDCs represent a valuable tool for cities to ensure that public facilities – such as those utilized for parks and recreation – keep pace with new development by distributing the costs of increased services on new development, not on existing development.

It is important to note that financing must include a long-term study of maintenance and staffing costs associated with the facility and any associated programming. While the capital cost – that

[1] See ORS 223.205 to 223.223.315.

is, the cost to construct a facility – is a one-time charge, the costs to maintain the facility and properly staff the facility are ongoing. A city may cover the expenses related to ongoing maintenance and staffing by implementing user fees. User fees may look different in each city and among each facility. For example, cities may charge higher rates for out of district and non-citizen users. On the other hand, a city many choose to implement a flat fee among all users, or implement a sliding scale with the opportunity for scholarships so that accessibility is addressed while maintaining an appropriate source of funding. A city will need to address these ongoing costs during its annual budgeting process.

Land Use Planning

As the amount of housing in a community increases, the number and size of parks should also increase. Determining recreational needs and establishing the location and priorities of various types of local park and recreational areas is an element of the land use planning process. Statewide Planning Goal 8 requires cities to inventory their existing recreational facilities and areas, determine existing and future recreational needs, and develop a plan to protect recreational resources. City recreational plans should be consistent with state and federal recreational plans.

Example:

City of Eugene's Parks System Plan

Plans for land and facilities to accommodate a community's future recreational needs usually are developed by city planning and associated organizations and park department staff and park advisory bodies. Development policies can help establish new park sites as land is subdivided or planned developments are constructed.

Cities located along the Willamette River are participants in a special state-mandated program. The Oregon Legislature has directed that a natural, scenic, historical and recreational greenway be developed and maintained along the Willamette River. The Oregon Department of Transportation developed a Willamette River Greenway Plan that was approved by the Land Conservation and Development Commission.[2] Much of the Greenway Plan is being implemented through local cooperative efforts included in land use plans and implementation programs of cities and counties located along the Willamette River Greenway. A somewhat similar program, although not state-mandated, applies to Bear Creek in the Ashland-Medford area.

Risk Management and Recreational Immunity

Park enjoyment can come with risks. A few recommendations include inspecting your playground equipment to ensure that the equipment is free from damage, rot, or loose, missing, or broken parts and pieces. These inspections should be done quarterly or upon user comments/complaints.

[2] Additional information on Goal 15: Willamette River Greenway is available at: https://www.oregon.gov/lcd/OP/Pages/Goal-15.aspx.

Ongoing maintenance of park equipment is essential to providing a safe and fun environment for park users. Additionally, having a capital improvement plan for park equipment is critical to have the funds available for repair or replacement such as replacing metal slides with plastic to avoid minor burns to a child who is using a metal slide on a hot summer day. The U.S. Consumer Product Safety Commission has public a *Public Playground Safety Handbook* which provides recommendations focused on playground-related injuries and mechanical mechanisms of injury. A copy of the handbook is accessible at: https://www.cpsc.gov/s3fs-public/325.pdf.

Resource:

To assist with managing risk, CityCounty Insurance Services has several documents in its Risk Resource library relating to parks and recreation for CIS members to use and review.

Like playground equipment, skate or BMX parks need similar inspections and maintenance. These parks have a higher risk of injury due to the nature of activities, therefore recreational immunity is an important part of risk management for parks.

Recreational immunity provides landowners – including cities – with immunity from liability arising from injuries sustained from recreational users of the land.[3] However, this immunity becomes limited when the landowner charges a fee to use the land for one or more recreational purposes.[4] However, if the landowner provides notice in a manner specified by ORS 105.688(8), the owner will maintain immunity for all other uses of the land for which the fee is not imposed.[5] The required notice must be provided "by means reasonably calculated to apprise a person of the limited uses of the land for which the charge is made, * * * or the portion of the land which is subject to charge" and the immunities that apply to other uses when no fee is charged.[6] A sample notice is provided at the end of this chapter.

Related Services

Cities may also provide youth and senior citizen centers as part of their parks and recreation programs. Other services may include programs similar to the city of Bend's "Dial-A-Ride" bus service for senior and disabled citizens.

Recreational Projects Across the State

As previously mentioned, the services, programs and facilities offered by a city varies greatly. Below are examples of just a few programs and facilities that cities around the state are providing.

[3] ORS 105.682 and 105.688.
[4] ORS 105.688.
[5] *Id.*
[6] ORS 105.688(8).

The city of Hermiston's Funland Playground Rebuild: https://hermistonprojects.com/funland/
The city of Hermiston recently built one of the largest, engaging, and inclusive playgrounds in the Northwest. The playground has three zones: Wildwest, Adventure, and Farmland. Included in the park a locomotive, wagon train, stagecoach, pirate ship, bark, giant fruit and vegetables, and a 6-foot watermelon slice.

The city of Madras's Adopt-A-Trail Program: https://www.ci.madras.or.us/publicworks/page/adopt-trail-program

The Adopt-a-Trail Program provides citizens and citizen groups the opportunity to assist the city of Madras with the clean-up of trash and debris located along the city's trail system. Volunteer participation in this program fosters civic pride, assists with the beautification of the city, and encourages greater participation in the city's affairs.

McMinnville's After School Program:
https://www.mcminnvilleoregon.gov/parksrec/page/new-kids-block

The city of McMinnville Parks & Recreation Department's Kids on the Block After-School Program serves approximately 400 first to fifth grade students each school year at all six of the McMinnville School District's elementary schools. The program provides a needed service and has a legacy near and dear to both short-term and long-term residents of the city. The purpose of the program is the provide a safe, fun, enriching afterschool experience – and has a heartfelt support from leadership over the past few decades. The program provides three hours of after-school programming and recreation enrichment on 135 program days per school year which covers most school days from mid-September to mid-May.

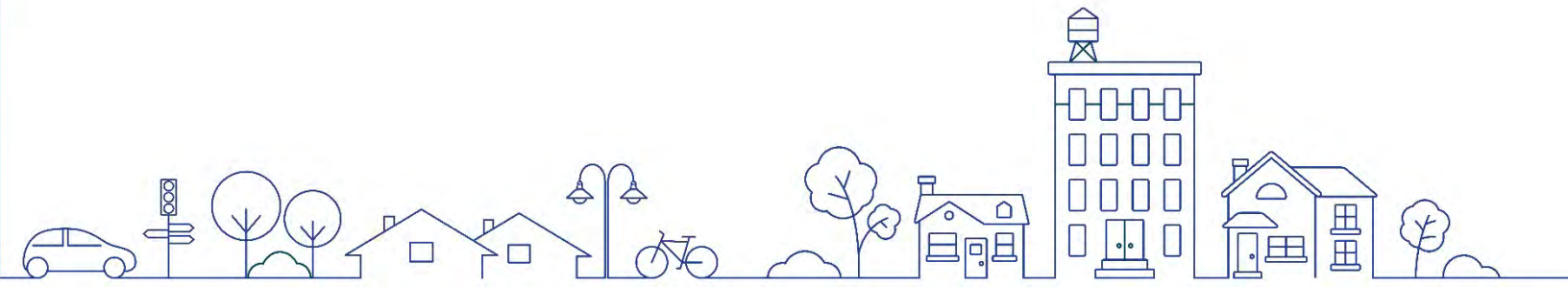
Conclusion
Parks and recreation services provide the local community with needed space and recreational opportunities. These facilities and services are impactful in improving the city's livability.

Sample Recreational Immunity Notice

NOTICE:

Oregon law (ORS 105.682, et seq.) provides the owner of land is not liable in contract or tort for injury death or property damage that arises out of use of the land for recreational purposes (known as “recreational use immunity”). That immunity from liability does not apply if the owner makes a charge for permission to use the land. Fees charged for a particular use in this park, such as camping, do not apply to other uses of the park, or to your ability to enter other areas of the park. Therefore, [*insert city name*] is not liable for injuries, death or property damage arising out of any use of this park for recreational purposes when no specific charge has been made for that use or for the right to enter that part of the property.

CHAPTER 20:
LIBRARIES



League of Oregon Cities

Published by the League of Oregon Cities
April 2023

Chapter 20: Libraries

As a free resource open to everyone, public libraries not only provide access to the traditional resources such as books and magazines, but many libraries also provide access to public meeting rooms and electronic resources such as e-books, computer stations, and free wi-fi. Some libraries even offer a coffee shop or loans of craft making equipment.

This chapter is intended to discuss the laws and legal issues facing libraries. The legal issues discussed below include: (i) the First Amendment rights of library patrons; (ii) patron behavior policies; (iii) First Amendment Audits; (iv) censorship of library materials, and (v) copyright law.

I. Oregon Law Governing Libraries

A "public library" means "a public agency that provides to all residents of a local government unit free and equal access to library and information services that are suitable for persons of all ages."[1] In Oregon, public libraries are operated by different governmental entities such as the state of Oregon, cities, counties, universities, community college library service districts established under ORS chapter 451, and special districts established under ORS 357.216.[2]

In Oregon, governance of libraries is largely through local control, but the state, through the State Library Board, does confer "public library status" and for those eligible libraries, providing state aid and grants.[3] Local governments operating libraries organized after September 13, 1975, must follow the formation and operation statutes contained in ORS chapter 357.[4] Public libraries operating before this date are not required to, but may choose to conform with ORS chapter 357.[5]

New libraries may be formed by resolution, ordinance or election, but the proposed library must: meet the minimum conditions established by the State Library Board; provide financial support from public funds; and hold regularly scheduled open hours.[6] The minimum standards do not apply to libraries serving populations of 2,000 or fewer residents.[7]

---

[1] ORS 357.400.
[2] *Id*.
[3] ORS 357.780; OAR 543-010-0036.
[4] ORS 357.610.
[5] *Id*.
[6] ORS 357.417; *See* OAR 543-010-0036.
[7] *Id*.

Each library established since 1975 must appoint a library board, comprised of five to 15 members.[8] The local government's governing body shall determine the library board's responsibility for: (1) appointment of staff; (2) rules and policies; (3) annual budget; (4) approving or delegating expenditures; (5) selection of sites for library facilities; (6) entering into contracts, and (7) any other activities.[9] To terminate public support of a library, the local governing body must hold at two public hearings on the matter at least 90 days apart and publish notice of the first public hearing for two successive weeks at least 30 days in advance of the first hearing.[10]

II. FIRST AMENDMENT

The First Amendment of the United States Constitution protects an individual's right to speak, publish, read, and view materials in the library.[11]

Under the federal forum analysis, a library is a designated (or limited) public forum.[12] In designated public forums, the First Amendment does not require public libraries to grant access to all those wishing to exercise free speech rights on its property.[13] In comparison, a traditional public forum such as sidewalks or parks, is a place where the government may only enact time, place and manner regulations that are narrowly tailored to serve a significant government interest and may not prohibit all communication.[14] As a designated public forum, courts have recognized that libraries may have reasonable rules in place for patron use of the library, consistent with the library's mission to provide access to library materials and services to the entire library community.[15]

Courts have upheld a library's regulation of spaces inside of the library such as the

[8] ORS 357.465.
[9] ORS 357.490.
[10] ORS 357.621.
[11] *Board of Education v. Pico*, 457 US 853, 867 (1982) (holding that "the right to receive ideas is a necessary predicate to the recipient's meaningful exercise of his own right of speech, press and political freedom").
[12]The U.S. Supreme Court in *United States v. American Library Association* supposed that the library is a limited public forum but did not analyze whether a library is a "traditional" public forum; *See* John N. Gathegi, *The Public Library as a Public Forum: The (De)Evolution of a Legal Doctrine)*, LIBRARY QUARTERLY (Jan 2005).
[13] *Kreimer v Board of Police of Morriston, NJ*, 958 F2d 1242, 1256-1263 (3rd Cir 1992).
[14] *Ward v Rock Against Racism*, 491 US 781, 798 (1989) (time, place or manner regulations that limit permitted First Amendment activities within a designated public forum are constitutional only if they are "narrowly tailored to serve a significant governmental interest, and ... leave open ample alternative channels for communication of information").
[15] *Kreimer*, 958 F2d at 1256-1263.

regulation of meeting rooms. [16] For example, a library may regulate the use of the meeting rooms, excluding religious worship services because it is not consistent with the library's purpose.[17]

In Oregon, in addition to the First Amendment, Article I, section 8 of the Oregon Constitution protects free expression. The Oregon Supreme Court has not applied the federal public forum analysis into Article I, section. Rather, in *State v. Robertson*, the Oregon Supreme Court applied a different test for free expression, without regard to the type of forum.[18] The *Robertson* analysis places regulations into one of three categories of review: (1) laws focusing on the content of expression violate Article I, section 8 unless it is one of a few exceptions; (2) laws focusing on harms or effects, but directed by their terms at expression; and (3) speech-neutral laws that, although they are not directed by their terms, may be applied to expression.[19]

As discussed below, the policies governing library patron behavior should be limited to the third category of speech neutral laws that are limited to time, place and manner. These "speech-neutral" laws cannot be challenged facially; rather, they are reviewed to determine whether the law in a particular circumstance burdened protected expression.[20]

A. Policies Governing Patron Behavior

Public libraries have some discretion to reasonably restrict the exercise of free speech rights in their buildings - especially to the extent that the conduct in question would be disruptive to the other patrons or inconsistent with the library's fundamental mission.[21] Libraries may have reasonable rules in place for patron use of the library, consistent with the library's mission to provide access to library materials and services to the entire library community.[22] Library patrons have the right to access information free from harassment, intimidation, or threats to their safety, well-being, and privacy rights.[23]

A library may require patrons wear shoes in the library to prevent injury from documented dangers such as vomit, urine, broken glass, and a staple on the library floors.[24] A library may also limit activities to access to information and limit other expressive activities such as making speeches and distributing pamphlets.[25] The power to regulate patron behavior is not

[16] *See Faith Center Church v. Glover*, 462 F 3d 1194 (9th Cir 2006) finding that the library meeting room is a limited public forum).
[17] *Id*.
[18] 293 Or 402, 412 (1982).
[19] *Id*.
[20] *State v. Illig-Renn*, 341 Or 228, 234, 142 P3d 62 (2006).
[21] *Kreimer*, 958 F2d at 1256-1263.
[22] *Id*.
[23] *Id*.
[24] *Neinast v. Bd of Trustees Columbus Metro Library*, 346 F3d 585, 595 (6th Cir 2003).
[25] *Kreimer*, 958 F.2d at 1260.

limited to actual disruption but can include behavior that is not consistent with library purposes.[26]

Although there are not many cases involving filming or photography in libraries, there are cases involving law enforcement. In *Askins v. Department of Homeland Security*, the Ninth Circuit Court of Appeals held that there is a First Amendment right to record matters of public interest in traditional public forums, which "includes the right to record law enforcement officers engaged in the exercise of their official duties in public places" such as sidewalks or streets.[27] The Ninth Circuit noted that such a right may not exist in areas "not freely open to the public" such as computer screens and holding cells.[28] Libraries should work with their legal counsel to make an individualized determination whether to regulate photography and recording in light of the potential threats posed by third-party photography or recording.

To draft policies governing patron behavior, libraries should consider the following:

- **Tailor the policies to the needs of the library.** Libraries should consider past concerns and document how the policies address the safety of staff and the patrons. Consider regular review of the policies to address concerns such disruptive behavior.

- **Draft the policies that are specific and can be applied objectively.** Courts are more likely to find that ambiguous or unnecessarily broad policies are unenforceable.

- **Draft the policies to be viewpoint neutral and limited to time, place and manner regulations.** Courts are more likely to find such policies enforceable.

- **Create an appeal process.** A process that provides notice and the right to appeal provides due process and is a best practice.

Example behavior policies are available from the American Library Association, Guidelines for the Development of Policies and Procedures Regarding User Behavior and Library Usage: Guidelines for the Development of Policies and Procedures Regarding User Behavior and Library Usage | Advocacy, Legislation & Issues (ala.org).

Once the behavior policies are adopted, it is important to ensure that the library staff are trained and enforce the policies consistently. Failure to follow the procedures consistently places the library at risk for claims that an individual's constitutional rights were violated.

[26] *Id*. at 1270.
[27] 899 F3d 1035, 1044 (9th Cir 2018).
[28] *Id*.

B. Audits

According to the American Library Association, a growing number of public libraries across the country are finding themselves the target of "First Amendment Audits."[29] In First Amendment audits, individuals arm themselves with video cameras, proclaim themselves "auditors," and enter public buildings, like police precincts and libraries, to record alleged Constitutional violations. [30] They are also claiming that they are permitted to film and photograph library staff and patrons on the grounds that libraries are "public spaces." [31]

What if this happens at my library? The American Library Association Office for Intellectual Freedom, recommends the following:

- **Understand the library's role as a designated public forum.** In designated public forums, staffers are only obligated to allow free speech that is consistent with the nature of that forum. In other words, library behavior and privacy policies can often supersede an individual's right to film or photograph the space. As is the case in many courthouses, a library can regulate photography or filming inside the building even if the facility is open to the public.

- **Adopt or review written policies.** Written policies can help staff members regulate behavior in a manner that respects every person's right to privacy and safety. Staffers should be familiar with these policies to mitigate behavioral violations that may occur during an audit. As always, staff training and consultation with your state library or legal counsel are important parts of this process.

- **Know your rights and responsibilities.** Public library workers are public employees. Several U.S. Courts of Appeals have upheld a private citizen's right to record audio and video of public employees carrying out their duties in a public space regardless of their consent. However, this does not include the right to harass or interfere with public employees as they carry out those duties.

- **Label all private spaces.** Libraries should clearly identify all nonpublic spaces inside the building, such as bathrooms, offices, break rooms, work areas, and reservable private study spaces. Creating this identification can provide clearer guidance when a First Amendment auditor violates library policy.

- **Know when to engage.** If a First Amendment auditor is not violating any behavior policies, avoid engaging. Most auditors enter these situations with a goal of getting a rise

[29] *See* Cass Balzer, *Uptick in First Amendment Audits*, AMERICAN LIBRARIES, (2022) available at: https://americanlibrariesmagazine.org/2022/01/03/uptick-in-first-amendment-audits-2/ (last accessed on March 26, 2023).
[30] *Id*.
[31] *Id*.

out of employees. If staffers do not give them that opportunity, auditors are more likely to leave without incident.[32]

C. Censorship of Library Materials

Libraries are increasingly encountering comments from the public that materials are inappropriate or offensive and asking that such resources are removed. Censorship is the suppression of ideas and information that certain persons – individuals, groups, or government officials – find objectionable or dangerous. The First Amendment right to receive information is also implicated in considering such censorship. [33]

To be prepared for such complaints that materials are inappropriate or offensive and therefore should be removed, libraries should consider a collection development policy that outlines the process and criteria for selecting resources. Libraries should also incorporate a reconsideration process. Additional intellectual freedom resources and example policies are available from the Oregon Library Association at Intellectual Freedom Resources (olaweb.org).

Libraries accepting funds from the federal government through the Children's Internet Protection Act are required to install filtering software.[34] The filtering software is to keep adults from accessing visual images online that are deemed obscene or child pornography and to block minors' access to images that are harmful to minors.[35] The U.S. Supreme Court upheld the constitutionality of the Children's Internet Protection Act because the internet at the library is "neither a traditional nor a designated public forum."[36]

III. COPYRIGHT LAW

Copyright is a form of protection grounded in the U.S. Constitution and granted by law for original works of authorship fixed in a tangible medium of expression.[37] Copyright, a form

[32] *Id.*; *See also* Deborah Caldwell-Stone, *Auditing the First Amendment at Your Public Library* (2019), available at: https://www.oif.ala.org/auditing-the-first-amendment-at-your-public-library/ (last accessed on March 26, 2023); *see also* HIRTLE, PETER B.; HUDSON, EMILY; KENYON, ANDREW T., COPYRIGHT AND CULTURAL INSTITUTIONS: GUIDELINES FOR DIGITIZATION FOR U.S. LIBRARIES, ARCHIVES, AND MUSEUMS, 127-128, Cornell University Library (2009), available at: https://hdl.handle.net/1813/14142 (last accessed on March 27, 2023).

[33] *See Bd. of Educ., Island Trees Union Free Sch. Dist. v. Pico*, 457 U.S. 853 (1982) (a plurality of the Supreme Court prohibited a school board from banning books from a public school library, finding the ban violative of the students' constitutional right to receive information).

[34] 15 USC §§ 6501-6506.

[35] *Id.*

[36] *United States v. American Library Association*, 539 US 194, 204-05 (2003) (plurality opinion).

[37] U.S. Const., Art. I, § 8, cl. 8 (Congress shall have Power * * * To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and

of intellectual property law, protects original works of authorship including literary, dramatic, musical, and artistic works, such as poetry, novels, movies, songs, computer software, and architecture.[38] Congress passed the most recent Copyright Act in 1976.[39]

Copyright protects original works of authorship, while a patent protects inventions or discoveries.[40] Ideas and discoveries are not protected by the copyright law, although the way in which they are expressed may be.[41] A trademark protects words, phrases, symbols, or designs identifying the source of the goods or services of one party and distinguishing them from those of others.[42]

Copyright exists from the moment the work is created.[43] Copyright covers both published and unpublished works.[44] In general, registration is voluntary and not required.[45] You will have to register, however, if you wish to bring a lawsuit for infringement of a U.S. work.[46]

The concept of copyright in libraries is implicated in the practice of digitizing and sharing library content.[47] Digitizing content in libraries would constitute infringement if the works were protected by copyright and permission was not obtained. [48] As discussed below, there are three notable exceptions to copyright laws: (1) materials in the public domain; (2) materials that are fairly used; and (3) materials used in the library.

A. Public Domain Exception

Materials in the public domain, or materials that are not protected by intellectual property laws, may be digitized without permission or restrictions.[49] Determining what is in the public domain is exceptionally complicated. There are a few public domain categories to consider.

Discoveries); *See* U.S. COPYRIGHT OFFICE, CIRCULAR 1 COPYRIGHT BASICS (2021) available at: https://www.copyright.gov/circs/circ01.pdf (last accessed on March 26, 2023).

[38] 17 USC § 102.
[39] 17 USC §§ 101 *et seq*; *See* U.S. COPYRIGHT OFFICE, CIRCULAR 1 COPYRIGHT BASICS (2021) available at: https://www.copyright.gov/circs/circ01.pdf (last accessed on March 26, 2023).
[40] *See* 35 USC §§ 100 *et seq.*
[41] *Feist Pubs., Inc. v. Rural Tel. Svc. Co., Inc.*, 499 US 340 (1991) (holding that the white pages are not "original works of authorship" and that there is no copyright in recitation of facts).
[42] *See* 15 USC §§ 1051 *et seq.*
[43] 17 USC § 101 (defining "created").
[44] *See Harper & Row v. Nation Enterprises*, 471 US 539 (1985) (holding that former President Gerald Ford held a copyright on his unpublished memoir).
[45] 17 USC § 408(a) ("registration is not a condition of copyright protection").
[46] 17 USC § 412 (registration is a requirement of an infringement action).
[47] *See Authors Guild v. Google, Inc.*, 804 F3d 202 (2nd Cir 2015); *See generally*, RUTH DUELOW AND MICHAEL ROBAK, LEGAL ISSUES IN LIBRARIES AND ARCHIVES, available at: https://mlpp.pressbooks.pub/librarylaw/ (last accessed on March 26, 2023).
[48] *Id*.
[49] 17 USC § 303.

- **U.S. federal government works.** The federal government dedicates its content to the public domain. This includes works by agencies or government employees in the course of their duties.[50]
- **Everything created before 1923.** If the work was published before 1923, it is likely in the public domain. This includes books, famous works of art, photographs, and early motion pictures.[51]
- **Works published in the U.S. between January 1, 1923, and December 31, 1977.** The copyright for work published or registered is the publication or registration date plus 95 years. [52] Works that were published before 1964 that were not renewed are in the public domain, and works published before 1978 that have no copyright notice are in the public domain.[53] Works created more than 120 years ago are in the public domain.[54]
- **Works created on or after January 1, 1978.** Work created for the term lasting for the author's life plus an additional 70 years. [55]

To research whether the copyright on a specific work or whether the copyright was renewed, the U.S. Copyright Office only provides online searching for records from 1978 to present available at: http://cocatalog.loc.gov/cgi-bin/Pwebrecon.cgi?DB=local&PAGE=First.

Records before 1978 are available in the (print) *Catalog of Copyright Entries*.

B. Fair Use Exception

When determining whether materials should be digitized for research, it is not always possible to determine a work is in the public domain. When considering whether the materials are copyrighted, libraries can digitize work that is considered "fair use."[56] Fair use is such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.[57]

---

[50] 17 USC § 105.
[51] Prior to 1998, copyright in published works could last at most 75 years. In 1988, the Sonny Bono Copyright Term Extension Act extended the term of all existing copyrights by 20 years and works already in the public domain (i.e. those published in 1922 and earlier) were unaffected. It is assumed that most, but not all, works published in 1922 and earlier are public domain.
[52] *See* U.S. COPYRIGHT OFFICE, CIRCULAR 15A DURATION OF A COPYRIGHT (2023) available at: Circular 15A Duration of Copyright (last accessed on March 26, 2023); *See also* Mannapperuma, Mehesha; Schofield, Brianna; Yankovsky, Andrea; Baily, Lila; Urban, Jennifer, IS IT IN THE PUBLIC DOMAIN? (2014) available at: FINAL_PublicDomain_Handbook_FINAL(1).pdf (berkeley.edu) (last accessed on March 26, 2023).
[53] *Id*.
[54] *Id*.
[55] The Copyright Act of 1976.
[56] 17 USC §107.
[57] *Id*.

To conduct a fair-use analysis, libraries should consider the four factors listed in the Copyright Act for determining whether a particular use is fair.[58] The factors to determine fair use are the following:

> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work.[59]

In considering the first factor, if the purpose is for educational purposes or research purposes, that would weigh in favor of fair use.[60] If the purpose, on the other hand, is to make a profit or for commercial gain, that would weigh against fair use.[61]

The courts also consider whether the use is a *transformative* one.[62] Did the use "transform" the material taken from the copyrighted work by using it for a broadly beneficial purpose different from that of the original, or did it just repeat the work for the same intent and value as the original, in effect substituting for it? [63] A transformative use is one that alters the original work "with new expression, meaning or message..."[64]

Mass digitization of copyright books have largely been considered fair use.[65] In the *Authors Guild v. Google* case, the court noted that Google, which digitized copyrighted works, did not make the entire copyrighted works freely available to read online.[66] Their uses (creating a searchable database; providing access to the print-disabled), were held to be *transformative* by the courts.[67]

The U.S. Copyright Office publishes a list of the fair use cases at: https://www.copyright.gov/fair-use/fair-index.html.

Before a library digitizes its holdings, it is a good practice to document the reasons that the library believes it is fair use. Libraries have a reduced exposure to statutory damages if they can prove that they had reasonable grounds for believing that the use of the copyrighted work

---

[58] *Id*.
[59] *Id*.
[60] *De Fontbrune v. Wofsy*, 39 F4th 1214 (9th Cir 2022) (finding reproduction of photographs of Pablo Picasso's work in reference book sold commercially was not fair use).
[61] *Id*.
[62] *Campbell v. Acuff-Rose Music*, 510 US 569, 579 (1994).
[63] *Id*.
[64] *Id*.
[65] *See Authors Guild, Inv. v. HathiTrust*, 755 F3d 87 (2nd Cir 2014); *Authors Guild v. Google, Inc.*, 721 F3d 132 (2nd Cir 2015).
[66] *Id*.
[67] *Id*.

was a fair use.[68]

C. Library Exception

In addition to the public domain and fair use exceptions, libraries have a specific exception to the copyright laws.[69] This library exemption, as discussed below, specifies when copyrighted material may be used for library purposes without permission from the copyright holder. This exception permits libraries and archives to:

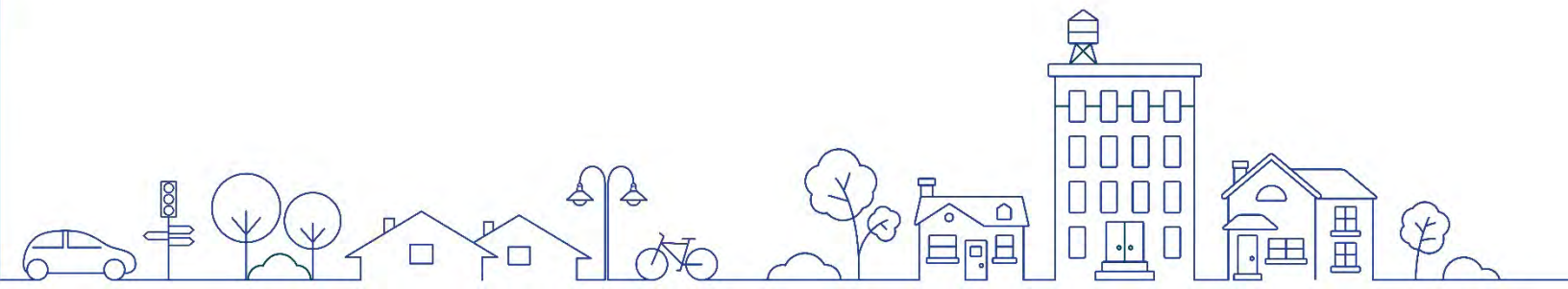
- Make one copy of an item held by a library for interlibrary loan;
- Make up to three copies of a damaged, deteriorated, lost, or stolen work for the purpose of replacement. This only applies if a replacement copy is not available at a fair price;
- Make up to three copies of an unpublished work held by the library for the purpose of preservation. If the copy is digital, it cannot be circulated outside the library;
- Reproduce, distribute, display, or perform a published work that is in its last 20 years of copyright for the purposes of preservation, research, or scholarship if the work is not available at a fair price or subject to commercial exploitation; and
- Make one copy of an entire work for a user or library who requests it if the work isn't available at a fair price.[70]

Under this exemption to the copyright laws, copies cannot be made for commercial purposes, be systematic to replace subscriptions and all copies made must include a notice stating that the materials may be protected under copyright.[71] Also note that fair use is broader than the specific exemption for libraries and that the exemptions specific to libraries do not replace fair use.

[68] 17 USC § 504(c)(2).
[69] 17 USC § 108; For an additional resource on the library exception, please see Table 6.8 in HIRTLE, PETER B.; HUDSON, EMILY; KENYON, ANDREW T., COPYRIGHT AND CULTURAL INSTITUTIONS: GUIDELINES FOR DIGITIZATION FOR U.S. LIBRARIES, ARCHIVES, AND MUSEUMS, 127-128, Cornell University Library (2009), available at: https://hdl.handle.net/1813/14142 (last accessed on March 27, 2023).
[70] *Id.*
[71] *Id.*

Oregon Municipal Handbook

CHAPTER 21:
AIRPORTS



League of Oregon Cities

Published by the League of Oregon Cities
April 2023

Table of Contents

Chapter 21: Airports

Throughout the United States, civilian airports are owned by local governments such as cities.[1] Municipal airports are part of the national aviation system administered by the Federal Aviation Administration (FAA).[2] Through the FAA, the federal government regulates aircraft, pilots and most local governments airport operations.[3] This chapter will provide a brief history of the development of the national aviation system in Oregon.

Oregon municipal airports provide a large variety of services such as passenger service, general aviation and auxiliary services to support operations. Each area of service is regulated by federal laws and regulations. This chapter contains an overview of: (i) appliable federal aviation rules; (ii) the contractual obligations known as "mutual assurances"; (iii) the restrictions on airport property development; and (iv) the restrictions on the use of airport revenues.

This chapter is intended to give an overview, rather than an in-depth treatment, of the regulations that could apply to a municipal airport. More information is available online for specific issues about the FAA regulations.[4] Please consult with your city attorney for specific questions about the applicable federal laws and regulations. Airport law is a highly specialized field of study, and most city attorneys utilize national law firms specializing in representing airports. Additional resources available to municipal attorneys are available from the International Municipal Lawyer's Association at http://www.imla.org.

Lastly, this chapter will discuss the importance of municipal airports to Oregon's economy and support of public safety.

I. History of Oregon Airports

The laws impacting municipal airports developed as aviation grew from early exhibitions to the jet age. It is important to understand this history and how the federal regulations developed over time.

Starting in 1903, after the Wright brothers flew the first powered, sustained flight, local

[1] *See* Airport Cooperative Research Program, Guidebook for Managing Small Airports (2009), *available at* ACRP Report 16 – Guidebook for Managing Small Airports (trb.org) (last accessed on February 6, 2023).
[2] *Id*.
[3] *Id*.
[4] *Id*. *See also* Airport Cooperative Research Program, Guidebook for Developing and Leasing Airport Property, *available at* ACRP Report 47 – Guidebook for Developing and Leasing Airport Property (worldbank.org) (2011); *See also* Federal Aviation Administration, Airport Compliance Manual Order 5190.6B Change 2 (2022) *available at* Change 2 to F A A Order 5190.6B, Airport Compliance Manual, December 2022.

communities developed airstrips to host the new technology.[5] Many communities across the nation, including those in Oregon, created grass airstrips to host exhibition events. [6]

Just 18 years after the Wright brothers made history, the Oregon Legislature created the State Board of Aeronautics, the first aviation agency in the United States.[7] The 1921 Oregon law made pilot registration and licensing mandatory.[8] The newly created board also tested pilots for competency with both written and flight examinations.[9] When the federal government took over these functions, the Oregon board's efforts turned to surveying and developing the state's aviation system and other aviation-related areas of concern.[10]

In 1925 and 1926, the United States Congress passed legislation that awarded government mail contracts to private carriers, helping create the commercial aviation industry.[11] The legislation also established federal regulations regarding aircraft, airmen, navigational facilities and the establishment of air traffic regulations.[12] The first federal government aviation regulations were the result of utilizing aviation for the United States Postal Service.

By the end of 1920s, there were 145 municipal airports across the United States and the nationwide airport system was beginning to form.[13] In 1926, Oregon's first airport accommodating airmail, Portland's Swan Island Airport, was approved and opened shortly thereafter.[14]

In the 1930s and 1940s, municipal airports continued to develop to assist the military in World War II. In 1942, Klamath Falls Municipal Airport was converted to military use to support military air operations, and in 1945, the airport was transferred back to civilian use.[15] During World War II, Pendleton's airport facilities were expanded to accommodate military training activities, and after the war, the airport was transferred from federal ownership to city of Pendleton ownership.[16]

---

[5] *See* JANET ROSE DALY BEDNAREK, JANET R. DALY, AMERICA'S AIRPORTS: AIRFIELD DEVELOPMENT, 1918-1947, p. 15 (2001).
[6] *Id*.
[7] Oregon Laws, ch 45 (1921); *See* OREGON SECRETARY OF STATE, OREGON DEPARTMENT OF AVIATION ADMINISTRATIVE OVERVIEW (2001), *available at* 0K720UYF0KF.PDF (state.or.us) (last accessed on February 6, 2023).
[8] *Id*.
[9] Oregon Laws, ch 186 (1923).
[10] *See* OREGON SECRETARY OF STATE, OREGON DEPARTMENT OF AVIATION ADMINISTRATIVE OVERVIEW (2001), *available at* http://records.sos.state.or.us/ORSOSWebDrawer/RecordView/7589710 (last accessed on February 6, 2023).
[11] Air Mail Act of 1925.
[12] Air Commerce Act of 1926.
[13] *See* U.S. CENTENNIAL OF FLIGHT COMMISSION, THE EARLIEST AIRPORTS, *available at* The Earliest Airports (centennialofflight.net) last accessed on February 6, 2023).
[14] *See* OREGON HISTORICAL SOCIETY, AIRPORTS (2022), *available at* Portland International Airport (oregonencyclopedia.org) (last accessed on February 6, 2023).
[15] *See* CRATER LAKE KLAMATH REGIONAL AIRPORT, MASTER PLAN, p. 1-3 (2021), *available at* LMT Covers and Dividers (klamathfalls.city) (last accessed on February 6, 2023).
[16] *See* EASTERN OREGON REGIONAL AIRPORT, AIRPORT MASTER PLAN, *available at* Eastern Oregon Regional Airport – Airport Master Plan - Century West p. 13 (2018).

After the war, the Federal Airport Act of 1946 brought about a federal responsibility and participation in the further construction of airports through the newly established Federal Aid Airport Program.[17] The program was intended to balance funding between the federal government, local jurisdictions, and private entities.

In Oregon, the 1947 airplane crash which claimed the lives of the governor, secretary of state, and Senate president provided the impetus for establishing Oregon's Search and Rescue coordination efforts under the direction of the State Aeronautics Board.[18] The Air Marking program, intended to provided safety and information for pilots by providing recognizable navigational aids and interrupted by World War II, continued with 182 communities marked by the end of 1947.[19]

The Federal Aviation Act of 1958 created the Federal Aviation Agency (later the Federal Aviation Administration or the FAA).[20] The act empowered the FAA to oversee and regulate safety in the airline industry and the use of American airspace by both civilian aircraft and military aircraft.[21]

In 1978, the Airline Deregulation Act was passed.[22] In the previous FAA Act and the Airline Deregulation Act, Congress preempted all local rules for air transportation, but allowed airports to retain some control over their facilities.[23] The preemption was upheld by the U.S. Supreme Court when it struck down a city ordinance regulating air traffic as a violation of the supremacy clause.[24]

Since 1982, the U.S. Congress has passed legislation establishing the Airport Improvement Program (AIP), which provides federal grant funding; creating the authority for airport operators to levy Passenger Facility Charges (PFCs); and governing how airport revenue is generated and used.[25]

The attacks carried out on September 11, 2001 changed the way the United States views aviation security.[26] President George W. Bush signed into law the Aviation and Transportation

---

[17] 49 USC § 1101 *et seq.*; *See* FEDERAL AVIATION ADMINISTRATION, AIRPORT IMPROVEMENT PROGRAM: 75 YEARS OLD AND STILL GOING STRONG (2021), *available at* AIP for FAA Focus and FAA history web (last accessed on February 6, 2023).
[18] *See* OREGON SECRETARY OF STATE, OREGON DEPARTMENT OF AVIATION ADMINISTRATIVE OVERVIEW (2001), *available at* 0K720UYF0KF.PDF (state.or.us) (last accessed on February 6, 2023).
[19] *Id*.
[20] 49 USC § 40103.
[21] *Id*.
[22] 49 USC § 41713.
[23] *Id*.
[24] *See City of Burbank v. Lockheed Air Terminal Inc.*, 411 US 624, 633 (1973).
[25] Airport and Airway Improvement Act of 1982, Pub L 97–248.
[26] *See* AIRPORT COOPERATIVE RESEARCH PROGRAM, GUIDEBOOK FOR MANAGING SMALL AIRPORTS (2009), *available at* ACRP Report 16 – Guidebook for Managing Small Airports (trb.org) (last accessed on February 6, 2023).

Security Act on November 19, 2001.[27] This law created the Transportation Security Administration (TSA) within the U.S. Department of Transportation (transferred to the Department of Homeland Security in November 2002).[28] The TSA became the federal agency responsible for security in all modes of transportation.[29]

Over time in Oregon, many original airstrips and airports were converted to other uses, such as the city of Portland's Swan Island Municipal Airport.[30] Currently in Oregon, cities own and operate 30 of the 97 airports.[31] Of those 30 municipal airports, the cities of Eugene, Pendleton and Redmond currently offer commercial passenger service.[32] The remaining 27 municipal airports are classified as general aviation airports by federal regulations.[33] Notably, the other airports offering passenger service in Oregon are not operated by cities.[34]

II. AIRPORT OPERATIONS

In modern times, Oregon municipal airports provide a large variety of services such as passenger service, general aviation and auxiliary services to support operations. An airport is not only a group of aircraft taking off and landing on a runway, but also an airfield with expanded facilities. Most airports have parking, maintenance buildings and a control tower. This section will describe the current operations for general aviation and commercial service airports.

Nationwide, approximately 88% of airports are general aviation airports.[35] General aviation airports are public-use airports that do not have scheduled service or have less than 2,500 annual passenger boardings.[36] Similarly in Oregon, 90% of the municipal airports are general aviation airports.[37] This section describes the services provided by municipal airports.

---

[27] Pub L 107-701, 115 Stat. 597 (2001).
[28] *Id*.
[29] *Id*.
[30] *See* PAUL FREEMAN, ABANDONED AND LITTLE KNOWN AIRFIELDS NORTHWESTERN OREGON (2022), *available at* Abandoned & Little-Known Airfields: Northwestern Oregon (airfields-freeman.com) (last accessed February 6, 2023).
[31] *See* OREGON DEPARTMENT OF AVIATION, AVIATION PLAN V6.0, EXECUTIVE SUMMARY, *available at* ODA_REPORT_OAP_ExecutiveSummary.pdf (oregon.gov) (last accessed February 6, 2023).
[32] *Id*.
[33] 49 USC § 47102 (8).
[34] Portland International Airport operated by the International Port of Portland, Southwest Oregon Regional operated by the North Bend Coos Bay Airport District and Rogue Valley International Medford Airport operated by Jackson County.
[35] *See* AIRPORT COOPERATIVE RESEARCH PROGRAM, GUIDEBOOK FOR MANAGING SMALL AIRPORTS (2009), *available at* ACRP Report 16 – Guidebook for Managing Small Airports (trb.org) (last accessed on February 6, 2023).
[36] 49 USC § 47102 (8).
[37] *See* OREGON DEPARTMENT OF AVIATION, AVIATION PLAN V6.0, EXECUTIVE SUMMARY, *available at* ODA_REPORT_OAP_ExecutiveSummary.pdf (oregon.gov) (last accessed February 6, 2023).

A. General Aviation Airports

General aviation includes both commercial and non-commercial activities.[38] General aviation can include agricultural flights, aerial firefighting, medical evacuation, search and rescue, flight training, corporate aviation, personal/private travel, air tourism, recreational flying and air sports.[39]

Airport operations for general aviation airports offer less services than a commercial service airport.[40] Although general aviation airports are smaller airports, these airports often provide a large array of services such as an airfield, parking, aircraft hangar leases, maintenance buildings, aircraft fueling, and often a control tower.[41] Even though general aviation airports provide less services and are substantially smaller operations than commercial service airports, general aviation airports are still responsible for meeting federal regulations such as maintaining security and infrastructure.[42]

B. Commercial Service Airports

Commercial service airports are distinguished from general aviation airports because they have 2,500 or more annual passenger boardings.[43] Scheduled commercial aircraft with 10 or more seats cannot operate at an airport unless the airport has an operating certificate issued by the FAA, known as a Part 139.[44]

Commercial service airports provide the same services as general aviation airports, but may provide additional services such as multiple terminals, aprons, taxiway bridges, airport security centers, and passenger facilities like restaurants and lounges.[45] In addition to the regulations for general aviation airports, Part 139 certification requires compliance with regulations such as airport security, airport condition reporting and inspections.[46]

III. State and Federal Laws

A. Oregon Law

According to Oregon law, cities have broad authority to operate an airport. Specifically,

[38] *See* Airport Cooperative Research Program, Guidebook for Managing Small Airports (2009), *available at* ACRP Report 16 – Guidebook for Managing Small Airports (trb.org) (last accessed on February 6, 2023).
[39] *Id*.
[40] *Id*.
[41] *Id*.
[42] *Id*.
[43] *Id*.
[44] 14 CFR Part 139.
[45] *See* Airport Cooperative Research Program, Guidebook for Managing Small Airports (2009), *available at* ACRP Report 16 – Guidebook for Managing Small Airports (trb.org) (last accessed on February 6, 2023).
[46] *Id*.

cities have the authority to "acquire, establish, construct, expand or lease, control, equip, improve, maintain, operate, police and regulate airports for the use of aircraft…."[47] Cities may acquire property for airports through voluntary "gift, grant, purchase, lease or contract" or by condemnation.[48] Cities may issue bonds for the acquisition, development, and maintenance of airports.[49]

State law provides that cities have the authority to regulate activity at the airport, prescribe penalties for violations, and charge fees or tolls. [50] However, as discussed below, many local regulations enacted by the virtue of police powers are preempted by federal laws and regulations.[51] Rather, the U.S. Supreme Court has found that Congress intended cities to have a more limited proprietary interest in enacting regulations on airport property.[52]

Oregon declares that publicly-owned airports are a matter of statewide concern.[53] As a result, state law has adopted criteria favorable for approval of expansion of existing airports and new airports.[54] Further, local governments "shall authorize" all aviation-related land use activities at the airport.[55]

B. Federal Statutes

Municipal airports are part of the national aviation system administered by the FAA. Federal aviation policy is "to develop a national intermodal transportation system that transports passengers and property in an efficient manner."[56] The U.S. Congress enacted laws to oversee and regulate safety in the airline industry and the use of American airspace by both civilian aircraft and military aircraft.[57]

As discussed below, local governments operate the majority of airports across the U.S., but the local operation is largely subject to the federal laws and regulations.

i. Preemption

The Supremacy Clause of the U.S. Constitution invalidates state and local laws that interfere with or contradict federal laws. The United States has expressly preempted the field of

[47] ORS 836.200.
[48] ORS 836.205; 836.215; 836.250.
[49] ORS 836.200; 836.230.
[50] ORS 836.210. *But see* 49 USC § 40117 (requiring approval from FAA to assess a passenger facility charge).
[51] *See City of Burbank v. Lockheed Air Terminal Inc*., 411 US 624, 633 (1973) (holding that the pervasive nature of the scheme of federal regulation of aircraft noise, the federal government has full control over aircraft noise, preempting state and local control).
[52] *Id*.
[53] ORS 836.608.
[54] *Id*.
[55] ORS 836.616.
[56] 49 USC § 47101(b)(1).
[57] *See generally*, 49 USC §§ 40101 - 50101.

aviation.[58] However, Congress allowed airports to retain some proprietary control over their facilities.[59]

One type of implied preemption is field preemption. "Field preemption," occurs when Congress, without expressly declaring that state laws are preempted, nevertheless legislates in a way that is so comprehensive as to occupy the entire field of an issue.[60] For example, the U.S. Supreme Court struck down the city of Burbank's ordinance prohibiting any jet departures between the hours of 11 p.m. and 7 p.m. as a noise regulation.[61]

Conflict preemption occurs when simultaneous compliance with both federal and state regulations is impossible.[62] Implied preemption is determined from Congressional intent or case law.[63] In the aviation area, implied preemption of federal law occurs in the areas of operational restrictions and airfield regulations.[64]

In the 1978 Airline Deregulation Act, Congress preserved the limited "proprietary powers of airport operators." [65] Very few courts have upheld an airport's proprietary power, and such powers have been limited to the area of alleviating airport congestion.[66] Subsequently, Congress enacted the Airport Noise and Capacity Act of 1990, which allows airports may impose restrictions on aircraft to alleviate demonstrated noise and environmental impacts, subject to FAA approval.[67] Any airport exercising its proprietary powers and receiving federal subsidies must make its facilities available on "fair and reasonable terms and without unjust discrimination."[68]

B. Federal Regulations and the Federal Aviation Administration

Municipal airports are part of the national aviation system administered by the FAA. The Federal Aviation Act of 1958 created the Federal Aviation Agency (later the Federal Aviation

[58] "The United States Government has exclusive sovereignty of the air space of the United States." 49 USC § 40103(a); The US preempts any local, "law, regulation, or other provision ... related to a price, route, or service ...." 49 USC § 41713(b) (1).
[59] 49 USC § 41713(b) (3) states that "this subsection . . . does not limit a State, political subdivision of a State, or other political authority of at least two States that owns or operates an airport . . . from carrying out its proprietary powers and rights."
[60] *E.g., City of Burbank v. Lockheed Air Terminal Inc.*, 411 US 624, 633 (1973) (holding that the pervasive nature of the scheme of federal regulation of aircraft noise, the Federal Aviation Administration, now in conjunction with the Environmental Protection Agency, has full control over aircraft noise, preempting state and local control).
[61] *Id.*
[62] *See Schneidewind v. ANR Pipeline Co.*, 485 US 293, 300 (1988).
[63] *See Cipollone v. Liggett Group*, 505 US 504, 516 (1992).
[64] *Abdullah v. American Airlines, Inc., 181 F3d 363* (3rd Cir 1999).
[65] *See* William Pennington, Airport Restrictions: A Dilemma of Federal Preemption and Proprietary Control, 56 J. AIR L. & COM. 805 (1991)
[66] *Western Air Lines v. Port Authority of N.Y. and N.J.*, 658 F Supp 952 (SDNY 1986), *aff'd*, 817 F 2d 222 (2nd Cir 1987), *cert. denied*, 485 U.S. 1006; *Midway Airlines, Inc. v. County of Westchester*, 584 F Supp 436 (SDNY 1984).
[67] 49 USC § 47521.
[68] 14 CFR Part 152.

Administration or the FAA).[69] The act empowered the FAA to oversee and regulate safety in the airline industry and the use of American airspace by both civilian aircraft and military aircraft.[70]

With respect to municipal airports, the FAA holds many roles. First, the FAA is a regulatory body and promulgates regulations in the Federal Aviation Regulations (FARs), federal grant assurances, standards in the FAA Advisory Circular 150 series, adjudications, FAA Orders, policy statements and guidance letters. The current aviation regulations, as well as additional standards and guidance in the FAA Advisory Circular 150 series, are accessible online through the FAA website: http://www.faa.gov/regulations_policies.

Second, the FAA funds the improvement of airports through the Airport Improvement Program (AIP). Through those grants, the FAA oversees airport safety, inspections, standards, airport design, construction, and operation. AIP funding comes with conditions. Airports must comply with 39 "grant assurances" that are incorporated into the grants. More on the grant assurances is discussed below.

Third, the FAA enforces its regulations and AIP grant terms through an administrative process.[71] The complaint resolution process is contained in federal regulation.[72] Generally, the focus is on compliance and is not on punitive action. The FAA can assess penalties and corrective action, however, since compliance is the goal, most remedies are negotiated. When the parties cannot agree to a remedy, the U.S. Court of Appeals has exclusive jurisdiction.[73]

i. FAA Regulations Impacting Airports

As discussed above, all commercial service airports serving 2,500 or more annual passenger boardings must be Part 139 certified.

Regardless of whether the airport is a commercial service airport or a general aviation, the primary Federal Aviation Regulations that apply include the following:[74]

- Part 77, Objects Affecting Navigable Airspace.[75] Part 77 establishes standards for determining obstructions in navigable airspace; outlines the requirements for notifying the FAA of certain proposed construction or alteration; provides for aeronautical studies of obstructions to air navigation to determine their effect on the safe and efficient use of airspace; and provides for public hearings on the hazardous effect of proposed construction or alteration on air navigation.

---

[69] 49 USC § 40103.
[70] *Id*.
[71] *See* FEDERAL AVIATION ADMINISTRATION, AIRPORT COMPLIANCE MANUAL ORDER 5190.6B CHANGE 2 (2022) *available at* Change 2 to F A A Order 5190.6B, Airport Compliance Manual, December 2022.
[72] 14 CFR Part 13.
[73] 49 USC § 46110
[74] *See* AIRPORT COOPERATIVE RESEARCH PROGRAM, GUIDEBOOK FOR MANAGING SMALL AIRPORTS (2009), *available at* https://onlinepubs.trb.org/onlinepubs/acrp/acrp_rpt_016.pdf (last accessed on February 6, 2023).
[75] 14 CFR Part 77.

- Part 150, Airport Noise Compatibility Planning.[76] Part 150 applies to the airport noise compatibility planning activities of public-use airports, including heliports. It outlines the procedures for developing and submitting airport noise compatibility programs.

- Part 151, Federal Aid to Airports.[77] Part 151 provides detailed information regarding FAA airport construction and development grants. It also specifies that all airport development under the federal-aid airport program must be done in accordance with an approved airport layout plan. Each airport layout plan and any changes to the layout are subject to FAA approval. This part also lists the advisory circulars that are incorporated in the airport development standards.

- Part 152, Airport Aid Program.[78] Part 152 applies to airport planning and development under the Airport and Airway Development Act of 1970, as amended. It outlines eligibility requirements and application procedures; funding, accounting, and reporting requirements; nondiscrimination in airport aid programs; suspension and termination of grants; and energy conservation programs.

- Part 157, Notice of Construction, Alteration, Activation, and Deactivation of Airports.[79] Part 157 defines the requirements for notifying the FAA when proposing to construct, alter, activate, or deactivate a civil or joint-use (civil/military) airport or to alter the status of such an airport.

- Part 170, Establishment and Discontinuance Criteria for Air Traffic Control Services and Navigational Facilities.[80] Part 170 sets the federal criteria for the establishment of air traffic control services.

- Part 171, Non-Federal Navigation Facilities.[81] Part 171 establishes procedures for requests for instrument flight rules (IFR) procedures, minimum requirements for approval, performance requirements, installation requirements, and maintenance and operations requirements for non-federal aids to navigation. This could include VHF omnidirectional range (VOR) facilities, nondirectional radio beacons, instrument leading system (ILS) facilities, microwave landing system (MLS) facilities, and others.

C. Grant Assurances

As discussed above, AIP funding comes with conditions. Airports must comply with 39 "grant assurances" that are incorporated into the grants. The assurances typically apply not just to the improvements specifically funded by the grant, but to all of an airport's operations. Likewise, although most of the assurances have a limited term (typically 20 years), others are perpetual.

[76] 14 CFR Part 150.
[77] 14 CFR Part 151.
[78] 14 CFR Part 152.
[79] 14 CFR Part 157.
[80] 14 CFR Part 170.
[81] 14 CFR Part 171.

Since airports typically accept new grants on a recurring basis, their obligations are effectively perpetual. As a result, the obligations imposed in exchange for AIP grants are significant not only to airports but to tenants and other users – who typically are the intended beneficiaries of the assurances.

Grant assurances are congressionally mandated but are contractually imposed upon the municipal airport rather than a regulation promulgated by the FAA.[82] The current grant assurances are located online at: https://www.faa.gov/airports/aip/grant_assurances. Cities may be the most interested in the following assurances:

- Assurance 5 – Preserving rights and powers. Prohibits the municipal sponsors of airports from depriving themselves of the rights and powers necessary to oversee the airport.

- Assurance 21– Compatible land use. Requires airports to endeavor to ensure compatible uses of neighboring property.

- Assurance 22 – Economic nondiscrimination. Prohibits "unjust discrimination." Requires all types of aeronautical activities to be allowed access to an airport on reasonable and comparable terms. For example, an airport must provide the same opportunities to similarly situated tenants and cannot exclude any aeronautical activities that it is capable of safely accommodating. This assurance does not require uniformity and an airport may be able to justify different lease conditions for tenants because they are engaged in different lines of business or located in different locations.

- Assurance 23 – Exclusive rights. Except where the airport provides certain services, prohibits exclusive rights. An airport cannot explicitly or constructively shield an incumbent fixed base operator (FBO) from competition by not allowing other FBOs to operate at the airport.

- Assurance 24 – Fee and rental structure. Requires fee and rental structure to make the airport as self-sustaining as possible.

- Assurance 25 – Airport revenue. Prohibits revenue diversion. Requires revenues raised by an airport – even from non-aeronautical activities – to be exclusively devoted to aeronautical purposes. This requirement has been the source of considerable controversy and has generated supplemental guidance from FAA. This chapter discusses this issue in more detail below.

- Assurance 29 – Airport Layout Plan. Requires airports to maintain accurate plans of the airport's layout and uses.

[82] 49 USC § 47105 to 47107.

IV. AIRPORT PROPERTY DEVELOPMENT

Many cities have airport property which they would like to use to enhance the local economy. The use of land conveyed by the federal government or improved with an AIP grant may only be used for aviation purposes.

Airport property development is regulated in two ways. First, many municipal airports were acquired from the United States after World War II pursuant to the Surplus Property Act of 1944 and Federal Property and Administrative Services Act of 1949. These properties were transferred to local governments with specific terms, conditions, reservations and restrictions.

Second, if the airport obtained an AIP grant, the FAA regulates the development of airport property through its grant assurances. A more detailed discussion of each assurance is below.

An outstanding resource about developing and leasing airport property by the Airport Cooperative Research Program is available at: ACRP Report 47 – Guidebook for Developing and Leasing Airport Property (worldbank.org).

A. Surplus Property Act

The United States acquired lands used for the war efforts for World War II, including airports. Some of the properties were voluntarily transferred for the war efforts and other properties were acquired by eminent domain.[83]

After World War II, the United States passed the Surplus Property Act of 1944 and Federal Property and Administrative Services Act of 1949.[84] The acts authorize the surplus real property to states and local governments.[85] However, the lands were provided on condition that they be used as public airports.[86]

As a result, properties that the United States acquired for military efforts were transferred to local governments with specific terms, conditions, reservations, and restrictions upon which such conveyances or disposals may be made. Local governments are responsible for the continuous compliance with the statutes and deed restrictions from properties acquired through the Surplus Property Act of 1944.

---

[83] *See* U.S. DEPARTMENT OF JUSTICE, HISTORY OF THE FEDERAL USE OF EMINENT DOMAIN (2022), *available at* https://www.justice.gov/enrd/history-federal-use-eminent-domain (last accessed February 11, 2023); STUART RANDOLPH HAYES, UNITED STATES V. CAUSBY: AN EXTENSION THEREOF, 3 Wm. & Mary L. Rev. 36 (1961)
[84] 49 USC § 47151; *see also* 14 CFR Part 155 (providing a process to release airport property from surplus property disposal restrictions).
[85] *Id*.
[86] *Id*.

If your city acquired an airport from the United States, you must examine the instrument transferring the property to the city and review the statutory authority upon which the transfer was made to determine the scope of deed restrictions and conditions.

i. City of Klamath Falls Case Study[87]

In Oregon, an example of how the United States acquired and developed property is in the city of Klamath Falls. In 1928, the city established the Klamath Falls Municipal Airport with the sale of $50,000 airport construction bonds. In 1942, the U.S. Navy selected the Klamath Falls airport as a site for a naval air station and in December 1944, the city sold the entire property to the U.S. for $1.00 without restrictions.

In 1945, the naval air station was completed, consisting of 3,200-ft-wide runways of varying lengths, several buildings, and a variety of hangar facilities. After World War II, the air station was closed following less than one year of operation.

Pursuant to the Surplus Act of 1944, the United States conveyed a portion of the facility to the city of Klamath Falls as long as the property was used for airport purposes. The deed restrictions stated, in part, "itinerant aircraft owned by the United States of America * * * shall at all times have the right to use the airport" and that use "shall be without charge of any nature other than payment for damage caused by such itinerant aircraft."

The remainder of the property was turned over to the U.S. Department of the Interior (DOI) and then later to the U.S. Air Force. The U.S. Air Force operated the federally owned property known as Kingsley Field from 1956 to 1970. Starting in 1971, the Oregon Air National Guard was stationed at Kingsley Field. In 1995, the Air National Guard assumed the airport tower control from the Federal Aviation Agency.

As a result, a rural municipal airport in Klamath Falls transformed into a multi-use airport with a complex mix of ownerships and restrictions. The city of Klamath Falls was granted the improved airport and buildings but is not allowed to charge itinerant aircraft for the use of the airport.

B. Grant Assurance Restrictions

As discussed above, AIP funding comes with conditions via grant assurances. [88] Several of the grant assurances directly relate to property development such as numbers 21 (compatible land use), 22 (economic nondiscrimination), 23 (exclusive rights), 29 (airport layout plan), and 31 (disposal of land).

---

[87] *See* CITY OF KLAMATH FALLS, MASTER PLAN REPORT (2004), *available at* Master-Plan-Chapters-1-to-7-PDF (klamathfalls.city) (last accessed February 11, 2023); 173RD FIGHTER WING, KINGSLEY FIELD HISTORY *available at* History (af.mil) (last accessed February 11, 2023).

[88] The current grant assurances are located online at: https://www.faa.gov/airports/aip/grant_assurances.

i. Airport Rules and Regulations

The FAA highly recommends that an airport establish rules and regulations for the safe, orderly, and efficient operation of the airport.[89] Rules and regulations are often referenced in airport lease agreements but are developed to apply to all persons using the airport for any reason.[90]

Airport owners of federally obligated airports are required by grant assurances to establish and enforce fair, equal, and not unjustly discriminatory airport rules and regulations.[91]

Rules and regulations typically cover the general use of the airport for such issues as aircraft rules, personal conduct, animals, smoking, waste containers and disposal, storage, pedestrians, vehicle operations, fueling safety, on-airport traffic rules, environmental restrictions, airport residences, hangar construction, and fire safety. [92]

ii. Airport Minimum Standards

The FAA encourages public airports to develop minimum standards.[93] Airport minimum standards set forth the minimum requirements an individual or entity wishing to provide aeronautical services to the public must meet in order to provide those services, such as minimum leasehold size, required equipment, hours of operation, and fees.[94] Minimum standards provide the advantage of maintaining compliance with grant assurances, maintain a higher quality of service for airport users and promote the orderly development of airport land.[95] Minimum standards also insure that no one operator is given an advantage over others by the airport.[96]

Every airport is unique and in developing minimum standards the airport manager must attempt to draft a set of standards tailored to that particular airport.[97] Careful consideration must be given to the specific conditions at an airport such as the size of the airport, the type of aeronautical activities and the space required, insurance and indemnity requirements etc.[98]

Minimum standards should be developed to establish an actual set of requirements to accommodate a range of commercial activities. Commercial aeronautical activities may include such aeronautical activities as aircraft maintenance, fueling, charter, flight training, sales, rental, and parts.[99]

---

[89] *See* FEDERAL AVIATION ADMINISTRATION, AIRPORT COMPLIANCE MANUAL ORDER 5190.6B CHANGE 2 (2022) *available at* Change 2 to F A A Order 5190.6B, Airport Compliance Manual, December 2022.
[90] *Id.*
[91] *Id.*
[92] *Id.*
[93] *Id.*
[94] *Id.*
[95] *Id.*
[96] *Id.*
[97] *See* AIRPORT COOPERATIVE RESEARCH PROGRAM, GUIDEBOOK FOR DEVELOPING AND LEASING AIRPORT PROPERTY, *available at* ACRP Report 47 – Guidebook for Developing and Leasing Airport Property (worldbank.org).
[98] *Id.*
[99] *Id.*

Airports must agree to make the opportunity to engage in commercial aeronautical activities available to any person, firm, or corporation that meets reasonable minimum standards established by the airport.[100]

iii. Airport Leases[101]

As a municipal airport, you will likely partner with private entities to lease portions of the airport. Airport leases can usually be broken into the following categories:

- Ground leases. The most common type of airport lease, a land lease is where the airport leases a parcel of land for a period of time and the tenant is responsible for making improvements on that land. At the end of the term, the land and all of the structures will revert to the airport.

- Fixed-base operator (FBO) leases. The majority of general aviation airports require an FBO to provide a variety of services that are identified in advance by the airport, typically through a Minimum Standards document. In return for providing this full complement of identified services, the FBO is granted the ability to sell fuel. Fuel sales are typically a significant component of an FBO's business model and income. Additional services an FBO might provide include, but are not limited to, aircraft storage, ground handling, maintenance and repair, flight instruction, aircraft rental, and aircraft sales.

- Specialized aeronautical service operator (SASO) leases. A SASO provides specialized products and services in one or more of the aviation-related service areas such as flight training or maintenance, excluding the retail sale of fuel. A SASO may operate under a direct lease agreement with the airport or as subtenant of an FBO.

- Hangar leases. This type of lease is for storage of aircraft only. Leases generally prevent a tenant from using the property for conducting a business or for storing other items.

- Airline leases. This type of lease is for operating the airline such as ticket counters, boarding gates, operations. Spaces such as baggage claim may be leased as a common use area.

Regardless of the type of lease, airport leases follow the basic format of facility leases, include Airport Rules and Regulations, and add the Airport Minimum Standards.[102]

---

[100] *See* grant assurance number 22 – Economic nondiscrimination.
[101] *See* AIRPORT COOPERATIVE RESEARCH PROGRAM, GUIDEBOOK FOR DEVELOPING AND LEASING AIRPORT PROPERTY, *available at* ACRP Report 47 – Guidebook for Developing and Leasing Airport Property (worldbank.org).
[102] *Id*.

If a municipal airport wishes to lease to a tenant for a nonaeronautical use such as construction offices not related to aviation, the FAA requires that the airport receive the fair market value for the land and that the non-aeronautical use does not preclude or slow the aeronautical development of the airport.[103]

iv. Disposal of land

Occasionally, airports wish to dispose of land. If the land was acquired with federal funds, grant assurance number 31 limits the transfer or disposal of land. In such cases, the airport may dispose of land only if the land is not necessary for aeronautical purposes and FAA may stipulate how land sale proceeds are to be spent by the airport.[104]

v. Compatible land uses[105]

Grant assurance number 21 requires airports to endeavor to ensure compatible uses of neighboring property. Incompatible land uses and their impact on airport operations and development have escalated over the past 50 years. As decisions to allow incompatible land uses near airports threaten the nation's aviation system, implementation of compatible land use controls has become an industry priority. The primary tools available to local governments to prevent incompatible development include zoning and land use controls such as comprehensive plans, and airport overlay zoning ordinances. Municipal airports should work with their city planning staff to ensure that neighboring lands are subject to compatible land use controls.

vi. Airport Master Plan[106]

An Airport Master Plan is a comprehensive study of an airport. An Airport Master Plan is the predominant vehicle for a vision or strategy, analyzing demand, forecast activity, tenant base, business clusters, utility infrastructure, environmental considerations, and airfield attributes to describe how land might be leased and developed for special-use aeronautical and nonaeronautical tenants/users. An Airport Layout Plan, part of the Airport Master Plan, is a scale drawing of existing and proposed airport facilities, their location on an airport, and the pertinent clearance and dimensional information required to demonstrate conformance with applicable standards. While the Airport Master Plan may be updated every seven to eight years, or longer, the Airport Layout Plan is mandated by FAA grant assurance number 29 to be up to date at all times.

---

[103] *See* FEDERAL AVIATION ADMINISTRATION, AIRPORT COMPLIANCE MANUAL ORDER 5190.6B CHANGE 2 (2022) *available at* Change 2 to F A A Order 5190.6B, Airport Compliance Manual, December 2022.
[104] *Id.*
[105] *See* AIRPORT COOPERATIVE RESEARCH PROGRAM, GUIDEBOOK FOR DEVELOPING AND LEASING AIRPORT PROPERTY, *available at* ACRP Report 47 – Guidebook for Developing and Leasing Airport Property (worldbank.org).
[106] FAA Advisory Circular (AC) 150/5070-6B Change 2 (2015).

vii. Through the Fence Agreements[107]

Often, users of the airport located adjacent to, but not a part of the airport, wish to access the airport facilities. A "through the fence" agreement is an arrangement where the airport permits access to the public landing area to such independent operators. The decision of whether or not to allow "through the fence" access to property owners is for the airport to decide, as the airport is not required to grant direct access to adjacent property owners. The FAA advises against such agreements but does not forbid them.[108]

V. Finance and Funding of Airports

Funding for airport development comes from five primary sources: federal AIP grants, passenger facility charges, state and local funding, tax-exempt bonds, and airport revenue.

For general aviation airports, cities often have to subsidize airport operations. The goal of the airport is to be self-sustaining. Most economic impact studies demonstrate that an airport has a regional economic impact.

A. Airport Improvement Program Grants[109]

Since its establishment in 1982, the AIP has become an essential source of funding for safety, capacity, security, and other improvements at airports.

AIP entitlement funds are available for commercial service airports that have at least 10,000 enplaned passengers per year. The amount is determined by a formula based on AIP authorization law and the number of enplaned passengers. Regardless of the number of passengers boarded, the minimum entitlement of a primary, commercial service airport is $650,000 per year and $1 million per year if total AIP is at least $3.2 billion.

Non-primary entitlement funds are available to general aviation airports. The amount given to an airport is based on the amount of development that airport has identified within the National Plan of Integrated Airport Systems (NPIAS) up to $150,000 per year.

Discretionary funds are available to any airport identified within the NPIAS. After the entitlements and set asides are funded, the remaining money can be invested at the FAA's discretion.

---

[107] FAA Recommendations for Airport Sponsors Considering Residential Through-the-Fence Access Agreements a*vailable at* FAA Recommendations for Airport Sponsors Considering Residential Through-the-Fence Access Agreements, July 2013 (last accessed February 13, 2023).
[108] *See* Federal Aviation Administration, Airport Compliance Manual Order 5190.6B Change 2 (2022) *available at* Change 2 to F A A Order 5190.6B, Airport Compliance Manual, December 2022 (last accessed February 13, 2023).
[109] *See* Federal Aviation Administration, Airport Improvement Program Handbook Order 5100.6B Change 1 (2019) *available at* Change 1 to FAA Order 5100.38D, Airport Improvement Program Handbook, 26 February 2019 (last accessed February 13, 2023).

B. Passenger Facility Charges[110]

Airports are currently permitted to assess a fee on passengers known as a passenger facility charge (PFC). PFCs are collected by the airlines and paid directly to the airport. They are intended to supplement AIP funding by providing more funding for runways, taxiways, terminals, gates, and other airport improvements. Currently no airport may charge a PFC of more than $4.50 per passenger, and no passenger has to pay more than $18 in PFCs per round-trip regardless of the number of airports through which a passenger connects. No airport can charge a PFC until the FAA approves it.

C. Municipal Bonds[111]

The single largest category of airport funding is bonds. However, the vast majority of airport bonds are issued by large-hub and medium-hub airports in the form of airport revenue bonds. Revenue bonds are secured by an airport's future revenue such as passenger facility charges.

Smaller airports have issued revenue bonds, but this is rare. Far more common are general obligation bonds for airport development, which are backed by the taxing power of a governmental unit and thus rate a stronger credit standing and carry lower financing costs.[112] Many times, airport improvement projects at small airports are included with other municipal projects in a single general obligation bond.

D. Airport Revenue[113]

Airport-generated revenue includes commercial leases, t-hangar leases, private hangar land leases, airport parking revenues agricultural land leases, terminal concession rents, fuel flowage fees, passenger facility charges and landing fees. For those airports receiving AIP funds, federal law prohibits "diversion" of airport-generated revenue at airport.[114]

In general, revenue diversion, as defined by the FAA, is the use of airport revenue for purposes other than airport capital, operating costs, or the costs of other facilities owned or operated by the airport and directly related to air transportation.[115] The prohibition against diversion means that revenue generated by an airport cannot be used for general economic development purposes.

---

[110] *See* AIRPORT COOPERATIVE RESEARCH PROGRAM, GUIDEBOOK FOR MANAGING SMALL AIRPORTS (2009), *available at* https://onlinepubs.trb.org/onlinepubs/acrp/acrp_rpt_016.pdf (last accessed on February 6, 2023).
[111] *Id.*
[112] *Id.*
[113] *Id.*
[114] 49 USC § 47107(b).
[115] *See* FEDERAL AVIATION ADMINISTRATION, AIRPORT IMPROVEMENT PROGRAM HANDBOOK ORDER 5100.6B CHANGE 1 (2019) *available at* Change 1 to FAA Order 5100.38D, Airport Improvement Program Handbook, 26 February 2019 (last accessed February 13, 2023).

VI. Importance of Municipal Airports

Municipal airports are an important economic development engine in Oregon. Not only do municipal airports contribute about $1.2 billion to local Oregon economies and employ 6,000 local public and private employees, but municipal airports also support critical public safety and disaster relief missions.[116]

In the 1990s, many Oregon municipal airports offered passenger service. In 2012, four municipal airports provided passenger service, and in late 2017, that number dropped to three municipal airports.[117] Increasing FAA regulations and the cost of fuel have caused commercial passenger flights to smaller communities to not be economically self-sustaining. Airlines are requiring subsidies such as the federal essential air service grant to serve smaller areas.

Essential air service (EAS) started as a result of the Airline Deregulation Act of 1978.[118] EAS was a program established to continue airline service to small communities because the lower profits these routes were likely to achieve.[119] In cases where there were actual losses, EAS could be used to help cover costs.[120] Before EAS in the pre-1978 world, providing flights to these communities was a cost of business for the airlines in exchange for access to the federal airways and the great investment by United States taxpayers.[121]

When the EAS program began in 1978, the program identified 746 eligible communities.[122] Due to increasing EAS eligibility requirements, only 159 communities were eligible in 2015. In 2012, the federal government further reduced the EAS program by eliminating subsidies to *new* essential air service airports.[123] At the same time, airlines have eliminated services from Oregon cities due to increasing costs of operations and increasingly difficult FAA regulations.[124] Currently in Oregon, only the city of Pendleton is a designated essential air service airport.[125] As the number of air service airports decrease, access to air service to many Oregonians has been reduced.

---

[116] *See* Oregon Department of Aviation, Aviation Plan v6.0, Executive Summary, *available at* ODA_REPORT_OAP_ExecutiveSummary.pdf (oregon.gov) (last accessed February 6, 2023). *See also* John Longley, Essential Air Service is Critical for Rural Air Service (2016), *available at* EAS critical for rural populations (amendoon.net) (last accessed on February 12, 2023).
[117] *Id.*
[118] *Id.*
[119] *Id.*
[120] *Id.*
[121] *Id.*
[122] *Id.*
[123] *Id.*
[124] *Id.*
[125] *Id.*

Although general aviation airports do not get as much federal funding as commercial service airports, they play an important role in Oregon's economy. General aviation airports host a variety of economic development opportunities such as aircraft production, firefighting air attack bases, pilot training programs, supporting military missions, medical evacuation, search and rescue, agricultural needs, air freight, corporate aviation, air sports and enhanced tourism opportunities. Lastly, airports are key facilities to address disasters because they designated as the primary, secondary and tertiary gateways for emergency disaster relief missions.

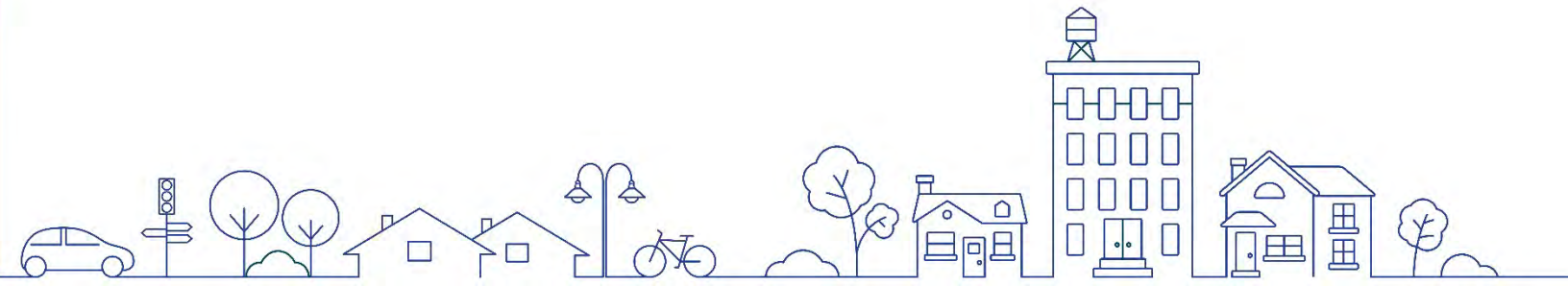
To enhance access through the state, Oregon cities could partner with the Oregon Department of Aviation to actively support an economic development program of encouraging the development of general aviation airports and to encourage the FAA in resuming the program to establish new essential air service airports.[126]

[126] *Id*

Oregon Municipal Handbook

CHAPTER 22:

DISPOSING OF PROPERTY



League of Oregon Cities

Published by the League of Oregon Cities

May 2021

Table of Contents

Chapter 22: Disposal of Property

Introduction

> **Resource:**
>
> LOC's *FAQ on Disposing of Surplus Property* available in the LOC's online Reference Library.

As part of operations, cities utilize property to conduct city business. The term "property" can encompass many different things: land, equipment and patents are all forms of property. Land and developments made to land are categorized as "real property." City parks, the public rights of way, and the city hall building are all examples of real property. On the other hand, equipment, vehicles, clothing and cash are generally categorized as "personal property." Office supplies, fire trucks, police cruisers and laptop computers are all examples of personal property. Copyrights, trademarks, patents and trade secrets are "intellectual property." Also, remember that property "owned" by the city is owned by the public and is used for the public good. Similar to their need to acquire new property, cities may also have the need to dispose of property. This chapter will cover the steps necessary to dispose of real property cities no longer wish to keep.[1]

Disclaimer: These materials are not intended to substitute for obtaining legal advice from a competent attorney. Rather, these materials are intended to provide general information regarding the disposal of property for public officials to allow the public official to have a working knowledge of the topic.

I. Disposal of Surplus Personal Property

The disposal of surplus personal property is a public contract to which the policy of preserving competitive bidding as the standard contracting method applies.[2] The disposal of surplus personal property may be exempt from the competitive bidding requirements of the Oregon Public Contracting Code if the local contracting agency adopts its own rules.[3] Typically, local codes will designate the person or persons authorized to declare property "surplus," if that authority is not retained by the local contract review board. The local code will then provide for various methods of disposal. The most common is a publicly advertised auction to the highest bidder but may also include a liquidation sale, fixed price sale, trade-in, donation or as a last resort, disposal as waste. Further discussion of disposal of personal property is provided for in Chapter 13 – Purchasing and Public Contracts and in LOC's *FAQ on Disposing of Surplus Property*.

---

[1] This chapter will focus on the disposal of city real property. The disposal of personal property is discussed in Chapter 13 – *Purchasing and Public Contracts.* Intellectual property is not addressed and cities wishing to learn more about intellectual property should work with their city attorneys.

[2] Real versus personal versus intellectual property. Real property is considered land, and anything growing on, attached to, or erected on land such as soil and buildings. Personal property is considered any movable or intangible thing that is subject to ownership and not classified as real property such as a firetruck or other equipment. Copyrights, trademarks, patents and trade secrets are intellectual property.

[3] ORS 279A.185.

II. Sale of Real Property

Real property must be maintained and managed utilizing city resources, and a city may decide that the real property may no longer serve a public purpose that benefits the city. When a city council considers it necessary or convenient to sell real property, the council shall post a notice of the proposed sale in a newspaper of general circulation in the city and shall hold a public hearing concerning the sale.[4] Notice of the public hearing must be published at least once during the week prior to the hearing and shall state:

- The time and place of the hearing;
- A description of the property or interest to be sold;
- The proposed uses for the property; and
- the reasons why the city council considers it necessary or convenient to sell the property.[5]

The nature of the proposed sale and the general terms, including an appraisal or other evidence of the market value of the property shall be fully disclosed by the city council at the public hearing.[6] In addition, any resident of the city shall be given the opportunity to present written or oral testimony at the hearing.[7]

Disposal of Real Property

The disposal of city-owned real property is governed by two state statutes:

ORS 221.725
Sale of city real property; publication of notice; public hearing

and

ORS 221.727
Alternative procedure for sale of city real property; public notice and hearing

III. Transfer, Lease, Donation of Real Property

Cities are granted the vested power to transfer, lease, donate or use their public lands pursuant to ORS 271.300 to 271.360.[8] Each city council may provide rules necessary for carrying out the power provided by those statutes.[9] Once a city determines that its real property is no longer needed for public use or when the public interest may be furthered, the city may exchange, or convey any or all of the city's interest in that real property to another governmental body, private individual or corporation.[10] The city may also lease real property so long as the lease is for a time period of 99 years or less.[11] In exchange for the land, a city may accept cash, real property, or both.[12] If the city council does not determine that the public interest may not be furthered by the exchange, conveyance or lease of the real property, the property may not be disposed of under the provisions of ORS 271.300 to 271.360 except that it may be exchanges for property that is equal to or superior to the useful value for public use.[13]

---

[4] ORS 221.725.
[5] *Id.*
[6] *Id.*
[7] *Id.*
[8] ORS 271.300(1).
[9] ORS 271.300(2).
[10] ORS 271.310(1).
[11] *Id.*
[12] *Id.*
[13] ORS 271.310(4).

IV. Relinquishing Title of Real Property Not Needed for Public Use

In addition to the ability to sell, transfer, exchange, convey, or lease real property, a city may also relinquish the title for any property no longer needed for public use provided that: 1) the property is relinquished to a governmental body in Oregon, and 2) after relinquishment, the property must be used for at least 20 years for a public purpose by the governmental body in which the property was relinquished to.[14] A piece of property may also be relinquished to a qualifying nonprofit or municipal corporation for the purpose of providing the following services:

- Low income housing;
- Social services; or
- Child-care services.

Cities may convey real property to a nonprofit or municipal corporation to be used by that entity for the creation of open space, parks or natural areas for perpetual public use so long as the conveyance document includes a restriction on the use of the property that limits the uses to those uses previously listed.[15] The conveyance document must also contain a provision for the revision of the property to the city if the property is not used in conformance with the restriction.[16] City owned real property may also be conveyed to a nonprofit, public or private corporation for the purpose of providing broadband service so long as the conveyance document provides for that limitation and reversion back to the city in the event of nonconformance.[17] The city may via resolution, waive and relinquish any reversionary interest held by the city in property transferred under the restrictions provided above so long as the transfer occurred at least 20 years prior, or if the city determines that waiving and relinquishing the reversionary interest is in the public interest.[18]

V. Other Considerations

If a piece of real property is located within 100 feet of a railroad right of way or within 500 feet of an at-grade rail crossing, the city must first notify the Oregon Department of Transportation at least 30 days prior to listing the property for sale, exchange or conveyance.[19] This notification requirement does not apply if the sale, exchange or conveyance is to a provider of rail service, the sale, exchange or conveyance is relating to an easement, or if the property is a light rail corridor excluded by the department.[20]

[14] ORS 271.330(1).
[15] ORS 271.330(3).
[16] *Id.*
[17] ORS 271.330(4).
[18] ORS 271.335.
[19] ORS 271.310(3)(a).
[20] ORS 271.310(3)(b).

VI. Conclusion

Whether by sale, transfer, lease or other methods, cities can and do utilize the various disposal methods to properly manage its real property.

CHAPTER 23: LICENSING AND REGULATION

League of Oregon Cities

Published by the League of Oregon Cities
September 2020 / Last updated February 2025

Table of Contents

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 vison 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 law[1] 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 Act[5], the Fair Credit Reporting Act[6], 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 accidently 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—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 Preempted 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 identity the types of businesses that are exempt from licensure. These operations may include charitable operations, non-profits, 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 both 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 non-discriminatory 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 non-discriminatory and clearly outlined. Criteria may include the following: 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; or 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 required information may include, but is not limited to, the following: 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; or the submission of an appeal fee.

Fines

Fines may be applied upon the 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 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 and, 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 can be created under a contract instead of 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.

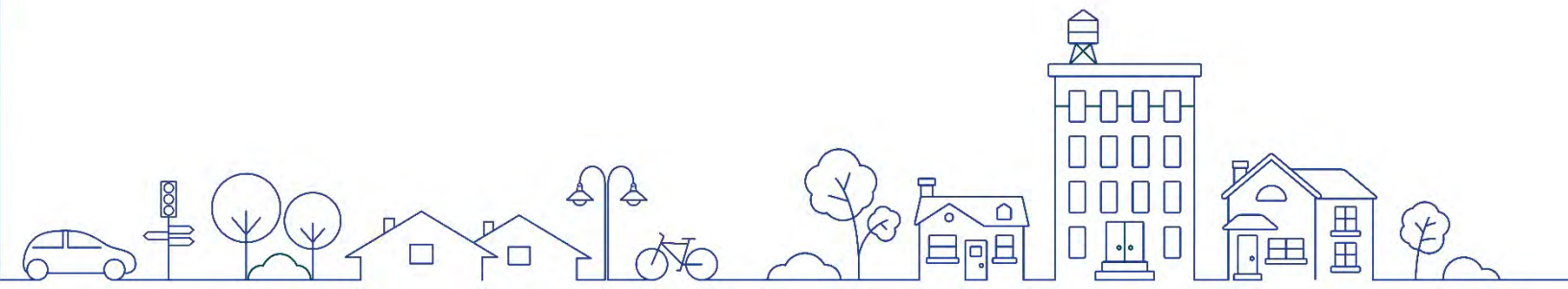
Cities are authorized to grant franchises to public utilities such as gas and electric providers, vehicles for hire, telecommunication providers, and solid waste collection.[28] The franchise agreements consist of provisions that govern how the franchisee is to operate within the city's boundary and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

There are limits on certain franchise fees. State law limits the fee for certain telecommunications companies to seven percent (7%) of a defined base.[29] At the federal level, the Telecommunications Act of 1996 required that compensation from telecommunications providers be on competitively neutral basis.[30] Federal law also limits cable television franchise fees to five percent (5%) 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 limitation 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 (5%).[32]

[27] ORS 221.460.
[28] ORS 221.420 (gas and electric providers); ORS 221.495 (vehicles for hire); ORS 221.510 (telecommunication providers); ORS 459A.085 (solid waste collection).
[29] ORS 221.515.
[30] 27 USC 253.
[31] 47 USC 542.
[32] ORS 221.450.

CHAPTER 24:
BUILDING REGULATIONS



League of Oregon Cities

Published by the League of Oregon Cities
December 2024

Table of Contents

Chapter 24: Building Regulations

The Oregon State Building Codes Division, part of Oregon Department of Consumer and Business Services, adopts, administers, and enforces a uniform, statewide building code to govern construction in Oregon.[1] Through the state municipal building inspection program, many cities have assumed administration and enforcement of the building inspection program.

This chapter will discuss: the role of the state of Oregon; the authority of cities to apply the building code; and a summary of the state's building codes. Lastly, this chapter will discuss other regulations or interested parties that impact buildings such as the state fire code, the national historic landmark program and the state historic preservation officer.

I. Building Codes Defined

Building codes are laws that set minimum requirements for how structural systems, plumbing, heating, ventilation and air conditioning (HVAC), natural gas systems, and other aspects of residential and commercial buildings should be designed and constructed.[2] A building permit gives a homeowner or contractor formal permission to build certain projects.[3] The permit is issued by local building officials if the plans comply with the building code, local zoning regulations, and any other laws or regulations that might apply.[4] Laws and regulations such as the state fire code are also discussed below.

A. Oregon Building Code

Nationwide, the decision to adopt or administer building code standards is typically left to local government.[5] This was

Importance of Modern Building Codes

1. Protects you from a wide range of hazards such as fire, flood, and earthquakes.
2. Cities and counties avoided at least $132 billion in losses from natural disasters.
3. Codes are always improving with the latest technology and experience.
4. Levels the playing field because when larger communities enforce codes, it makes it easier for smaller communities to follow.
5. Saves communities money in reduced insurance premiums, lower bond ratings, and can help when applying for federal grant funds.

Federal Emergency Management Agency, *5 Reasons Building Codes Should Matter to You* (2021), available at: https://www.fema.gov/blog/5-reasons-building-codes-should-matter-you (last accessed on May 1, 2024).

[1] ORS 455.020(1); *see* State of Oregon Legislative Policy and Research Office, State Background Brief Building Code (2018), available at: background-brief-state-building-code-2018.pdf (oregonlegislature.gov) (last accessed on May 1, 2024).
[2] *Id.*
[3] *See* State of Oregon Building Codes Division, *About Oregon Residential Building Permits*, available at: https://www.oregon.gov/bcd/lbdd/pages/oregon-permits.aspx (last accessed on May 1, 2024).
[4] *Id.*
[5] *See* State of Oregon Legislative Policy and Research Office, *supra* (providing the background of the state building codes).

the case in Oregon until the early 1970s, and by that time the Portland metro area had 53 different local codes, while 20 Oregon counties had none.[6]

In 1973, the Oregon Legislative Assembly required the state to adopt a uniform, statewide building code to govern construction in the state.[7] The state-wide adoption of the building codes was intended to create a quick and efficient method to aid in construction and to encourage "economic development, experimentation, innovation and cost effectiveness in construction, especially in rural or remote parts of this state."[8]

The state building code is applicable and uniform throughout Oregon and is composed of a series of specialty codes, each of which addresses a specific area of construction.[9] The state building code does not include the regulations adopted by the Oregon State Fire Marshal.[10] The building codes are made up the following specialty codes:

- *Oregon Structural Specialty Code*.[11] Structural standards for the construction, reconstruction, alteration, and repair of buildings and other structures. Enforcement can be delegated to local governments.
- *Oregon Residential Specialty Code*.[12] All requirements, including structural design provisions, related to the construction of residential dwellings three stories or fewer above grade plane height. Enforcement can be delegated to local governments.
- *Oregon Energy Efficiency Specialty Code*.[13] Energy efficiency standards for the Oregon Structural Specialty Code. Enforcement can be delegated to local governments.
- *Oregon Mechanical Specialty Code*.[14] Standards for the installation and use of mechanical, heating, and ventilating devices and equipment. Enforcement can be delegated to local governments.
- *Oregon Electrical Specialty Code*.[15] Minimum safety standards for workmanship and materials in electrical installations. Enforcement can be delegated to local governments.

---

[6] *See* State of Oregon Building Codes Division, *How it all started: Building a uniform state building code*, available at: https://www.oregon.gov/bcd/50years/Pages/how-it-all-started.aspx (last accessed on May 1, 2024).
[7] Senate Bill 73 (1973).
[8] ORS 455.015.
[9] ORS 455.010(7)(8).
[10] ORS 455.010(8).
[11] OREGON STRUCTURAL SPECIALTY CODE (2022), available at: https://codes.iccsafe.org/content/ORSSC2022P1 (last accessed on May 1, 2024); *see also* OAR 918-460-0010.
[12] OREGON RESIDENTIAL SPECIALTY CODE (2023), available at: https://codes.iccsafe.org/content/ORRC2023P1 (last accessed on May 1, 2024); *see also* OAR 918-480-0005.
[13] OREGON ENERGY EFFICIENCY SPECIALTY CODE (2021), available at: https://www.oregon.gov/bcd/codes-stand/Documents/2021oeesc.pdf (last accessed on May 1, 2024).
[14] OREGON MECHANICAL SPECIALTY CODE (2021), available at: https://codes.iccsafe.org/content/ORMSC2022P1, (last accessed on May 1, 2024); *see also* OAR 918-440-0010.
[15] OREGON ELECTRICAL SPECIALTY CODE (2023); *see also* OAR 918-305-0100.

- *Oregon Plumbing Specialty Code*.[16] All installations of plumbing and drainage in buildings and structures in this state and all potable water supply, drainage, and waste installations within or serving buildings or structures. Enforcement can be delegated to local governments.

- *Oregon Manufactured Dwelling Installation Specialty Code*.[17] Standards for the installation of manufactured dwellings. Enforcement can be delegated to local governments.

- *Recreational Parks and Organizational Camps*.[18] Standards for the design, construction, enlargement, or alteration of recreational or picnic parks or organizational camps. Enforcement can be delegated to local governments.

- *Manufactured Dwellings and RV Park Program*.[19] Design and construction of mobile home and manufactured dwelling parks.

- *Oregon Elevator Specialty Code*.[20] Safety standards for the installation, alteration, repair, or maintenance of elevators.

- *Oregon Boiler and Pressure Vessel Specialty Code*.[21] Minimum safety standards for the construction, installation, repair, use, and operation of boilers and pressure vessels.

Oregon law does not require the building codes to be published.[22] This is because some of the specialty codes are copyrighted, and the publisher prohibits governments from distributing the code.[23] For example, the 2022 Oregon Structural Specialty Code is published by the International Code Council (ICC), and prohibits the publication of the Code.[24] Rather, the ICC makes the published codes available for free in a non-downloadable form on the ICC's website.[25]

---

[16] OREGON PLUMBING SPECIALTY CODE (2023); *see also* OAR 918-750-0110.
[17] OREGON MANUFACTURED DWELLING INSTALLATION SPECIALTY CODE (2010), available at: https://www.oregon.gov/bcd/codes-stand/Documents/md-2010omdisc-codebook.pdf (last accessed on May 1, 2024); *see also* OAR 918-500-0510.
[18] OAR 918-650-0000 to 918-650-0080.
[19] OREGON MANUFACTURED DWELLING AND PARK SPECIALTY CODE (2002), available at: https://www.oregon.gov/bcd/codes-stand/Documents/md-2002-mdparks-code.pdf (last accessed on May 1, 2024); *see also* OAR 918-500-0510.
[20] *See* OREGON ELEVATOR SPECIALTY CODE (2024).
[21] *See* OREGON BOILER AND PRESSURE VESSEL SPECIALTY CODE (2021).
[22] ORS 455.030.
[23] *See* OREGON STRUCTURAL SPECIALTY CODE (2022), available at: https://codes.iccsafe.org/content/ORSSC2022P1/copyright (last accessed on May 1, 2024).
[24] *Id*.
[25] *Id*.

The specialty code adoption cycle generally occurs every three years for most specialty codes.[26] The state coordinates, interprets, and generally supervises the code adoption and amendment process, ensuring the proposed specialty codes: (1) are based on the application of scientific principles, approved tests, and professional judgment; (2) focus on desired results instead of the means of achieving such results; (3) avoid the incorporation of particular methods or materials; (4) encourage the use of new methods and materials; and (5) encourage maximum energy conservation.[27] The state utilizes the administrative rulemaking process to advise on code amendments from groups such as advisory boards and code review committees.[28] The advisory boards are composed of persons that include specialty contractors, local government, building owners, utilities and the general public.[29]

B. Building Code Tools

Oregon State Building Codes Division developed two web-based code tools to assist development:

- *Oregon ePermitting*.[30] The state has developed an online permitting system for access to services and information from all participating cities and counties.[31] The Oregon ePermitting system allows contractors to apply for building permits, submit plans and construction documents, and schedule inspections. The system is a database for local jurisdictions to track and manage the permitting systems. Lastly, the system has mobile apps for inspectors and builders to communicate with photos and videos.[32] Many local jurisdictions voluntarily participate in part or all of the ePermitting system.[33]

- *Oregon Design Criteria Hub*.[34] The Oregon Design Criteria Hub is an interactive mapping tool that provides site-specific climatic and geographic design criteria for construction projects governed by the Oregon Residential Specialty Code (ORSC).[35] The hub is a streamlined tool where data from multiple maps and sources referenced by the ORSC can be accessed.[36] The hub is available to design professionals as well as local

[26] *See* STATE OF OREGON LEGISLATIVE POLICY AND RESEARCH OFFICE, *supra* (providing the specialty code adoption process).
[27] *Id*.
[28] *Id*.
[29] ORS 455.132 to ORS 455.140; ORS 480.535; ORS 693.115.
[30] Oregon Building Codes Division, *Oregon ePermitting*, available at: https://aca-oregon.accela.com/oregon/ (last accessed on May 14, 2024).
[31] ORS 455.095; *See also* BUILDING CODES DIVISION, CELEBRATING 50 YEARS OF THE STATE BUILDING CODE (2023).
[32] *Id*.
[33] *Id*. A list of the participating jurisdictions is available at: https://www.oregon.gov/BCD/epermitting/Documents/jurisdictions/participating.pdf (last accessed on May 1, 2024).
[34] *See* Oregon Building Codes Division, *Oregon Design Criteria Hub*, available at: https://www.oregon.gov/bcd/codes-stand/Pages/design-criteria.aspx (last accessed on May 1, 2024).
[35] *Id*.
[36] *Id*.

municipalities to assist in efficiently determining appropriate site-specific design criteria and to simplify the design and review of ORSC governed structures.[37]

C. Building Permits

Oregon law requires a property owner to obtain local permits for a range of installations, alterations, and construction performed to ensure that the work meets minimum standards for safe construction.[38] A building permit is required to construct, enlarge, alter, repair, or move a residential building or structure.[39]

Not all work requires permits. For example, the following work does not require a permit:

- Building an accessory structure, such as a shed or garage, that is uninhabitable, detached, one-story, less than 200 square feet or less than 15 feet measured from the floor to the average height of the roof.
- Building a patio, porch, or deck cover not more than 200 square feet in area or 12 feet in average roof height, and not closer than three feet to any property line.
- Building a porch or deck where the floor or deck is not more than 30 inches above the adjacent grade at any point.
- Installing a fence made of wood, wire mesh, or chain link less than seven feet in height.[40]

Before commencing work, property owners and contractors should contact their local building department to verify permit requirements before beginning work.

Building Permit Process

1. **Submit application.** Submit the following: project address, legal description, owner's name and address, name of the contractor, and a description of the work.

2. **Application is reviewed.** City planning staff may review for compliance with zoning rules, setback, lot coverage limitations, building height restrictions. If sufficient, the plans are reviewed by the plan examiner. If the plans are complex, other city professionals will review (i.e. plumbing, mechanical, structural, electrical or transportation concerns). If application is sufficient and money is paid, permit and job card are issued.

3. **Work begins.** Most plumbing and electrical work must be done by licensed contractors. As required by permit approval, building inspections are performed.

4. **Certificate of occupancy issued.** Once work is complete or conditions may be imposed to ensure completion, the owner may use the building.

See 1 *Construction Law in Oregon* (OSB Legal Pubs 2019) § 17.2.

[37] *Id*.
[38] *Id*.
[39] OREGON RESIDENTIAL SPECIALTY CODE (2023), § R101.
[40] *Id*.; See also State of Oregon Building Codes Division, *About Oregon Residential Building Permits*, available at: https://www.oregon.gov/bcd/lbdd/pages/oregon-permits.aspx (last accessed on May 1, 2024).

The person performing the work, whether it is a homeowner or contractor, is responsible for obtaining all necessary permits.[41] Once the permit is issued, the work must be done within 180 days unless the building official has granted extensions.[42] Failure to get a permit could lead to a civil penalty. For the city of Salem, failure to obtain a permit could result in civil penalties up to $2,000 per violation per day.[43]

D. Building Code Trends

With its state-wide administration of building codes, Oregon has become an innovator in this area. In recent years, Oregon has adopted a Small Home Specialty Code, a Residential Reach Code, a Commercial Reach Code and is currently exploring further explore energy efficiency through the Resilient Efficient Buildings Task Force.

i. Small Home Specialty Code

In 2019, the Oregon Legislature created a path for approval of "tiny homes" in response to the high demand for the small houses.[44] At that time, the building codes did not have specific provisions appliable to small houses. The law specified that the 2018 International Residential Code would be adopted as the Small Home Specialty Code for the design and construction for small homes.[45] A "small home" is a single-family residence that is not more than 400 square feet in size.[46]

ii. Energy Efficiency goals

In 2020, Governor Kate Brown issued Executive Order (EO) 20-04, requiring the Oregon Building Codes Division to evaluate and report on the state's current progress toward achieving the goal of reducing greenhouse gas emissions at least 75% below 1990 levels by 2050 for new residential and commercial buildings, and options for achieving that goal over the next three code cycles. [47]

In response to EO 20-04, the Building Codes Division adopted the Oregon Reach Code.[48] This code is separate from the state building code and applicable at the designer's and

---

[41] *See, e.g.*, OREGON RESIDENTIAL SPECIALTY CODE (2023), § R105.
[42] *See* OREGON RESIDENTIAL SPECIALTY CODE (2023), § R105.3.2.
[43] *See* City of Salem, *Report Building Activity Done Without a Permit*, available at: https://www.cityofsalem.net/business/building-in-salem/feedback/report-building-activity-done-without-a-permit (last accessed on May 1, 2024).
[44] House Bill 2423 (2019).
[45] See INTERNATIONAL RESIDENTIAL CODE (2018) Appendix Q, available at: https://codes.iccsafe.org/content/IRC2018P4 (last accessed on May 1, 2024).
[46] ORS 455.616.
[47] https://www.oregon.gov/bcd/Documents/eo-energy-20-04.pdf (last accessed on May 1, 2024).
[48] Exec. Order No. 20-04, available at: https://www.oregon.gov/bcd/Documents/202309-eo-energy-20-04-6breport.pdf (last accessed on May 1, 2024).

contractor's discretion.[49] The Oregon Reach Code is split into two codes: (1) the Oregon Residential Reach Code; and (2) the Oregon Commercial Reach Code.[50] This provides an additional choice to increase energy efficiency for the construction of structures regulated by the Oregon Structural Specialty Code.[51]

iii. Wildfire Hazard Mitigation

The Oregon Legislature directed the state's Building Codes Division to adopt fire hardening building code standards to help protect structures from wildfire.[52] The standards will be based on existing wildfire mitigation provisions, and could be applied to new dwellings and the accessory structures of dwellings in areas of the state mapped as high hazard zones and that are in the wildland urban interface.[53]

The Building Codes Division is in the process of adopting these standards, which will be based on the wildfire mitigation provisions in Section R327 of the 2021 Oregon Residential Specialty Code.[54] The Oregon Department of Forestry is overseeing the development of a comprehensive statewide map of wildlife hazard zones.[55] The high hazard zones of the state in the wildland urban interface will be mapped out on the Oregon Wildfire Hazard Map.[56]

E. Collaboration with Office of the State Fire Marshal

Through the Oregon Fire Code, the State Fire Marshal adopts minimum requirements related to fire prevention and standards for fire protection purposes.[57] Unlike the state building codes, local jurisdictions may adopt their own regulations, as long as the local regulations are consistent with the Fire Code.[58] The State Fire Marshal reviews the local regulations and makes consistency findings.[59] For ease, most cities in Oregon default to the Oregon Fire Code.

In 2018, the Building Codes Division Administrator and State Fire Marshal outlined best practices and suggestions to coordinate efforts with the state requirements such as providing code references and a plain statement of facts for citations and orders; providing electronic

---

[49] OREGON RESIDENTIAL REACH CODE (2021), available at: https://www.oregon.gov/bcd/codes-stand/Documents/2021-residential-reach-code.pdf (last accessed on May 1, 2024); OREGON COMMERCIAL REACH CODE (2022), available at: https://www.oregon.gov/bcd/codes-stand/Documents/2022ocrc.pdf (last accessed on May 1, 2024).
[50] *Id.*
[51] *Id.*
[52] Senate Bill 80 (2023).
[53] *Id.*
[54] *See* Oregon Building Codes Division, *Wildfire Hazard Mitigation*, available at: https://www.oregon.gov/bcd/codes-stand/pages/wildfire-hazard-mitigation.aspx (last accessed on May 1, 2024).
[55] *Id.*
[56] *Id.*
[57] *See* OREGON FIRE CODE (2022), available at: https://codes.iccsafe.org/content/ORFC2022P1 (last accessed on May 1, 2024).
[58] *See* OAR 837-039-0006.
[59] *Id.*

access to plans to local fire officials, schedule joint meetings with building and fire officials, develop a pre-application meeting with building and fire officials, and develop a parallel review process for the state building code and fire code.[60] Fire code matters pertaining to new construction are made by the building official with consideration for advice provided by State Fire Marshal or fire official.[61]

The State Fire Marshal has created tools to educate homeowners and renters about defensible space.[62] Creation of defensible space is a practice recommended to increase the chances of a home surviving a wildfire.[63]

II. Municipal Building Inspection Program

As discussed above, the state administers a uniform, statewide building code to govern construction in Oregon.[64] The state oversees the roughly 130 municipalities that administer the state building code through the municipal building inspection program.[65]

A. City Authority

Local governments can apply to the state to assume responsibility for administering and enforcing specified specialty codes.[66] If approved by the state, the administration and enforcement of building codes is delegated for a period of four years.[67] Once delegated, the municipal building inspection program is reviewed every four years for compliance with the minimum standards and policies established by the state.[68]

Municipal building inspection programs must establish and maintain minimum standards and policies designed to ensure consistent administration and enforcement of the state building code.[69] For cities that have not assumed the building inspection program, counties provide the

[60] Building Codes Division Administrator and State Fire Marshal letter to building and fire officials dated May 1, 2018, available at: https://www.oregon.gov/bcd/codes-stand/Documents/20180515-joint-bcd-osfm-letter.pdf (last accessed on May 1, 2024).
[61] ORS 455.485.
[62] *See* State Fire Marshal, *Creating Defensible Space*, available at: https://oregondefensiblespace.org/(last accessed on May 1, 2024); State Fire Marshal, Oregon Defensible Space for Homeowners & Renters, available at: https://www.oregon.gov/osfm/Documents/OSFMDefensibleSpaceAssessmentTool.pdf (last accessed on May 1, 2024).
[63] *Id.*
[64] Senate Bill 73 (1973).
[65] *See* Oregon Building Codes Division, State of Oregon Permit Surcharge Fee, available at: https://www.oregon.gov/bcd/jurisdictions/Documents/surcharge-backgrounder.pdf (last accessed on May 1, 2024).
[66] ORS 455.148; ORS 455.150; e.g. City of Lincoln City Building Inspection Program Operating Plan, available at: https://www.oregon.gov/bcd/jurisdictions/Documents/202310-lincolncity-program-assumption-request.pdf (last accessed on May 1, 2024).
[67] ORS 455.148(2), ORS 455.150(2).
[68] OAR 918-020-0180.
[69] OAR 918-020-0090; OAR 918-308-0010.

service within city limits.[70] Where a city or a county has not assumed or is unable to administer the building inspection programs, the state will assume the administration and enforcement of the program.[71]

Cities requesting to assume new building department programs or additional parts of a program must provide a full-service program.[72] The city must also prepare an assumption plan demonstrating its ability to administer the program for at least four years, to maintain or improve on service levels provided to the areas, operate a financially feasible program for at least two years, and transition the program from the previous service provider.[73] If a municipality would like to assume an electrical program, the requirements in OAR Division 918, Chapter 308 must also be followed. The application for the request for delegation of building inspection program must prepare an operating plan describing the manner in which the city shall meet the specific process and goals of the state building codes.[74] The city operating plan must describe how the building inspection program will cooperate with the State Fire Marshal and how the Fire Code will be considered in the building review process.[75]

Several examples of municipal inspection program assumption applications are available online at: https://www.oregon.gov/bcd/jurisdictions/Pages/program-assumptions.aspx.

Local governments are expressly prohibited from adopting or administering building code standards without permission from the state.[76] Cities are not preempted from adopting ordinances that address the "local administration of the state building code; local appeal boards; fees and other charges; abatement of nuisances and dangerous buildings; enforcement through penalties, stop-work orders or other means; or minimum health, sanitation and safety standards for governing the use of structures for housing."[77]

B. Building Official

The governing body of the city must appoint a building official, who is the person responsible for the administration and enforcement of the building inspection program.[78] Local building officials work under the authority of state.[79] Building officials are certified by the state and exercise broad discretion as they administer the municipal inspection program including

[70] ORS 455.148(6).
[71] ORS 455.148(12).
[72] ORS 455.148.
[73] OAR 918-020-0095.
[74] ORS 455.148(8); OAR 918-020-0080.
[75] ORS 455.148(6).
[76] ORS 455.040; *see State, By & Through Haley v. City of Troutdale*, 281 Or 203 (1978); *Thunderbird Mobile Club, LLC v. City of Wilsonville*, 234 Or App 457, *rev den*, 348 Or 524 (2010).
[77] ORS 455.040; ORS 455.020(4).
[78] ORS 455.148(3); ORS 455.150(3).
[79] OAR 918-020-0090; *see also* OREGON BUILDING CODES DIVISION, REFERENCE MANUAL FOR BUILDING OFFICIALS (2022), available at: https://www.oregon.gov/osbae/Documents/Reference-Manual-for-Building-Officials.pdf (last accessed on May 1, 2024).

interpreting the codes, considering alternate methods, and waiving requirements or fees.[80] Building inspection staff act under the authority of their local building official.[81]

C. Contracted Building Officials

The use of contracted building officials by local governments is an issue that was contested by a variety of interests. During the 2018 legislative session, the Oregon Office of Legislative Counsel found that the building official exercises legislative authority, and the use of a non-employee as the building official could therefore be an unconstitutional delegation of legislative authority.[82] In 2019, Oregon Attorney General Ellen Rosenblum issued an opinion finding that contracting out entire building departments, including building official discretionary decisions, was unconstitutional.[83]

In 2020, the Oregon Building Codes Division formed an advisory committee to identify possible pathways to resolve the legal issues of using a contracted building official. Cities and counties identified a process to retain the third-party programs provided local governments met several additional administrative requirements. In 2021, the Oregon Legislature passed the bill drafted to address the use of third-party building officials.[84] The 2021 law requires cities with contracted building officials to put in place certain procedural safeguards, including:

- A requirement for discretionary decisions to be: (1) in writing, including notice of hearing rights; (2) pre-approved or ratified by a municipal employee trained in building department oversight, and (3) subject to a rapid local appeal process.[85]
- The contract building official shall be licensed by the State of Oregon.[86] The contract building official is considered to be a public official for purposes of ORS chapter 244.[87]
- A city that uses a contract building official must have an independent auditor examine the building inspection program finances every two years.[88]

A city using a contract building official was required to submit an updated operating plan to reflect the new laws.[89]

[80] OAR 918-098-1015(1).
[81] ORS 455.715(3).
[82] Oregon Legislative Counsel Dexter Johnson Opinion Re: Municipal building officials and inspectors.
[83] Op. Att'y Gen. 8296 (2019).
[84] Senate Bill 866 (2021).
[85] ORS 455.202.
[86] *Id.*
[87] ORS 455.206.
[88] OAR 455.202.
[89] ORS 455.208.

D. Uniform Forms and Fees

The state adopts rules establishing uniform permit, inspection, and certificate of occupancy requirements as well as a uniform fee methodology.[90] A state surcharge fee of 12% is applied any time a construction activity under the state building code is authorized and will be inspected. [91]

Local governments may adopt by ordinance or regulation such fees as may be necessary and reasonable to provide for the administration and enforcement of the municipal building inspection program.[92] When a local government changes its fees, it must submit notice of the time and place for public comment to the state prior to the fee's adoption by the local governing body.[93] Once the state receives the notice of the hearing, interested parties have 60 days to appeal the fee increase.[94]

Fees are dedicated to the administration and enforcement of the municipal building inspection program.[95] Dedicated fees provide stable funding for local building departments, provide timely, value-added plan reviews and inspections, and support safe and affordable buildings.[96]

In Clackamas, Washington, and Multnomah counties, special rules apply to the permitting process for permits that do not require a review of building plans. [97]

E. Enforcement

Municipalities that assumed the administration and enforcement of a building inspection program before January 1, 2002, may administer and enforce some or all of a building inspection program. [98] On or after January 1, 2002, municipalities that assume the administration and enforcement of a building inspection program, must administer and enforce the program for all of the specialty codes, not just some of them.[99] If a municipality with a selective building inspection program seeks to administer additional parts of a program, the municipality must begin to enforce all aspects of the building inspection program.[100]

---

[90] ORS 455.055; OAR 918-050-0000 *et seq*.
[91] ORS 455.170(2); ORS 446.430(2); *See* OREGON BUILDING CODES DIVISION, STATE OF OREGON PERMIT SURCHARGE FEE, available at: https://www.oregon.gov/bcd/jurisdictions/Documents/surcharge-backgrounder.pdf (last accessed on May 1, 2024).
[92] ORS 455.210(3)(a).
[93] *Id.*
[94] *Id.*
[95] ORS 455.210(3)(c); ORS 479.845; *see also* OREGON BUILDING CODES DIVISION, DEDICATED FEES, available at: https://www.oregon.gov/bcd/jurisdictions/Documents/backgroundar-dedicated-fees.pdf (last accessed on May 1, 2024).
[96] *Id.*
[97] ORS 455.044; ORS 455.046; OAR 918-050-0030.
[98] ORS 455.150.
[99] ORS 455.148; ORS 455.150.
[100] ORS 455.150(7).

III. BUILDING CODE DISPUTES

Building codes are complicated and are open to a degree of interpretation. Disputes arise in the interpretation of the codes. Sometimes those disputes are resolved in the field. As discussed below, the state interprets the state building codes and if the issue is brought to the state, it may resolve disputes between local building officials on the application of the code.[101] If unresolved, those disputes may lead to a citation with potential penalties unless compliance is achieved.

Further, the Oregon Building Code Division investigates complaints made by persons believing that businesses and individuals are in violation of the building code statutes, rules, and specialty codes.[102]

A. Interprets the Specialty Codes

i. Statewide and Site-Specific Code Interpretations

If someone wants to use any material, design, or method of construction that raises questions under the state building code, that person (or the building official) may request a ruling regarding acceptability from the state.[103] The ruling is based on advice from the appropriate advisory board and copies of the ruling are transmitted to all building officials in the state.[104]

A statewide code interpretation is a binding interpretation of a specific code provision that applies to all jurisdictions.[105] A consumer or jurisdiction may request a statewide code interpretation.[106] The information contained in statewide code interpretation is legally binding on any party involved in activities regulated by applicable Oregon law, Oregon regulation, or the state building code.[107] If the information contained in this statewide code interpretation is cited as a basis for a civil infraction, a representative of the jurisdiction must cite the interpretation number found in the statewide rulings.[108]

A site-specific code interpretation is a binding interpretation of a specific provision for use by a municipality that applies to the specific facts and circumstances in one particular

[101] ORS 455.042.
[102] *See* Oregon Building Code Division, *Enforcement Program*, available at: https://www.oregon.gov/bcd/enforcement/pages/index.aspx (last accessed on May 6, 2024).
[103] ORS 455.060.
[104] *Id*.
[105] OAR 918-008-0075 to 918-008-0085.
[106] OAR 918-008-0080.
[107] OAR 918-008-0110.
[108] OAR 918-098-1900.

location.[109] Only the building official of a jurisdiction may request a site-specific code interpretation.[110]

ii. Statewide Alternative Methods

A statewide alternative method is a ruling on the acceptability of any material, design, or method of construction that is not covered by the state building code.[111] A person or a building official may request an alternate method ruling.[112]

Statewide alternate methods are approved by the state in consultation with the appropriate advisory board.[113] The advisory board's review includes technical and scientific facts of the proposed alternate method.[114] In addition:

- Building officials shall approve the use of any material, design or method of construction addressed in a statewide alternate method;
- The decision to use a statewide alternate method is at the discretion of the applicant; and
- Statewide alternate methods do not limit the authority of the building official to consider other proposed alternate methods encompassing the same subject matter.[115]

The Oregon Building Code Division's rulings on statewide alternative methods are available online at: https://www.oregon.gov/bcd/codes-stand/pages/alternate-methods.aspx.

B. Citations

All building officials must include an exact reference to the applicable specialty code section, administrative rule, or statute when issuing corrective notices at construction sites. [116] Further, the building official must include a plain statement of facts upon which the citation for correction action is based.[117] This is also known as "cite it, write it."[118] The state has also published a structural checklist and electrical checklist for applicable specialty code citations.[119]

---

[109] OAR 918-008-0075; OAR 918-008-0080; OAR 918-008-0090.
[110] OAR 918-008-0090.
[111] *See* OAR 918-008-0075; 918-008-0080; 918-008-0095.
[112] *Id*.
[113] *Id*.
[114] *Id*.
[115] *Id*.
[116] OAR 918-098-1900; *See also* OREGON OF OREGON BUILDING CODES DIVISION, CITE IT, WRITE IT RULES (2013), available at: https://www.oregon.gov/bcd/codes-stand/Documents/cite-it-write-it-rules.pdf (last accessed May 6, 2024).
[117] *Id*.
[118] *Id*.
[119] *See* OREGON BUILDING CODES DIVISION, STRUCTURAL STANDARDS CITE-IT, WRITE-IT (2021), available at: https://www.oregon.gov/bcd/codes-stand/Documents/cite-it-write-it-checklist.pdf (last accessed May 6, 2024); See OREGON BUILDING CODES DIVISION, INSPECTOR'S QUICK REFERENCE 2017 OESC, available at: https://www.oregon.gov/bcd/codes-stand/Documents/el-insp-quick-ref.pdf (last accessed May 6, 2024).

The checklist is a resource for building officials to help ensure that the officials are consistent in the violations they cite.

The citations may assess civil penalties, or condition, suspend or revoke a license or certificate of competency.[120] The director of the Oregon Building Codes Division has developed a penalty matrix for civil penalties.[121] The penalty matrix identifies penalties that may be assessed to businesses and individuals found to be in violation of building code statutes, rules, and specialty codes.[122]

C. Appeals

Decisions of a building official can be appealed to the local jurisdiction appeals board or the state specialty code chief.[123] The local jurisdiction appeals board procedure is set forth by the applicable jurisdiction.[124] If the appeal is directed to the state specialty code chief, the appeal process is set forth in the administrative rules.[125]

If the state finds in favor of the appellant, it overturns the decision of the local building official and directs the building official to take specified action. The Oregon Building Codes Division maintains the state specialty code chief rulings that overturn the local building official online at: https://www.oregon.gov/bcd/codes-stand/Pages/appeal-decisions.aspx.

If the state finds in favor of the building official, the appellant may appeal to the appropriate advisory board.[126]

D. Municipal Liability

Cities may be concerned about the potential liability for negligently inspecting work subject to the state's building codes. Currently, there are no Oregon appellate cases on negligent building code inspections for issuing a building permit in error. In a noteworthy Washington case, plaintiff homebuyers sued the county building department, alleging that the department's inspector had performed a negligent inspection.[127] The Washington Supreme Court stated that there was no duty owed to the homebuyers and therefore the county was not liable for its inspector's actions.[128]

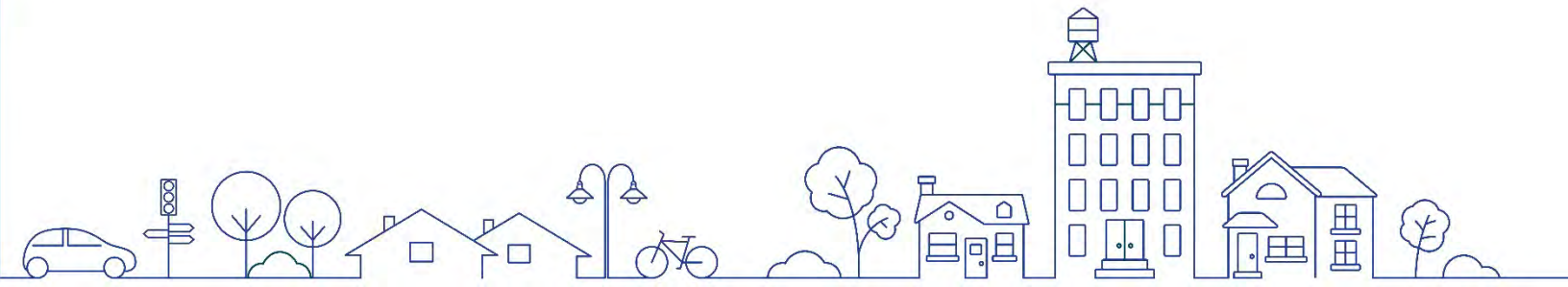
---

[120] OAR 918-001-0036.
[121] *Id. See also* Oregon Building Codes Division, *Advisory Board Civil Penalty Matrix* (2017), available at: https://www.oregon.gov/bcd/enforcement/Documents/penalty-matrix.pdf (last accessed May 6, 2024).
[122] *Id.*
[123] ORS 455.475; OAR 918-008-0120 (for appeals relating to the Electrical Specialty Code); OAR 918-001-130 (for appeals of all other specialty codes); OAR 918-020-0260 (appeals of discretionary decisions to the local board).
[124] See e.g., city of Portland, *Building Code Board of Appeals*, available at https://www.portland.gov/bds/appeals-board (last accessed May 6, 2024).
[125] OAR 918-008-0120.
[126] *Id.*
[127] *Taylor v. Stevens Cnty.*, 111 Wash 2d 159 (1988).
[128] *Id.*

In Oregon, arguably the law of negligence would apply to such a claim. Oregon negligence law would be concerned about reasonableness, foreseeability, and the particular code at issue.[129] Since inspections could be considered a discretionary function, it is possible that local governments would be immune from performing discretionary functions.[130] In a recent Oregon Court of Appeals case, the court held that the city's enactment and enforcement of a fire sprinkler ordinance was the "quintessential discretionary policy-making decision," and the city is immune for that choice.[131]

[129] *See generally Fazzolari v. Portland School Dist. No. 1J* (1987).
[130] *See generally Smith v. Cooper*, 256 Or 485, 495 (1970) (public employee is not liable for negligently performing discretionary function, although line differentiating ministerial functions from discretionary functions has never been clearly drawn); *See* 1 *Construction Law in Oregon* (OSB Legal Pubs 2019) § 17.2.
[131] *See Ragaway v. City of Portland*, 315 Or App 647 (2021).

CHAPTER 25: LAND USE AND DEVELOPMENT



League of Oregon Cities

Published by the League of Oregon Cities
December 2024

Table of Contents

Chapter 25: Land Use and Regulations

Oregon is unique, regulating land use by creating a mandatory framework for land-use planning that is subject to review by the state. The purpose of Oregon's land use laws has been to preserve farms and forestland and to encourage cities to be dense.

Compared to other states, Oregon's land use process is more centralized. In Oregon, one board (the Land Conservation and Development Commission) and one state agency (the Department of Land Conservation and Development) guide, review, and monitor land use planning throughout the state according to statute and rule. Yet, at its essence, land use is primarily a function of local governments deciding how to develop land with input from its citizens.

This chapter will discuss the brief history of Oregon's land use regulations, local land use regulations, local government land use actions and appeals from land use actions.[1] Please consult with your city attorney to review the legal implications of any particular land use action.

I. Brief History of Land Use in Oregon

In 1919, the state of Oregon granted authority to cities to plan and zone; this was challenged in court and upheld as valid in 1925, two years before the U.S. Supreme Court established a national precedent for such authority.[2]

Following World War II, the development of the farmlands into subdivisions of the Willamette Valley brought concern because it was starting to look more and more like Southern California, a resemblance many Oregonians sought to avoid. In 1955, the Oregon Legislature adopted a comprehensive law to regulate subdivisions and partitions of land.[3]

The 1960s brought land use planning issues in Oregon to a head. Citizen worries about

---

[1] A special acknowledgment to the Oregon Department of Land Conservation and Development for providing the backbone of the material provided in this chapter. This chapter cites heavily to the following publications: (1) Oregon Department of Land Conservation and Development, An Introductory Guide to Land Use Planning for Small Cities and Counties in Oregon (2007) [hereinafter referred to as Introductory Guide]; available at: https://www.oregon.gov/lcd/Publications/Intro_Guide_LandUsePlanning_SmallCitiesCounties_2007.pdf (last accessed June 10, 2024); and (2) Oregon Department of Land Conservation and Development, *Understanding Oregon's Land Use Planning Program, Training for Local Officials and the Public*, available at: https://www.oregonlandusetraining.info/index.html (last accessed June 5, 2024) [hereinafter referred to as *Training for Local Officials*]. Another excellent resource is 1 *Land Use* (OSB Legal Pubs 2010), available at: https://www.osbar.org/_docs/legalpubs/brochures/10/LandUse.pdf (last accessed July 15, 2024).

[2] Oregon Laws 1919, c. 300; *Kroner v. City of Portland*, 116 Or 141 (1925); *Village of Euclid v. Ambler Realty Co.*, 272 US 398 (1926). *See also* John Ame, *History of Land Use Planning in Oregon* (2008), available at https://oregonexplorer.info/content/history-land-use-planning?topic=4123&ptopic=62 (last accessed June 4, 2024) [hereinafter referred to as *History of Land Use*].

[3] *History of Land Use*, supra note 1.

losing access to the Pacific coast led to the 1967 Beach Bill, which decreed that all land within 16 vertical feet of the average low tide mark belongs to the people of Oregon and guarantees the public free and uninterrupted use of Oregon's 363 miles of coastal beaches.[4]

Passed in 1969, Senate Bill 10 established a basic program for statewide planning, requiring local governments to draw up comprehensive plans and established ten goals to guide cities and counties in their planning.[5] The bills basic concern was, "[t]o conserve prime farm lands for the production of crops and provide for an orderly and efficient transition from rural to urban land use."[6]

The 1973 Oregon Legislature passed the Land Conservation and Development Act, which regulated land use far more extensively than Senate Bill 10.[7] That bill provided the following:

- Created a state agency board, the Land Conservation and Development Commission (LCDC), and directed it to establish new statewide planning goals and guidelines after wide public input.[8]
- Required all Oregon cities and counties prepare a comprehensive plan and implement regulations in accordance with the new state goals.[9]
- Functioned as a property tax relief bill that awarded tax reductions to owners of farm and forest lands.[10] This, in effect, indirectly compensated farmers and owners of timber lands for land use restrictions and lowered their annual fixed operating costs.[11]

A fundamental premise of Oregon's land use program is that it does not necessarily offer solutions to land use conflicts but, instead, a process through which land use conflicts can be resolved.

After passage of the Land Conservation and Development Act, the LCDC established the following statewide planning goals after soliciting public comments, holding nearly 100 workshops and meeting with numerous economic and political groups:

Process Goals

- Goal 1 Citizen Involvement[12]

[4] *History of Land Use*, supra note 1; House Bill 1601 (1967).
[5] *History of Land Use*, supra note 1; Senate Bill 10 (1969).
[6] *Id*.
[7] Senate Bill 100 (1973).
[8] *Id*.
[9] *Id*.
[10] Senate Bill 101 (1973).
[11] *Id*.
[12]OAR 660-015-0000(1); Oregon Department of Land Conservation and Development, *Goal 1: Citizen Involvement*, available at: https://www.oregon.gov/lcd/OP/Pages/Goal-1.aspx (last accessed June 5, 2024).

- Goal 2 Land Use Planning[13]

Resource Goals

- Goal 3 Agricultural Lands[14]
- Goal 4 Forest Lands[15]
- Goal 5 Natural Resources, Scenic and Historic Areas, and Open Spaces[16]

Hazard Goals

- Goal 6 Air, Water and Land Resources Quality[17]
- Goal 7 Areas Subject to Natural Hazards[18]

Urban Area Goals

- Goal 8 Recreational Needs[19]
- Goal 9 Economic Development[20]
- Goal 10 Housing[21]
- Goal 11 Public Facilities and Services[22]
- Goal 12 Transportation[23]
- Goal 13 Energy Conservation[24]
- Goal 14 Urbanization[25]

---

[13] OAR 660-015-0000(2); Oregon Department of Land Conservation and Development, *Goal 2: Land Use Planning*, available at: https://www.oregon.gov/lcd/OP/Pages/Goal-2.aspx (last accessed June 5, 2024).
[14] OAR 660-015-0000(3); Oregon Department of Land Conservation and Development, *Goal 3: Agricultural Lands*, available at: https://www.oregon.gov/lcd/OP/Pages/Goal-3.aspx (last accessed June 5, 2024).
[15] OAR 660-015-0000(4); Oregon Department of Land Conservation and Development, *Goal 4: Forest Lands*, available at: https://www.oregon.gov/lcd/OP/Pages/Goal-4.aspx (last accessed June 5, 2024).
[16] OAR 660-015-0000(5); Oregon Department of Land Conservation and Development, *Goal 5: Natural Resources, Scenic and Historic Areas, and Open Spaces*, available at: https://www.oregon.gov/lcd/OP/Pages/Goal-5.aspx (last accessed June 5, 2024).
[17] OAR 660-015-0000(6); Oregon Department of Land Conservation and Development, *Goal 6: Air, Water, and Land Resources Quality*, available at: https://www.oregon.gov/lcd/OP/Pages/Goal-6.aspx (last accessed June 5, 2024).
[18] OAR 660-015-0000(7); Oregon Department of Land Conservation and Development, *Goal 7:* Areas Subject to Natural Hazards, available at: https://www.oregon.gov/lcd/OP/Pages/Goal-7.aspx (last accessed June 5, 2024).
[19] OAR 660-015-0000(8); Oregon Department of Land Conservation and Development, *Goal 8*: Recreational Needs, available at: https://www.oregon.gov/lcd/OP/Pages/Goal-8.aspx (last accessed June 5, 2024).
[20] OAR 660-015-0000(9); Oregon Department of Land Conservation and Development, *Goal 9: Economic Development*, available at: https://www.oregon.gov/lcd/OP/Pages/Goal-9.aspx (last accessed June 5, 2024).
[21] OAR 660-015-0000(10); Oregon Department of Land Conservation and Development, *Goal 10: Housing*, available at: https://www.oregon.gov/lcd/OP/Pages/Goal-10.aspx (last accessed June 5, 2024).
[22] OAR 660-015-0000(11); Oregon Department of Land Conservation and Development, *Goal 11: Public Facilities and Services*, available at: https://www.oregon.gov/lcd/OP/Pages/Goal-11.aspx (last accessed June 5, 2024).
[23] OAR 660-015-0000(12); Oregon Department of Land Conservation and Development, *Goal 12: Transportation*, available at: https://www.oregon.gov/lcd/OP/Pages/Goal-12.aspx (last accessed June 5, 2024).
[24] OAR 660-015-0000(13); Oregon Department of Land Conservation and Development, *Goal 13: Energy Conservation*, available at: https://www.oregon.gov/lcd/OP/Pages/Goal-13.aspx (last accessed June 5, 2024).
[25] OAR 660-015-0000(14); Oregon Department of Land Conservation and Development, *Goal 14: Urbanization*, available at: https://www.oregon.gov/lcd/OP/Pages/Goal-14.aspx (last accessed June 5, 2024).

Willamette Valley Goals

- Goal 15 Willamette River Greenway[26]

Coastal Goals

- Goal 16 Estuarine Resources[27]
- Goal 17 Coastal Shorelands[28]
- Goal 18 Beaches and Dunes[29]
- Goal 19 Ocean Resources[30]

Most of the goals are accompanied by "guidelines," which are suggestions about how a goal may be applied.[31] As noted in Goal 2, guidelines are not mandatory.[32] The goals and guidelines are, however, adopted as Oregon administrative rules.[33]

Since the Land Conservation and Development Act was enacted, voters have challenged Oregon's land use program. Of note, in 2000, Oregon voters passed Ballot Measure 7, requiring the government to reimburse land owners when regulations reduced the value of their property.[34] However, the Oregon Supreme Court declared Ballot Measure 7 unconstitutional.[35] In 2004, Oregon voters initially passed Ballot Measure 37, a largely similar measure, but avoided the constitutional issues of Ballot Measure 7.[36] Ballot Measure 37 was later modified by the Oregon Legislature and approved by the voters in 2007 as Ballot Measure 49.[37]

Statutes relating to city land use planning and development are the following:

---

[26] OAR 660-015-0005; Oregon Department of Land Conservation and Development, *Goal 15: Willamette River Greenway*, available at: https://www.oregon.gov/lcd/OP/Pages/Goal-15.aspx (last accessed June 5, 2024).
[27] OAR 660-015-0010(1); Oregon Department of Land Conservation and Development, *Goal 16: Estuarine Resources*, available at: https://www.oregon.gov/lcd/OP/Pages/Goal-16.aspx (last accessed June 5, 2024).
[28] OAR 660-015-0010(2); Oregon Department of Land Conservation and Development, *Goal 17: Coastal Shorelands*, available at: https://www.oregon.gov/lcd/OP/Pages/Goal-17.aspx (last accessed June 5, 2024).
[29] OAR 660-015-0010(3); Oregon Department of Land Conservation and Development, *Goal 18: Beaches and Dunes*, available at: https://www.oregon.gov/lcd/OP/Pages/Goal-18.aspx (last accessed June 5, 2024).
[30] OAR 660-015-0010(4); Oregon Department of Land Conservation and Development, *Goal 19: Ocean Resources*, available at: https://www.oregon.gov/lcd/OP/Pages/Goal-19.aspx (last accessed June 5, 2024).
[31] Oregon Department of Land Conservation and Development, Statewide Planning Goals and Guidelines (July 2019), available at: https://www.oregon.gov/lcd/Publications/compilation_of_statewide_planning_goals_July2019.pdf (last accessed June 5, 2024).
[32] *Id*.
[33] *Id*.; OAR 660-015-0000 to OAR 660-015-0010.
[34] *League of Oregon Cities v. State*, 334 Or 645 (2002).
[35] *Id*.
[36] Ballot Measure 7 (2004).
[37] ORS 195.300 to 195.336; ORS 197.353. *See also* Oregon Department of Land Conservation and Development, *Measure* 49, available at: https://www.oregon.gov/lcd/measure49/pages/index.aspx (last accessed June 5, 2024).

ORS Chapter 197

- Establishes the LCDC and the Department of Land Conservation and Development (DLCD)[38]
- Defines a "land use decision"[39]
- Assigns comprehensive planning responsibilities[40]
- Requires city compliance with the statewide planning goals[41]
- LCDC order city compliance with goals and plans[42]
- Addresses needed housing and urban growth boundary (UGB)[43]
- Establishes local procedural requirements[44]
- Contains post acknowledgement procedures[45]
- Establishes the jurisdiction of the Land Use Board of Appeals (LUBA)[46]

ORS Chapter 227

- Establishes city planning commission[47]
- Requires city approvals of certain plats or renaming of streets[48]
- Requires certain hearing procedures for review[49]
- Authorizes cities to regulate development of land[50]

ORS Chapter 195

- Sets forth local government coordination agreement requirements[51]
- Sets forth urban service agreements requirements[52]
- Just compensation for land use regulations[53]

ORS Chapter 268

- Governs the planning and other authority of Metro Service District, the Portland area regional government

[38] ORS 197.030 to 197.070; ORS 197.075 to 197.095.
[39] ORS 197.015(10).
[40] ORS 197.175.
[41] ORS 197.251.
[42] ORS 197.319 to 197.350.
[43] ORS 197.746 to 197.761.
[44] ORS 197.796 to 197.797.
[45] ORS 197.610 to 197.651.
[46] ORS 197.805 to 197.860.
[47] ORS 227.010 to 227.090.
[48] ORS 227.095 to 227.120.
[49] ORS 227.160 to 227.188.
[50] ORS 227.215 to 227.320.
[51] ORS 195.020 to 195.040.
[52] ORS 195.060 to 195.085.
[53] ORS 195.300 to 195.336.

ORS Chapter 222

- Governs annexations and boundary changes

ORS Chapter 92

- Governs partition and subdivision of land

II. Local Land Use

As discussed above, cities were required to adopt a comprehensive plan and implementing regulations in accordance with these stateside planning goals.[54]

A. Comprehensive Plan

A comprehensive plan is a generalized, coordinated land use map and policy statement of the governing body of a city.[55] It relates to all man-made and natural systems as well as activities relating to the use of lands.[56] It establishes the community's vision and identifies the type, location and intensity of future development.[57] It must address local conditions and priorities consistent with the applicable requirements of the Statewide Planning Goals.[58] The plan is implemented through local ordinances, codes, or regulations.

A comprehensive plan generally includes the following three elements:

- *An inventory of existing land uses*, housing stock, developable lands, and public facilities such as water, sewer, and storm drainage, natural resources, natural hazards, recreational facilities, transportation facilities, and economics. [59] Background documents may also discuss the adequacy of community services such as education and law enforcement.[60]

  The inventories, while significant, do not play a major role in the day-to-day administration of the planning program of a city or county.[61] The inventories are most important when developing the goals and policies. The inventories are normally updated during major plan updates, and the updated inventories may lead to changes in policies within the plan.[62] For example, if a policy was adopted in 1988 to provide

[54] ORS 197.251.
[55] *Training for Local Officials*, *supra* note 1.
[56] *Id*.
[57] *Id*.
[58] *Id*. *See also* ORS 197.251.
[59] *E.g.*, OAR 660-009-0000 to 660-009-0030; *see also* Oregon Department of Land Conservation and Development, *Plan Amendments*, available at: https://www.oregon.gov/lcd/CPU/Pages/Plan-Amendments.aspx (last accessed June 5, 2024); INTRODUCTORY GUIDE, *supra* note 1, at 3.
[60] *Id*.
[61] INTRODUCTORY GUIDE, *supra* note 1, at 4.
[62] *Id*.

additional tourist-related housing to further an economic development goal, and by 2005 the city found it had an overabundance of tourist-related housing that had been constructed in the intervening years, it would probably be prudent to consider revising that particular policy.[63]

- *Goal and policy statements*, which indicate, in a general way, the objectives of the jurisdiction over a specific planning period and guidance on how to achieve those objectives.[64] The goals and policies are generally designed to provide guidance to elected and appointed officials over the use of land.[65] They are important when reviewing proposed zone changes, comprehensive plan amendments, and sometimes, conditional use permits.[66]

- *A comprehensive plan map*, which depicts, in a site-specific nature (*i.e.*, to individual property lines), the desired arrangement of uses for the entire jurisdiction.[67] The zoning map must be subordinate to the comprehensive plan map.[68] That is, the zoning map cannot allow a more intensive land use than is shown on the comprehensive plan map for the same area.[69] To take that a step further, if a plan designates a certain area as residential, the zoning map cannot designate the same area as commercial — a more intensive land use.[70]

> *A comprehensive plan policy can only be used as an approval criterion for a zone change or a permit if the words require it such as shall or must.*
>
> *Policy terms such as "should," "encourage," or "consider," are not used as a basis for making a land use decision.*
>
> *Introductory Guide to Land Use Planning for Small Cities*

Once the LCDC determined that a local government's local plan and regulations were in compliance with the statewide planning goals, it issued an order "acknowledging" that plan.[71] By the mid-1980s, almost all local governments achieved LCDC acknowledgment.[72]

---

[63] *Id*.
[64] INTRODUCTORY GUIDE, *supra* note 1, at 3.
[65] INTRODUCTORY GUIDE, *supra* note 1, at 4.
[66] *Id*.
[67] INTRODUCTORY GUIDE, *supra* note 1, at 3-4.
[68] *Id*.
[69] *Id*.
[70] *Id*.
[71] *See* PLANNING THE OREGON WAY: A TWENTY-YEAR EVALUATION (Carl Abbott et al. eds., 1994).
[72] *Id*.

After acknowledgment, the local plan becomes the sole land use regulation for the jurisdiction in most instances.[73] The statewide goals no longer directly apply to land use decisions of a local government but continue to apply to legislative amendments to the acknowledged plan and regulations.[74]

The comprehensive plan map is the controlling document for local land use decisions and even zoning maps are subordinate.[75] That means that a zoning map cannot allow a more intensive land use than is shown on the comprehensive plan map.[76]

A library of the acknowledged plans throughout Oregon is available online by the University of Oregon, Scholars' Bank Local and Regional Documents Archive, available at: https://scholarsbank.uoregon.edu/xmlui/handle/1794/7549 (last accessed June 6, 2024).

B. Development Code

The development code is the implementation of the comprehensive plan. The development code may be named many different things depending on the local government, such as *community development ordinance*, *land development code*. The development code intended to implement the broad comprehensive plan and is a critical component of DLCD acknowledgment of compliance with the statewide planning goals.[77] The code is a compilation of the ordinances of general applicability relating to land use and is the most important tool in the day-to-day planning effort.[78]

The code will typically be split into: (1) zoning, including permitted, conditional and prohibited uses within each zone; (2) procedures for land use approval, and (3) criteria or standards for approval.

i. Zoning

The purpose of zoning is to delineate the city into areas known as *zones* where certain types of uses and what land uses may occur in each zone.[79] Within each zone, uses will be listed as *permitted* (often referred to as an *outright permitted use*) which means that the use is not subject to approval criteria.[80] Other uses will be listed as *conditional uses*, which means these uses are subject to a land use decision based on the criteria for conditional uses.[81]

---

[73] *Byrd v. Stringer*, 295 Or 311 (1983).
[74] *Id*.
[75] See Oregon Department of Land Conservation and Development, *Plan Amendments (PAPA)*, available at: https://www.oregon.gov/lcd/CPU/Pages/Plan-Amendments.aspx (last accessed June 15, 2024).
[76] *Id*.
[77] INTRODUCTORY GUIDE, *supra* note 1, at 3-4.
[78] INTRODUCTORY GUIDE, *supra* note 1, at 4.
[79] *Id*.
[80] *Id*.
[81] *Id*.

Zoning can be split into base zones and overlay zones.[82] Base zone designations in cities are typically residential, commercial, industrial, and public.[83] Within the base zone categories, cities often include several more specific zones.[84] For example, sub-categories of residential zoning may include single-family, multi-family, medium-density, and high-density.[85]

An overlay zone is, as the name implies, a zone that adds requirements or considerations regarding the use of affected land and do not replace the underlying zone.[86] Overlay zones are commonly employed to implement requirements of the floodplain or other hazard ordinance, to protect flight paths around airports, and protect significant wildlife habitat.[87] Overlay zones may make an otherwise permitted use into a conditional use, alter setback or height requirements, or add other types of approval criteria, depending on the purpose of the zone.[88]

The zoning map is a visual tool that shows the location and boundaries of the zones covering all geographical areas of the city.[89] Many cities have zoning maps available online.[90]

While zoning categories are similar statewide, each community creates its own, based on the desired development pattern and policy framework contained in the comprehensive plan.[91] The zoning map and any changes to zoning designations over time must be consistent with policies and designations in the comprehensive plan.[92] The comprehensive plan map and zoning map may be very similar but not necessarily identical.[93]

ii. Land Use Approval Procedures

The development code will set forth the procedures for land use action including land divisions, building permits, zone changes, and legislative action. Depending on the type of decision, the typical development code breaks the land use approval process into different categories, based upon the level of review:

> ***Ministerial***.[94] Ministerial decisions are typically made without any notice or opportunity to comment or appeal. This procedure is frequently used because there are clear and objective approval criteria and applying city standards or criteria requires little or no

[82] INTRODUCTORY GUIDE, *supra* note 1, at 18.
[83] *Training for Local Officials*, *supra* note 1.
[84] *Training for Local Officials*, *supra* note 1.
[85] *Training for Local Officials*, *supra* note 1.
[86] INTRODUCTORY GUIDE, *supra* note 1, at 4.
[87] INTRODUCTORY GUIDE, *supra* note 1, at 18.
[88] *Id.*
[89] *Training for Local Officials*, *supra* note 1.
[90] For example, the City of Beaverton has its zones and many more visual tools in its geographic information system (GIS), available at: https://beaverton.maps.arcgis.com/home/index.html (last accessed June 6, 2024).
[91] *Training for Local Officials*, *supra* note 1.
[92] *Training for Local Officials*, *supra* note 1.
[93] *Training for Local Officials*, *supra* note 1.
[94] INTRODUCTORY GUIDE, *supra* note 1, at 26; *Training for Local Officials*, *supra* note 1.

discretion. Examples include building permits for a use permitted by code or a determination that a proposed structure meets setback or height requirements.

Administrative Decisions.[95] Administrative decisions are decisions made without a hearing if a notice of decision provided to neighbors with an opportunity to appeal the decision to a quasi-judicial hearing where testimony would be taken. An administrative process is used when the type of land use decision has objective standards with a lower level of discretion, for uses permitted outright or permitted with standards. An appeal of an administrative decision provides an opportunity for a hearing before a planning commission, using the quasi-judicial hearing procedures as discussed below. An example of an administrative decision would be a design review.

Quasi-Judicial Decisions.[96] Quasi-judicial decisions are land use actions that generally have discretionary approval criteria. Quasi-judicial decisions automatically go to a hearings officer or hearing body for approval with a right of appeal to the governing body. Where the decision requires an ordinance for decisions like a re-zone, the planning commission makes a recommendation to the governing body and if the governing body agrees, it enacts an ordinance. Additional examples of quasi-judicial decisions are conditional use permits, variances, partitions, subdivisions, annexations and road and street vacations.

Legislative Decisions.[97] Legislative decisions are those that require a greater level of discretion or a legislative change. Legislative decisions go directly to the planning commission for a recommendation to the governing body. The governing body considers the issue and if approved, the governing body takes action with an ordinance. The examples for a legislative decision include the following: code text amendments, comprehensive plan text amendments, and comprehensive plan map amendments.

iii. Development Standards

Development of lots must meet not only the zone requirements in the development code such as minimum lot sizes (if any); minimum density (if any); and siting requirements, such as height limits, lot coverage, setbacks, and floor area ratios, but also the development standards.[98] Development standards typically contain the basic infrastructure requirements, e.g., street and sidewalk, sewer and water connections, required landscaping, and similar requirements.[99]

[95] INTRODUCTORY GUIDE, *supra* note 1, at 25; *Training for Local Officials*, *supra* note 1.
[96] INTRODUCTORY GUIDE, *supra* note 1, at 27; *Training for Local Officials*, *supra* note 1.
[97] INTRODUCTORY GUIDE, *supra* note 1, at 26; *Training for Local Officials*, *supra* note 1.
[98] INTRODUCTORY GUIDE, *supra* note 1, at 4.
[99] *Id.*

III. TYPICAL LAND USE ACTIONS

A. Building Permits

The simplest land use action is the issuance of a building permit. The building permit applicant must include with the permit application a site plan showing the tentative location of the proposed structure.[100] The building permit application will also include structural plans, which will be reviewed by the local building official.[101] Building regulations are discussed in Chapter 24 of the League of Oregon Cities Oregon Municipal Handbook.

To issue a building permit, the land use planner would consider the following:

- What is the zoning of the property?
- In that zone, is the proposed use allowed outright within that zone? Or is the proposed use a conditional use that must meet additional criteria for land use approval?
- Does the proposed site plan comply with all of the development regulations such as setback, height limit, and parking?
- Does the proposed building require any special review such as site plan review, floodplain review, hillside review, or historic review?[102]

Using the site plan, the planner would determine whether development code requirements such as setbacks from the exterior property lines are adequate.[103]

B. Land Divisions

Under Oregon law, there are two categories of land divisions: partitions and subdivisions. A partition divides a unit of land into two or three parcels.[104] A subdivision divides a unit of land into four or more lots.[105]

Partitions and subdivisions undergo two stages of review and approval.[106] A tentative or preliminary plan is a proposal that is reviewed by the land use planner to ensure conformance with code or ordinance requirements and identify planning issues or problems.[107] Approval of the preliminary plat frequently includes conditions of approval that must be satisfied before final plat approval.[108] A common condition is that the applicant must construct the necessary public

---

[100] INTRODUCTORY GUIDE, *supra* note 1, at 6.
[101] *Id.*
[102] *Id.*
[103] *Id.*
[104] ORS 92.010(9); ORS chapter 92.
[105] ORS 92.010(16).
[106] ORS 92.044; ORS 92.046; *see Bienz v. Dayton*, 29 Or App 761, 767–768 (1977) (explaining two-step process).
[107] *Id.*
[108] ORS 92.090(3)(d).

improvements prior to final plat approval.[109]

Final land division approval is simply a check to see that the preliminary approval process has been followed and all of the conditions have been met.[110] After it is approved, the tentative or preliminary plan becomes a final plat with accurate survey lines and dimensions of lots, streets, utilities, and other physical features.[111] It is commonly handled by staff as an administrative matter.[112] This final plat is officially recorded with the county.[113]

A city's development code will provide the following city-specific requirements: (1) standards for improvements to public infrastructure, such as streets (including sidewalks), water, sewer, and drainage system; (2) procedures for processing applications; and (3) criteria for reviewing applications.[114]

Some development codes have a different procedure for major and minor partitions, but currently there is no distinction in state law.[115] Similarly, some jurisdictions may still require that partitions and subdivisions go before a public hearing.[116] The statutes now allow administrative approval of partitions and subdivisions by staff.[117]

C. Zone Change

A zone change, also known as a zoning map amendment, is a process by which the applicant seeks to amend the zoning map to change the designation on a specific tract.[118] A comprehensive plan map amendment often accompanies a zone change.[119]

A property owner/applicant submits a completed application.[120] Once city staff determines the application is complete, a hearing is scheduled before the planning commission and the city council.[121] A zone change is normally a two-hearing process, the first before the planning commission and the second

Dos and Don'ts of Zone Changes

1. Don't rezone a portion of a piece of property without rezoning the whole parcel.

2. Do ensure that the proposed zone will conform to the comprehensive plan map.

3. Don't rezone lands to create islands of a special designation in the middle of a different zone, i.e. spot zoning.

INTRODUCTORY GUIDE, *supra* note 1, at 13.

[109] INTRODUCTORY GUIDE, *supra* note 1, at 16.
[110] ORS chapter 92; INTRODUCTORY GUIDE, *supra* note 1, at 16.
[111] ORS chapter 92; INTRODUCTORY GUIDE, *supra* note 1, at 15-16.
[112] INTRODUCTORY GUIDE, *supra* note 1, at 16.
[113] ORS 92.120.
[114] INTRODUCTORY GUIDE, *supra* note 1, at 15.
[115] ORS chapter 92; INTRODUCTORY GUIDE, *supra* note 1, at 15.
[116] *Id*.
[117] ORS 197.195 (allowing a limited land use decision).
[118] *See* Oregon City, *Zone Changes & Comprehensive Plan Amendments*, available at: https://www.orcity.org/794/Zone-Changes-Comprehensive-Plan-Amendmen (last accessed June 12, 2024).
[119] *Id*.
[120] *Id*.
[121] INTRODUCTORY GUIDE, *supra* note 1, at 12.

hearing before the governing body.[122] It requires that post-acknowledgement plan amendment rules be applied, including notifying the DLCD at least 35 days before the first public hearing on the application.[123]

Typical criteria for approval include: (1) demonstration that the proposed zone will be compatible with surrounding property uses; (2) public services are adequate to serve the proposed use; and (3) the change will comply with the goals and policies of the comprehensive plan.[124] For the last criterion listed, different sections of the plan may seem to conflict with each other, requiring the city to balance the policies with the unique circumstances of the request in question.[125]

D. Conditional Use Permits

A conditional use permit is a process by which a city reviews a proposed land use that is listed in the development code as a conditional use.[126] As discussed above, a city's development code delineates the city into areas known as *zones* where conditional uses may be allowed, provided that the proposed use meets the criteria.

Tips for Conditional Use

Always require a site plan for any structure and attach the plan to the findings of fact.

For commercial enterprises such as a home occupation or public or semi-public uses, ask for an applicant's written statement detailing how the proposed use will be conducted "Statement of Operations" to set the parameters of the use.

INTRODUCTORY GUIDE, *supra* note 1, at 10.

Conditional use provisions generally apply to uses or activities that have potential adverse impacts or compatibility issues and therefore require review.[127] In many cases, adverse impacts and compatibility issues can be resolved or minimized by the application of conditions or limitations.[128]

Through the review process, the decision-maker can assess neighborhood comments as well as comments from other parties of record, who are those who respond to the notice or

[122] *Id*.
[123] ORS 197.610; OAR 660-018-0020.
[124] INTRODUCTORY GUIDE, *supra* note 1, at 12. *E.g.*, the City of Salem, *Change the Zoning of Your Property*, available at: https://www.cityofsalem.net/business/land-use-zoning/development-application-help/change-the-zoning-of-your-property (last accessed June 12, 2024).
[125] *Id*.
[126] *See Anderson v. Peden*, 284 Or 313, 317–320 (1978).
[127] *See* City of Portland, *Conditional Use Reviews*, available at: https://www.portland.gov/bds/zoning-land-use/land-use-review-fees-and-types/conditional-use-reviews (last accessed June 12, 2024).
[128] INTRODUCTORY GUIDE, *supra* note 1, at 10-11.

participate in a public hearing.[129] The decision-maker can approve the request, deny it, or approve it with conditions, based on criteria in the zoning ordinance.[130]

Typically, a conditional use permit will require the following criteria:

- The proposal be consistent with the comprehensive plan and the objectives of the zoning ordinance and other applicable policies;
- The proposal has a minimal adverse impact on abutting properties and the surrounding area compared to the impact of development that is permitted outright;
- The size, design, and operation characteristics of the proposed use;
- The proposal preserves assets of particular interest to the community; and
- The applicant has a bona fide intent and capability to develop, use the land as proposed and has some appropriate purpose for submitting the proposal.[131]

Typical conditional use permits in a city are for multi-family dwellings and public and semi-public structures, including churches.[132] Conditional use permit requests can be decided by staff, planning commission, or elected officials.[133] Conditions of approval may be specified by the zone or imposed by a decision-maker based on the results of a public review and hearing, although the decision-maker will need to justify special conditions by citing an overarching policy or requirement.[134]

E. Variance

A variance is a process to allow an exception from development standards in the development code — normally setbacks, building height, or other physical dimensions.[135] For example, a variance may be requested to allow a reduced setback for a home built on an unusually shaped lot.[136] Variances are subject to specific and rigorous approval standards outlined in the development code.[137] Decisions require evidence and findings demonstrating the standards are met.[138]

A variance request generally requires a site plan showing the proposed development including the exterior boundaries of the structures, distance from the property lines, access, and

[129] *Id*. *See* City of Sherwood, *Conditional Use Permit*, available at: https://www.sherwoodoregon.gov/planning/page/conditional-use-permit (last accessed June 12, 2024).
[130] *Id*.
[131] INTRODUCTORY GUIDE, *supra* note 1, at 10-11.
[132] *Id*.
[133] *Id*.
[134] *Id*.
[135] INTRODUCTORY GUIDE, *supra* note 1, at 8.
[136] *Training for Local Officials*, *supra* note 1.
[137] *Id*. *E.g.*, *Reagan v. City of Oregon City*, 39 Or LUBA 672, 682–683 (2001).
[138] *Training for Local Officials*, *supra* note 1. *See Friends of Bryant Woods Park v. City of Lake Oswego*, 126 Or App 205, 208 (1994).

other information necessary to support the request.[139] The applicant must describe the nature of the variance sought and explain how it satisfies the approval criteria in the development code.[140]

A request for a variance will be evaluated against the criteria established in the development code.[141] A variance that does not satisfy all of the criteria should not be approved. There are generally four criteria for approval of a variance:

- Exceptional or extraordinary circumstances that apply to the property but do not apply generally to other properties in the same zone or vicinity. These circumstances result from lot size or shape, topography, or other conditions that the property owners cannot control;[142]
- The variance is necessary so that the applicant can enjoy a property right, the nature of which owners of properties in the same zone or vicinity possess;[143]
- The granting of the variance will not be detrimental to public safety, health, or welfare, or injurious to other property;[144] and
- The hardship is not self-imposed, and the variance is the minimum that will alleviate the hardship.[145]

As these criteria imply, a variance should only be approved for unusual circumstances.

IV. Nature of Land Use Decisions

Land use decisions are subject to notice and an opportunity for a hearing.[146] A *land use decision* is: (1) a decision that applies the local land use regulations; or (2) significantly impacts use of land, involves some discretion and is in some written form.[147] The question of whether a local government action is a land use decision can be a difficult issue. There is a body of law on what actions are considered a *land use decision*.

In processing land use actions in Oregon, there are two types of public hearing procedures: legislative and quasi-judicial.[148] The two-hearing processes differ significantly in the procedural and public notice requirements.

---

[139] Introductory Guide, *supra* note 1, at 8.
[140] *Id.*
[141] Introductory Guide, *supra* note 1, at 8. *See Thomas v. City of Rockaway Beach*, 24 Or LUBA 532, 534 (1993).
[142] Introductory Guide, *supra* note 1, at 8. *See Lovell v. Planning Com. of Independence*, 37 Or App 3, 6, 586 P2d 99 (1978).
[143] Introductory Guide, *supra* note 1, at 8. *See Foster v. City of Astoria*, 16 Or LUBA 879, 888 (1988).
[144] Introductory Guide, *supra* note 1, at 8. *See Cope v. City of Cannon Beach*, 15 Or LUBA 546, 551–552 (1987).
[145] Introductory Guide, *supra* note 1, at 8. *See Elder v. Douglas County*, 33 Or LUBA 276, 280 (1997).
[146] ORS 197.797.
[147] ORS 197.015(10); *Billington v. Polk County*, 299 Or 471, 478–479 (1985); *Petersen v. Klamath Falls*, 279 Or 249, 254 (1977).
[148] Introductory Guide, *supra* note 1, at 19.

Legislative decisions are where a governing body enacts policies or standards which are generally applicable to all persons or property or large classes of persons or property.[149] A legislative hearing is a public hearing in which the planning commission, city council, board of commissioners, or county court is acting as a legislator, making new law.

Quasi-judicial decisions are decisions where a governing body is applying adopted policies or standards to *specific property*.[150] A quasi-judicial hearing is a type of land use proceeding in which the decision maker is acting in the capacity of a judge.[151]

When deciding whether a particular matter is legislative or quasi-judicial, ask three questions:

(1) Is the process bound to result in a decision?

(2) Is the decision bound to apply preexisting criteria to concrete facts?

(3) Is the action directed at a closely circumscribed factual situation or a relatively small number of persons?[152]

If the answers to these questions are yes, then use quasi-judicial procedures.[153] If the answers to all the questions are no, it is a legislative matter. The nature and procedure of the administrative and legislative decisions are discussed below.

A. Legislative Decisions

Legislative decisions typically affect large areas and are not focused on small, localized segments of property or the community.[154] When a governing body makes a legislative decision, it is sitting in its role as the policy-making body for the local government.[155] The Oregon Land Use Board of Appeals (LUBA) shall affirm a local government's interpretation of its comprehensive plan and land use regulations unless the interpretation is inconsistent with the comprehensive plan, regulation or state law.[156]

Legislative hearings typically occur when considering amendments to the goals and policies in the comprehensive plan, to major map amendments, and to changes to the zoning ordinance.[157]

---

[149] INTRODUCTORY GUIDE, *supra* note 1, at 8. *See South of Sunnyside Neighborhood League v. Board of Comm'rs*, 280 Or 3, 10–12 (1977).
[150] INTRODUCTORY GUIDE, *supra* note 1, at 27.
[151] INTRODUCTORY GUIDE, *supra* note 1, at 19.
[152] *Strawberry Hill 4 Wheelers v. Board of Comm'rs*, 287 Or 591, 602–603 (1979).
[153] *Id*.
[154] INTRODUCTORY GUIDE, *supra* note 1, at 26.
[155] *Id*.
[156] ORS 197.829.
[157] *Training for Local Officials, supra* note 1.

i. Public Notices

To consider legislative changes, cities must follow the procedures set forth in the city's development code for sending notice of legislative hearings.[158] Local procedures generally include providing notice of the hearing in a newspaper of general circulation at least 10 days before the hearing.[159]

The strict notice and process requirements for quasi-judicial decisions do not apply to legislative land use decisions. However, Ballot Measure 56, approved by the voters in 1998, requires that if the proposed legislative change limits or prohibits previously allowed land uses, Oregon law requires notice to property owners not less than 20 and not more than 40 days in advance of the first hearing.[160]

Unless the city determines that the statewide planning goals do not apply, legislative land use hearing notice must be mailed to the DLCD at least 35 days in advance of the first evidentiary hearing on adoption.[161] In the unlikely event that the statewide planning goals do not apply, the city must mail the notice of adoption to the DLCD not later than five working days following adoption.[162] Failure to provide the proper notice requires the city to redo the hearing after the required notice.[163]

ii. Citizen Involvement

Statewide Land Use Planning Goal 1 requires every local government to adopt and implement a citizen involvement program.[164] Local governments have typically complied by establishing neighborhood associations, to which notice of pending legislative decisions are sent so that the associations may participate and submit comments.[165]

iii. Hearing Procedure

Because legislative decisions do not involve specific persons or property, the procedural requirements for making legislative decisions are less complex than those for quasi-judicial decisions.[166] In most local governments, proposed legislative amendments are first referred to a planning commission for public hearing and recommendation before coming to the governing body for public hearing and adoption.[167]

---

[158] *Id.*
[159] INTRODUCTORY GUIDE, *supra* note 1, at 19.
[160] ORS 227.186 (Ballot Measure 56).
[161] ORS 197.610; OAR 660-018-0020.
[162] ORS 197.615.
[163] ORS 197.610; *N.E. Medford Neighborhood Coalition v. City of Medford*, 214 Or App 46 (2007).
[164] OAR 660-015-0000(1); Oregon Department of Land Conservation and Development, *Goal 1: Citizen Involvement*, available at: https://www.oregon.gov/lcd/OP/Pages/Goal-1.aspx (last accessed June 5, 2024).
[165] ORS 197.797.
[166] INTRODUCTORY GUIDE, *supra* note 1, at 19.
[167] INTRODUCTORY GUIDE, *supra* note 1, at 14.

For legislative matters, there are no concerns about contact between citizens and the decision-makers because the decision makers are seeking broad input to make a reasonable decision on the proposed amendments.[168]

During the hearing, the presiding officer should explain the nature of the hearing and ask for a staff report.[169] The presiding officer can ask people to testify in the order they signed up rather than split testimony into opponents, proponents and those from a neutral position.[170] After the close of testimony, the decision makers decide whether to adopt the proposed legislative amendment in compliance with the adoption procedures of the local government charter or code.[171] All legislative land use decisions must be enacted by ordinance. [172]

iv. Comprehensive Plan Amendments

As discussed below, comprehensive plans may be amended through post-acknowledgment plan amendments or periodic review. Comprehensive plan amendments are made as community needs, goals and resources change.[173] Depending on the type of comprehensive plan amendment, cities have additional considerations for procedure and notice.

Post-Acknowledgment Plan Amendment

Post-acknowledgment plan amendment (PAPA) is a term to describe unscheduled adjustments to a comprehensive plan.[174] PAPAs generally deal with a discrete issue in the comprehensive plan and have specific procedural requirements regarding notice and appeals.[175]

A city's comprehensive plan may contain approval criteria or a review process for PAPAs. If it does, the city must meet the approval criteria to amend the comprehensive plan. A post-acknowledgment amendment to a comprehensive plan or implementing regulation must be in compliance with any applicable statewide planning goal.[176]

State law requires local governments to notify the public when a comprehensive plan is under review or when changes are proposed or adopted.[177] After a city submits its PAPA notice to the DLCD, state law requires the DLCD to provide public notice of all proposals and adoptions received on a weekly basis.[178] The DLCD then reviews all proposed and adopted

---

[168] INTRODUCTORY GUIDE, *supra* note 1, at 19.
[169] *Id.*
[170] *Id.*
[171] *Id.*
[172] OAR 661-010-0010(3).
[173] *Training for Local Officials*, *supra* note 1.
[174] ORS 197.610 to 197.615.
[175] *Id.*
[176] ORS 197.610 to 197.615.
[177] ORS 197.610.
[178] OAR 660-018-0025.

comprehensive plan amendments for compliance with statewide planning goals.[179]

Periodic Review

Periodic review is a term used in Oregon law to describe the periodic evaluation and revision of a local comprehensive plan.[180] State law requires cities to review their comprehensive plans according to a periodic schedule established by the LCDC.[181] Cities with a population of 2,500 or more in a metropolitan planning organization or a metropolitan service district shall conduct period review every seven years.[182] Cities with a population greater than 10,000 are required to go through periodic review every 10 years.[183]

The purpose of periodic review is to ensure that comprehensive plans are:

- Updated to respond to changes in local, regional and state conditions
- Coordinated with other comprehensive plans and investments
- In compliance with the statewide planning goals, statutes and rules[184]

Once a periodic review is initiated, local governments prepare a work program to the DLCD for review and approval.[185] Citizens must be provided the opportunity to propose work tasks.[186] Once the work program is complete and approved, the local government embarks on completing the tasks in the work program.

Generally, periodic review is only a review of the fundamental building blocks of local planning such as economic development, needed housing, transportation, public facilities and services, and urban growth.[187] Certain statutes and rules are implemented through periodic review.[188] For example, the Goal 5 (Natural Resources, Scenic and Historic Areas, and Open Spaces) administrative rule (OAR 660, Division 23) states that a local government must, with some exceptions, address the requirements of the rule at its next periodic review.[189]

---

[179] ORS 197.627.
[180] ORS 197.627 to 197.636.
[181] *Id*
[182] ORS 197.629(1)(a).
[183] ORS 197.629(1)(b).
[184] *See* OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT, THE COMPLETE PLANNER'S GUIDE TO PERIODIC REVIEW: A GUIDE (2012), available at: https://www.oregon.gov/lcd/Publications/Periodic_Review_Guide_2nd_ed_2012.pdf (last accessed June 6, 2024).
[185] OAR 660-025-0100(1).
[186] OAR 660-025-0080(2)(a).
[187] *See* OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT, THE COMPLETE PLANNER'S GUIDE TO PERIODIC REVIEW: A GUIDE (2012), available at: https://www.oregon.gov/lcd/Publications/Periodic_Review_Guide_2nd_ed_2012.pdf (last accessed June 6, 2024).
[188] *Id*.
[189] *Id*.

Plan amendments may require amendments to the implementing measures such as the zoning and development code.[190] Like the PAPAs, the DLCD reviews the plans, and any revisions or updates to the plans, to make sure they align with the goals.[191] Citizens who participated at the local level may submit an objection to the DLCD about the local government's tasks.[192] After the DLCD makes a decision to approve or remand a task, the decision may be appealed to the LCDC.[193]

B. Quasi-Judicial Decisions

A quasi-judicial hearing is a type of land use proceeding in which the decision maker addresses a narrow land use issue, normally related to one or a limited number of parcels and apply existing criteria.[194] State law requires the quasi-judicial process to include items such as proper notice, a staff report, consideration of certain evidence, the right of rebuttal, the concept of raise it or waive it, and the participants have the right to appeal the final decision.[195]

The quasi-judicial decision-making process is controlled by both state law and local code and can differ substantially among local governments.[196] The general rule is that parties to a quasi-judicial decision are entitled to be treated as if they were parties to a court action --they are entitled to present and rebut evidence and testimony, to be judged by an impartial decision-maker, and to a written decision.[197]

i. Notice

For quasi-judicial decisions, specific parties must be notified at least 20 days prior to the public hearing to include the following: the applicant; property owners within 100 feet of the property if within a UGB, within 250 feet if located outside a UGB and within 500 feet if located within a farm or forest zone; and any neighborhood or community organizations whose boundaries include the site. Some local governments also require that notice be posted on the property.[198] The notice must explain the nature of the application, list the applicable criteria, and describe the procedures to be used at the hearing.[199] A violation of the notice requirements can result in a remand if it prejudices a "substantial right."[200]

---

[190] *Id*.
[191] OAR 660-025-0130.
[192] OAR 660-025-0140.
[193] OAR 660-025-0150 to 660-025-0160.
[194] ORS 197.797.
[195] ORS 197.797.
[196] *See* ORS 197.195; ORS 197.797; ORS 215.416; ORS 227.160 to 227.185.
[197] ORS 197.797; ORS 215.416; ORS 227.175; *Fasano v. Washington County*, 264 Or 574 (1973) *overruled in part*, 288 Or 585, 590 (1980).
[198] ORS 197.797.
[199] *Id*.
[200] ORS 197.828.

ii. Hearings Body

As discussed above, a quasi-judicial hearing is a type of land use proceeding in which the decision maker is acting in the capacity of a judge.[201] As such, the parties to such a quasi-judicial decision are entitled to a fair, equal, and unbiased consideration and decision from the hearings body. [202]

Prior to hearing any evidence, members of a hearings body should be given the opportunity to declare *ex parte* contacts, bias, and conflicts of interests.[203] After any such declarations, it is a best practice to ask the audience if anyone has any objections to the hearings body hearing the case.

Ex Parte Contacts

An *ex parte* contact occurs when a decision-maker receives information, discusses the land use application or visits the site in question outside the formal public hearing.[204] This does not include discussions with and information received from staff.[205] Failure to disclose such contact may result in reversal or remand of the decision.[206] If *ex parte* contact does occur, the decision-maker must disclose it on the record at the hearing, describe the circumstances under which it occurred and present any new evidence introduced through that contact.[207] The presiding officer must give parties the opportunity to rebut the substance of the *ex parte* contact.

Conflicts of Interest

Prior to participating in any discussion, a member of the planning commission or governing body must declare any potential or actual conflicts of interest.[208]

A "potential conflict of interest" exists if the land use decision *could* result in a personal financial gain or loss to the decision maker, any member of their household, or any business with which they or a household member is associated.[209] A decision maker must publicly declare the potential conflict of interest and explain the nature of the conflict prior to participating in the discussion but may continue to participate in the discussion and decision.[210]

---

[201] INTRODUCTORY GUIDE, *supra* note 1, at 19.
[202] ORS 197.835 (12).
[203] *Id*.
[204] *See McNamara v. Union County*, 28 Or LUBA 396, 398, fn. 1 (1994); *Angel v. City of Portland*, 21 Or LUBA 1, 8-9 (1991); *Training for Local Officials.*
[205] *Richards-Kreitzberg v. Marion County*, 31 Or LUBA 540, 541-542 (1996); *Training for Local Officials*
[206] *Training for Local Officials.*
[207] ORS 227.180; *Training for Local Officials.*
[208] ORS Chapter 244 (Government Standards and Practices); *Training for Local Officials*, *supra* note 1.
[209] ORS 244.020(13).
[210] ORS 244.120(2).

An "actual conflict of interest" exists if the land use decision *would* result in a personal financial gain or loss to the decision maker, any member of their household, or any business with which they or a household member is associated.[211] A decision maker with an actual conflict of interest must declare the conflict in the same manner as for a potential conflict but may not participate in the discussion or decision.[212] If the participation of the decision maker is necessary to meet a requirement of a minimum number of votes to take official action, the decision maker may vote, but may not participate in the discussion.[213]

Bias

"Actual bias" means prejudice or prejudgment of the facts to such a degree that they are incapable of rendering an objective decision on the merits of the case.[214] A member of a governing body should not participate in a decision if he or she has an actual bias regarding the application.[215] It is not bias for a governing body to decide a city's own applications.[216]

Even though bias is often subjective, not all personal views or positions are actual bias in the eyes of the law.[217] While it is not unusual for decision-makers to have a perspective or background, the threshold test is if this will influence their decision.[218] Decision-makers should carefully consider any issues related to their personal bias and be prepared to step aside if necessary.[219]

Although a court will not overturn a city council decision based upon a mere appearance of bias, perception of bias can create problems during the local hearing process, undermine acceptance of the city's decision, and lead to appeals.[220] For the reasons stated above, it is probably better to err on the side of participation.[221] It is useful, however, for the council to have a discussion about bias issues to determine some ground rules for participation.[222] This can also be a good idea to prevent the opposite problem from happening – a perception that a particular councilor has stepped down for bias to avoid having to make a controversial decision.[223]

iii. Criteria

When making a quasi-judicial decision, the governing body must apply the adopted criteria for approval contained in the local government's comprehensive plan and development

---

[211] ORS 244.020(1).
[212] ORS 244.120(2).
[213] ORS 244.120(2)(b)(B).
[214] *Spiering v. Yamhill County*, 25 Or LUBA 695 (1993).
[215] *Fasano v. Board of County Comm'rs*, 264 Or 574, 588 (1973), *overruled on other grounds*, 288 Or 585 (1980).
[216] *Pend-Air Citizen's Committee v. City of Pendleton*, 29 Or LUBA 362 (1995).
[217] *Training for Local Officials*, *supra* note 1.
[218] *Fasano v. Board of County Comm'rs*, 264 Or 574, 588 (1973), *overruled on other grounds*, 288 Or 585 (1980).
[219] *Training for Local Officials*, *supra* note 1.
[220] *Fasano v. Board of County Comm'rs*, 264 Or 574, 588 (1973), *overruled on other grounds*, 288 Or 585 (1980).
[221] *Training for Local Officials*, *supra* note 1.
[222] *Training for Local Officials*, *supra* note 1.
[223] *Training for Local Officials*, *supra* note 1.

regulations.[224] An application is judged by the criteria in effect at the time the application is filed.[225] In other words, the governing body cannot delay a decision on an application to rush through a legislative amendment to the criteria and then retroactively apply the new criteria to the pending application.[226]

If an applicant demonstrates compliance with these criteria, the application must be approved even if the governing body disagrees with the criteria or believes that additional unadopted criteria should be applied.[227] Conversely, if the applicant fails to demonstrate compliance with the applicable criteria, the governing body must deny the application even if the governing body believes that the applicable criteria are unreasonable.[228]

Criteria must not be arbitrary or so vague that it does not provide an applicant with a reasonable idea of what the applicant needs to do to obtain an approval.[229]

iv. Hearing Procedure

Quasi-judicial hearings can occur either as the initial fact-finding hearing or as an appeal of a decision. Initial hearings, such as zone changes, allow any participant to submit evidence and testimony to the decision-maker. Most development codes provide for at least one hearing before a lower body such as a planning commission or a hearings officer before the decision may be appealed to the governing body.[230]

Appeal Hearings – Judicial Review

Depending on the development code, the appeal hearing will be either a *de novo* or *on the record*. *De novo* is a Latin term that means "anew" and if a hearings body hears an appeal *de novo*, it is makes a decision as it if had not been

Tips on Hearings

- Introduce the body (planning commission, council, board, or court) and staff at the outset of the hearing.
- Body declares conflicts and *ex parte* contacts.
- Ask for objections to members hearing case.
- Use a script to ensure all required procedures are followed.
- Set a time limit for each speaker, if necessary. Try to keep speakers focused on relevant criteria.
- Train hearings body members on the importance of due process
- Use a sign-up sheet that requires names and addresses to keep track of proponents and opponents who wish to speak or receive notice of the decision or both.
- Keep control of the hearing. There are several short courses available for planning commissioners. New planning commissioners and other elected officials are encouraged to attend.
- Record names and mailing addresses of all hearing participants. These people qualify as "parties" to the hearing and must be notified of the decision.

INTRODUCTORY GUIDE, *supra* note 1, at 21.

[224] ORS 227.173.
[225] ORS 227.178(3).
[226] *Id*.
[227] *Buel-McIntire v. City of Yachats*, 63 Or LUBA 452 (2011).
[228] *Stewart v. City of Salem*, 58 Or LUBA 605 (2009).
[229] *Spiering v. Yamhill County*, 25 Or LUBA 695, 715 (1993).
[230] INTRODUCTORY GUIDE, *supra* note 1, at 14.

heard previously.[231] A *de novo* hearing means that any person may submit new evidence and testimony before the governing body.[232] Some local governments limit the arguments in a *de novo* hearing to those stated in the notice of appeal.[233]

On the record hearings means that the governing body's review on appeal is limited to argument based upon the issues raised and the evidence presented at the lower hearing.[234] Evidence is considered to be *on the record* if it has been submitted to the decision-maker as part of the application, staff report, or written or oral public testimony during the proceedings on the application.[235] The purpose of limiting evidence and testimony is to encourage issues to be fully presented and resolved at the lower level. Even if a governing body is aware of some outside information that might be relevant to the decision, it may not consider that information unless it was presented by staff or one of the parties during proceedings.[236]

Hearing Procedure

At the hearing, the presiding officer summarizes the procedures and planning staff describes the case, including the applicable criteria in the comprehensive plan or zoning code, and its recommendation.[237]

The presiding officer (or city representative) must state that evidence and testimony must be directed to the applicable criteria or criteria that the person believes should be applied and must raise issues "accompanied by statements or evidence sufficient to afford" the parties an opportunity to respond.[238] The presiding officer (or city representative) must also state, "failure of the applicant to raise constitutional or other issues relating to the proposed conditions of approval with sufficient specificity to allow the local government or its designee to respond to the issue precludes an action for damages in circuit court."[239]

Generally, applicants then present their case for approval and others may support them.[240] Opponents then have the opportunity to challenge the applicant's case.[241] All parties have the right to present and rebut evidence directed toward the applicable criteria.[242]

Failure to raise an issue orally or in writing in advance of or during the hearing precludes appeal to LUBA on that issue.[243] This is commonly referred to as the "raise it or waive it"

---

[231] *Murphy v. City of Ashland*, 19 Or LUBA 182, 190 & n 7, *aff'd without opinion*, 103 Or App 238 (1990).
[232] ORS 197.797.
[233] *Jensen Properties v. Washington County*, 61 Or LUBA 155 (2010).
[234] *See* City of Bend, Development Code § 4.1.115.
[235] *Id*.
[236] *Wicks v. City of Reedsport*, 29 Or LUBA 8, 16–17 (1995).
[237] INTRODUCTORY GUIDE, *supra* note 1, at 19.
[238] ORS 197.797(5)
[239] ORS 197.796(3)(b).
[240] INTRODUCTORY GUIDE, *supra* note 1, at 19.
[241] *Id*.
[242] ORS 197.797.
[243] *Id*.

requirement because it provides that LUBA may not consider an issue on appeal unless a party raised it at the local level with "sufficient specificity to enable the local government to respond."[244]

Unless waived by the applicant, the applicant is entitled to submit final written arguments after the record is closed to all other parties.[245] This extension is exempt from the 120-Day Rule described below.[246]

Substantial Evidence

A decision to approve or deny must be based on "substantial evidence in the whole record."[247] If a local decision is supported by substantial evidence, LUBA will not overturn the ruling even if it might reach a different conclusion on the same evidence.[248] Substantial evidence is evidence a reasonable person would rely on in reaching a decision.[249]

If LUBA concludes that a reasonable person could have reached the same conclusion as the local government in view of all the evidence in the record, it will defer to the local government's choice between conflicting evidence.[250] In order to determine whether evidence is "substantial" it must be considered in the context of conflicting evidence in the record.[251] The local hearings body is empowered to make the choice between different reasonable conclusions to be drawn from the evidence in the whole record.[252]

The Oregon Supreme Court stated that Land Use Board of Appeals (LUBA) is required to defer to a local government's interpretation of its code, so long as the interpretation is not "clearly contrary to the enacted language," or "inconsistent with express language of the ordinance or its apparent purpose or policy."[253] The 1993 Oregon Legislature incorporated this court holding standard into Oregon law.[254]

However, the Oregon Court of Appeals adopted a more deferential review of the local governing body's interpretation when it applied the *PGE* rules of construction to review the text and context of the local provisions, overturning only if the local decision is "clearly wrong."[255] More recently, the Court of Appeals has indicated that the courts should defer to a city's

---

[244] ORS 197.835.
[245] ORS 197.797(6)(e).
[246] *Id*.
[247] ORS 197.835.
[248] *Id*.
[249] *City of Portland v. Bureau of Labor and Ind.*, 298 Or 104, 119 (1984).
[250] *Younger v. City of Portland*, 305 Or 346, 360 (1988).
[251] *Id*.
[252] *Id*.
[253] *Clark v. Jackson County*, 313 Or 508 (1992).
[254] ORS 197.829.
[255] *Church v. Grant County*, 187 Or App 518 (2003) (holding that the *Clark* test and the statute are more correctly characterized as consistent with the rules of construction announced in *PGE v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d 1143 (1993).

interpretation of its own code if that interpretation is "plausible." [256]

Continuances

Any party can request either a continuance or an open record, and the choice of which process will be used is up to the hearings body.[257] After the initial continuance or open record period, the parties must be permitted at least seven days to respond to the new evidence submitted, and the extensions are not exempt from the 120-Day Rule, unless the continuance is agreed to by the applicant.[258]

Findings/Orders

The governing body's final decision must be expressed in writing.[259] This decision, typically referred to as the "*Findings of Fact, Conclusions of Law and Order*" sets forth the relevant criteria, state the evidence on which the governing body relies, and explains the justification for the decision based on the criteria and the facts. Typically, a governing body will make a preliminary oral decision at the conclusion of the public hearing, which is followed up by adoption of the written decision at a later meeting.

Often, the winning side will request an opportunity to draft the findings. This does not violate any state law and may save staff resources.[260] However, the findings are official statements from the city and should be carefully reviewed to ensure they accurately reflect the facts of the case and the governing body's judgment.

Once the final decision has been made, a written notice of the decision must be mailed to the applicant, all parties at the public hearing, and those who requested it.[261] In the case of a comprehensive plan text or map amendment or a zoning change, where the 45-day notice was sent to the DLCD, a notice of the decision must be given to the DLCD within five working days of the final decision.[262]

120-Day Rule

Cities must make a final decision on a land use application, including resolution of all local appeals, within 120 days of the filing of a complete application.[263] If the local government fails to do so, then the applicant can file a *writ of mandamus* in circuit court to compel the local government to approve the application.[264] If the applicant prevails on the writ, the court can

---

[256] *Siporen v. City of Medford*, 231 Or App 585, 598-99 (2009).
[257] ORS 197.797(6).
[258] *Id*.
[259] OAR 661-010-0010(3).
[260] *Dimone v. City of Hillsboro*, 41 Or LUBA 167 (2001).
[261] ORS 227.175.
[262] ORS 197.615.
[263] ORS 227.178.
[264] ORS 227.179.

make the local government pay the applicant's attorney fees.[265]

V. APPEALS

In the local development code, it will outline a local appeal process. Generally, an appeal of the planning commission decision will go to the elected officials, but some jurisdictions use a hearings officer.[266]

A final local land use decision can be appealed to LUBA within 21 days of the final local decision.[267] LUBA has exclusive jurisdiction to review "land use decisions" and "limited land use decisions."[268]

Quasi-judicial decisions that are not land use decisions may be appealed to a circuit court as a writ of review.[269] As discussed above, there is a body of law on what actions are considered a land use decision. Once appealed, the city is responsible for compiling the record.[270]

A. Administrative Review (LUBA)

LUBA is a three-member administrative hearings body appointed by the governor.[271] Although the members of LUBA are not judges (but they must be attorneys), they serve as the initial appeal body for almost all land use cases in Oregon.[272] LUBA's procedure is very similar to filing a brief and arguing a case before the Court of Appeals or Supreme Court.[273]

LUBA publishes case notes that describe important LUBA holdings that are organized by subject matter. The notes are available at: https://www.oregon.gov/luba/Pages/Headnotes.aspx (last accessed June 12, 2024).

LUBA can affirm, reverse, or remand the governing body's decision.[274] LUBA will typically remand the decision when it determines that the local government's decision is not supported by substantial evidence or the local government failed to apply or correctly apply an applicable criterion.[275] LUBA is required to make a final decision within 77 days of the filing of the record.[276]

---

[265] *Id*.
[266] INTRODUCTORY GUIDE, *supra* note 1, at 22.
[267] ORS 197.830.
[268] ORS 197.015(10); 197.015(12); 197.825(1).
[269] ORS 34.020.
[270] OAR 661-010-0025.
[271] ORS 197.810.
[272] *Id*.
[273] OAR 661-010-0000 to 661-010-0075.
[274] ORS 197.835.
[275] *Id*.
[276] ORS 197.830(14).

LUBA can award attorney fees if the losing party fails to present a position that is well founded in law or factually supported.[277] LUBA can also award attorney fees to a prevailing party on a takings claim.[278] However, award of attorney fees by LUBA rarely occurs.

When LUBA remands a case, the governing body must reconsider its decision based on LUBA's order.[279] Local governments must respond to a LUBA remand within 90 days of a request from the applicant for a decision.[280]

B. Judicial Review

LUBA's decision may be appealed within 21 days to the Oregon Court of Appeals.[281] Review at the Court of Appeals is also expedited; except in limited circumstances, the court must hold oral argument within 49 days of the transmittal of the record and to make a decision no later than 91 days after oral argument.[282]

VI. Other Issues

In addition to the issues discussed above that are addressed in a city's development code, cities have encountered other issues such as urban growth boundary amendments, takings issues under the U.S. Constitution's Fifth Amendment, nonconforming uses, and land use compatibility statements.

A. Urban Growth Boundary Amendments

One of the most fundamental aspects to Oregon's land planning is the creation of urban growth boundaries (UGBs) to place limits on urban development. Statewide Goal 14 requires every city, in coordination with the affected county, to establish an urban growth boundary around the city limits containing a 20- year supply of buildable land for residential uses.[283] The intent of Goal 14 is to manage urban development to a well-defined, contiguous area, it is believed that growth can be accommodated without urban sprawl.[284]

[277] ORS 197.830(15)(b).
[278] ORS 197.796(5).
[279] ORS 227.181
[280] *Id*.
[281] ORS 197.850.
[282] ORS 197.850(7); ORS 197.850(10).
[283] OAR 660-015-0000(14).
[284] *Id. See also* Oregon Department of Land Conservation and Development, *Goal 14: Urbanization*, available at: https://www.oregon.gov/lcd/op/pages/goal-14.aspx (last accessed June 14, 2024).

Metro establishes the Metro UGB for cities within its jurisdiction.[285] Within the Metro UGB, each city then establishes an urban services boundary within which the particular city commits to annex and serve the territory.[286]

In order to protect land adjacent to the UGB from being developed incompatibly with future urban land needs, a local jurisdiction may designate urban reserve territory.[287] The urban reserve area reflects a 30-to-50-year land need beyond the current UGB.[288] Once designated, an urban reserve becomes the first priority territory for expansion of the UGB when such need is determined.[289]

Oregon law requires a review of the 20-year land supply and require either adjustments to the UGB or to land use regulations to accommodate need.[290] Once a need is identified, the factors of Goal 14 are applied to determine the appropriate area for expansion.[291] Generally, non-resource land is preferred over resource land such as farm or forest.[292] Urban growth boundary amendments of more than 100 acres in the Metro area or more than 50 acres in cities with a population of 2,500 or more must be submitted to the Land Conservation and Development Commission (LCDC) under the period review process.[293] Appeal of the LCDC's decision goes to the Oregon Court of Appeals.[294]

To give local governments better access to the process of updating a comprehensive plan, in 2016 the LCDC adopted a simplified UGB process.[295] The simplified process reduces much of the complexity while encouraging cities to increase their development capacity and maintain a supply of land that is ready for development. Unlike the traditional UGB expansion process, which plans for a 20-year period, the simplified UGB process plans for a 14-year period.[296]

B. Takings

The United States Constitution and the Oregon Constitution prohibit the taking of private property for public use without due process and just compensation.[297] In land use planning, there are two primary ways that courts have found that local governments can violate the takings clause without due process or just compensation:

---

[285] OAR 660-007-0000 to OAR 660-007-0060; Metro Code Chapter 3.07; Metro, *Urban Growth Management Functional Plan*, available at: https://www.oregonmetro.gov/library/urban-growth-boundary/lookup (last accessed June 14, 2024).
[286] *Id*.
[287] ORS 197A.230 to 197A.250; OAR 660-027-0005 to OAR 660-027-0080.
[288] *Id*.
[289] ORS 197A.285; ORS 197A.355.
[290] ORS 197A.015 to 197A.314; OAR 660-015-0000(14).
[291] *Id*.
[292] *Id*.
[293] ORS 197.626.
[294] *Id*.
[295] ORS 197A.310 to ORS 197A.325.
[296] *Id*.
[297] U.S. Const., amend. V; Or Const, Art. I, § 18.

- *Inverse Condemnation*. If a zoning regulation goes "too far" and effectively appropriates private property for a public use, a court can invalidate the regulation and/or require just compensation, including for compensation for a "temporary taking."[298]

  Such a "regulatory taking" is very difficult to prove – basically the regulation must eliminate all reasonable economic use from a property and a plaintiff must "ripen" the claim by applying for any other use or form of relief allowed by the local ordinance (less valuable use, variances, zone changes).[299]

- *Exactions*. An exaction is a requirement that an owner give up a property right, such as extra right-of-way, as a condition of approval of a land use application.[300] An exaction is constitutional if the local government demonstrates that it complies with the following:

  - The exaction must advance a legitimate state interest;
  - The exaction must have an "essential nexus" to that state interest (i.e., directly help to achieve that interest); and
  - The exaction must "roughly proportional" (i.e., related in nature and degree) to the impacts of the development.[301]

Oregon law provides a method of challenging conditions of approval that may be unconstitutional exactions.[302] An applicant for a land use decision must bring a case within 180 days after the final decision either at LUBA or a circuit court.[303] The applicant must have raised the issue at the local level and exhausted all local appeals.[304] As discussed above, the city must: (1) state at the beginning of a hearing that failure to raise an issue with regard to a condition of approval precludes appeal; and (2) provide the condition of approval with sufficient specificity to enable the applicant to contest the decision before the final local hearing is closed.[305]

Recently, the U.S. Supreme Court held that development fees and exactions imposed on a broad class of property owners through legislative action are subject to the same nexus and proportionality analysis as those applied on an ad hoc basis.[306] As a result, system development charges following the careful analysis required by Oregon law will likely be sufficient. However, high fees that are not closely related to the nexus and proportionality of the proposed development are not constitutional.

---

[298] *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).
[299] *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 US 302 (2002)
[300] *Dolan v. City of Tigard*, 512 US 374 (1994); *Sheetz v. El Dorado County*, 601 US _ (2024).
[301] *Id*.
[302] ORS 197.796.
[303] ORS 197.796.
[304] *Id*.
[305] *Id*.
[306] *Sheetz v. El Dorado County*, 601 US _ (2024)

C. Nonconforming Uses

A *nonconforming use* is a use or structure that was legally established but is no longer permitted because zoning regulations have been applied or changed since the use or structure was established.[307] A common example is a residence in a commercial zone. Nonconforming uses may be created because the local government made a conscious decision to plan for a structure or an area to eventually convert to a different use, such as houses in the downtown.[308] Changes in state regulations regarding farm and forest lands can create nonconforming uses in rural areas, such as a school near a city in a farm zone.[309]

Most development codes allow continuation of nonconforming uses.[310] Maintenance and repair of nonconforming structures are usually allowed, but expansion and replacement are often limited or prohibited.[311] Different codes treat replacement in the event of a natural hazard or disaster in different ways.[312] There is generally a provision for replacement of a building that has been destroyed by fire or other disaster, often within one year, but not all codes permit it.[313]

State law guides alteration, restoration, and replacement of nonconforming uses in counties.[314] There is no such statute that applies to cities. If your code has provisions for altering or expanding a nonconforming use, it will likely include approval criteria.[315]

D. Land Use Compatibility Statements

State agency actions must be completed in a manner that is consistent with the local comprehensive plan.[316] The vehicle through which a city confirms that a proposal is consistent with the plan is a land use compatibility statement, or *LUCS*.[317] Common LUCS requests include new or amended water rights, on-site sewage disposal approval, and wetland fill or removal.[318]

For example, the Oregon Department of Environmental Quality (DEQ) activities affecting land use and the requirement for a LUCS may be found in Oregon Administrative Rules (OAR) Chapter 340, Division 18. A LUCS is required for nearly all DEQ permits and certain approvals of plans or related activities that affect land use prior to issuance of a DEQ

[307] INTRODUCTORY GUIDE, *supra* note 1, at 17.
[308] *Id.*
[309] *Id.*
[310] *Id.*
[311] *Id.*
[312] *Id.*
[313] *Id.*
[314] ORS 215.130.
[315] INTRODUCTORY GUIDE, *supra* note 1, at 17.
[316] ORS 197.180(1)(b); OAR 660-030-0070; OAR 660-015-0000(2).
[317] *Flowers v. Klamath County*, 17 Or LUBA 1078, 1083 (1989).
[318] INTRODUCTORY GUIDE, *supra* note 1, at 18.

permit or approval.[319]

The DEQ and other state agencies with permitting or approval activities that affect land use are required by Oregon law to be consistent with local comprehensive plans and have a process for determining consistency.[320] Signing a LUCS is generally not a land use decision that requires public notice and opportunity for appeal.[321] In certain unusual circumstances, deciding whether the proposed use is permitted may require discretion requiring notice of the decision and opportunity for appeal.[322]

[319] OAR 340-018-0000 to OAR 340-018-0200.
[320] *Id*.
[321] INTRODUCTORY GUIDE, *supra* note 1, at 18.
[322] *Id*.

Oregon Municipal Handbook

CHAPTER 26:
ECONOMIC DEVELOPMENT

League of Oregon Cities

Published by the League of Oregon Cities
October 2022

Chapter 26: Economic Development

Introduction

This chapter addresses different avenues municipalities can explore to spur economic development within their jurisdiction. Topics will include urban renewal, economic improvement districts, and enterprise zones.

I. What is Economic Development
II. Urban Renewal
III. Economic Improvement Districts
IV. Enterprise Zones

Special thanks to Emily Matasar and Ashley Driscoll of Beery Elsner & Hammond LLP for their assistance drafting this chapter.

What is Economic Development?

Economic development is a concerted effort on the part of municipalities to influence the direction of private sector investment toward opportunities that can lead to sustained economic growth within the community. In turn, sustained economic growth can enhance local incomes, spur profitable business opportunities for employers and generate tax revenues, which can then be reinvested to maintain the infrastructure to support continued growth.

This chapter focuses on the primary tools cities have to encourage economic growth and development within their communities: urban renewal, economic improvement districts and enterprise zones.

Urban Renewal

Background:

Urban renewal is a re-development tool that cities and counties use to revitalize blighted areas within their communities. "Blight" means areas that "are detrimental to the safety, health or welfare of a community."[1] Indicators of blight include buildings that are unsafe or unfit for their intended purpose, overcrowding, and inadequate streets and other rights of way.[2]

Dozens of Oregon cities and counties already utilize urban renewal to add economic vibrancy to otherwise blighted areas in their communities. Re-vitalized communities may attract business, create jobs, and stimulate a local economy, while property value growth increases local tax rolls. In addition, urban renewal may provide a city or county with increased flexibility in working with private parties to complete development projects.

[1] ORS 457.010(1).
[2] *Id*.

Urban renewal projects and programs can include: the building of infrastructure such as streets or water, sewer or wastewater utilities to support new development; construction of public buildings or facilities; streetscape and transportation improvements such as lighting, trees, sidewalks, and pedestrian or bicycle routes; storefront grant or recruitment and retention programs for existing businesses; historic preservation projects; and more. If a city or county is considering urban renewal, the first step is to conduct a preliminary feasibility study to determine whether a blighted area actually exists, what projects would address the blight, and specific parameters for the urban renewal area.

Urban Renewal Agency Creation and Authority:

Each city and county inherently contains a public body known as an urban renewal agency ("URA").[3] However, such URA is not authorized to act until the city or county's governing body permits the URA to do so.[4] A city or county activates its URA by declaring, via nonemergency ordinance, that a blighted area exists and that there is a need for a URA to function in the area.[5] The ordinance must specify whether the URA will exercise its powers via: (1) a housing authority; (2) a designated board or commission of at least three members; or (3) the city or county's governing body itself (provided that the URA is a legal entity separate from the governing body of the city or county).[6] Broadly, a URA may make plans to rehabilitate and repair buildings, enforce land use laws, rehouse persons and property displaced by urban renewal projects,[7] borrow money and accept financial assistance,[8] and more.

Plan Requirements and Implementation:

Once activated, the URA has the responsibility of drafting an urban renewal plan and accompanying report. An urban renewal plan must include the following components:[9]

a. A description of each urban renewal project to be undertaken.
b. An outline of the major actions planned for the urban renewal area.
c. A map and legal description of the urban renewal area.
d. An explanation of the plan's relationship to local objectives.
e. An indication of proposed land uses, maximum densities, and building requirements for each urban renewal area.
f. A description of temporary or permanent relocation methods used for persons and businesses within the renewal area.
g. An indication of what properties (if any) may be acquired by the URA and how those properties will be disposed (by sale, lease, or otherwise), together with a schedule for acquisition and disposition.
h. If the plan includes the use of ad valorem taxes or tax increment financing, the maximum amount of indebtedness that may be issued or incurred under the plan.

[3] ORS 457.035(1).
[4] *Id*.
[5] *Id*.
[6] ORS 457.045.
[7] ORS 457.170; ORS 457.180.
[8] ORS 457.190.
[9] ORS 457.085(2)(a)-(j).

i. A description of possible future "substantial" amendments to the urban renewal plan, including amendments that (1) add more than one percent of land to the urban renewal area and/or (2) increase the maximum amount of indebtedness that may be issued or incurred under the plan.
j. If a project includes a public building (such as a fire station, police station, or public library), an explanation of how the public building serves or benefits the urban renewal area.

Urban renewal plans are also subject to statutory limitations and requirements. If a plan includes the use of ad valorem taxes, the associated urban renewal area is limited by its maximum total acreage and assessed value.[10] If a city or county has a population of more than 50,000, these limits are either 15% of the total assessed value of that city or county, or 15% of the total acreage of that city or county.[11] If a city or county has a population of less than 50,000, these limits are either 25% of the total assessed value of that city or county, or 25% of the total acreage of that city or county.[12]

In addition, plans must conform with a city or county's acknowledged comprehensive plan[13] (though a city or county may approve a URA without conformance to its comprehensive plan if the area is in need of re-development due to a flood, fire, hurricane, earthquake, storm, or other natural disaster for which the city or county has sought assistance under federal law).[14] Furthermore, any given property may only be included in one urban renewal area at a time.[15] Finally, each plan must include the maximum amount of indebtedness that may be issued or incurred under the plan.[16] This maximum amount of indebtedness must be based on good faith estimates and comply with statutory limitations.[17]

The report that accompanies an urban renewal plan must contain:[18]

a. A description of the conditions in the urban renewal area and the expected impact of the plan;
b. Reasons for the selection of each urban renewal area in the plan;
c. The relationship between each project to be undertaken under the plan and the existing conditions in the urban renewal area;
d. The estimated total costs for each project and the sources of moneys to pay the costs.
e. The anticipated completion date for each project;
f. The estimated amount of moneys required for each urban renewal area under and the anticipated year in which indebtedness will be retired or otherwise provided for;
g. A financial analysis of the plan with enough information to determine the plan's feasibility;

[10] ORS 457.420.
[11] ORS 457.420(2)(a)(A) & (B).
[12] ORS 457.420(2)(b)(A) & (B).
[13] ORS 457.085(3).
[14] ORS 457.160.
[15] ORS 457.420(3).
[16] ORS 457.190(3)(a).
[17] ORS 457.190(4).
[18] ORS 457.087(1)-(9).

h. A fiscal impact statement that estimates the impact of the tax increment financing, both until and after the indebtedness is repaid, upon all districts levying taxes on property in the urban renewal area; and
i. A relocation report that includes (a) an analysis of existing residents or businesses required to relocate as a result of the urban renewal agency's implementation of the plan; (b) a description of the methods used for the relocation of persons living, and businesses situated, in the urban renewal area; and (c) the cost range of each existing housing unit to be destroyed or altered and the new units to be added.

Once the urban renewal plan and report are drafted, the URA submits them to the city or county's governing body, as well as each taxing district affected by the plan, for review and approval.[19] Affected taxing districts have 45 days to provide written recommendations on the plan to the URA, and urban renewal plans that include public building projects require special concurrence from affected taxing districts.[20] After the statutorily required 45-day period has passed, the city or county governing body may approve the plan via non-emergency ordinance.[21] The city or county must follow all public notice and hearing requirements throughout its approval process.[22] Finally, the city or county must send a copy of the ordinance approving the urban renewal plan to the URA, which must record the plan with the recording officer of each included county.[23]

Following the plan's approval, the URA must prepare an annual financial report for the city or county before January 31 of each year.[24] Designed to encourage public transparency into urban renewal financing, each URA must annually report its maximum indebtedness, how much of that money has already been used, and an estimate of future money to be received.[25]

Urban Renewal Financing

Although a URA may use a variety of methods to fund its urban renewal effort,[26] tax increment financing ("TIF") is the most common funding mechanism. Upon a plan's adoption, the county assessor establishes the current assessed value of all property in the urban renewal area and then freezes that tax base.[27] As tax values increase beyond this frozen base, the resulting tax revenues become the URA's and can be used to finance the plan. Any tax revenue that is generated above the frozen base is called the "increment." When an urban renewal plan expires, the frozen base does as well, and the city or county will resume receiving taxes on the area's total assessed value.[28] State law establishes the process for evaluating a property's assessed value, the

[19] ORS 457.089.
[20] *Id*.
[21] ORS 457.095
[22] *See* ORS 457.095-ORS 457.120.
[23] ORS 457.125.
[24] ORS 457.460.
[25] *Id*.
[26] In addition to TIF, a URA may use the sale of property, loans, grants, and bonds to finance an urban renewal effort.
[27] ORS 457.430(1).
[28] ORS 457.450.

maximum total and annual increases a county assessor may make, and the proper procedure for handling surplus funds.[29]

Amendments, Transfers of Authority, and Terminations

Any substantial change made to an urban renewal plan must be approved and recorded in the same manner as the original plan.[30] A URA may not increase a plan's urban renewal area by more than 20 % of the total land area of the existing plan area without taking any subsequent reductions of the area into account.[31] In addition, a URA may only increase the maximum indebtedness under a plan if the total increase from all amendments does not exceed 20 % of the plan's initial maximum indebtedness (as adjusted by statute).[32]

A URA may transfer its authority via ordinance to another authorized body at any time.[33] However, a URA may only be terminated if the need for it no longer exists.[34] If terminated, all files, facilities, and personnel will transfer to city or county and the city or county will take the URA's place in any outstanding legal actions, contracts, or other obligations of the URA.[35] A URA may not be terminated if any portion of indebtedness still exists.[36]

[29] ORS 457.470; ORS 457.450.
[30] ORS 457.220(2).
[31] ORS 457.220(3).
[32] ORS 457.220(4).
[33] ORS 457.055.
[34] ORS 457.075.
[35] *Id*.
[36] *Id*.

EIDs: Economic Improvement Districts

Economic Improvement Districts ("EIDs") are public-private partnerships in which local property and business owners elect to make a collective contribution to the maintenance, development, and promotion of the district. A city may raise revenues for an EID in two distinct ways: (1) assessments on real property within the district; and (2) new or increased business license fees on businesses located in the district. All funds raised through either method must be used for "economic improvements" benefitting properties and businesses within the district. Qualifying improvements include planning or management of development or improvement activities, landscaping and maintenance of public areas, promotion of commercial activity or public events, activities in support of business recruitment and development, improvements in parking systems or enforcement, and other similar projects.[37]

To create an EID, the city must draft an ordinance establishing a procedure for raising revenue (whether by assessment or business license fee) for the cost of the economic improvement, which the ordinance must describe.[38] In particular, the EID ordinance must:

- Describe the qualifying economic improvement project to be undertaken or constructed;
- Contain a preliminary estimate of the probable cost of the economic improvement and, if imposing assessments, the proposed formula for apportioning cost to specially benefited property;
- Describe the boundaries of the benefiting district;
- Specify the number of years, up to five, in which assessments will be levied or business license fees will be imposed; and
- Include provisions for notices of the economic improvement, assessment/fee, and required hearing to affected property owners or business operators.[39]

Not sooner than 30 days after the city provides notice to affected parties, the city must hold a public hearing, called a remonstrance hearing, to allow those affected by creation of the district to voice support or opposition. If 33 % or more of the parties affected by the assessment or license fee object, then the ordinance fails and the city may not create the EID [40] If less than 33 % object and the city still wishes to move forward with the EID, then the city may not levy an assessment on the property of an owner who objected at the public hearing,[41] but may decide whether or not to exclude a person conducting business who objected to the business license fee.[42]

If, after the hearing, the city passes the ordinance establishing the EID and imposes assessments on properties within the district, then it must mail or personally deliver notice of the final

[37] ORS 223.112(2); ORS 223.141(4).
[38] ORS 223.114(1); ORS 223.144(1).
[39] ORS 223.117(1).
[40] For assessments, the economic improvement project must be terminated "when written objections are received at the public hearing from owners of property upon which more than 33 percent of the total amount of assessments is levied." ORS 223.117(2)(e). For business license fees, the project must be terminated "when written objections are received at the public hearing from more than 33 percent of persons conducting business within the economic improvement district who will be subject to the proposed business license fee." ORS 223.147(2)(d).
[41] ORS 223.118(1)(a).
[42] ORS 223.147(2)(c)-(d).

assessment to each affected property.[43] The notice must explain that the owner of the affected property has the right to apply—within ten days after notice of final assessment is first published—to the city to pay the assessment in installments over a period of up to 30 years, with interest. [44] If not paid within the ten-day period, final assessments as well as accrued and unpaid interest and penalties become a lien on the property.[45] The city must keep detailed records of the EID, descriptions of the affected properties, names of property owners, and amounts of unpaid final assessments.[46] In addition, a city may issue bonds up to the unpaid balance of the final assessment plus the amount necessary to fund a debt service reserve and to pay financing costs from the bonds.[47]

Once an EID is established, it becomes a mandatory funding source from within the district for the benefit of the entire district. EIDs have used program funding for services such as graffiti abatement, sidewalk cleaning, and snow removal, as well as events such as a sidewalk sale and holiday tree lighting. Many cities opt to form advisory committees primarily composed of impacted property owners and businesses to advise the city on EID expenditures.[48]

When an EID expires, the city may renew it by passing a new ordinance—and holding another hearing—as long as the city complies with the requirements of establishing a new EID.

EIDs are popular with developers because the district benefits from the improvements relatively quickly but the payment obligations may be deferred for up to 30 years or even transferred to future property owners (who generally must pay the outstanding assessment in full when the property is transferred).

[43] ORS 223.127(2); ORS 223.210(1)
[44] ORS 223.127(2); ORS 223.210(1); ORS 223.215(2).
[45] ORS 223.127(1); ORS 223.230(3); ORS 223.393.
[46] ORS 223.127(2); ORS 223.230(1).
[47] ORS 223.127(2); ORS 223.235(1)-(2).
[48] ORS 223.119; ORS 223.151.

Enterprise Zones

Background:

Another economic development tool for local governments is enterprise zones. Enterprise zones exempt certain businesses within the zone from local property taxes on new investments for a period of time in order to attract private business investment, help resident businesses reinvest and grow, and ultimately revitalize areas of the state experiencing economic hardship.

The Oregon Legislature originally established Oregon's enterprise zone program in 1985, allowing a maximum of 30 zones that would each relieve tax burdens for qualifying businesses for ten years.[49] By 1989, the governor had designated all 30 zones throughout the state, and the cap was increased several times until 2015 when the Legislature lifted it entirely.[50] As of the date of publication, there are 76 enterprise zones in the state: 58 rural and 18 urban.[51] The program is set to sunset in June 30, 2025, unless extended by the Legislature.[52]

Cities, counties, tribal governments, and ports, or a combination of such jurisdictions, may designate an enterprise zone in an area that exhibits significant hardship based on economic measures set out in statute.[53] The local government(s) that designated the zone becomes the zone's "sponsor," and administers the program within the zone,[54] while Business Oregon ensures the zone and its sponsor(s) complies with the statutory requirements laid out in state law. There are currently five types of enterprise zones: standard, Long-term Rural Enterprise Zone Facilities, Electronic Commerce Zones, Tribal, and Rural Renewable Energy Development Zones.[55] Each type of enterprise zone has different requirements, benefits, and incentives, but this section focuses on the standard enterprise zone.

Requirements to Designate Enterprise Zone:

An enterprise zone must be located in an area in which:

- 50% or more of the households have incomes below 80 % of the median income of the state;
- The unemployment rate is at least two percentage points greater than the comparable unemployment rate for the state;
- The percentage of persons or families below the federal poverty level is at least five percentage points higher than the statewide poverty incidence rate;
- The 10-year change in population is at least 15 percentage points below the state's corresponding population change; or

[49] Enterprise Zones in Oregon: Local Sponsorship, https://www.oregon.gov/biz/Publications/Sponsorship%20Guidebook.pdf ("Sponsorship Guidebook"), p.2.
[50] LPRO Issue Brief, p.1.
[51] BizOr website, https://www.oregon.gov/biz/programs/enterprisezones/Pages/default.aspx (last visited 10/7/2022).
[52] ORS 285C.255.
[53] ORS 285C.090.
[54] ORS 285C.050(20)
[55] LPRO Issue Brief, p.2.

- Equally severe economic indicators that substitute for those specified that are evaluated by Business Oregon.[56]

An urban zone may not exceed 12 square miles in size, while a rural zone may not exceed 15 square miles. A zone may be noncontiguous (subject to distance requirements),[57] and multiple jurisdictions may join together to cosponsor a single zone.

Once a jurisdiction identifies an area as a potential enterprise zone, it may begin the process of designation. The jurisdiction should begin gathering the data necessary to demonstrate local economic hardship to qualify for an enterprise zone, and determine the other jurisdictions including local taxing districts, counties, ports, or tribal governments that may need to participate in or consent to the designation. Because Business Oregon oversees the enterprise zone program throughout the state, a city that is interested in exploring designating an enterprise zone should engage Business Oregon early in the process.

Designating an enterprise zone officially begins when the sponsoring government sends a formal advisory to Business Oregon stating its intent to designate an enterprise zone and providing documentation such as a map indicating the proposed zone's boundary and data on social and economic conditions that support designation as an enterprise zone.[58] Business Oregon reviews the documentation submitted, determines whether it meets the statutory requirements, and notifies the jurisdiction of its determination.

The sponsoring government must hold a public meeting to discuss the proposed enterprise zone, and must make the map, data, and written commentary of other jurisdictions available to the public at the meeting.[59] At least 21 days before the meeting, the sponsoring government must provide notice of the meeting to the relevant local taxing districts, soliciting written comments and inviting representatives to appear at the meeting, and must also provide notice to the county assessor. [60]

Not sooner than seven days after the public meeting, the sponsoring government must designate the enterprise zone by duly passed resolution, which must acknowledge any cosponsors and their duties, and must state that the zone does not compromise or override other ordinances or affect comprehensive plans.[61] Except in cases of re-designation, the enterprise zone designation becomes effective on the adoption date of the last resolution by a sponsoring or consenting government.[62]

Zones terminate by law on the June 30 that occurs 10 years after the zone designation, unless terminated earlier by the zone sponsor(s).[63]

---

[56] ORS 285C.090; Sponsorship Guidebook, p.12.
[57] ORS 285C.090(3)-(4).
[58] OAR 123-650-4000(1).
[59] OAR 123-650-5100.
[60] OAR 123-650-5000.
[61] OAR 123-650-4800.
[62] Sponsorship Guidebook, p.13.
[63] ORS 285C.245(2).

Benefits to Eligible Businesses:

The standard enterprise zone exemption provides for total exemption from ad valorem property taxation for eligible businesses within the zone for three tax years,[64] but that period may be longer for rural enterprise zones[65] or upon agreement of the sponsor and the eligible business.[66] In addition to the standard exemption, a sponsor may add local incentives such as discounts in fees, regulatory assistance, or enhanced public services, [67] and there are additional optional benefits for construction-in-process[68] and publicly-owned real estate.[69]

In order to be eligible for the benefits in an enterprise zone, a business must operate within the zone and must provide goods, products or services to other businesses, organizations, or itself. Qualifying activities include manufacturing, assembly, fabrication, processing, shipping or storage.[70] Businesses engaged in retail sales or services, child care, housing, retail food service, health care, entertainment, financial services, professional services, leasing space to others, property management, or construction are explicitly excluded, as are businesses providing goods or services to the general public or for personal or household use.[71] Although tourism businesses are generally excluded from enterprise zone benefits, within the first six months of designation, a sponsor may elect by resolution to extend enterprise zone benefits to hotels, motels or destination resorts within the enterprise zone.[72]

To qualify for enterprise zone benefits, an eligible business must increase its full-time permanent employment within the zone by the greater of ten percent of its workforce or add one additional employee,[73] and must maintain a consistent level of business operations throughout the exemption period.[74] In addition, the eligible business may not diminish employment elsewhere in the state.[75] Finally, with few exceptions, the eligible business must enter into a first-source hiring agreement with a publicly funded job training provider that refers qualified candidates for jobs at the eligible business.[76]

Eligible investments include newly constructed buildings; major additions, modifications or improvements of existing buildings; and large, immobile equipment and tools;[77] and the minimum investment required is $50,000.[78] Non-qualifying investments include land, existing

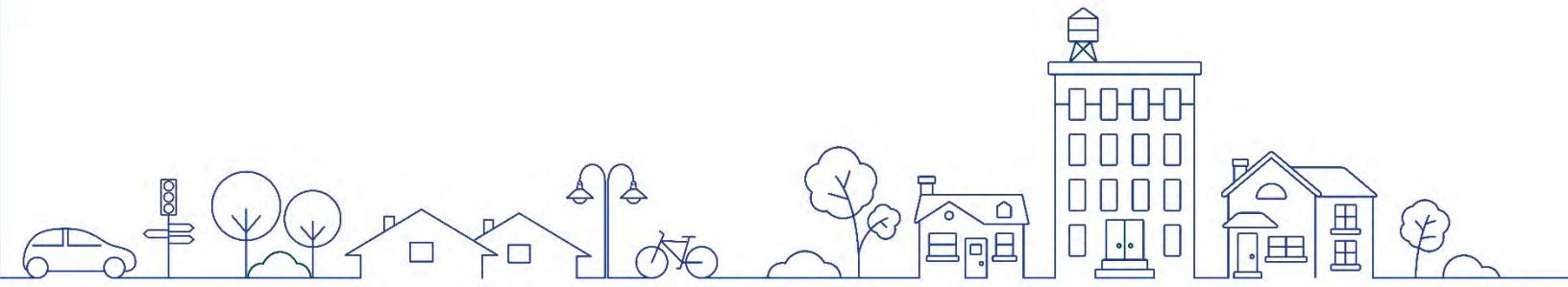
[64] ORS 285C.175.
[65] ORS 285C.403(3)(c).
[66] ORS 285C.160.
[67] ORS 285C.105(1)(b); Sponsorship Guidebook, p.6.
[68] ORS 285C.170.
[69] ORS 285C.110.
[70] ORS 285C.135(1).
[71] ORS 285C.135(2).
[72] ORS 285C.070.
[73] ORS 285C.200(1)(c).
[74] ORS 285C.210.
[75] ORS 285C.200(4).
[76] ORS 285C.050(10); ORS 285C.215.
[77] ORS 285C.180(1).
[78] ORS 285C.185(1).

buildings, existing equipment, most rolling stock (such as forklifts and delivery trucks) and most personal property.[79]

[79] ORS 285C.180(3).

Oregon Municipal Handbook

CHAPTER 27:
MARIJUANA LAW



League of Oregon Cities

Published by the League of Oregon Cities
May 2021

Table of Contents

Chapter 27: Marijuana Law

This chapter begins with the history of marijuana as a controlled substance under federal law and the recent changes to how this criminal drug law is enforced. In Part II, the chapter turns to Oregon's marijuana laws, which include the Oregon Medical Marijuana Act and the Adult and Medical Use of Cannabis Act. This part addresses how the state regulates marijuana-related activities and how these activities are taxed under state law. In Part III, this chapter addresses the role of local governments under these laws and the degree of autonomy that cities possess under their home rule authority to tax or regulate marijuana. Finally, this chapter offers four appendices with sample ordinances that address "opting out" of local marijuana establishments, as well as a sample tax measure and a sample ordinance that imposes time, place, and manner restrictions on marijuana businesses. For more information on Oregon's marijuana laws, visit the LOC's website for its Topics A-Z webpage on marijuana.[1]

[1] *Marijuana Overview*, League of Or Cities, https://www.orcities.org/resources/reference/topics-z/details/marijuana (last accessed April 7, 2021).

I. FEDERAL LAW

The history of marijuana as a prohibited substance under federal law dates back as early as 1937 with the enactment of the Marijuana Tax Act, a law that effectively criminalized the possession of marijuana for most purposes.[2] In the 1950s, the U.S. enacted stricter sentencing laws that imposed mandatory minimum sentences for drug-related offenses; these laws criminalized "narcotics" and defined this term to include marijuana.[3] After a 1969 Supreme Court ruling declared certain aspects of those laws unconstitutional, the U.S. enacted the Controlled Substance Act of 1970 (CSA), which continued to criminalize unauthorized possession of marijuana, as well as other drugs like heroin and morphine.[4]

Today, marijuana remains a Schedule I controlled substance under the CSA.[5] Schedule I substances are those for which the federal government has found there is **(1)** a high potential for abuse; **(2)** no currently accepted medical use in treatment in the United States; and **(3)** a lack of accepted safety for use of the drug or other substance under medical supervision.[6] Despite this, Oregon and more than a dozen other states have taken steps in recent years to legalize marijuana for adult recreational use.[7] Some states also permit the use of marijuana for medical purposes, including Oregon.[8]

In December 2014, Congress passed a law directing the Department of Justice (DOJ) to refrain from using funding to prevent states, including Oregon, from implementing state medical marijuana laws.[9] In August 2016, the Ninth Circuit Court of Appeals upheld this law in *U.S. v. McIntosh* and found that the DOJ could not use any funds to prosecute individuals who engage in conduct associated with the use, distribution, possession and cultivation of medical marijuana, provided the individuals' conduct was specifically permitted by a state statute and the individual fully complied with the terms of said state statute.[10] That decision was only applicable to medical marijuana, and the Ninth Circuit's decision cautioned that the manufacture, distribution, and possession of marijuana is still a federal crime. The court found that while the DOJ is not presently able to prosecute individuals for these crimes, that

[2] Richard J. Bonnie, *The Surprising Collapse f Marijuana Prohibition: What Now?*, 50 UCDLR 573, 577 (2016).
[3] *Id.*
[4] *Id.*; *see also* Leary v. U.S., 395 U.S. 6, 12 (1969).
[5] *See* 21 USCA § 812.
[6] *See* 21 USCA § 812(b)(1).
[7] *Cannabis Overview*, NATIONAL CONFERENCE OF STATE LEGISLATURES, https://www.ncsl.org/research/civil-and-criminal-justice/marijuana-overview.aspx (last accessed March 25, 2021).
[8] *Id.*
[9] *See* U.S. v. McIntosh, 833 F.3d 1163, 1178-80 (9th Cir. 2016).
[10] *Id.*

limitation could expire if not renewed.[11] Since 2014, Congress has included this spending limitation in every ones of its appropriations acts.[12]

The federal government has been less welcoming of recreational marijuana, but recent administrations have nevertheless shown they are reluctant to prosecute individuals for marijuana-related offenses if the activities are legal under state law. The Obama Administration, for example, took the position that prosecutorial resources were not to be used to enforce marijuana offenses as long as the processing, sale, and possession of marijuana complied with state law.[13] The Trump Administration, meanwhile, denounced recreational marijuana publicly yet left enforcement of the CSA in states like Oregon in the discretion of local U.S. attorneys.[14] In Oregon, this meant that federal prosecutors focused on overproduction, interstate trafficking, and marijuana activities that are carried out on federal land or by criminal organizations.[15]

As this brief history demonstrates, federal prosecution of marijuana-related activities has yet to impact marijuana establishments that comply with state law. That said, Oregon's laws on medical and recreational marijuana ultimately do not, and cannot, provide immunity from federal prosecution. Consequently, if the federal government does choose to act under the CSA against establishments that are legal under state law, the operators could be subject to prosecution.

II. STATE LAW

Two separate regulatory structures govern the marijuana industry in Oregon. The first is the Oregon Medical Marijuana Act (OMMA), which was enacted following the approval of Measure 67 by Oregon voters in 1998.[16] This act regulates medical marijuana facilities and the use of medical marijuana by registered cardholders.[17] The second is the Adult and Medical Use of Cannabis Act, which was enacted in 2015 following the approval of Measure 91 by Oregon

[11] *Id.*
[12] *See* Robert Becher & William Weinreb, *Ninth Circuit Clarifies Restrictions on Prosecutions Related to Medical Marijuana*, JD SUPRA, July 17, 2020, https://www.jdsupra.com/legalnews/ninth-circuit-clarifies-restrictions-on-87879/ (last accessed March 26, 2021).
[13] *See* Memo from James M. Cole to All United States Attorneys, Guidance Regarding Marijuana Enforcement (Aug 29, 2013), *available at* https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf (last accessed March 10, 2021).
[14] Memorandum from U.S. Attorney for the District of Oregon Billy Williams (May 18, 2018), https://media.oregonlive.com/marijuana/other/2018/05/18/USAOR-Marijuana%20Enforcement%20Priorities-Final%20(1).pdf (last accessed March 26, 2021).
[15] *Id.*
[16] *See* Michael Rosenblum & Barry Weisz, *Cannabis State-By-State Regulations*, JD SUPRA, Oct. 5, 2018, https://www.jdsupra.com/legalnews/cannabis-state-by-state-regulations-46200/ (last accessed March 26, 2021).
[17] *Id.*

voters in the 2014 general election.[18] This act mostly regulates recreational marijuana facilities, which produce marijuana to sell to any individuals who are 21 and over.[19]

A. Medical Marijuana

Oregon's medical marijuana program is codified at ORS 475B.785 to ORS 475B.949.[20] Since the enactment of the program in 1998, the Legislature has amended the OMMA on several occasions and the Oregon Health Authority (OHA) — the state agency tasked with administering the program — has promulgated rules that provide further specificity about the program.[21]

Generally, under the OMMA, a person suffering from a qualifying debilitating health condition must show written documentation from a physician that the medical use of marijuana may mitigate the symptoms or effects of that condition.[22] Cardholders also must reapply annually with updated written documentation.[23] The patient may designate a caregiver and a grower if the patient decides not to grow his or her own marijuana.[24] Patients, caregivers, and growers who comply with the OMMA are exempt from state criminal prosecution for any criminal offense in which possession, delivery or manufacture of marijuana is an element.[25] Patients without medical marijuana cards may still claim immunity from state criminal prosecution if they comply with the OMMA and, within 12 months prior to the arrest at issue, had received a diagnosis of a debilitating medical condition for which a physician had advised medical marijuana could mitigate the symptoms or effects.[26] The OMMA also provides protection from state criminal prosecution for medical marijuana processors and medical marijuana dispensaries acting in compliance with the law.[27]

The OMMA originally was envisioned as a system in which patients would grow for themselves the marijuana that they needed, or designate a small-scale grower, and, as a result, the regulation was relatively minimal. The OMMA did not originally envision large-scale grow sites, processing sites or dispensaries. However, as time went on, the Legislature saw a need to impose more restrictions on medical marijuana grows, create a system for registering processors, and create a system for state-registered facilities to lawfully transfer medical marijuana between growers and patients or caregivers.

---

[18] *Id.*
[19] *Id.*
[20] *See* ORS 475B.785 to ORS 475B.949.
[21] *See* OAR 333-080-0010 to OAR 333-008-9905.
[22] ORS 475B.797(2).
[23] ORS 475B.797(6)(b).
[24] *See* ORS 475B.804; *see also* ORS 475B.810.
[25] ORS 475B.907.
[26] ORS 475B.913.
[27] ORS 475B.907.

Legislation in 2015, 2016, 2017, and 2018 addressed some of the local government concerns about the lack of regulation that had not been addressed in the original legislation. For example, a medical marijuana grow site now can have only a limited number of mature marijuana plants and a limited amount of usable marijuana harvested from those plants.[28] In addition, medical marijuana is now classified as a farm crop, but the Legislature was careful to carve out local regulatory authority not available for other farm crops.[29] The Legislature also added a new registration category for medical marijuana processors and imposed greater restrictions on those facilities.[30] Along similar lines, the Legislature also added further restrictions on where certain medical marijuana facilities can locate, and imposed new testing, labeling, inspection and reporting requirements.[31]

With the Legislature's more robust statutory scheme came more extensive medical marijuana administrative rules from the OHA.[32] These rules cover many of the gaps left by the Legislature, including setting out a detailed registration system and requirements for testing, reporting, background checks, security and advertising, among other things.[33]

B. Recreational Marijuana

In November 2014, Oregon voters approved Ballot Measure 91, which decriminalized the production and recreational use of certain amounts of marijuana by persons 21 years of age or older.[34] The Oregon Liquor Control Commission (OLCC) is charged with licensing and regulating the growing, processing, and sale of marijuana in the recreational market.[35] In particular, the Legislature tasked the OLCC with administering a license program for producers, processors, wholesalers, and retailers; under that program, a person may hold more than one type of license.[36]

In the years since the approval of Measure 91, the Legislature has made notable changes to its laws governing recreational marijuana. For example, the Legislature added a provision in 2017 that prohibits marijuana establishments from being sited within 1,000 feet of

[28] ORS 475B.831.
[29] *See, e.g.*, ORS 475B.928.
[30] ORS 475B.840.
[31] *See, e.g.*, ORS 475B.870; *see also* ORS 475B.600 to ORS 475B.655.
[32] *See* OAR 333-008-0010 to OAR 333-008-9905.
[33] *See, e.g.*, OAR 333-008-2070.
[34] *See* Michael Rosenblum & Barry Weisz, *Cannabis State-By-State Regulations*, JD SUPRA, Oct. 5, 2018, https://www.jdsupra.com/legalnews/cannabis-state-by-state-regulations-46200/ (last accessed March 26, 2021).
[35] *See* OAR 845-025-1000 to OAR 845-025-8750.
[36] *Id.*

a school, with limited exceptions.[37] The Legislature also expanded the OLCC's rulemaking authority, tasking the agency with, among other things, developing and maintaining a seed-to-sale tracking system and adopting restrictions on the size of recreational marijuana grows.[38] Finally, the Legislature enacted a provision that requires the OLCC to create a system for transitioning medical marijuana registrants to OLCC recreational licensing, with the possibility for recreational licensees to register to engage in medical marijuana activities.[39]

C. Industrial Hemp

The OLCC is tasked with developing rules to govern the transfer of industrial hemp products into the retail marijuana market.[40] The Oregon Department of Agriculture also licenses hemp growers, processors, and seed providers.[41] To sell hemp products at an OLCC-licensed marijuana retailer, a hemp processor must apply for and obtain an "industrial hemp grower certificate" from the OLCC.[42] OLCC-licensed processors, in turn, must receive a "hemp endorsement" from the OLCC to receive raw hemp material and process that material into concentrates or extracts.[43] Once processed, hemp material may be transferred to retailers.[44]

D. State Taxation of Recreational Marijuana and State Shared Revenue

The sale of recreational marijuana items by OLCC-licensed retailers is subject to a 17 % state sales tax, to be collected by those retailers.[45] Medical marijuana cardholders and caregivers do not have to pay the retail tax.[46]

State tax revenue is distributed across the state government and local governments through quarterly payments.[47] As an initial matter, not all local governments are entitled to the revenue; only cities and counties that **(1)** have not banned marijuana premises in their jurisdiction and **(2)** have provided a timely OLCC certification are eligible to receive state shared revenue payments for state marijuana taxes collected.[48] Electronic certifications to the OLCC, confirming whether a city has banned marijuana facilities in its jurisdiction, are

[37] RANEE NIEDERMEYER, OR. LIQUOR CONTROL COMM., 2017 LEGISLATIVE SESSION SUMMARY 13 (2017), https://www.oregon.gov/olcc/docs/Legislative_docs/2017_Session_Bill_Summary.pdf (last accessed April 2, 2021).
[38] *See generally* OAR 845-025-1000 to OAR 845-025-08750.
[39] ORS 475B.167.
[40] ORS 571.336.
[41] ORS 571.272.
[42] OAR 845-025-2700.
[43] OAR 845-025-3210.
[44] OAR 845-025-2750.
[45] *See* ORS 475B.705.
[46] ORS 475B.707.
[47] ORS 475B.759(3)(a).
[48] *See* ORS 475B.759(4)(A), ORS 475B.759(6)(b).

required annually.[49] A city's failure to timely certify will result in a forfeiture of its share of the state revenue, with that city's share going to the cities that filed the required certifications.[50]

Eligible cities receive 10% of the total marijuana tax revenue.[51] The revenue is distributed among cities based 75 % on the city's population and 25 % on licensure numbers in the city, as compared to the populations and total licenses of all cities that opt to receive marijuana tax revenue.[52] In part, this means that a city without any retailers or medical marijuana shops is still eligible to receive its share of the population-based revenue, provided that it meets the state's requirements for receiving marijuana revenue. The remaining tax revenues are distributed as follows: 10 % to counties; 40 % to the Common School Fund; 20 % to the Mental Health Alcoholism and Drug Services Account; and 15 % to the State Police Account.[53]

State shared marijuana tax payments will be bundled with any local tax payments for those cities that have an intergovernmental agreement with the Oregon Department of Revenue (DOR) for the collection of their local tax. This sample agreement is available on the Marijuana topics page of the LOC website.[54] To receive an accompanying report to the tax payment distributed, cities must provide a secrecy laws certificate to the DOR.

OLCC certification questions can be directed to marijuana@oregon.gov or (503) 872-6366. DOR tax questions can be directed to marijuanatax.dor@oregon.gov or (503) 947-2597.

E. Registration and License Types

In the context of medical and recreational marijuana, there is a total of 10 activities that require registration or a license from the state. The table on the next page provides a summary of each type of activity and its registration/licensing requirements along with a citation to the laws that govern those activities.

[49] *Id.*
[50] *Id.*
[51] ORS 475B.759(3)(b)(A).
[52] *Id.*
[53] *See generally* ORS 475B.759.
[54] *Marijuana Overview*, LEAGUE OF OREGON CITIES, https://www.orcities.org/resources/reference/topics-z /details /marijuana (last accessed April 6, 2021).

Oregon's Ten Regulated Marijuana Activities

	Grow	Make Products	Wholesale	Transfer to User	Research & Testing*
Medical Regulated Activities	**Marijuana Grow Site**: Location for planting, cultivating, growing, trimming, or harvesting marijuana or drying marijuana leaves or flowers *Register with OHA* *ORS 475B.810; OAR 333-008-010 to 333-008-0750*	**Marijuana Processing Site**: Location for compounding or converting marijuana into medical products, concentrates or extracts *Register with OHA* *ORS 475B.840; OAR 333-008-1600 to 333-oo8-2200*	**Wholesaler**:** Purchase marijuana items for resale to a person other than a consumer. *License with OLCC* *ORS 475B.129; OAR 845-025-3600*	**Dispensary**: Transfer usable marijuana, immature marijuana plants, seed, and medical products, concentrates and extracts to patients and caregivers. *Register with OHA* *ORS 475B.858; OAR 333-008-1000 to OAR 333-008-1248*	**Laboratories**: Conducts testing of recreational and medical marijuana items. *Obtain license under ORS 475B.560 and OAR 845-025-5000 to 845-025-5075.* *Obtain OHA accreditation* *ORS 475B.565* **Researchers:** Public or private research of medical and recreational marijuana, including medical and agricultural research *Certification from OLCC* *ORS 475B.286 and OAR 845-025-5300 to 845-025-5350*
Recreational Regulated Activities* **	**Producers**: Manufacture, plant, cultivate, grow, harvest *Obtain license from OLCC* *ORS 475B.070; OAR 845-025-2000 to OAR 845-025-2080*	**Processors**: Process, compound or convert marijuana into products, concentrates or extracts, but does not include packaging or labeling *Obtain license from OLCC* *ORS 475B.090; OAR 845-025-3200 to OAR 845-025-3290*	**Wholesalers**: Purchase marijuana items for resale to a person other than a consumer *Obtain license from OLCC* *ORS 475B.100; OAR 845-025-3500*	**Retailers**: Sell marijuana items to a consumer *Obtain license from OLCC* *ORS 475B.105; OAR 845-025-2800 to OAR 845-025-2890*	

*These activities support both the recreational and medical marijuana systems.

**There is no means for obtaining a medical wholesale license from OHA. Legislation in 2016 allows an OLCC licensed recreational wholesaler to obtain authority from OLCC to also wholesale medical marijuana.

***In addition to the ten types of regulated activities, certain employees must also obtain an OLCC handlers permit. ORS 475B.261; OAR 845-025-5500 to OAR 845-025-5590.

F. Is a Consolidated System on the Horizon?

During the 2016 legislative session, the Legislature amended the state's recreational marijuana laws to begin shifting towards a consolidated system. As noted above, the Legislature imposed a requirement on the OLCC to adopt rules governing the process of transitioning from medical registration with the OHA to medical and recreational licensing with the OLCC.[55] In particular, state law required the OLCC to establish a program that allows medical registrants to convert to a retail license.[56] Recreational marijuana licensees also are allowed to register with the OLCC to distribute medical marijuana.[57] These laws and regulations essentially allow any one establishment to engage in both retail and medical marijuana activities.

Although oversight of marijuana activities is somewhat consolidated under the OLCC, cities should note that the recreational and medical programs continue to retain separate characteristics and, as such, marijuana businesses are still subject to different rules. For example, in 2016, the Legislature added a separate description of what constitutes medical marijuana, with a definition that suggests that medical products may carry a different potency than recreational marijuana.[58] Additionally, as discussed below, the spacing requirements remain different; while medical marijuana dispensaries are prohibited from being within 1,000 feet of each other under state law, there is no such requirement for recreational retailers unless a city adopts it as a local time, place, and manner regulation.[59]

G. Liens

Properties can be subject to liens under ORS Chapter 475B. Liens may be placed if the owner of a building or premises knowingly has used (or allowed another to use) the building or premises for the production, processing, sale or use of marijuana items contrary to the provisions of any state law or local ordinance regulating the production, processing, sale or use of marijuana items.[60] If state or local law is violated, the building or premises is subject to a lien and may be sold to pay all fines and costs assessed against the occupants of the building or premises.[61]

[55] ORS 475B.167.
[56] *Id.*; *see also* OAR 845-025-2910.
[57] *See, e.g.*, ORS 475B.105(3)(e).
[58] ORS 475B.015(27).
[59] ORS 475B.858(3)(d); *see also* ORS 475B.486(2)(a).
[60] ORS 475B.424.
[61] *Id.*

H. Illegal Marijuana Market Enforcement Grant Program

In 2018, the Legislature created the Illegal Marijuana Market Enforcement Grant Program (the "Program") through Senate Bill 1544.[62] The purpose of this program is to help cities and counties defray the costs incurred by local law enforcement agencies in addressing unlawful marijuana cultivation and distribution.[63] The Oregon Criminal Justice Commission administers the program, in part by reviewing grant applications and publishing annual reports that measure the status and effectiveness of the program.[64] The program is funded with $1.5 million per year, paid for out of the funds that go to the Oregon Liquor Control Commission for OLCC marijuana operations.[65] Cities in rural parts of the state — particularly southwest Oregon — with high marijuana production and inadequate law enforcement should seriously consider participation in the new program.[66] The grant program runs through Jan. 1, 2024, unless it is extended.[67]

[62] 2018 Or Laws Ch. 103, §§ 13-17, 26.
[63] *Id.*
[64] *Id.*
[65] *Id.*
[66] *Id.*
[67] *Id.*

III. Local Laws

As set out in ORS 475B.486, ORS 475B.928, and under their home rule authority, cities have several options for regulating marijuana activities. Whether to regulate is a local choice. What follows is an overview of the options available to cities. However, before embarking on any form of regulation, cities should begin by examining the 10 types of marijuana activities authorized by state statute and the restrictions that state law places on each type of activity to determine whether a gap exists between what state law allows and what the community desires to further restrict.

A. State Restrictions on the Location of Medical and Recreational Marijuana Activities

Before regulating or prohibiting state-registered or licensed marijuana activities, the LOC recommends that cities examine the existing restrictions under state law. First, it is important to know about any state restrictions that create a regulatory "floor." In other words, although courts generally have upheld a city's authority to impose more stringent restrictions than those described in state law, a city generally cannot impose restrictions that are more lenient than those described in state law.[68] Second, some cities may determine that the state's limits on marijuana activities are sufficient, and that local regulation is therefore unnecessary.

i. Medical Grow Sites and Recreational Producers

ORS Chapter 475B does not restrict where medical marijuana grow sites or recreational marijuana producers can locate. In fact, in 2016, the Legislature clarified that both medical and recreational marijuana are farm crops, allowing marijuana to be grown on land zoned for exclusive farm use.[69] Nonetheless, such grows are still subject to local time, place, and manner restrictions.[70]

[68] *See, e.g.*, City of La Grande v. Public Emp. Retirement Bd., 281 Or 137, 140 (1978) (noting that local laws are preempted by state law where they impose rules that are "incompatible" with state law). For more information on Oregon's state preemption doctrine, refer to the chapter of this Handbook on home rule).
[69] ORS 475B.526.
[70] ORS 475B.928.

In addition, the OLCC has adopted some administrative restrictions on where recreational marijuana facilities can locate, particularly recreational marijuana producers.[71] For example, all recreational marijuana facilities are prohibited from locating on federal property.[72] Facilities also are prohibited from locating at the same physical location or address as a liquor licensee or at the same physical location or address as an OHA-licensed medical marijuana facility.[73] Recreational marijuana growers in particular are prohibited from locating on public land, the same tax lot or parcel as another licensed grower under common ownership, and several other areas.[74] Cities should review these limitations before adopting their own time, place, and manner ordinances.

In addition to location restrictions, state statutes and administrative rules place limitations on the number of plants that a medical marijuana grower can grow in residential zones, and on the size of recreational marijuana grow canopies.[75] Generally, a medical marijuana grow site may have up to 12 mature plants if it is in a residential zone, and up to 48 mature plants if it is located in any other zone.[76] However, there are exceptions for certain grow sites that were in existence and had registered with the state by January 1, 2015.[77] For those grow sites, the number of plants is limited to the number of plants that were at the grow site as of December 31, 2015, as long as that number does not exceed 24 mature plants per grow site in a residential zone and 96 mature plants per grow site in all other zones.[78] A grower loses the right to claim those exceptions, however, if the grower's registration is currently suspended or revoked.[79]

ii. Medical Processing Sites and Recreational Processors

Processors that produce medical marijuana extracts cannot be located in an area zoned for residential use.[80] The OHA has defined "zoned for residential use" to mean "the only primary use allowed outright in the designated zone is residential."[81]

[71] *See* OAR 845-025-1230.
[72] OAR 845-025-1230(1)(a).
[73] OAR 845-025-1230(1)(b)(B)-(D).
[74] OAR 845-025-1230(2).
[75] ORS 475B.085; ORS 475B.831.
[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] ORS 475B.831(5)(a).
[80] ORS 475B.840(3)(a).
[81] OAR 333-008-0010(77).

Processors that make recreational marijuana extracts cannot be located in an area zoned *exclusively* for residential use, and they are also subject to the general location restrictions in the OLCC rules outlined above.[82]

iii. Medical Marijuana Dispensaries

Under state law, medical marijuana dispensaries cannot be located in residential zones, at the same address as a grow site, or within 1,000 feet of another dispensary.[83]

In addition, dispensaries cannot locate within 1,000 feet of most public elementary or secondary schools, nor within 1,000 feet of a private or parochial elementary or secondary school.[84] However, if a school is established within 1,000 feet of an existing dispensary, the dispensary may remain where it is unless the OHA revokes its registration.[85] A dispensary can also be located as close as 500 feet to a school if the OHA finds there is a physical or geographic barrier between the school and establishment that prevents children from being capable of traversing there.[86]

iv. Wholesalers and Recreational Retailers

Wholesale and retail licensees may not locate in an area that is zoned exclusively for residential use and are subject to many of the same restrictions on location.[87] The same requirements that apply to medical marijuana dispensaries regarding their proximity to schools apply to retail licensees.[88] If a school is established within 1,000 feet of an existing retail licensee, the licensee may remain where it is unless the OLCC revokes its license.[89] An establishment can be located as close as 500 feet to a school if the OLCC finds there is a physical or geographic barrier between the school and establishment that prevents children from being capable of traversing there.[90]

State law does not impose a 1,000-foot buffer between retailers as it does for medical marijuana dispensaries. While cities can create this buffer under local law, state law prohibits cities from requiring a distance greater than 1,000 feet from another retailer.[91] In other words, the maximum buffer that can exist between retailers is 1,000 feet.

---

[82] OAR 845-025-1230(1)(b).
[83] ORS 475B.858(3).
[84] *Id.*
[85] ORS 475B.870.
[86] ORS 475B.864.
[87] *See, e.g.*, ORS 475B.105.
[88] *Id.*
[89] ORS 475B.115.
[90] ORS 475B.109.
[91] ORS 475B.486.

v. Compatibility with Local Land Use Requirements

In addition to express restrictions on the location of certain marijuana facilities, state law also requires certain marijuana facilities to obtain a land use compatibility statement (LUCS) from a local government before the state will issue a license.[92] In particular, recreational producers, processors, wholesalers, and retailers must request a LUCS from a local government before the OLCC issues a license.[93] A LUCS describes whether the proposed use is allowable in the zone requested, and must be issued within 21 days of (1) Receipt of the request if the land use is allowable as an outright permitted use; or **(2)** Final local permit approval, if the land use is allowable as a conditional use.[94] Certain small-scale medical marijuana growers outside of a city's limits do not have to request a LUCS when applying for a recreational marijuana license.[95]

A local government that has a ballot measure proposing to ban marijuana activities does not have to act on the LUCS while the ballot measure is pending.[96]

B. Local Government Means of Regulation

In recent years, the Legislature has enacted several pieces of legislation that have encroached on, but not entirely preempted, a city's home rule authority to regulate marijuana. What follows is a discussion of those various encroachments, and the options that remain available for cities that may wish to regulate marijuana activities.

i. Taxes

The OMMA was silent on local authority to tax. Local governments, therefore, retained their home rule authority to tax medical marijuana. Measure 91, on the other hand, attempted to preempt local government authority to tax recreational marijuana, though there were significant questions regarding the effect and scope of that purported preemption.

Under ORS 475B.491, adopted in 2015, the Legislature vested authority to "impose a tax or fee on the production, processing or sale of marijuana items" solely in the Legislature, thereby preempting local governments from imposing their own tax except as provided by the law.[97] The Legislature went on to provide that cities may adopt an ordinance imposing a tax or fee of up to 3 % on the sale of marijuana items by a retail licensee.[98] The ordinance must be

[92] ORS 475B.063.
[93] *Id.*
[94] *Id.*
[95] ORS 475B.074(e).
[96] ORS 475B.063(3).
[97] ORS 475B.491.
[98] ORS 475B.491(4)(a).

referred to the voters in a statewide general election, meaning an election in November of an even-numbered year.[99] However, if a city has adopted an ordinance prohibiting the establishment of any other recreational or medical marijuana establishments in the city, the city may not impose a local tax under that provision.[100] In addition, in 2016, the Legislature adopted a restriction on local governments by providing that a local tax may not be imposed on a medical marijuana patient or caregiver.[101]

Cities that do impose a local tax may look to the state for help in administering that tax. Recognizing that cities, particularly smaller cities, may not have the resources to administer and enforce a local marijuana tax, the Legislature, in 2016, authorized the Oregon Department of Revenue (DOR) to collect, enforce, administer, and distribute locally-imposed marijuana taxes by intergovernmental agreement.[102] The DOR has prepared a sample intergovernmental agreement that cities may use as a starting point in their negotiations with the DOR when seeking assistance in collecting the local tax. This sample agreement is available on the Marijuana topics page of the LOC website.[103] If the municipality has an agreement with the DOR for tax administration, the marijuana business would make local tax payments the same way it makes state tax payments. The business would also include the local tax information on the quarterly return filed with the DOR. For questions about, cities should contact the DOR at marijuanatax.dor@oregon.gov or at (503) 947-2597.

For those cities that enacted taxes on medical or recreational marijuana prior to the Legislature's adoption of ORS 475B.491, the status of those taxes remains an open question. Arguably, cities that had "adopt[ed] or enact[ed]" taxes prior to the effective date of ORS 475B.491 are grandfathered in under the law. However, the issue is not free from doubt, and cities that decide to collect on pre-ORS 475B.491 taxes should be prepared to defend their ability to do so against legal challenge. Consequently, cities that plan to continue to collect taxes imposed prior to the passage of ORS 475B.491 should work closely with their city attorney to discuss the implications and risks of that approach.

[99] If a city council amends an existing marijuana ordinance to prohibit or allow any of those listed below, the ordinance can be amended without referring the amendment to the electors of the city: a medical marijuana processing site; a medical marijuana dispensary; a marijuana producer that holds a license issued under ORS 475B.070 and that has been designated as an exclusively medical licensee; or, a marijuana retailer that holds a license issued under ORS 475B.110 and is designated as an exclusively medical licensee.
[100] ORS 475B.968(7).
[101] ORS 475B.491(4).
[102] ORS 305.620(1).
[103] *Marijuana Overview*, LEAGUE OF OREGON CITIES, https://www.orcities.org/resources/reference/topics-z /details /marijuana (last accessed April 6, 2021).

ii. Ban on State-Registered and Licensed Activities

Under ORS 475B.968, cities may prohibit within their jurisdiction the operation of recreational marijuana producers, processors, wholesalers, and retailers, as well as medical marijuana processors and medical marijuana dispensaries.[104] This law is silent on whether a city can ban medical marijuana growers, marijuana laboratories, and marijuana researchers from operating in the city.[105] However, ORS 475B.968 does not indicate that the bill's process for banning marijuana activities is the exclusive means of doing so. Cities considering banning medical marijuana grow sites, marijuana laboratories, or marijuana researchers should consult their city attorney about whether they can do so under either home rule, federal preemption or both legal theories. Please be advised that this approach may entail significant risk of litigation and potential financial implications.

Before December 24, 2015, cities located in counties that voted against Measure 91 by 55 % or more (Baker, Crook, Gilliam, Grant, Harney, Jefferson, Klamath, Lake, Malheur, Morrow, Sherman, Umatilla, Union, Wallowa, and Wheeler Counties) had the opportunity to enact a ban through council adoption of an ordinance prohibiting any of the six activities listed in ORS 475B.968. For cities that did not take that approach within the required timeline, and for cities not located in those counties, the city council may adopt an ordinance banning any of the six activities, but that ordinance must be referred to the voters at a statewide general election, meaning an election in November of an even-numbered year.[106] Medical marijuana dispensaries and medical marijuana processors that have registered with the state by the time their city adopts a prohibition ordinance are not subject to the ban if they have successfully completed a city or county land use application process.[107]

Under either procedure, as soon as the city council adopts the ordinance, it must submit it to the OHA for medical bans and the OLCC for recreational bans, and those agencies will stop registering and licensing the banned facilities.[108] In other words, for cities using the referral process, the council's adoption of an ordinance acts as a moratorium on new facilities until the election occurs. Adoption of such an ordinance will also make a city ineligible for state shared revenues from the state marijuana tax distributions, as cities are required to certify annually to the OLCC that they do not have a ban to receive payment.[109]

For cities using the referral process, it is also important to note that once the elections official files the referral with the county election office, the ballot measure is certified to the

[104] ORS 475B.968.
[105] *Id.*
[106] *Id.*
[107] ORS 475B.968(8)-(9).
[108] ORS 475B.968(3)-(4).
[109] ORS 475B.759(4)(a).

ballot. At that point, the restrictions on public employees engaging in political activity will apply. Consequently, cities should consult the secretary of state and their city attorney to ensure that public employees are complying with state elections law in their communications about the pending measure. For more information on these laws and process, consult the Handbook chapter on Oregon election law.

If voters reject a ballot measure proposing to ban marijuana activities, the OHA and the OLCC will not begin registering and licensing marijuana facilities until the first business day of the January following the statewide general election.[110] This provision affords time to cities that want to regulate marijuana businesses, allowing them the opportunity to adopt time, place, and manner ordinances after the ban is rejected and before new registrations or licenses are issued by the state.

In determining whether to prohibit any of the marijuana activities registered or licensed by the state, cities may want to consider the tax implications. Cities that enact a prohibition on any marijuana activity will not be eligible to receive state marijuana tax revenues or impose a local tax, even if the city bans only certain activities and allows others.[111]

If a city council amends an existing marijuana ordinance to prohibit or allow any of those listed below, the ordinance can be amended without referring the amendment to the electors of the city: a medical marijuana processing site; a medical marijuana dispensary; a marijuana producer that holds a license issued under ORS 475B.070 and that has been designated as an exclusively medical licensee; and, a marijuana retailer that holds a license issued under ORS 475B.110 and is designated as an exclusively medical licensee.[112]

Similarly, the governing body of a city may repeal an ordinance without referring the decision to voters.[113] If an ordinance is repealed, the city must give notice of the change to the appropriate regulatory agency, either OHA or OLCC.[114]

It is also important to note that, in 2016, the Legislature preempted cities from imposing restrictions on certain aspects of the personal possession of recreational and medical marijuana.[115] As a result, cities interested in enacting a ban on any aspect of personal use and growing of marijuana should consult with their city attorney to discuss the scope of the preemption, and whether the city can regulate or ban possession under either home rule, federal

[110] ORS 475B.968(5).
[111] ORS 475B.968(7).
[112] ORS 475B.968(6).
[113] ORS 475B.496.
[114] ORS 475B.496(2).
[115] ORS 475B.477.

preemption or both legal theories. Again, this option involves risks that could have legal and financial implications for a city.

iii. Time, Place, and Manner Regulations

Under Oregon law, cities are permitted to adopt "reasonable regulations" of commercial marijuana activities.[116] This includes placing conditions on commercial marijuana activities through the issuance of local business licenses or through a separate licensing or registration system for marijuana establishments.

ORS 475B.486 and ORS 475B.928 provide that local governments may impose reasonable regulations on the time, place, and manner of operation of recreational and medical marijuana facilities, respectively.[117] The LOC believes that, under the home rule provisions of the Oregon Constitution, local governments do not need legislative authorization to impose time, place, and manner restrictions, and that the Legislature's decision to expressly confirm local authority to impose certain restrictions does not foreclose cities from imposing other restrictions not described in state law.

State law expressly provides that cities may impose reasonable regulations that include, but are not limited to, the following:

- Cities may limit the hours of operation of retail licensees and medical marijuana grow sites, processing sites and dispensaries;

- Cities may limit the location of all four types of recreational licensees, as well as medical marijuana grow sites, processing sites and dispensaries, except that a city may not impose more than a 1,000-foot buffer between retail licensees;

- Cities may impose reasonable conditions on the manner in which marijuana is processed or sold to the public; and

- Cities may limit the public's access to the premises of all four types of recreational licenses, as well as medical marijuana grow sites, processing sites and dispensaries.[118]

Another common clause in local business license ordinances is that the licensee must comply with local, state, and federal law. Oregon's appellate courts have yet to reach a holding on whether this type of local provision can be enforced against marijuana establishments.

[116] ORS 475B.486; *see also* ORS 475B.928.
[117] *Id.*
[118] *Id.*

Arguably, requiring local marijuana businesses to comply with federal law is not a "reasonable" regulation because it precludes any of them from operating within the city. Moreover, charter amendments or ordinances that are inconsistent with the terms of ORS Chapter 475B are preempted under ORS 475B.454. That said, ORS Chapter 475B is itself inconsistent with federal law and could be subject to federal preemption. At any rate, cities that seek to impose this type of clause against marijuana businesses should consult legal counsel about the risk of litigation with this option and the potential financial implications for the city.

iv. Federal RICO Lawsuits

The federal Racketeer Influenced and Corrupt Organizations Act (RICO) was enacted in 1970 as Title IX of the Organized Crime Control Act of 1970.[119] RICO is primarily known as a tool to help law enforcement prosecute organized criminal enterprises. RICO also contains a civil provision, however, that allows a person who suffers economic harm because of criminal activity to file a lawsuit for injunctive relief, treble damages, and attorney fees.[120] Because the possession and sale of marijuana remain illegal under federal law, marijuana retailers, wholesalers, and processors are potentially vulnerable to a civil RICO lawsuit.

In 2017, the Tenth Circuit Court of Appeals held that marijuana production can constitute a pattern of criminal activity that triggers the civil remedy provisions under RICO, even when that production is legal under state law.[121] Since 2017, several RICO cases have been filed against business in states where recreational marijuana is legal, including Oregon.[122] While this right to recover exists in theory, it is a difficult case to prove.[123] Courts tends to dismiss these claims against marijuana businesses on the grounds that there is not enough evidence of actual financial injury.[124]

Despite this trend, civil RICO lawsuits have the potential to disrupt the marijuana economy in states where its production is legalized. The threat of a lawsuit remains for these businesses, particularly if a plaintiff can show concrete proof that a marijuana business is the direct cause of one's loss in income or other financial injury. Theoretically, a civil RICO suit

---

[119] 18 U.S.C. §§ 1961-1968.
[120] 18 U.S.C. § 1964.
[121] *See* Safe Streets Alliance v. Hickenlooper, 859 F.3d 865, 884 (10th Cir. 2017) (holding that "[m]arijuana is a controlled substance under the CSA," and "the manufacture, distribution, and sale of that substance is [therefore] racketeering activity under RICO.").
[122] *See, e.g.,* Ainsworth v. Owenby, 326 F. Supp. 3d 1111 (D. Or. 2018) (dismissing a RICO claim because the plaintiff's alleged need to purchase security cameras was not a sufficient injury caused by the neighboring marijuana business); *see also* Shoultz v. Derrick, 369 F. Supp. 3d 1120 (D. Or. 2019) (dismissing a RICO claim because the plaintiff failed to show clear financial harm).
[123] *Id.*
[124] *Id.; but see* Momtazi Family, LLC v. Wagner, 2019 4059178 (D. Or. 2019) (denying the defendant's motion to dismiss where the plaintiff alleged the defendant's adjacent marijuana business had materially diminished the fair market value of plaintiff's vineyard and rental income from the property.).

could even be filed by a city, though cities should note that the Ninth Circuit Court of Appeals has yet to interpret RICO and may reach a different conclusion than did the Tenth Circuit, which only hears cases arising in Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming.

Appendix A

Opt Out by Voter Referral

APPENDIX A

Opt Out by Voter Referral

Since December 24, 2015, all cities that desire to ban certain marijuana activities must do so by referral at a statewide general election, meaning an election in November of an even-numbered year. Cities should consult the secretary of state's referral manual and work with the city recorder or similar official to determine the procedures necessary to refer an ordinance to the voters.

Once a city council adopts an ordinance, its city must submit the ordinance to the Oregon Health Authority (if banning medical marijuana businesses) and/or the Oregon Liquor Control Commission (if banning recreational marijuana businesses). Those agencies will then stop registering and licensing the prohibited businesses until the next statewide general election, when the voters will decide whether to approve or reject the ordinance. In other words, the council's adoption of an ordinance acts as a moratorium on new facilities until the election. Each agency has a form for submitting the ordinances.

Medical marijuana dispensaries are grandfathered and can operate despite a ban if they: (1) applied to be registered by July 1, 2015, or were registered prior to the date on which the ordinance was adopted by the city council, and (2) successfully completed the land use application process (if applicable). Medical marijuana processors are grandfathered and are able to operate despite a ban if they: (1) were registered under ORS 475B.840 to ORS 475B.855 and were processing usable marijuana on or before July 1, 2015; or (2) are registered under ORS 475B.840 prior to the date on which the ordinance is adopted by the governing body; and (3) have successfully completed a local land use application process (if applicable).

Cities that adopt an ordinance prohibiting the establishment of medical or recreational marijuana businesses are not eligible to receive a distribution of state marijuana tax revenues or to impose a local tax under section ORS 475B.491.

In addition, it is important to note that once elections officials file the referral with the county election office, the ballot measure is certified to the ballot. At that point, the restrictions on public employees engaging in political activity will apply. Consequently, cities should consult the Secretary of State's manual *Restrictions on Political Campaigning by Public Employees* and their city attorney to ensure that public employees are complying with state elections law in their communications about the pending measure.

****

AN ORDINANCE OF THE CITY OF {NAME} DECLARING A BAN ON {MEDICAL MARIJUANA PROCESSING SITES, MEDICAL MARIJUANA DISPENSARIES, RECREATIONAL MARIJUANA PRODUCERS, RECREATIONAL MARIJUANA PROCESSORS, RECREATIONAL MARIJUANA WHOLESALERS, AND/OR RECREATIONAL MARIJUANA RETAILERS}; REFERRING ORDINANCE; AND DECLARING AN EMERGENCY

Whereas, ORS 475B.840 to 475B.876 directs the Oregon Health Authority will register medical marijuana processing sites and medical marijuana dispensaries;

Whereas, ORS 475B.010 to 475B.545 directs the Oregon Liquor Control Commission to license the production, processing, wholesale, and retail sale of recreational marijuana;

Whereas, ORS 475B.968 provides that a city council may adopt an ordinance to be referred to the electors of the city prohibiting the establishment of certain state-registered and state-licensed marijuana businesses in the area subject to the jurisdiction of the city;

Whereas, the city council wants to refer the question of whether to prohibit {recreational marijuana producers, processors, wholesalers, and/or retailers, as well as medical marijuana processors and/or medical marijuana dispensaries} to the voters of {City};

NOW THEREFORE, BASED ON THE FOREGOING, THE CITY OF {NAME} ORDAINS AS FOLLOWS:

DEFINITIONS.

Marijuana means the plant Cannabis family *Cannabaceae*, any part of the plant Cannabis family *Cannabaceae* and the seeds of the plant Cannabis family *Cannabaceae*.

Marijuana processing site means an entity registered with the Oregon Health Authority to process marijuana.

Marijuana processor means an entity licensed by the Oregon Liquor Control Commission to process marijuana.

Marijuana producer means an entity licensed by the Oregon Liquor Control Commission to manufacture, plant, cultivate, grow or harvest marijuana.

Marijuana retailer means an entity licensed by the Oregon Liquor Control Commission to sell marijuana items to a consumer in this state.

Marijuana wholesaler means an entity licensed by the Oregon Liquor Control Commission to purchase items in this state for resale to a person other than a consumer.

Medical marijuana dispensary means an entity registered with the Oregon Health Authority to transfer marijuana.

BAN DECLARED. As described in section ORS 475B.968, the City of {Name} hereby prohibits the establishment {and operation}[1] of the following in the area subject to the jurisdiction of the city {select desired options from the list below}:

(a) Marijuana processing sites;
(b) Medical marijuana dispensaries;
(c) Marijuana producers;

[1] Include this wording if (1) there are existing recreational licensees operating within the city and (2) the city does not wish to grandfather in those activities.

(d) Marijuana processors;
(e) Marijuana wholesalers;
(f) Marijuana retailers.

EXCEPTION. The prohibition set out in this ordinance does not apply to a marijuana processing site or medical marijuana dispensary that meets the conditions set out in ORS 475B.968(8)-(9).

REFERRAL. This ordinance shall be referred to the electors of the city of {name} at the next statewide general election on {date}.

EMERGENCY. This ordinance being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist, and this ordinance shall be in full force and effect on {date/passage}.

****

A RESOLUTION APPROVING REFERRAL TO THE ELECTORS OF THE CITY OF {NAME} THE QUESTION OF BANNING {MEDICAL MARIJUANA PROCESSING SITES, MEDICAL MARIJUANA DISPENSARIES, RECREATIONAL MARIJUANA PRODUCERS, RECREATIONAL MARIJUANA PROCESSORS, RECREATIONAL MARIJUANA WHOLESALERS, AND/OR RECREATIONAL MARIJUANA RETAILERS} WITHIN THE CITY[2]

Whereas, section ORS 475B.968 provides that a city council may adopt an ordinance to be referred to the electors of the city prohibiting the establishment of certain state-registered and state-licensed marijuana businesses in the area subject to the jurisdiction of the city;

Whereas, the CITY OF {NAME} city council adopted Ordinance {number}, which prohibits the establishment of {list of marijuana activities) in the area subject to the jurisdiction of the city;

NOW, THEREFORE, THE CITY OF {NAME} RESOLVES AS FOLLOWS:

MEASURE. A measure election is hereby called for submitting to the electors of the CITY OF {NAME} a measure prohibiting the establishment of certain marijuana activities in the area subject to the jurisdiction of the city, a copy of which is attached hereto as "Exhibit 1," and incorporated herein by reference.[3]

ELECTION CONDUCTED BY MAIL. The measure election shall be held in the CITY OF {NAME} on {date}. As required by ORS 254.465, the measure election shall be conducted by mail by the County Clerk of {county name} County, according to the procedures adopted by the Oregon Secretary of State.

DELEGATION. The CITY OF {NAME} authorizes the {City Manager, City Administrator, City Recorder, or other appropriate city official} or the {City Manager, City Administrator, City Recorder, or other appropriate city official} designee, to act on behalf of the city and to take such

[2] Some cities approve the ballot title, question, summary, and explanatory statement by adopting an ordinance, rather than by adopting a separate resolution.
[3] Exhibit 1 should include the question and summary.

further action as is necessary to carry out the intent and purposes set forth herein, in compliance with the applicable provisions of law.

PREPARATION OF BALLOT TITLE. The City Attorney is hereby directed to prepare the ballot title for the measure, and deposit the ballot title with the {city elections officer} within the times set forth by law.[4]

NOTICE OF BALLOT TITLE AND RIGHT TO APPEAL. Upon receiving the ballot title for this measure, the {city elections officer} shall publish in the next available edition of a newspaper of general circulation in the city a notice of receipt of the ballot title, including notice that an elector may file a petition for review of the ballot title.

EXPLANATORY STATEMENT. The explanatory statement for the measure, which is attached hereto as "Exhibit 2," and incorporated herein by reference, is hereby approved.

FILING WITH COUNTY ELECTIONS OFFICE. The {city elections officer} shall deliver the Notice of Measure Election to the county clerk for {name of county} County for inclusion on the ballot for the {date} election.[5]

EFFECTIVE DATE. This resolution is effective upon adoption.

****

As noted, the ballot title, question, summary, and explanatory statement may be approved by the council through ordinance or resolution.

BALLOT TITLE
A caption which reasonably identifies the subject of the measure
10-word limit under ORS 250.035(1)(a)

Prohibits certain marijuana registrants {and/or} licensees in {city}

QUESTION
A question which plainly phrases the chief purpose of the measure so that an affirmative response to the question corresponds to an affirmative vote on the measure
20-word limit under ORS 250.035(1)(b)

Shall {city} prohibit {medical marijuana processors, medical marijuana dispensaries, recreational marijuana producers, processors, wholesalers, and retailers} in {city}?

SUMMARY

[4] Alternatively, the council may prepare the ballot title and attach it to the resolution for approval. In that case, this section might say, "The ballot title for the measure set forth as Exhibit {number} to this resolution is hereby adopted." A city's local rules may dictate who will prepare the ballot title.
[5] The Notice of Measure Election is a form provided by the Oregon Secretary of State where cities provide the ballot title, question, summary, and explanatory statement. The form can be found on the Secretary of State's website at www.sos.oregon.gov.

A concise and impartial statement summarizing the measure and its major effect
17- word limit under ORS 250.035(1)(c)

**Note: This summary may need to be modified depending on which activities a city proposes to ban and whether it will grandfather in existing retail activities. By law, certain medical marijuana businesses can continue operating.*

State law allows operation of registered medical marijuana processors, medical marijuana dispensaries and licensed recreational marijuana producers, processors, wholesalers, and retailers. State law provides that a city council may adopt an ordinance to be referred to the voters to prohibit the establishment of any of those registered or licensed activities.

Approval of this measure would prohibit the establishment {and operation}[6] of {medical marijuana processors, medical marijuana dispensaries, recreational marijuana producers, processors, wholesalers, and retailers} within the area subject to the jurisdiction of the city {provided that state law allows for continued operation of medical marijuana processors and medical marijuana dispensaries already registered—or in some cases, that have applied to be registered—and that have successfully completed a local land use application process}.

If this measure is approved, the city will be ineligible to receive distributions of state marijuana tax revenues and will be unable to impose a local tax or fee on the production, processing or sale of marijuana or any product into which marijuana has been incorporated.

****

EXPLANATORY STATEMENT

An impartial, simple and understandable statement explaining the measure and its effect for use in the county voters' pamphlet

500-word limit under ORS 251.345 and OAR 165-022-0040(3)

Approval of this measure would prohibit the establishment {and operation}[7] of certain marijuana activities within the city.

ORS 475B.840 to 475B.876 directs the Oregon Health Authority will register medical marijuana processors and medical marijuana dispensaries. Medical marijuana processors compound or convert marijuana into concentrates, extracts, edible products, and other products intended for human consumption and use. Medical marijuana dispensaries facilitate the transfer of marijuana and marijuana products between patients, caregivers, processors, and growers. ORS 475B.010 to 475B.545 directs the Oregon Liquor Control Commission will license recreational marijuana producers (those who manufacture, plant, cultivate, grow or harvest marijuana), processors, wholesalers, and retailers.

[6] Include this wording if (1) there are existing recreational licensees operating within the city and (2) the city does not wish to grandfather in those activities.
[7] Include this wording if (1) there are existing recreational licensees operating within the city and (2) the city does not wish to grandfather in those activities.

A city council may adopt an ordinance prohibiting the establishment of any of those entities within the city, but the council must refer the ordinance to the voters at a statewide general election. The CITY OF {NAME} city council has adopted an ordinance prohibiting the establishment of {list of marijuana activities to be banned} within the city and, as a result, has referred this measure to the voters.

If approved, this measure would prohibit {medical marijuana processors, medical marijuana dispensaries, and/or recreational marijuana producers, processors, wholesalers, and/or retailers} within the city. Medical marijuana processors and medical marijuana dispensaries that were registered with the state before the city council adopted the ordinance, and medical marijuana dispensaries that had applied to be registered on or before July 1, 2015, can continue operating in the city even if this measure is approved, if those entities have successfully completed a local land use application process.

Approval of this measure has revenue impacts. Currently, 10% of state marijuana tax revenues will be distributed to cities under ORS 475B.759(3)(b)(A). If approved, this measure would make the city ineligible to receive distributions of state marijuana tax revenues.

Currently, under ORS 475B.491, a city may impose up to a 3% tax on the sale of marijuana items by a marijuana retailer in the city. However, a city that adopts an ordinance prohibiting the establishment of medical marijuana processors, medical marijuana dispensaries, or recreational marijuana producers, processors, wholesalers, or retailers may not impose a local tax or fee on the production, processing or sale of marijuana or any product into which marijuana has been incorporated. Approval of this measure would therefore prevent a city from imposing a local tax on those activities.

This document is not a substitute for legal advice. City councils considering prohibiting or taxing any marijuana facilities should not rely solely on this sample. Any city council considering any form of regulation of marijuana should consult with its city attorney regarding the advantages, disadvantages, risks and limitations of any given approach.

Legal counsel can also assist a city in preparing an ordinance that is consistent with local procedures, existing ordinances and a city's charter, and advise on what process is needed to adopt the ordinance. The sample provided is intended to be a starting point, not an ending point, for any jurisdiction considering prohibiting or taxing marijuana.

Appendix B

City Council Repeal of Ordinance that Prohibits Marijuana Businesses

APPENDIX B

City Council Repeal of Ordinance that Prohibits Marijuana Businesses

Under ORS 475B.496, cities may repeal an earlier ordinance prohibiting the establishment of marijuana businesses. A repeal under ORS 475B.496 does not need to be referred to the voters. Alternatively, a city can "opt-in" to allowing marijuana facilities by adopting an ordinance under ORS 475B.968 and referring that ordinance to the voters at the next statewide general election. Cities should consult the secretary of state's referral manual and work with their city recorder or similar official to determine the procedures necessary to refer an ordinance to the voters. The process for referring an "opt-in" ordinance will be the same as the process for referring an "opt-out" ordinance, as set forth in Appendix A, with the appropriate changes in ballot title language.

If a city adopts a repeal ordinance under ORS 475B.496, the city must submit the ordinance to the Oregon Health Authority (if the ordinance being repealed relates to medical marijuana businesses) or the Oregon Liquor Control Commission (if the ordinance being repealed relates to recreational marijuana businesses). Each agency has a form for submitting the ordinances.

If a city adopts an "opt-in" ordinance under ORS 475B.968, the Oregon Liquor Control Commission or the Oregon Health Authority (depending upon whether a recreational marijuana or medical marijuana business is involved) will begin licensing businesses on January 1 following the November election. That delay should provide cities with an opportunity to update its ordinances and codes to add any needed time, manner, and place restrictions.

Any referral election to opt-in or opt-out under ORS 475B.968 must be held at the next statewide general election following the council's adoption of the predicate ordinance.

In addition, it is important to note that once the elections official files the referral with the county election office, the ballot measure is certified to the ballot. At that point, the restrictions on public employees engaging in political activity will apply. Consequently, cities should consult the secretary of state's manual *Restrictions on Political Campaigning by Public Employees* and their city attorney to ensure that public employees are complying with state elections law in their communications about the pending measure.

****

AN ORDINANCE OF THE CITY OF {NAME} REPEALING A BAN ON {MEDICAL MARIJUANA PROCESSING SITES, MEDICAL MARIJUANA DISPENSARIES, RECREATIONAL MARIJUANA PRODUCERS, RECREATIONAL MARIJUANA PROCESSORS, RECREATIONAL MARIJUANA WHOLESALERS, AND/OR RECREATIONAL MARIJUANA RETAILERS}; AND DECLARING AN EMERGENCY

Whereas, the city electors approved a ban on {medical marijuana processing sites, medical marijuana dispensaries, recreational marijuana producers, recreational marijuana processors, recreational marijuana wholesalers, and/or recreational marijuana retailers} on [_____];

Whereas, ORS 475B.496 provides that a city council may adopt an ordinance repealing ordinances that prohibit the establishment of marijuana related businesses in the area subject to the jurisdiction of the city;

Whereas, the city council wants to repeal the prohibition on {recreational marijuana producers, processors, wholesalers, and/or retailers, as well as medical marijuana processors and/or medical marijuana dispensaries};

NOW THEREFORE, BASED ON THE FOREGOING, THE CITY OF {NAME} ORDAINS AS FOLLOWS:

DEFINITIONS.

Marijuana means the plant Cannabis family *Cannabaceae*, any part of the plant Cannabis family *Cannabaceae* and the seeds of the plant Cannabis family *Cannabaceae*.

Marijuana processing site means an entity registered with the Oregon Health Authority to process marijuana.

Marijuana processor means an entity licensed by the Oregon Liquor Control Commission to process marijuana.

Marijuana producer means an entity licensed by the Oregon Liquor Control Commission to manufacture, plant, cultivate, grow or harvest marijuana.

Marijuana retailer means an entity licensed by the Oregon Liquor Control Commission to sell marijuana items to a consumer in this state.

Marijuana wholesaler means an entity licensed by the Oregon Liquor Control Commission to purchase items in this state for resale to a person other than a consumer.

Medical marijuana dispensary means an entity registered with the Oregon Health Authority to transfer marijuana.

BAN REPEALED. As described in ORS 475B.496, the City of {Name} hereby repeals its ordinance{s} {list ordinance by name/number/date} prohibiting the establishment {and operation of the following in the area subject to the jurisdiction of the city {select desired options from the list below}:

(a) Marijuana processing sites;
(b) Medical marijuana dispensaries;
(c) Marijuana producers;
(d) Marijuana processors;
(e) Marijuana wholesalers;
(f) Marijuana retailers.

EMERGENCY. This ordinance being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist, and this ordinance shall be in full force and effect on {date/passage}.

This document is not a substitute for legal advice. City councils considering prohibiting or taxing any marijuana facilities should not rely solely on this sample. Any city council considering any form of regulation of marijuana should consult with its city attorney regarding the advantages, disadvantages, risks and limitations of any given approach.

Legal counsel can also assist a city in preparing an ordinance that is consistent with local procedures, existing ordinances and a city's charter, and advise on what process is needed to adopt the ordinance. The sample provided is intended to be a starting point, not an ending point, for any jurisdiction considering prohibiting or taxing marijuana.

Appendix C

Local Tax by Voter Referral

APPENDIX C

Local Tax by Voter Referral

ORS 475B.491 allows cities to impose a tax on sale of marijuana items made by those with recreational retail licenses. The local tax may not exceed 3 %. To adopt a local tax under ORS 475B.491, a city must refer an ordinance to the voters at a statewide general election, meaning an election in November of an even-numbered year.[1]

Under ORS 475B.968, a city that adopts a prohibition under those sections may not impose a tax or fee on the production, processing or sale or marijuana or any product into which marijuana has been incorporated. Significantly, if a city proposes a prohibition measure and a tax measure to voters in the same general election, the tax measure will only become operative if the ballot measure prohibiting the establishment of certain marijuana registrants and licensees fails.

It is important to note that once the elections official files the referral with the county election office, the ballot measure is certified to the ballot. At that point, the restrictions on public employees engaging in political activity will apply. Consequently, cities should consult the secretary of state's manual *Restrictions on Political Campaigning by Public Employees* and their city attorney to ensure that public employees are complying with state elections law in their communications about the pending measure.

****

AN ORDINANCE OF THE CITY OF {NAME} IMPOSING A {UP TO THREE} % TAX {OR FEE} ON THE SALE OF MARIJUANA ITEMS BY A MARIJUANA RETAILER AND REFERRING ORDINANCE[2]

Whereas, ORS 475B.491 provides that a city council may adopt an ordinance to be referred to the voters that imposes up to a 3% tax {or fee} on the sale of marijuana items by a marijuana retailer in the area subject to the jurisdiction of the city;

Whereas, the city council wants to impose a tax {or fee} on the sale of marijuana items by a marijuana retailer in the area subject to the jurisdiction of the city;

NOW THEREFORE, BASED ON THE FOREGOING, THE CITY OF {NAME} ORDAINS AS FOLLOWS:

DEFINITIONS.

Marijuana item has the meaning given that term in ORS 475B.015(19).

[1] Cities that imposed marijuana taxes prior to 2015, the effective date of ORS 475B.491, should talk to their city attorney about the status of those taxes.

[2] No emergency clause is included in this ordinance because a city may not include an emergency clause in an ordinance regarding taxation. *See Advance Resorts v. City of Wheeler*, 141 Or App 166, 178, *rev den*, 324 Or 322 (1996) (holding that a city may not include an emergency clause in an ordinance regarding taxation).

Marijuana retailer means a person who sells marijuana items to a consumer in this state.

Retail sale price means the price paid for a marijuana item, excluding tax, to a marijuana retailer by or on behalf of a consumer of the marijuana item.

TAX IMPOSED. As described in ORS 475B.491, the City of {Name} hereby imposes a tax {or fee} of {up to three} % on the retail sale price of marijuana items by a marijuana retailer in the area subject to the jurisdiction of the city.

COLLECTION. The tax {or fee} shall be collected at the point of sale of a marijuana item by a marijuana retailer at the time at which the retail sale occurs and remitted by each marijuana retailer that engages in the retail sale of marijuana items.[3]

INTEREST AND PENALTY.

(A) Interest shall be added to the overall tax amount due at the same rate established under ORS 305.220 for each month, or fraction of a month, from the time the return to the Oregon Department of Revenue was originally required to be filed by the marijuana retailer to the time of payment.

(B) If a marijuana retailer fails to file a return with the Oregon Department of Revenue or pay the tax as required, a penalty shall be imposed upon the marijuana retailer in the same manner and amount provided under ORS 314.400.

(C) Every penalty imposed, and any interest that accrues, becomes a part of the financial obligation required to be paid by the marijuana retailer and remitted to the Oregon Department of Revenue.

(D) Taxes, interest, and penalties transferred to {Name of City} by the Oregon Department of Revenue will be distributed to the City's {Name of Designated Fund}.

(E) If at any time a marijuana retailer fails to remit any amount owed in taxes, interest or penalties, the Oregon Department of Revenue is authorized to enforce collection on behalf of the City of the owed amount in accordance with ORS 475B.700 to 475B.760, any agreement between the Oregon Department of Revenue and {Name} under ORS 305.620 and any applicable administrative rules adopted by the Oregon Department of Revenue.

REFERRAL. This ordinance shall be referred to the electors of {city} at the next statewide general election on {date}.

[3] Cities may want to include information about where, how, and when the tax must be remitted.

****

A RESOLUTION APPROVING REFERRAL TO THE ELECTORS OF THE CITY OF {NAME} THE QUESTION OF IMPOSING A {UP TO THREE} % TAX {OR FEE} ON THE SALE OF MARIJUANA ITEMS BY A MARIJUANA RETAILER WITHIN THE CITY[4]

Whereas, ORS 475B.491 provides that a city council may adopt an ordinance to be referred to the voters that imposes up to a 3 % tax or fee on the sale of marijuana items by a marijuana retailer in the area subject to the jurisdiction of the city;

Whereas, the city of {name} city council adopted Ordinance {number}, which imposes a tax of {up to three} % on the sale of marijuana items by a marijuana retailer in the area subject to the jurisdiction of the city;

NOW, THEREFORE, THE CITY OF {NAME} RESOLVES AS FOLLOWS:

MEASURE. A measure election is hereby called to submit to the electors of the city of {name} a measure imposing a {up to three} % tax on the sale of marijuana items by a marijuana retailer in the area subject to the jurisdiction of the city, a copy of which is attached hereto as "Exhibit 1," and incorporated herein by reference.[5]

ELECTION CONDUCTED BY MAIL. The measure election shall be held in the city of {name} on {date}. As required by ORS 254.465, the measure election shall be conducted by mail by the County Clerk of {county name} County, according to the procedures adopted by the Oregon Secretary of State.

DELEGATION. The city of {name} authorizes the City Manager, or the City Manager's designee, to act on behalf of the city and to take such further action as is necessary to carry out the intent and purposes set forth herein, in compliance with the applicable provisions of law.

PREPARATION OF BALLOT TITLE. The City Attorney is hereby directed to prepare the ballot title for the measure, and deposit the ballot title with the {city elections officer} within the times set forth by law.[6]

NOTICE OF BALLOT TITLE AND RIGHT TO APPEAL. Upon receiving the ballot title for this measure, the {city elections officer} shall publish in the next available edition of a newspaper of general circulation in the city a notice of receipt of the ballot title, including notice that an elector may file a petition for review of the ballot title.

[4] Some cities approve the ballot title, question, summary, and explanatory statement by adopting an ordinance, rather than by adopting a separate resolution.

[5] Exhibit 1 should include the question and summary.

[6] Alternatively, the council may prepare the ballot title and attach it to the resolution for approval. In that case, this section might say, "The ballot title for the measure set forth as Exhibit {number} to this resolution is hereby adopted." A city's local rules may dictate who will prepare the ballot title.

EXPLANATORY STATEMENT. The explanatory statement for the measure, which is attached hereto as "Exhibit 2," and incorporated herein by reference, is hereby approved.

FILING WITH COUNTY ELECTIONS OFFICE. The {city elections officer} shall deliver the Notice of Measure Election to the county clerk for {name of county} County for inclusion on the ballot for the {date} election.[7]

EFFECTIVE DATE. This resolution is effective upon adoption.

****

BALLOT TITLE
A caption which reasonably identifies the subject of the measure
10-word limit under ORS 250.035(1)(a)

Imposes city tax on marijuana retailer's sale of marijuana items

QUESTION
A question which plainly phrases the chief purpose of the measure so that an affirmative response to the question corresponds to an affirmative vote on the measure
20-word limit under ORS 250.035(1)(b)

Shall City of {name} impose a {up to 3% } tax on the sale in the City of {city} of marijuana items by a marijuana retailer?

SUMMARY
A concise and impartial statement summarizing the measure and its major effect
175-word limit under ORS 250.035(1)(c)

Under state law, a city council may adopt an ordinance to be referred to the voters of the city imposing up to a 3 % tax or fee on the sale of marijuana items in the city by a licensed marijuana retailer.

Approval of this measure would impose a {up to 3} % tax on the sale of marijuana items in the city by a licensed marijuana retailer. The tax would be collected at the point of sale and remitted by the marijuana retailer.

[7] The Notice of Measure Election is a form provided by the Oregon Secretary of State where cities provide the ballot title, question, summary, and explanatory statement. The form can be found on the Secretary of State's website at www.sos.oregon.gov.

EXPLANATORY STATEMENT

An impartial, simple and understandable statement explaining the measure and its effect for use in the county voters' pamphlet.

500-word limit under ORS 251.345 and OAR 165-022-0040(3)

Approval of this measure would impose a {up to 3} % tax on the sale of marijuana items by a marijuana retailer within the city. There are no restrictions on how the city may use the revenues generated by this tax.

Under Measure 91, adopted by Oregon voters in November 2014, codified in ORS chapter 475B and amended by the Legislature in 2016, 2017, and 2018, the Oregon Liquor Control Commission must license the retail sale of recreational marijuana. ORS 475B.491 provides that a city council may adopt an ordinance imposing up to a 3 % tax on the sale of marijuana items (which include marijuana concentrates, extracts, edibles, and other products intended for human consumption and use) by retail licensees in the city, but the council must refer that ordinance to the voters at a statewide general election. The City of {name} city council has adopted an ordinance imposing a {up to 3} % tax on the sale of marijuana items by a retail licensee in the city, and, as a result, has referred this measure to the voters.

This document is not a substitute for legal advice. City councils considering prohibiting or taxing any marijuana facilities should not rely solely on this sample. Any city council considering any form of regulation of marijuana should consult with its city attorney regarding the advantages, disadvantages, risks and limitations of any given approach.

Legal counsel can also assist a city in preparing an ordinance that is consistent with local procedures, existing ordinances and a city's charter, and advise on what process is needed to adopt the ordinance.

The sample provided is intended to be a starting point, not an ending point, for any jurisdiction considering prohibiting or taxing marijuana.

Appendix D

Sample Time, Place, and Manner Restrictions on Marijuana Businesses

APPENDIX D

Sample Time, Place, and Manner Restrictions on Marijuana Businesses

Scope

The sample wording below is designed to address both medical marijuana as well as recreational marijuana. It assumes that a city will treat both types of marijuana activities similarly. As Oregon moves towards a combined system, state law largely treats medical marijuana the same as recreational marijuana. The commentary below notes where there are differences (*i.e.*, buffer requirements) or where a city might desire to treat medical marijuana differently from recreational marijuana activities

How to Use this Model

This document is not a substitute for legal advice.

This document is not intended to be a complete or comprehensive code chapter on marijuana businesses. A city should not adopt the sample wording in its entirety. Rather, this document, much like a restaurant menu, covers various subjects, which a city may or may not want to include in a marijuana time, place, and manner ordinance, and provides different options under each of those subjects. Consequently, this document is organized by subject area and includes a discussion of the subject followed by sample text on the following:

- Findings
- Definitions
- Rulemaking
- Licenses / Registration
    - License/Registration Required
    - License/Registration Application
    - Issuance of License/Registration
    - Fees
    - Display of License/Proof of Registration
    - Term, Renewal and Surrender
    - Transferability
    - Indemnification

- Criminal Background Checks
- Standards of Operation
    - Registration and Compliance with Administrative Rules
    - Compliance with Other Laws
    - Hours of Operation
    - Public View
    - Odors
    - Lighting
    - Sales
    - On-Site Use
    - On-Site Manufacturing
    - Outdoor Storage
    - Secure Disposal
    - Home Occupation
    - Drive-Through, Walk-Up
    - Labeling
    - Accounting Systems
    - Accounting Records
- Location
- Signs
- Examination of Books, Records and Premises
- Civil Enforcement
- Public Nuisance
- Criminal Enforcement
- Confidentiality
- Emergency Clause

Findings

Discussion

Findings provide the background and purpose of the legislation. Cities should consider how the sample findings below need to be modified to reflect their unique circumstances.

In preparing the findings, as well as other provisions of the ordinance, cities should keep in mind that marijuana remains an illegal drug under the federal Controlled Substances Act. To avoid allegations that city officials are violating federal law by authorizing the commission of a federal offense, the sample findings make clear that the authorization to operate a marijuana business comes from state law, not local law. As such, the sample has been drafted in a manner to be restrictive rather than permissive. To illustrate that point, this sample includes wording for cities that desire to create a local licensing program as a way to implement their time, place and manner regulations. The sample's wording is drafted with care, however, to indicate that the source of authority to operate a marijuana business derives from state law and that the local license is a means to impose restrictions on the operator and is not intended to be a separate source of authority. Consequently, the wording of the following sample text carefully avoids terms that would affirmatively "allow" or "authorize" marijuana businesses.

ORS 475B now contains provisions relating to recreational marijuana businesses and medical marijuana dispensaries, processors, and growers. The model ordinance relates to recreational marijuana businesses, of which there are several categories: producer, processor, wholesaler, retailer, and laboratory. A city may choose to permit the operation of none, some, or all of these categories within the city. The ordinance should be crafted to reflect this choice.

Sample Text

1. State law authorizes the operation of medical and recreational marijuana businesses and provides those businesses with immunity from state criminal prosecution.

2. Although the State of Oregon has passed legislation authorizing marijuana businesses and providing criminal immunity under state law, the operation of those businesses remains illegal under federal law.

3. The city council has home rule authority to decide whether, and under what conditions, certain commercial conduct should be regulated within the city and subject to the general and police powers of the city, except when local action has been clearly and unambiguously preempted by state statute.

4. Whether a certain business should operate within a local jurisdiction is a local government decision, and local governments may enforce that decision through the general and police powers of that jurisdiction.

5. [*If using an existing or creating a new license/registration system for a marijuana business*] The city's licensing [*or registration*] and regulatory system should not be construed to constitute an authorization to engage in any activity prohibited by law nor a waiver of any

other license or regulatory requirement imposed by any other provisions of city ordinance or local, regional, state or federal law.

6. The city council wants to regulate the operation of marijuana businesses in the city in ways that protect and benefit the public health, safety and welfare of existing and future residents and businesses in the city.

7. The ordinance is intended to impose restrictions, not provide authorizations.

8. The ordinance is intended to apply only to recreational marijuana businesses, and not to medical marijuana businesses or to personal possession, growing or use of marijuana as authorized by the state in ORS 475B.797 to ORS 475B.807. [*Use this provision only if the city does not want to combine its medical marijuana ordinance with this ordinance or wants to address medical marijuana as part of a separate ordinance.]*

9. [*If the city intends to refer a local sales tax option to its citizens to approve a sales tax of up to 3 % pursuant to ORS 475B.491, the following finding could be added.]* Upon approval of city voters, the city shall impose a local sales tax of ___% *[up to 3 %]* on the sales of recreational marijuana by marijuana retailers in order to recover its costs incurred in connection with the city's recreational marijuana licensing program.

10. The operation of a marijuana business without proper authority from either the Oregon Liquor Control Commission or the Oregon Liquor Control Commission (OREGON LIQUOR CONTROL COMMISSION) is prohibited within the city.

Definitions

Discussion

Definitions should be used to clarify intent and avoid ambiguity. The specific terms defined in a marijuana ordinance will depend on the provisions of that ordinance. The terms listed here are offered as examples and cover some of the most commonly-used terms in state law relating to marijuana businesses. Recreational marijuana businesses can include producers, processors, wholesalers and retailers. A city may or may not allow all of these separate categories of marijuana business to operate within the city. The definitions need to reflect only those types of marijuana businesses permitted in a city. In addition, depending on the needs of a particular city, it may be useful or necessary to include additional definitions not listed below.

It is important to note that when interpreting ordinances that contain specific references to state law, the courts will use the version of the state statute that was in effect at the time that the ordinance was adopted. Put differently, if the Legislature amends a state statute, a city ordinance that references that statute is not automatically updated to reflect the legislative change. Consequently, if using statutory cites, the city will need to periodically review and update their ordinances if the city wants the benefit of the new statutory wording. As a result, the model ordinance does not refer to specific sections of the Oregon Revised Statutes.

Sample Text

1. Licensee means a person who holds a license issued by the city to engage in a marijuana business in accordance with this chapter.

2. Licensee representative means an owner, director, officer, manager, employee, agent or other representative of a licensee, to the extent that the person acts in a representative capacity.

3. Marijuana means all parts of the plant cannabis family *Cannabacea*, whether growing or not; the resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture or preparation of the plant or its resin. It does not include the mature stalks of the plant, fiber produced from the stalks, oil or cake made from the seeds of the plant, any other compound, manufacture, salt, derivative, mixture or preparation of the mature stalks (except the resin extracted therefrom), fiber, oil or cake, or the sterilized seed of the plant which is incapable of germination.

4. Marijuana business means (1) any business licensed by the Oregon Liquor Control Commission to engage in the business of producing, processing, wholesaling, or selling marijuana or marijuana items, or (2) any business registered with the Oregon Health Authority for the growing, processing, or dispensing of marijuana or marijuana items.

   Alternative Approach: This model assumes similar treatment of both medical as well as recreational activities. If a city desires to set separate standards of operation either between medical and recreational businesses, or among license types within the medical or recreational system, then the city will need to separately define medical growers, medical processors, medical dispensaries, recreational producers, recreational processors, wholesalers, and recreational retailers. Both state law and the administrative rules provide a basis for creating such definitions

5. Marijuana items means marijuana, cannabinoid products, cannabinoid concentrates, and cannabinoid extracts.

Rulemaking

Discussion

Depending on the size and structure of the city, a city may want to provide the city manager/administrator or that person's designee, or another appointed city official such as the chief of police, with authority to adopt administrative rules to implement and enforce the city's medical marijuana ordinances.

Sample Text

1. Rulemaking. The city manager [*administrator*] or the city manager's [*administrator's*] designee [*or some other designated public official, such as "chief of police"*] has authority to adopt administrative rules and procedures necessary for the proper administration and

enforcement of this chapter [*or if not creating a new chapter, "ordinances relating to the operation of a marijuana business"*].

Licenses / Registration

License/Registration Required

Discussion

Cities that want to regulate marijuana businesses can do so in several ways. Many cities, particularly those with larger staffs, have decided to regulate marijuana businesses through a license or permit system. Even those cities that are using a licensing system are imposing differing levels of regulation, from basic registration and tracking to extensively restricting the activities of marijuana businesses. Because a licensing approach allows cities to both track and regulate marijuana businesses, with multiple enforcement mechanisms, the sample wording provides for a licensing system. Although this sample only requires a marijuana business license, a city could also require the employees of marijuana businesses to get licenses.

As explained above, to avoid conflicts with federal law, the sample text is drafted to make clear that the authority for marijuana businesses to operate comes from state, and not local, law. Although the sample text uses the word "license," the text is intended to clarify that the license operates as a registration system, and not as a grant of authority to violate federal law. Cities that want to further emphasize that point may want to avoid the use of the word "license" and instead convert the sample text to "registration."

Cities that adopt a licensing/registration system will have to determine where to incorporate that system into their code. For example, cities with police protection licenses may want to add marijuana businesses to those licensing provisions.

Sample Text

1. Local License Required. Marijuana businesses must possess a valid license issued under this chapter to operate within the city. The license required by this chapter facilitates the registration and the city's oversight of a marijuana business. The license required by this chapter should not be construed to constitute an authorization to engage in any activity prohibited by law nor a waiver of any other regulatory or license requirement imposed by any other provision of city ordinance or local, regional, state or federal law.

2. State Registration Required. To be eligible to apply for a license under this chapter, marijuana businesses must be either registered with the Oregon Health Authority or licensed by the Oregon Liquor Control Commission and otherwise authorized by state law to operate a marijuana business.

License/Registration Application

Discussion

Cities using a licensing/registration system will have to decide what information to request in an application. The sample list of information provided below is a compilation of application requirements from different city ordinances. Cities may determine that they want to require less, more or different information from applicants.

In addition, although this sample requires the same information for both an initial and renewal application, cities may want to use a less intensive or otherwise different process for license renewals.

This sample also provides the city with the option to inspect the proposed licensed premises as part of the application process and thereafter. More information regarding inspections is found in the section "Civil Enforcement."

Sample Text

1. Application/Renewals. Applications for new and renewed licenses must be submitted to _____ [*designated public official or city department*] on a form provided by the city. A separate application must be submitted for each proposed marijuana business. The initial or renewal application must include the following information:

    a. Certification that the proposed marijuana business is licensed at that location as a marijuana business with the Oregon Health Authority or the Oregon Liquor Control Commission.

    b. The applicant's name, residence address, and date of birth. [*A city may want to require photo identification, such as a driver's license or other government-issued identification*.]

    c. The names and residence addresses of:

        i. Any person or legal entity that has an ownership interest in the marijuana business, including all principals of the applicant;

        ii. Any person or legal entity with a financial interest that has loaned or given money or real or personal property to the applicant, or principal of the applicant, for use by the proposed marijuana business within the preceding year;

        iii. Any person or legal entity that has leased real property to the applicant for use by the marijuana business and any person who manages that property; and

        iv. Any person who is anticipated at the time of the application to be an employee or volunteer at the proposed facility.

    d. The business name.

    e. The address and telephone number of the proposed marijuana business.

f. The mailing address for correspondence about the license.

g. A detailed description of the type, nature and extent of the business, including a description of the category of marijuana business to be operated.

h. The proposed days and hours of operation.

i. A detailed description of the proposed accounting and inventory system of the marijuana business.

j. Certification that the licensed premises for the proposed marijuana business has met all applicable requirements of the city development and sign code.

k. Certification that all applicable taxes and fees have been paid.

l. A complete application for a criminal background check for the applicant, and all principals, persons with a financial interest, employees and volunteers of the proposed marijuana business.

Alternative Sample Text on Criminal Background: A statement whether the applicant, principals, persons with a financial interest, employees or volunteers have been convicted of a misdemeanor within the past ____ [*time period*] that relates to _____, [*relevant crimes, such as fraud, theft, manufacture or delivery of a Schedule I controlled substance*] or have ever been convicted of a felony. (See below for a fuller discussion on background checks.)

m. The names of at least three natural persons who can give an informed account of the marijuana business and moral character of the applicant and principals.

n. The signature, under penalty of perjury, of the applicant, if a natural person, or otherwise the signature of an authorized agent of the applicant, if the applicant is other than a natural person.

o. Other information deemed necessary by _____ [*designated public official*] to complete review of the application or renewal.

p. The city may inspect the proposed licensed premises prior to issuing a license and at any time during normal business hours following the issuance of a license. If, during the inspection, the city determines that the applicant or the licensed premises are not in compliance with this chapter or any other chapter of the city's building, development, zoning, nuisance or other city ordinance or code, the applicant will be provided with a notice of the failed inspection and that the requirements of this chapter have not been met. *[If the city chooses, a process for an additional inspection or hearing following a failed inspection could be added to this provision.]*

2. Continuing obligation to update information. All information provided in an initial or renewal application must be kept current at all times, including after a license is issued. Each licensee shall notify _____ [*designated public official or department*] in writing

within _____ [*time period, such as ten business days*] of any change in the information provided to obtain the license.

Issuance of License/Registration

Discussion

Each city that adopts a licensing/registration system will have to determine the process for issuing licenses, the criteria for issuing or denying a license, and who within the city will apply those criteria. Cities may want to look to how other local licenses, such as business licenses, are issued in crafting a process for issuing medical marijuana facility licenses.

If a city wants to cap the number of licenses that it will issue, the city could address that issue in this section. If a city takes that approach, it should consider what method it will use to determine which applicants will receive licenses when the number of applications exceeds the cap.

Sample Text

1. Determination. Within ____ [*time period*] after receiving a complete [*initial or renewal*] application and license fee for a medical marijuana business license, the _____ [*designated public official or department*] will issue the license if _____ [*designated public official or department*] finds that the facility is licensed as a marijuana business with the Oregon Health Authority or the Oregon Liquor Control Commission and that all other requirements under this chapter have been met. The city license will list the specific category of marijuana business license being issued.

2. Denial. In addition to denial for failure to meet the requirements of this chapter, the _____ [*designated public official or department*] may deny a license if:

    a. The applicant made an untrue, misleading, or incomplete statement on, or in connection with, the application for the license or a previous application for a license;

    b. Notwithstanding the federal Controlled Substances Act, the applicant fails to meet all requirements of local, state, and federal laws and regulations, including, but not limited to, other permitting or licensing requirements and land use regulations; or

    c. The _____ [*applicant, principals, employees, volunteers, persons with a financial interest in the facility*] have been convicted of _____ [*specified crimes*].

3. Notice of denial. The city shall issue a notice of denial to an applicant in writing specifying the reasons for the denial. *[The city may add any appeal or hearing rights it wishes to provide to an applicant or cross reference to another portion of the city code that relates to appeals and hearings.]*

Fees

Discussion

Cities adopting a licensing system may want to charge a one-time initial license application fee, an annual license fee, or both. Cities may want to look at how their other licensing fees are structured when setting the marijuana business license fee. Some cities prorate the license fee for licenses that are issued after a certain point in the licensing year. For example, if all licenses expire on December 31 each year, a city might prorate the fees for licenses issued after June 30 of that year. Some cities also provide that license fees are not refundable.

Sample Text

1. Fee. An initial license application or renewal application must be accompanied by a license fee. The fee amount will be established by _____ [*method for setting fees, commonly through council resolution; alternatively, fee amount may be set by ordinance*].

Display of License/Proof of Registration

Sample Text

1. Display. When requested, the licensee shall show the license issued under this chapter to any person with whom the licensee is dealing as part of the licensed activity or to _____ [*designated public official*].

   Alternative Sample Text: The license issued under this chapter must be prominently displayed at all times in an easily visible location inside the licensed premises.

Term, Renewal and Surrender

Discussion

Cities with licensing/registration systems will need to set a term and create a renewal process. The two options in the first subsection below provide different means of tracking expiration and renewal. The first option would put all renewals at one time of year and the second option would put renewals on a rolling basis. Cities may want to consider schedules for other local license and renewal processes to determine whether to align marijuana business licenses with those other processes. In addition, cities may want to provide a process for surrendering a license/registration.

Sample Text

1. Termination. A license terminates automatically _____ [*on month and day of each year/certain years or some time period from the date of issuance*], unless a license renewal application has been approved.
2. Renewal. A license may be renewed for additional _____ [*duration*] terms as provided by this chapter.
3. Renewal Application. Renewal applications shall be submitted, with the required license fee, to _____ [*designated public official or department*] not less than _____ [*days, months*] prior to the expiration date of the existing license.
4. Termination Due to Change in Law. A license terminates automatically if federal or state statutes, regulations or guidelines are modified, changed, or interpreted in such a way by state or federal law enforcement officials as to prohibit operation of the marijuana business under this ordinance.
5. Termination Due to Suspension, Revocation or Termination by State Authority. A license terminates automatically upon the suspension, revocation, surrender or termination of an Oregon Health Authority registry or an Oregon Liquor Control Commission issued marijuana business license for any reason.
6. Surrender. A licensee may surrender a marijuana business license by delivering written notice to the city that the licensee thereby surrenders the license. A licensee's surrender of a license under this section does not affect the licensee's civil or criminal liability for acts the licensee committed before surrendering the license.

Transferability

Discussion

Cities should consider whether they want to allow licensees to transfer their license, and, if so, the process for allowing such a transfer. For example, under certain circumstances, a city might allow the license to be transferred if the business is sold. The alternative sample text below provides for a license transfer. Cities that allow for transfer might consider creating a transfer application, which could require an accompanying fee, to ensure that the new licensee is eligible to hold the license.[139]

Sample Text

[139] The Oregon Administrative Rules provide regulations regarding the transferability of state-issued licenses.

1. Transferability. Licenses issued under this chapter shall not be transferred to any other person by operation of law or otherwise.

   Alternative Sample Text: Licenses issued under this chapter may be transferred to another person upon determination by _____ [*designated public official*] that the person receiving the license meets the requirements of this chapter for licensees.

Indemnification

Sample Text

1. Waiver. By accepting a marijuana business license issued under this chapter, the licensee waives and releases the city, its officers, elected officials, employees, volunteers and agents from any liability for injuries, damages or liabilities of any kind that result from any arrest or prosecution of a marijuana business owner or operator, principal, person or legal entity with a financial interest in the marijuana business, person or entity that has leased real property to the marijuana business, employee, volunteer, client or customer for a violation of federal, state or local laws and regulations.
2. Indemnification. By accepting a marijuana business or license issued under this chapter, the licensee(s), jointly and severally if there is more than one, agree to indemnify and hold harmless the city, its officers, elected officials, employees, volunteers, and agents, insurers, and self-insurance pool against all liability, claims, and demands on account of any injury, loss, or damage, including, without limitation, claims arising from bodily injury, personal injury, sickness, disease, death, property loss or damage, or any other loss of any kind whatsoever arising out of or in any manner connected with the operation of the marijuana business that is the subject of the license.

Criminal Background Checks

Discussion

Under ORS chapter 475B an individual may be required by the Oregon Health Authority and Oregon Liquor Control Commission to submit to a criminal background check. Generally speaking, persons convicted within the last two years of manufacture or deliver of a controlled substance, having more than one conviction of manufacture or delivery of a controlled substance, or (with respect to recreational licenses) any conviction or delivery of a control substance to a person under 21, are not eligible for state licensing or registration. Cities may want to require additional background checks for licensees, owners, employees, volunteers or other individuals associated with a marijuana business and may want to include additional disqualifying convictions. Alternatively, cities could require license applicants and others associated with

licensed facilities to self-report that information as part of the application process, as provided in the License Application alternative sample text above.

Alternatively, some cities may want to use their licenses solely for tracking purposes, without limiting who is eligible to receive a license or work at a licensed facility. In that case, a city may not want to require criminal background checks.

Sample Text

1. Background Check Required / Disqualification. All _____ [*applicants, principals, employees, volunteers, persons with a financial interest in the marijuana business*] must submit to a criminal background check performed by _____ [*designated public official*] before _____ [*a license will be issued; beginning employment at a facility; etc.*]. A person who has been convicted of _____ [*specified crimes*] may not be _____ [*a licensee, employee, volunteer, etc.*].

Standards of Operation

Discussion

The topics covered in this section are examples of some of the many issues that a city may want to address in regulating medical marijuana facilities, but the list is not exhaustive. In drafting provisions for a section covering standards of operation, there are at least four considerations to keep in mind.

First, state law provides that time, place and manner regulations need to be "reasonable," however the statute does not define that term. Until the Legislature provides a definition or until state courts articulate a standard for "reasonable regulations," there is a higher likelihood that regulations will face legal challenges. Cities will be better positioned against legal challenges if they make specific findings as to how and why their regulations relate to public health, welfare, and safety concerns.

Second, as a reminder, a city should consider drafting ordinances to restrict, rather than authorize, certain activities in an effort to avoid conflicts with federal law. For example, rather than providing that a medical marijuana facility *may* operate between the hours of 8 a.m. and 5 p.m., the ordinance should provide that a facility *may not* operate between the hours of 5 p.m. and 8 a.m. If the city does not want to restrict activity, it should simply remain silent on that issue, rather than affirmatively authorizing conduct that is illegal under federal law.

Third, when deciding what restrictions to impose, cities should become familiar with the conditions the state is placing on marijuana businesses by reviewing the most recent version of OAR 845-025-1000 to OAR 845-025-8080. After reviewing those conditions, cities should consider whether they want to impose additional requirements or whether they want to include similar requirements in their code so that they can independently enforce those provisions of state law through local enforcement mechanisms.

Fourth, when considering operational restrictions, cities might consider drafting an ordinance that segregates the restrictions by the category of marijuana business. For example, certain restrictions might apply to processors and not producers, wholesalers or retailers. *[Consider adding a prefatory phrase such as, "For marijuana processors," followed by a list of operating restrictions that apply to processors.]*

Fifth, cities should consider what restrictions might already be in place based on existing zoning or other ordinances of general applicability. For example, because many cities have existing fencing, sign, and noise ordinances, those matters are not specifically addressed in this model. However, if a city wants to treat marijuana businesses differently than that of other businesses, it will need to specifically do so in this section. For example, "A marijuana business in a residential district shall not produce or emit a sound that is detectible at the property line. A marijuana business operating in any other zone shall comply with the city's noise ordinance at _____."

Finally, because this is an emerging industry with evolving technologies, cities are better served drafting ordinances to address the effects of the industry, rather than the means to achieve those effects. For example, rather than drafting an odor provision that requires a specific air cleaning technology, it is preferable to draft an ordinance that requires the business to have an air filtration system certified by an engineer to ensure marijuana odor cannot be detected outside of the property lines or enclosed structure.

Sample Text

1. Registration and Compliance with State Law. The marijuana business's state license or authority must be in good standing with the Oregon Health Authority or Oregon Liquor Control Commission and the marijuana business must comply with all applicable laws and regulations administered by the respective state agency, including, without limitation those rules that relate to labeling, packaging, testing, security, waste management, food handling, and training.

2. Compliance with Other Laws. The facility must comply with all applicable laws and regulations, including, but not limited to, the development, land use, zoning, building and fire codes.

3. Hours of Operation. Operating hours for a marijuana business must be as follows: (i) for a business engaged in sales or transfer of marijuana or marijuana products to a consumer: no earlier than _____ and no later than _____ on the same day. *[consider using same time period as allowed under any applicable ordinance relating to liquor stores]*; for all other medical business activities: no earlier than _____ and no later than _____on the same day: for processor: no earlier than _____ and no later than _____ on the same day. *[Note, existing land use ordnances may already prohibit activities at certain times using same time period as allowed under any applicable ordinance relating to liquor stores]*

4. Public View. All doorways, windows and other openings shall be located, covered or screened in such a manner to prevent a view into the interior from any exterior public or semipublic area.

5. Odors. The marijuana business must use an air filtration and ventilation system which is certified by an Oregon Licensed mechanical engineer to ensure, to the greatest extent feasible, that all objectionable odors associated with the marijuana are confined to the licensed premises. For the purposes of this provision, the standard for judging "objectionable odors" shall be that of an average, reasonable person with ordinary sensibilities after taking into consideration the character of the neighborhood in which the odor is made and the odor is detected.

6. Lighting. Facilities must maintain adequate outdoor lighting over each exterior exit.

7. Sales. Sales or any other transfers of marijuana must occur inside the licensed premises and must be conducted only between the marijuana business and individuals 21 years of age and older.

8. On-Site Use. Marijuana and tobacco products must not be smoked, ingested, consumed or otherwise used on the licensed premises.

9. On-Site Manufacturing. With the exception of marijuana processors, the manufacturing or processing of any extracts, oils, resins, or similar derivatives of marijuana is prohibited at any licensed premises. Marijuana processors may engage in processing in industrial zones only.

10. Outdoor Storage. Outdoor storage of merchandise, raw materials or other material associated with the marijuana business is prohibited.

11. Secure Disposal. The facility must provide for secure disposal of marijuana remnants or by-products; marijuana remnants or by-products shall not be placed within the marijuana business's exterior refuse containers.

12. Home Occupation. A marijuana business may not be operated as a home occupation.

13. Drive-Through, Walk-Up. A marijuana business may not have a walk-up window or a drive-through.

14. Labeling. All products containing marijuana intended to be ingested (i.e. edibles) must be labeled with the product's serving size and the amount of tetrahydrocannabinol in each serving in accordance with Oregon Health Authority and Oregon Liquor Control Commission rules.

15. Accounting Systems. The marijuana business must have an accounting system specifically designed for enterprises reliant on transactions conducted primarily in cash and sufficient to maintain detailed, auditable financial records. If the _____ *[designated public official]* finds the books and records of the facility are deficient in any way or if the marijuana business's accounting system is not auditable, the marijuana business must modify

the accounting system to meet the requirements of the _____ *[designated public official]*.

16. Accounting Records. Every marijuana business must keep and preserve, in an accounting format established by _____ *[designated public official]*, records of all sales made by the marijuana business and such other books or accounts as may be required by the _____ *[designated public official]*. Each marijuana business must keep and preserve for a period of at least _____ *[time period]* records containing at least the following information:

    a. Daily wholesale purchases (including grow receipts) if licensed as a marijuana wholesaler and retail sales, if licensed as a retailer, including a cash receipts and expenses journal;

    b. State and federal income tax returns;

    c. State quarterly sales tax returns for retail sales;

    d. True names and any aliases of any owner, operator, employee or volunteer of the marijuana business;

    e. True names and addresses and any aliases of persons that have, or have had within the preceding year, a financial interest in the marijuana business; and

    f. _____ *[designated public official]* may require additional information as he or she deems necessary.

Location

Discussion

A city can regulate the location of a marijuana business either through amendments to its zoning code, made in accordance with local and statutory land use procedures, or by imposing conditions on the marijuana business license. Cities should consult their city attorney to discuss the benefits, risks and timelines associated with each approach.

Keeping in mind that state law allows for the licensing of marijuana retailers, wholesalers, processors, producers and laboratories, cities may want to impose restrictions on where marijuana businesses and facilities can locate in relation to other zones or specified locations and based upon the specific type of marijuana business. For example, a city could impose limits on the distance of marijuana businesses or facilities from:

- A residential zone or a multi-use zone which includes residences;
- Places where children congregate;

- A public elementary, private elementary, secondary, or career school attended primarily by individuals under the age of 21;
- A public library;
- A public park, public playground, recreation center, or facility;
- A licensed child care facility;
- A public transit center;
- Any game arcade where admission is not restricted to persons aged 21 or older;
- Another licensed medical marijuana facility licensed by the Oregon Health Authority or a recreational marijuana facility licensed by the OREGON LIQUOR CONTROL COMMISSION;
- Any public property, not including the right of way; or
- Any combination of the above.

Cities that impose those types of distance restrictions should consider how those provisions will operate if one of the protected properties, such as a school, locates within a restricted area of an existing marijuana business. An ordinance could provide that the marijuana business may remain in place, that the license will be revoked, or that the license will no longer be eligible for renewal. Cities should work closely with their city attorney to evaluate the risks and benefits of those options. In addition, cities may want to look to the state regulations for guidance.

In addition, cities should consult their city attorney if they are imposing restrictions that are more stringent than those imposed under state law, by, for example, requiring facilities to locate 2,000 feet from other medical marijuana businesses. Note, however, that state law does restrict cities from imposing a buffer requirement on recreational retailers. Specifically, cities cannot restrict retailers from locating more than 1,000 feet from another recreational retailer. See ORS 475B.486(2)(a). Consequently, a standard buffer of 1,000 feet will work for both medical as well as recreational facilities. However, anything greater than a 1,000 feet requirement can only apply to Medical dispensaries. Although the courts have generally upheld local authority to impose more stringent requirements than those imposed by state law, a city should consult its city attorney regarding the risks associated with taking a more restrictive approach. That is true particularly if the regulations have the effect of prohibiting marijuana businesses within the city. However, a city that takes that route should work closely with its legal counsel to follow current court cases in this area and be prepared to defend its regulations against a legal challenge.

Cities that adopt distance restrictions will also need to consider how the distance will be measured. For example, one city provided that the distance would be measured in a straight line from the closest edge of each property line, while another city provided that the distance would be measured from the property line of the affected property, such as a school, to the closest point of space occupied by the medical marijuana facility. Another city provided that the distance would be measured between the closest points of the respective lot lines.

In addition to distance restrictions, some cities have imposed restrictions on what types of businesses can be next to marijuana businesses. For example, some cities have prohibited tobacco smoking lounges, marijuana social clubs, and retail marijuana businesses from being in the same proximity. Some cities have also required marijuana businesses to be located at fixed, permanent locations. For example, an ordinance might provide, "A marijuana business or facility may not be located at a temporary or mobile site. No person shall locate, operate, own, allow to be operated or aid, abet or assist in the operation of any mobile marijuana business which transports or delivers, or arranges transportation or delivery, of marijuana to a person."

As noted above, restrictions may need to be segregated by the category of marijuana business involved. For example, restrictions that relate to marijuana producers might not apply to marijuana retailers, processors or wholesalers.

Sample Text

1. Restrictions on Location: Marijuana Dispensary or Retailer. A marijuana retailer shall not locate:
    a. Within a residence or mixed-use property that includes a residence.
    b. Within _____ zone(s).
    c. Within _____ [*distance*] of _____ [*certain zones, types of properties, schools, parks, licensed day care facilities, parks, public transit centers, game arcades no restricted to persons age 21 and older, any public property, any other recreational or medical marijuana facilities, etc.*]
    d. On the same property or within the same building with _____ [*other types of facilities, such as marijuana social clubs*].

2. Restrictions on Location: Marijuana Wholesaler. A marijuana wholesaler shall not locate:
    a. Within a residence or mixed-use property that includes a residence.
    b. Within _____ zone(s).
    c. Within _____ [*distance*] of _____ [*certain zones, types of properties, medical marijuana facilities, etc.*]
    d. On the same property or within the same building with _____ [*other types of facilities,*].

3. Restrictions on Location: marijuana producer. A marijuana producer shall not locate:
    a. Within a residence or mixed-use property that includes a residence.
    b. Within _____ zone(s).
    c. Within _____ [*distance*] of _____ [*certain zones, types of properties, medical marijuana facilities, etc.*]

   d. On the same property or within the same building with _____ [*other types of marijuana businesses*].

4. Restrictions on Location: marijuana processor. A marijuana processor shall not locate:

   a. Within a residence or mixed-use property that includes a residence.

   b. Within _____ zone(s).

   c. Within _____ [*distance*] of _____ [*certain zones, types of properties, medical or recreational marijuana business, etc.*]

   d. On the same property or within the same building with _____ [*other types of marijuana businesses*].

5. Distances. For purposes of this section, all distances shall be measured _____ [*method for measuring distance*].

Signs

Discussion

No sample text is provided because cities that want to regulate the signs on marijuana businesses or facilities should consider applying their existing sign code. If a city does not have a sign code or wishes to amend and update its sign code, that city should consult the LOC's Guide to Drafting a Sign Code, available at https://www.orcities.org/application/files/6915/6321/5042/GuidetoDraftingSignCode03-09-18.pdf. Cities that want to impose sign restrictions on medical marijuana facilities other than those already in the city sign code should consult their city attorney about possible free speech implications.

Examination of Books, Records, and Premises

Discussion

Cities regulating marijuana businesses and facilities should consider who will enforce those regulations and how. One aspect of that decision is whether a city will provide for inspections, and, if so, what those inspections will entail and who will conduct them. In addition, cities that provide for inspection of a licensed premises and its records may want to specify which records a marijuana business or facility must keep, and for how long. Sample text on records retention is provided in the Standards of Operation section above.

Sample Text

1. Examination of Books, Records and Premises. To determine compliance with the requirements of this chapter and other chapters of _____ [*city's code*], a licensee shall allow _____ [*designated public official*] to examine or cause to be examined by an

agent or representative designated by _____ [*designated public official*], at any reasonable time, the licensed premises, including wastewater from the facility, and any and all marijuana business financial, operational and licensed premises information, including books, papers, payroll reports, and state and federal income tax returns, and quarterly sales tax returns for marijuana retailers. Every licensee is directed and required to furnish to _____ [*designated public official*] the means, facilities and opportunity for making such examinations and investigations.

2. Compliance with Law Enforcement. As part of investigation of a crime or a violation of this chapter which law enforcement officials reasonably suspect has taken place on the facility's premises or in connection with the operation of the marijuana business, the _____ [*designated public official*] shall be allowed to view surveillance videotapes or digital recordings at any reasonable time. Without reducing or waiving any provisions of this chapter, the _____ [*law enforcement department*] shall have the same access to the licensed premises, its records and its operations as allowed to state inspectors.

   Alternative Sample Text: The marijuana business shall be open for inspection and examination by _____ [*public official charged with enforcement*] during all operating hours.

Civil Enforcement

Discussion

A licensing system allows a city multiple methods of enforcement. As included in the sample text below, the city can deny, suspend or revoke a license, but it may also impose penalties on a facility owner that does not comply with local ordinances.

If a city adopts a license suspension and revocation provision like the one listed below, a city may want to consider whether to address additional issues such as:

- Will the ordinance list all possible reasons for revocation, or will it include a more general revocation provision based on noncompliance with this chapter, as provided in the sample?
- Will the ordinance provide the form and timing of the suspension or revocation? For example, "Any denial, suspension or revocation under this section shall be in writing, including the reasons for the denial, suspension or revocation, and sent by first-class mail at least _____ [*time period*] prior to the effective date of the denial, suspension or revocation." If the licensee is given advanced notice of the pending suspension or revocation, as is the case in this sample language, the city may want to give the licensee a period of time within which to correct the problem to avoid suspension or revocation.
- Will the ordinance allow for an appeal, and, if so, can that decision be appealed? For example, "A denial, suspension, or revocation under this section may be appealed to

_____ [*designated public official*]. The findings of _____ [*designated public official*] shall be final and conclusive." In addition, if the ordinance allows for an appeal, the city may want to include in the ordinance whether the appeal stays the pending enforcement action.

- Will the ordinance put limitations on how soon after revocation a person or entity can apply for a new license? For example, "A person or entity who has had a license revoked may not apply for a new license until _____ [*time period*] from the date of the revocation."

Cities may also want to review their existing city codes to see if there are other violation provisions that they want to incorporate by reference here.

Sample Text

1. Enforcement. _____ [*designated public official*] may deny, suspend or revoke a license issued under this chapter for failure to comply with this chapter [*and rules adopted under this chapter*], for submitting falsified information to the city or the OREGON LIQUOR CONTROL COMMISSION, or for noncompliance with any other city ordinances or state law.

2. Civil Penalty. In addition to the other remedies provided in this section, any person or entity, including any person who acts as the agent of, or otherwise assists, a person or entity who fails to comply with the requirements of this chapter or the terms of a license issued under this chapter, who undertakes an activity regulated by this chapter without first obtaining a license, who fails to comply with a cease and desist order issued pursuant to this chapter, or who fails to comply with state law shall be subject to a civil penalty not to exceed _____ [*amount*] per violation.

3. Other Remedies. In addition to the other remedies provided in this section, the city may institute any legal proceedings in circuit court necessary to enforce the provisions of this chapter. Proceedings may include, but are not limited to, injunctions to prohibit the continuance of a licensed activity, and any use or occupation of any building or structure used in violation of this chapter.

4. Remedies not Exclusive. The remedies provided in this section are not exclusive and shall not prevent the city from exercising any other remedy available under the law, nor shall the provisions of this chapter prohibit or restrict the city or other appropriate prosecutor from pursuing criminal charges under city ordinance or state law.

Public Nuisance

Discussion

Public nuisance ordinances provide a means for cities to take action to protect the public in general. Adding a public nuisance provision to a marijuana business or facility ordinance provides the city with another means of enforcing its local regulations. A city that has a municipal court might also consider working with its legal counsel to determine whether it can provide for private nuisance actions in municipal court.

Sample Text

1. Public Nuisance. Any premises, house, building, structure or place of any kind where marijuana is grown, processed, manufactured, sold, bartered, distributed or given away in violation of state law or this chapter, or any place where marijuana is kept or possessed for sale, barter, distribution or gift in violation of state law or this chapter, is a public nuisance.

2. Action to Remedy Public Nuisance. The city many institute an action in circuit court in the name of the city to abate, and to temporarily and permanently enjoin, such nuisance. The court has the right to make temporary and final orders as in other injunction proceedings. The city shall not be required to give bond in such an action.

Criminal Enforcement

Discussion

As noted, cities generally cannot criminalize what state law expressly allows. However, it is an open question whether a city can impose criminal penalties for violating a law of general applicability that reaches conduct expressly authorized under state law. For example, it is an open question whether a city can impose criminal penalties on a marijuana business that operates without a business license, in violation of local law, because state law does not expressly provide that a marijuana business is exempt from criminal prosecution for operating without a business license. Therefore, cities that want to impose criminal penalties should work closely with their city attorney to determine whether the city can impose criminal penalties for failure to comply with the city's licensing provisions or other provisions of general applicability.

Confidentiality

Sample Text

1. Confidentiality. Except as otherwise required by law, it shall be unlawful for the city, any officer, employee or agent to divulge, release or make known in any manner any financial or

employee information submitted or disclosed to the city under the terms of this chapter. Nothing in this section shall prohibit the following:

a. The disclosure of names and facility addresses of any licensee under this chapter or of _____ [*other individuals associated with a marijuana business, such as other owners*];

b. The disclosure of general statistics in a form which would prevent identification of financial information regarding a business [*or marijuana business operator*];

c. The presentation of evidence to a court, or other tribunal having jurisdiction in the prosecution of any criminal or civil claim by the city under this chapter;

d. The disclosure of information to and upon request of a local, state or federal law enforcement official or by order of any state or federal court; or

e. The disclosure of information when such disclosure of conditionally exempt information is ordered under public records law procedures [*or when such disclosure is ordered under the Oregon Public Records Law*].

Emergency Clause

Discussion

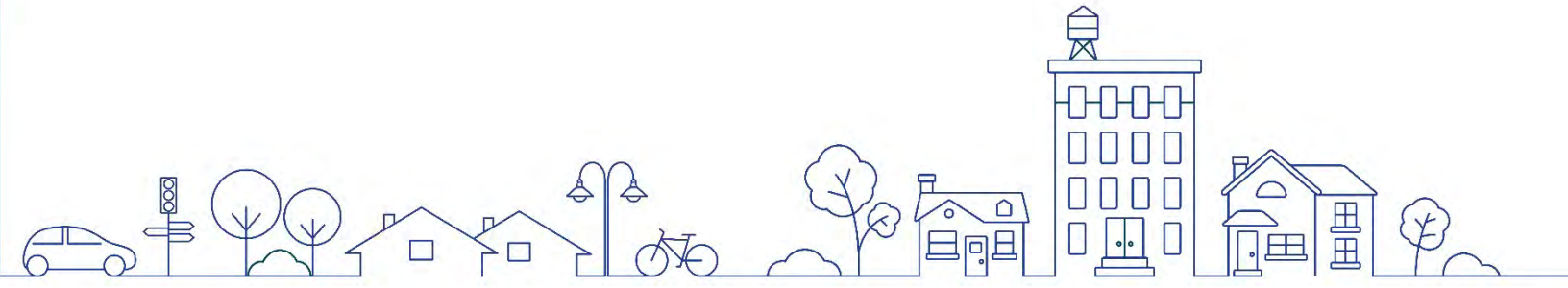
The League's model charter, available on the Library page under Publications on the LOC's website (www.orcities.org), provides that ordinances normally take effect on the 30th day after adoption, or on a later day provided in the ordinance. The model charter provides an exception to that general rule and allows an ordinance to take effect as soon as adopted, or on another date less than 30 days after adoption, if it contains an emergency clause. Cities that want their ordinance to have immediate effect should review their charter and talk to their city attorney about whether an emergency clause is needed.

Sample Text

This act being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist, and this ordinance shall be in full force and effect on _____ [*date*].

Oregon Municipal Handbook

CHAPTER 28:
FIRST AMENDMENT LAW



League of Oregon Cities

Published by the League of Oregon Cities April 2022
Last updated by LOC Attorneys August 2024

Table of Contents

The League of Oregon Cities wishes to extend its sincerest thanks to Markowitz Herbold, a Portland based law firm, for writing this chapter of the Municipal Handbook. Two attorneys, Hanna Hoffman and Harry Wilson, created the chapter.

Hannah Hoffman is an attorney at Markowitz Herbold and represents both individuals and businesses in complex commercial disputes. She is a key member of the firm's government, appellate, and employment practice groups. Before joining the firm, Hannah served as a Clackamas County deputy district attorney and an assistant general counsel with the Oregon Department of Justice's Solicitor General's Office. She was also a law clerk for the Honorable Michael Mosman of the U.S. District Court of Oregon. Before attending law school, Hannah was a journalist reporting on politics, government, and education for the Willamette Week, McMinnville News Registers, and the Statements Journal in Salem.

Harry Wilson "is one of the top litigators on the West Coast" according to a former Attorney General of Oregon. Harry chairs Markowitz Herbold's Government Practice Group. He has represented a wide array of state and local governments, public officials, election campaigns, and advocacy organizations. Harry's work for the League of Oregon Cities includes preparing an amicus brief to the United States Supreme Court in support of the League's efforts to obtain review of the Ninth Circuit Court of Appeal's decision in *Martin v. City of Boise*. Harry is both a trial and appellate lawyer. At the trial court level, he has led the defense of high-stakes class actions and prosecuted civil fraud against some of the largest companies in the world. At the appellate level, he has briefed more than 60 appeals to state and federal appellate courts, including the Oregon Supreme Court, the Ninth Circuit Court of Appeals, and the United States Supreme Court.

Chapter 28: First Amendment Law

City governments thrive under the protections of the First Amendment. Members of the public run for office on campaigns built on freedom of speech, press, and assembly. City residents practice their faiths under the freedom of religion and seek relief from unfair treatment under their right to petition. Each of these public interactions and responsibilities implicate the First Amendment[1] of the United States Constitution and Article I, Section 8[2] of the Oregon Constitution.

The state and federal constitutions lay out the basic framework for how a government must operate. Both documents list the rights that citizens have and require governments to follow certain rules in order to respect those rights. But unlike statutes, administrative rules, or city charters, constitutional provisions are general, not specific. They have been interpreted by courts whose decisions set forth the nuances and details.

This chapter will focus on the First Amendment to the United States Constitution. But Oregon's Constitution also protects the same freedoms in Article I, Section 8.[3]

---

[1] Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances. U.S. Const. amend. I.

[2] **Section 8. Freedom of Speech and Press.** No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right. Or. Const. art. I, § 8.

[3] Note that Article 1, Section 8 does not say anything about religion, assembly, or petitions of the government. This is because the Oregon Constitution does not contain any clause expressly relating to assembly or petitions; however, it contains six clauses relating to religion, all of which are separate from Section 8. They are:

Section 2. **Freedom of worship**. All men shall be secure in the Natural right, to worship Almighty God according to the dictates of their own consciences.

Section 3. **Freedom of religious opinion**. No law shall in any case whatever control the free exercise, and enjoyment of religeous [sic] opinions, or interfere with the rights of conscience.

Section 4. **No religious qualification for office**. No religious test shall be required as a qualification for any office of trust or profit.

Section 5. No money to be appropriated for religion. No money shall be drawn from the Treasury for the benefit of any religeous [sic], or theological institution, nor shall any money be appropriated for the payment of any religeous [sic] services in either house of the Legislative Assembly.

Section 6. No religious test for witnesses or jurors. No person shall be rendered incompetent as a witness, or juror in consequence of his opinions on matters of religeon [sic]; nor be questioned in any Court of Justice touching his religeous [sic] belief to affect the weight of his testimony.

Although these two constitutional sections are often closely aligned, there are some differences, which will be noted below.

First Amendment law sets out the rules that city governments must follow in order to protect five crucial rights: freedom of speech, freedom of the press, freedom of religion, freedom of assembly, and freedom to petition the government. But contrary to popular belief, those freedoms are not unlimited. Cities can, and do, place limits on speech, religious practices, and the press. It matters, however, what kinds of limits are applied and why they are applied.

First Amendment law is complex and full of nuances. And because First Amendment law is not intuitive, the public may not understand their own rights or the scope of constraints on their city government. Many people have misconceptions about the First Amendment and how it works—largely because it is so complex. This chapter is designed to answer common questions about the law and how it works, and to clarify misconceptions. Because of the complexity of the topic, it is a good idea to consult this chapter when you interact with a member of the public or a city employee in a way that may implicate the First Amendment (which will happen more often than you think).

This chapter gives a basic overview of the rules that city governments must follow under the First Amendment and Article I, Section 8. Part I gives an overview of who the First Amendment applies to and who it does not. Parts II through VI cover each of the five freedoms or "rights" listed in the First Amendment. Finally, Part VII briefly describes how the First Amendment is enforced.

I. Who Does the First Amendment Apply To?

Section Overview

- The First Amendment prohibits *governments* from abridging freedom of speech, press, assembly, and religion. It does not prohibit private individuals or organizations from enacting private restrictions.
- Social media platforms do not have to follow the First Amendment.
- City officials should keep private social media accounts wholly separate from the accounts they use to discuss public business.

Section 7. Manner of administering oath or affirmation. The mode of administering an oath, or affirmation shall be such as may be most consistent with, and binding upon the conscience of the person to whom such oath or affirmation may be administered.

The First Amendment guarantees individuals' right to freedom of speech, religion, press, assembly, to petition the government and requires the government to respect and protect those freedoms. But the First Amendment does *not* require individual citizens to respect each other's First Amendment rights. Nor does it require private entities to do so. Simply put, private citizens and entities cannot violate the First Amendment because it does not apply to them. [4] This distinction can be confusing, particularly in the 21st Century where much of our speech occurs on social media platforms run by private businesses. This section explains how this works, who must follow the First Amendment, and who is not required to.

Throughout this section, the most important question is, "Who is acting?" If a government or government official does something—pass an ordinance, enforce a statute, block a reporter on Twitter—the First Amendment rules apply. But if a private business does the same thing—such as block a Twitter account—the First Amendment rules do *not*.[5]

This chart shows how it works:

A	Acts On	B	First Am. Applies?
Individual Citizen	→	Individual Citizen	No
Private Entity	→	Individual Citizen	No
City Government	→	Individual Citizen	**Yes**
City Government	→	Private Entity	**Yes**
Individual Citizen	→	Private Entity	No

[4] *See Hudgens v. N.L.R.B.*, 424 U.S. 507, 513 (1976) ("[T]he constitutional guarantee of free speech is a guarantee only against abridgment by government, federal or state."); *see also Green v. Miss United States of Am., LLC*, 533 F. Supp. 3d 978, 983 (D. Or. 2021) (explaining that the analysis under Art. I, § 8 of Oregon Constitution asks whether a law, not a private actor, is in violation of the constitution).

[5] This does not mean that private entities have no rules they must follow. To the contrary, many statutes govern what private entities may do. For example, they are forbidden from discriminating against individuals on the basis of race, sex, religion, disability, and national origin, among other characteristics. *See* Title IV of the Civil Rights Act of 1964, 42 U.S.C. § 2000(d); Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. § 6102; ORS 659A.001 *et seq*.

A. City Governments

The First Amendment says that "Congress shall make no law" infringing the five individual freedoms guaranteed by the amendment.[6] This reference to Congress suggests that the First Amendment applies only to the federal government, not to state or local government. In fact, this was how the First Amendment was interpreted for many years. But this interpretation changed after ratification of the Fourteenth Amendment in 1868, which included the Equal Protection Clause.[7] The Equal Protection Clause prohibits *state* governments from depriving individuals of equal protection of the law, including the laws found in the Bill of Rights.[8] In a series of decisions issued in the first half of the 20th century, the United States Supreme Court ruled that the First Amendment applies to state governments by way of the Equal Protection Clause—and states have been bound by the First Amendment ever since.[9]

Of course, neither the First Amendment nor the Equal Protection Clause expressly mention cities or city governments. However, cities and other municipalities are considered subdivisions of the state for purposes of constitutional law, and the First Amendment applies to them just as it would to a state government.[10] Practically speaking, this means that any person, department, or group who works for or represents a city must abide by the First Amendment. This includes but is not limited to:

- City councils and city council members
- City managers/administrators
- City police departments, fire departments, and municipal courts
- City parks departments
- City planning departments

[6] U.S. Const. amend I., cl. 1.

[7] "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall *any state* deprive any person of life, liberty, or property, without due process of law; *nor deny to any person within its jurisdiction the equal protection of the laws.*" U.S. Const. amend. XIV, § 1 (emphasis added).

[8] *Id*.

[9] *See, e.g.*, *Gitlow v. New York*, 268 U.S. 652 (1925) (freedom of speech and press); *Near v. Minnesota*, 283 U.S. 697 (1931) (freedom of speech); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (freedom of religion); *De Jonge v. Oregon*, 299 U.S. 353 (1937) (freedom of assembly); *Edwards v. South Carolina*, 372 U.S. 229 (1963) (right to petition).

[10] *See, e.g.*, *Gathright v. City of Portland*, 439 F.3d 573 (9th Cir. 2006) (applying First Amendment to a Portland city ordinance).

- City human resources managers
- City employees when interacting with the public
- City elected officials
- City volunteers

The most important thing to remember is that—unlike individual citizens or private businesses—if the government is acting (passing a law, enforcing an ordinance, arresting a person, etc.) it must adhere to the First Amendment and Article I, Section 8. This rule is called the "state action doctrine."[11]

B. Social Media

Until recently, the state action doctrine was relatively straightforward. Most speech took place either in private homes or in public spaces, such as parks, sidewalks, or streets, which were monitored and regulated by local government, states, and police departments—all government entities.[12] Today, however, much of what people say publicly and much of what news reporters publish takes place on social media—Twitter, Facebook, Instagram, TikTok, and similar platforms.[13] Those private businesses are not government bodies, and do not have to follow the First Amendment.[14] It is the legal equivalent of speaking in a shopping mall parking lot instead of a city park.[15] Private businesses are allowed to impose restrictions on speech for users, customers, employees, visitors, and others.[16] Thus, a person who uses Twitter to post their thoughts, opinions, or links to articles, has no right to free speech *vis-à-vis* Twitter.[17]

---

[11] *See, e.g.*, Louis Michael Seidman, *State Action and the Constitution's Middle Band*, 117 Mich. L. Rev. 1, (2018-19); State Action Doctrine, U.S. Const. Annotated, Cornell L. School Legal Info. Inst., https://www.law.cornell.edu/constitution-conan/amendment-14/state-action-doctrine (accessed Apr. 18, 2022).

[12] *See, e.g. Edwards*, 372 U.S. at 235 (1963) (observing that peaceful protest on a city sidewalk was free speech in its "most pristine and classic form"); *Ward v. Rock Against Racism*, 491 U.S. 781, 797 (1989) (holding that a city has a substantial interest in regulating use of city parks); *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017) (noting that "[a] basic rule . . . is that a street or a park is a quintessential forum for the exercise of First Amendment rights.").

[13] *Packingham*, 137 S. Ct. at 1735.

[14] *Prager Univ. v. Google LLC*, 951 F.3d 991, 998-99 (9th Cir. 2020) (holding that although YouTube provides a platform for speech, it is not a public forum and is not bound by the First Amendment).

[15] *Id.* at 998 (explaining that a private entity, such as a retail establishment, does not become a public actor merely by opening its property to public speech).

[16] *Id.* at 998-99; *Plotkin v. The Astorian*, 3:20-cv-01865-SB, No. 2021 WL 864946 (D. Or. Mar. 8, 2021) (holding that newspaper could not violate the First Amendment when it removed advertisements from private citizen); *Belknap v. Alphabet, Inc.*, 504 F. Supp. 3d 1156, 1159-60 (D. Or., Dec. 1, 2020) (Simon, J.) (holding that YouTube and Google did not violate the First Amendment when they removed comments citing Breitbart news).

[17] *Id.*

1. City Governments on Social Media

Although social media platforms can censor speech that appears on their websites, governments cannot.[18] This is an important distinction. City governments or departments often use social media to connect with the public. They create Facebook pages or Instagram and Twitter accounts, and those pages and accounts usually allow public comments.[19] Social media platforms allow members of the public to mention those pages or accounts on their own pages.[20] Social media platforms also allow individuals to mention city officials or politicians—or even tag them in posts.[21]

These forms of interaction sometimes result in public criticism for city governments or even for individuals. So, while social media interaction with the public can be useful, it can also be contentious.[22] And it can be tempting to block or remove followers or commenters who are being particularly negative or critical.

But the First Amendment does not allow this. With respect to the First Amendment, the question is always, "Who is acting?"—not "Where is the action happening?" It does not matter that speech is taking place on social media; instead, it only matters whether the social media platform or the city is censoring speech.[23] A city cannot block people for being critical, offensive, or for offering misinformation. The rules discussed later in this chapter apply to any situation where a member of the public is interacting with a government body, department, or official on any social media platform. The rules are no different for social media than if the interaction occurred in person.[24]

2. City Officials on Social Media

First Amendment Best Practice: City officials who wish to be online in a private capacity, as well as an official capacity, should create separate and distinct social media accounts—one for their private life that does not discuss city business or government matters and one for their government duties. This creates a clear

[18] *Packingham*, 137 S. Ct. at 1736 (holding that a state could not prohibit sex offenders from accessing websites that would provide the information about minors).

[19] *See, e.g.*, Portland City Government, Facebook, https://www.facebook.com/notifypdx (accessed Apr. 18, 2022); City of Grant's Pass, Instagram, https://www.instagram.com/grantspassoregon (accessed Apr. 18, 2022); City of Bend, Oregon, Twitter, https://twitter.com/CityofBend (accessed Apr. 18, 2022).

[20] *See id*.

[21] *See id*.; *see also, e.g.*, Ted Wheeler, Instagram, https://www.instagram.com/tedwheelerpdx (accessed Apr. 18, 2022).

[22] *See id.*

[23] *Packingham*, 137 S. Ct. at 1736.

[24] *See Garnier v. O'Connor-Ratcliff*, 513 F. Supp. 3d 1229 (S.D. Cal. Jan. 14, 2021), *appeal docketed*, No. 21-55157 (9th Cir. Feb. 24, 2021) (holding that school board may block Facebook commenters only under same circumstances it could remove attendees at a meeting).

delineation between when a person is acting in their "private" life and when in their "official" capacity—*i.e.*, on behalf of the government.

The rules described above apply as equally to city officials as they do to city governments. But social media use by officials can become more complicated because many city officials run businesses, hold "day jobs," or engage in private activities outside of the government office that they hold. And like many people, they use social media to share private activities with family and friends. Often though, the line between the private individual and the public official becomes blurred on social media because they, like other people, mix private and public business on their social media accounts.

As explained above, the First Amendment applies only to the government and government officials. This means that when a city official acts in their official capacity online, they cannot block constituents, censor their comments, or prohibit certain viewpoints from being heard. But when they act in a private capacity, those rules do not apply. (Becoming a member of the city council does not deprive a person of a private life.) The distinction here is much like how a city councilor may decide who they invite to their home and whose opinions they listen to there—but cannot decide who they invite to a city council meeting or whose opinions they hear in that setting.

The question then becomes how do we know when a social media account belongs to "an official" versus "a private" individual?[25] After all, "not every social media account operated by a public official is a government account."[26] Courts have identified six factors when answering this question:

1) How is the account presented?

2) How is the account used?

3) How is the account categorized?

4) How is the account treated and regarded by others, with particular weight to other government officials and agencies?

5) To whom is the account made available?

[25] *Knight First Am. Inst. at Columbia Univ. v. Trump*, 928 F.3d 226, 236 (2nd Cir. 2019), *cert granted, vacated on other grounds, Biden v. Knight First Am. Inst. at Columbia Univ.*, 141 S. Ct. 1220 (mem.) (2021).

[26] *Id.*

6) Did the events giving rise to plaintiff's claim arise out of the defendant's official status (as opposed to a private dispute, such as a divorce or a neighbor dispute)?[27]

In March 2024, the United States Supreme Court released two opinions setting forth the "state-action test doctrine" as it applies to city officials and social media use.[28] The Supreme Court reviewed both cases and set forth a new "state-action doctrine test" that requires the aggrieved citizen to establish the following:

(1) the public official had actual authority to speak on behalf of the government on a particular matter; and
(2) the public official exercised that authority in social media posts.

In *O'Connor-Ratcliff*, the defendant school board member, created a public Facebook page to promote her school board campaign—the board member also had a personal Facebook page for personal use. Post-election, the board member continued to use the two Facebook pages in their respective ways, and also created a Twitter page for school board business use. A member of the public commented on the board member's Facebook page with 42 nearly identical separate posts and 226 identical replies on the Twitter page within ten-minutes. In response to the repetitive posts, the board member deleted the comments prior to blocking the user from the pages.

In *Lindke*, the defendant city manager, maintained and utilized a Facebook page which stated his official city position, sometimes used his page for both personal and public business, and often interacted with citizens on city-related business posts. A member of the public commented in disagreement regarding one of the city manager's city-related posts, which the city manager then deleted and later blocked the user.

The Supreme Court emphasized that the type of social media platform matters, in so far as the blocking features and how far reaching the action is. Noteworthy, the Court stated, "[a] public official who fails to keep personal posts in a clearly designated personal account therefore exposes himself to greater potential liability." *Id.* at 204.

Both of these cases were reversed and remanded and the lower court will apply the new state-action doctrine to the respective facts of the case.

While the above factors may sound straightforward, applying them can become complicated when a social media account has a mix of private and public content. The

[27] *Phillips v. Ochoa*, No. 2:20-cv-00272-JAD-VCF, 2020 WL 4905535 *4 (D. Nev. Aug. 20, 2020) (relying on *Knight*, 928 F.3d at 236); *Davison v. Randall*, 912 F.3d 666, 680-81 (4th Cir. 2019), *as amended* (Jan. 9, 2019).
[28] *Lindke v. Freed*, 601 US 187 (2024) and *O'Connor-Ratcliff v. Garnier*, 601 US 205 (2024).

best approach, then, is to keep the accounts wholly separate. The private-citizen account should never discuss public business or anything to do with the city council. The public-official account should discuss only issues relating to city council and city government (although small humanizing details are fine). The goal is to create a clear delineation that shows which account is "acting" on behalf of a government official. Although that official account must adhere to the First Amendment, the other, private account may do as any other person legally does on social media.

II. Freedom of Speech

Section Overview

- Cities cannot regulate speech on the basis of what viewpoint or opinion that a person holds.
- The focus of regulations should be on what people *do* rather than what they *say*.
- Cities can regulate the "time, place, and manner" of speech as long as regulations are neutral, objective, and generally applicable.
- City officials have wide latitude to regulate speech during public meetings.
- Harassment statutes and ordinances should be drafted as narrowly as possible.
- City employees have free speech rights, but they are limited when the employee is speaking in the scope of their employment.
- Commercial speech is treated exactly the same as other forms of speech under the Oregon Constitution.

Freedom of speech is the first freedom listed in the First Amendment and is likely the most well-known First Amendment right.[29] But although "freedom of speech" sounds straightforward it is deceptively complicated for three primary reasons. First, it is subject to two major misconceptions, which conflict with each other. One is that "free speech" means that a person can say anything with virtually no consequences. The other misconception is that "free speech" does not include "harmful" speech (such as racial slurs or misinformation about matters of public concern)—which is not protected. This

[29] U.S. Const. amend. I.

section will discuss both of these misconceptions, but in summary (1) speech can carry consequences, and (2) nearly all harmful speech is protected under the First Amendment.

The second reason that "freedom of speech" is complicated is that it is not always clear what constitutes "speech" and what constitutes "conduct." City governments can regulate most "conduct" without violating the First Amendment. Speed limits, for example, regulate conduct—driving a car—not speech. But some conduct is expressive and, therefore, falls under the First Amendment's protections.

Third, "freedom of speech" is complicated by the fact that cities *can* regulate speech—the First Amendment does not prohibit all regulations that affect speech. But cities can only regulate speech in certain ways. Determining which types of regulations are acceptable is often unclear.

Keeping these complications in mind, this section attempts to explain how and when a city can—and cannot—regulate speech. Although this section does not cover every possible scenario, it attempts to cover the most common and most controversial topics that tend to come up for city governments.

Additionally, courts recognize four types of public forums for determining how much protection of speech and expression on public property should receive.[30] When a speaker is on government property, expressing ideas or opinions, the government entity must determine what type of public forum the location is. The four types of public form categories are the following:

1. Traditional Public Forum: places such as streets, sidewalks, public square, or parks. Regulations affecting speech in such places should be content-neutral time, place, manner restrictions.
2. Designated Public Forum: places such as municipal theaters or state university meeting rooms; places that are not normally open to First Amendment activities, but the government has chosen to allow them. Regulations affecting speech in such places should be content-neutral time, place, manner restrictions.
3. Limited Public Forum: places such as a city owned auditorium or public-school facilities during after school hours or interior of city hall; places only open for use by certain groups or dedicated for discussion of certain

[30] *Gilley v. Stabin*, 652 F Supp 3d 1268, 1285-86 (D Or 2023), vacated in part, appeal dismissed in part, No. 23-35097, 2024 WL 1007480 (9th Cir Mar 8, 2024) (citing *Preminger v. Peake*, 552 F3d 757, 765 (9th Cir 2008) and *Hopper v. City of Pasco*, 241 F3d 1067, 1074-75 (9th Cir 2001).

subjects. Regulations affecting speech in such places may limit speech to only certain subjects and impose blanket restrictions on others; limitations do not have to be content neutral, must be viewpoint neutral and reasonable.

4. Non-Public Forum: places such as airport terminal or post office; places not traditionally used or designated for expressive activity.

A. Viewpoint Discrimination

The simplest, most straightforward rule relating to the First Amendment is that the government cannot regulate speech on the basis of the viewpoint that the speaker supports.[31] This means that a city cannot allow speech that supports Opinion A but prohibit speech that supports Opinion B.[32] This is called "viewpoint discrimination," and it is always prohibited.

Viewpoint discrimination—commonly referred to as "censorship"—sounds nefarious but often arises from noble impulses. For example, a local government's attempt to ban violent pornography that subjugates women[33], to prohibit displays of crosses by the Ku Klux Klan on public property[34], and to prevent racially motivated crimes[35] have all been found unconstitutional because they discriminate on the basis of the speaker's viewpoint. Because of this rule, bans on hate speech—as well-intentioned as they are—violate the First Amendment.[36]

---

[31] "The Fourteenth Amendment does not permit a State to make criminal the peaceful expression of unpopular views. '(A) function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech is protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. There is no room under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups.'" *Edwards*, 372 U.S. at 237-38, cleaned up (quoting *Terminiello v. Chicago*, 337 U.S. 1, 4-5 (1949)).

[32] *Id.*

[33] *American Booksellers Ass'n, Inc. v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986).

[34] *Capitol Square Review Bd. v. Pinette*, 515 U.S. 753 (1995).

[35] *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377 (1992).

[36] *Matal v. Tam*, 137 S. Ct. 1744, 1764 (2017) ("Speech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express the thought that we hate.") (quotation marks and citation omitted).

Examples of Viewpoint Discrimination	
• Prohibiting some protests but allowing others • Banning or removing commenters on city social media pages on the basis that they support or oppose a particular policy • Selectively prosecuting only some political protesters • Giving traffic tickets to drivers with bumper stickers supporting a certain party or candidate	• Banning political insignia for some groups but not others • Restricting comments at public meetings to allow only certain viewpoints or perspectives • Adopting an ordinance prohibiting certain offensive terms or slurs • Prohibiting only certain groups from meeting in otherwise-available public spaces

Some indicators of an ordinance that might unconstitutionally prohibit a viewpoint include:

- Regulating some speech as harmful or unsafe;
- Providing that some speech has more or less value than others; and
- Regulating speech based on how it makes other people feel—guilty, uncomfortable, "bothered," *etc*.

The prohibition against viewpoint discrimination does not mean that cities must allow anyone to speak whenever they wish. But it *does* mean that a city must employ a neutral means of regulating speech. This could mean that a city does not allow any comments at all on its Facebook page. Or it could mean that a city might decide not to allow any groups or clubs to use city buildings for meeting space, or only allow meetings at certain times or on certain days.

The bottom line is that a city should not attempt to regulate what people say—and should particularly avoid restricting only certain topics or opinions. If a city wants to regulate speech, it should find other ways of doing so.

B. Regulating Speech

In Oregon, laws that regulate or restrict speech are analyzed under a framework that creates three "categories" of speech.[37] Each category allows for increasingly greater government regulation.[38]

The first category includes laws that are "written in terms directed to the substance of any opinion or subject of communication."[39] These laws are unconstitutional on their face, with some limited historical exceptions, because they regulate or restrict the content of what someone is saying.[40] This category includes viewpoint discrimination, as discussed above, but also extends to "content regulation," which is broader and includes restrictions on subject matter, not just point of view.[41]

The second category includes laws that regulate speech on the basis of the effect or harm the speech may cause.[42] Examples of laws in this category include criminal statutes that prohibit blackmail or extortion.[43] This category also includes laws that prohibit threats.[44] Laws is this category must be written narrowly; courts will strike down laws that are "overbroad."[45] Because laws cannot be overbroad, "category two" laws must be written narrowly and focus on the effect of the speech, not on its content.[46]

The third and final category includes laws that are not written to regulate speech but ultimately have that effect in some situations.[47] This category of laws often ends up regulating expressive *conduct*, which is conduct that conveys a message and is therefore treated as if it were speech.[48] Courts will uphold laws that fall into this category as long

---

[37] *Matter of Validation Proceeding to Determine the Regularity and Legality of Mult. Co. Home Rule Charter Sec. 11.60* ("*Mult. Co. Home Rule*"), 366 Or. 295, 301 (2020) (en banc) (citing *State v. Robertson*, 293 Or. 402 (1982)).

[38] *Id.*

[39] *Id.* (quotation marks omitted).

[40] *Id.*

[41] *Id. See also Nat. Inst. Of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371 (2018) ("Content-based regulations target speech based on its communicative content . . . and are presumptively unconstitutional[.] . . . This stringent standard reflects the fundamental principle that governments have 'no power to restrict expression because of its message, its ideas, its subject matter, or its content.'") (cleaned up).

[42] *Mult. Co. Home Rule*, 366 Or. at 301-02.

[43] *Id.* at 422-23.

[44] *Id.*

[45] *Id.*

[46] *Robertson*, 293 Or. at 410 ("For a law is overbroad to the extent that it announces a prohibition that reaches conduct which may not be prohibited. A legislature can make a law as 'broad' and inclusive as it chooses unless it reaches into constitutionally protected ground.") (quoting *State v. Blocker*, 291 Or. 255, 261 (1981), *overruled on other grounds*, *State v. Christian*, 354 Or. 22 (2013)).

[47] *Mult. Co. Home Rule*, 366 Or. at 302-03.

[48] *See, e.g., Texas v. Johnson*, 491 U.S. 397, 404 (1989) ("The First Amendment literally forbids the abridgment only of 'speech,' but we have long recognized that its protection does not end at the spoken or written word. . . . [W]e have acknowledged that

as (1) they are not written in a way that targets speech and (2) they regulate expressive and non-expressive conduct identically.[49] Category three laws are a frequent issue for cities, and this section addresses some common scenarios that may arise. Category three laws are addressed again in the section on freedom of assembly, since these laws often interact with political protest events.

1. Public Nudity

One type of conduct that can be considered "expressive" is nudity.[50] City ordinances relate to nudity in a variety of ways, including regulation of public nudity, strip clubs, and pornography. Because Oregon courts have held that public nudity can be expressive conduct—and therefore protected by the First Amendment—certain rules are important for cities to follow if they choose to regulate nudity:

1) Laws that restrict exposing one's genitals must be construed to prohibit only non-expressive nudity (*e.g.*, public urination). They cannot be used to prohibit nudity as party of a theatrical or dance performance, for example.[51]

2) Nude dancing in bars and taverns cannot be prohibited.[52]

3) Cities cannot restrict the distance between a nude dancer and the audience or the type of attire the dancer must wear.[53]

4) Cities can regulate sexual contact between dancers and patrons, but they cannot prohibit touching for the sole reason that it causes arousal.[54]

This area of law has been well developed in the Oregon courts. But none of these court-made rules keep a city from prohibiting crimes such as public urination, indecent exposure, or sexual harassment and assault. On the other hand, cities should be careful when attempting to regulate adult-oriented entertainment or nudity-centric events such as

---

conduct may be sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments.") (quotation marks and citations omitted.)

[49] *Mult. Co. Home Rule*, 366 Or. at 301 (relying on *State v. Babson*, 355 Or. 383 (2014) (en banc) (upholding prohibition on occupying Capitol steps after certain hours, even though the statute resulted in the arrest of protesters whose presence on the steps amounted to expressive conduct.)

[50] *City of Portland v. Gatewood*, 76 Or. App. 74, 79 (1985).

[51] *Id.*

[52] *Sekne v. City of Portland*, 81 Or. App. 630 (1986).

[53] *City of Nyssa v. Dufloth*, 339 Or. 330 (2005).

[54] *City of Salem v. Lawrow*, 233 Or. App. 32, 38-39 (2009).

the Naked Bike Ride[55]—which would be considered "expressive" and therefore protected.

First Amendment Best Practice: When it comes to nudity, cities should draft regulations as narrowly as possible and focus them on regulating either (1) exposure of genitals for no expressive reason (*e.g.*, urination) or (2) sexual contact.

C. Time/Place/Manner Constraints

One of the most common ways a government is allowed to regulate speech is a category of law referred to as "time, place, manner" restrictions.[56] This category of laws is as it sounds: laws that control when, where, and how speech can take place, regardless of what is being said. A wide range of laws fall into this category, ranging from requiring permits for parades and demonstrations to imposing curfews in public parks.

A few examples are addressed below in greater detail, but generally, Oregon courts[57] apply a three-part test to determine if a law is a permissible time, place, and manner restriction.[58] The three factors are:

1) Whether the law discriminates on the basis of the speech's content;

2) Whether the restriction advances a legitimate state interest without restricting substantially more speech than necessary; and

3) Whether ample alternative opportunities exist to communicate the intended message.[59]

For example, in *Babson*, the Oregon Supreme Court upheld a law that imposed an 11 p.m. curfew on the Capitol steps.[60] The Oregon State Police cited a peaceful protester for criminal trespass when she refused to leave after 11 p.m., and she appealed the citation to the Supreme Court on the theory that her rights to free speech and assembly had been violated.[61] The Court held that her rights had not been violated because, applying the three-part test: (1) the statute did not regulate the content of the speech; (2) it

[55] John Patrick Pullen, Portland's World Naked Bike Ride, Travel Portland, https://www.travelportland.com/events/naked-bike-ride/ (accessed Apr. 18, 2022).
[56] *See, e.g.*, *Green*, 533 F. Supp. 3d at 984.
[57] The U.S. Constitution First Amendment time, place, manner restrictions regarding the various public forum categories, potentially pose analysis differing from the Oregon Constitutional analysis.
[58] *Id.*
[59] *Id.* (citing *Babson*, 355 Or. at 407-08).
[60] *Babson*, 355 Or. at 388.
[61] *Id.* at 389.

advanced a legitimate government interest in the safety, security, and aesthetic value of the Capitol; and (3) the protesters had access to alternative locations where they could communicate their message during the hours the Capitol was closed.[62]

This type of law is therefore a quintessential "time, place, manner" restriction. Below are some other common examples. (This topic will also be discussed below in the section on freedom of assembly.)

1. Public Meetings

City governments often come into contact with private citizens during public meetings—whether in the city council, the city planning commission, or an advisory council. Cities have a fair amount of latitude to regulate public meetings and can use time, place, manner restrictions to keep those meetings running smoothly and to allow everyone the chance to be heard. For example, cities can impose content-neutral rules of decorum at public meetings without running afoul of the First Amendment, as long as they do not restrict any particular group of speakers over another.[63] As one court noted, limitations on speech at public meetings "must be reasonable and viewpoint neutral, but that is all they need to be."[64]

Restrictions on public meetings include the ability to remove a person from a meeting when that person is "acting in a way that actually disturbs or impedes the meeting."[65] A city council can also ban a person who is repeatedly disruptive, although such a ban should not be indefinite and should last only long enough to serve its purpose.[66] City councils also have the power to verbally censure their own members without running afoul of the First Amendment, as the freedom of speech does not protect public officials from criticism.[67]

However, one thing a city council cannot do is force attendees to recite the Pledge of Allegiance or even stand for it.[68] This is because the government cannot compel

---

[62] *Id.* at 410-11.

[63] *See Garnier*, 513 F. Supp. 3d at 1248.

[64] *DeGrassi v. City of Glendora*, 207 F.3d 636, 646 (9th Cir. 2000) (quotation marks omitted) (citing *Kindt v. Santa Monica Rent Control Bd.*, 67 F.3d 266 (9th Cir. 1995)); *see also Steskal v. Benton Cty.*, 247 Fed. Appx. 890, 891 (9th Cir. 2007).

[65] *White v. City of Norwalk*. 900 F.2d 1421, 1424 (9th Cir. 1990).

[66] *Garnier*, 513 F. Supp. 3d at 1251 (holding that three-year ban from city's social media page was too long, although initial blocking had been acceptable and akin to temporary bans from city council meetings).

[67] *Houston Comm. College System v. Wilson*, 142 S. Ct. 1253 (2022) ("The First Amendment surely promises an elected representative . . . the right to speak freely on questions of government policy. But just as surely, it cannot be used as a weapon to silence other representatives seeking to do the same.").

[68] *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (holding that the government may not force individuals to salute the flag or pledge allegiance to it) ("We think the action of the local authorities in compelling the flag salute and pledge

speech (either in word or in act) and cannot force citizens to profess any opinion or feeling on a subject.[69] This principle applies equally to requiring attendees to stand for the flag salute; cities are forbidden from imposing this requirement.[70]

Examples of Permissible Restrictions on Public Meetings
• Limits on subject matter (but not views on the subject) • Time limits on individual testimony • Restricting testimony to written statements • Allowing no public testimony at all or no comments at all on public social media pages • Adopting a policy that prohibits swearing, yelling, name calling, and similar behavior during testimony • Requiring attendees to adhere to a dress code (shoes, shirts, COVID masks, removing hats, *etc*.)

2. Noise Codes and Harassment

One function of city government is to keep the peace among citizens. Ordinances are often designed to prevent conflict or to balance the needs of competing groups of people who are required to live together. Two common types of ordinances that serve this purpose are noise codes and harassment laws—both of which implicate speech and do so in different ways.

Noise codes are, generally, considered to be permissible time, place, manner restrictions.[71] As long as a noise code does not target any particular type of speech (for example, bans on amplified sound only for political protests) and is applied using

transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.").

[69] *Id*.

[70] *Id*. at 632 ("There is no doubt that, in connection with the pledges, the flag salute is a form of utterance. Symbolism is a primitive but effective way of communicating ideas.").

[71] *See City of Portland v. Aziz*, 47 Or. App. 937, 947 (1980) (holding that city ordinance prohibiting unauthorized use of amplified speakers and similar devices was a reasonable time, place, manner restriction).

objective standards such as decibels or earshot distance, it will not run afoul of the First Amendment or Article I, Section 8.[72] Cities may also permissibly restrict noisy activities in certain areas, such as restrictions on sound trucks (*e.g.*, trucks playing campaign messages on a speaker) and unmuffled engines in residential neighborhoods.[73] Again, as long as noise restrictions apply equally to everyone, they are permissible.

Harassment laws, on the other hand, are more complicated. While "harassment" laws seem like they would go to the "manner" of speech, courts have found that it is unconstitutional to prohibit most harassing or annoying speech—even if it is highly offensive.[74] Instead, harassment laws can only prohibit speech that has the effect of putting the listener in fear of *imminent* harm or violence.[75] Words that are insulting, obscene, annoying, or likely to provoke a violent response cannot be prohibited.[76] (This is a similar principle to the rule that prohibits the government from outlawing hate speech.)

It may seem counter-intuitive that a city can protect citizens from being annoyed by very *loud* speech but cannot protect them from being annoyed by very *offensive* speech. But this distinction goes back to the difference between "what" a person says and "how" they say it. A noise code is objective and can be applied equally to anyone who is speaking. For example, if a political activist gives a speech in a public park, it is possible to use a decibel meter to determine exactly how loud they are speaking. On the other hand, it is not possible to objectively measure how annoying, offensive, or inciting their words are because different listeners will experience different reactions. Speech that some people find annoying or even abusive may sound inspirational and stirring to others. And even if the activist offends everyone who hears them, they have a right to express their views in public. In other words, the speaker does not have a right to use a microphone, but they have a right to speak.[77]

---

[72] *Id.*; *see also City of Portland v. Ayers*, 93 Or. App. 731, 735-36 (1988) (en banc); *Porter v. Martinez*, 68 F4th 429, 441-42 (9th Cir 2023), *cert denied*, 2024 WL 759806 (Feb 26, 2024) (upholding a prohibition on horn hoking as applied to a motorist at a protest rally).

[73] *Ayers*, 93 Or. App. at 735 (relying on *City of Portland v. Tidyman*, 306 Or. 174, 182 (1988) (en banc)).

[74] *State v. Johnson*, 345 Or. 190, 196-97 (2008).

[75] *Id.* (holding that ORS 166.065(1)(a)(B) is unconstitutionally overbroad unless applied only to speech that creates a fear of imminent harm).

[76] *Id.* at 197 ("Defendant's expression may have been offensive, but the state may not suppress all speech that offends with the club of the criminal law.")

[77] Use of a microphone is an example of what "manner" refers to in "time, place, and manner." It refers to what means a person uses to speak, not what their speech consists of.

3. Sit-Lie Ordinances

When it comes to regulating the "place" that speech takes place, sidewalks are a particularly complicated subject. On one hand, they are a quintessential public forum, open to anyone to speak publicly. On the other hand, they are designed to convey people from one place to another, and they are also the means by which people enter and leave businesses. Because sidewalks serve these multiple purposes, they tend to become a focus of regulation for cities.

One of the most common regulations is a "sit-lie" ordinance, which prohibits people from sitting or lying down on sidewalks, often during certain hours of the day or in such a way that obstructs pedestrian traffic. These ordinances are an example of a time, place, manner restriction, and contrary to (somewhat) popular belief, they are not unconstitutional or otherwise illegal.[78]

There is no First Amendment right to sit or lie on a public sidewalk.[79] This is true even if the person sitting or lying is also conveying a message.[80] Sit-lie ordinances do not regulate speech, and as long as they are applied in an objective, even-handed manner, do not present a First Amendment problem.[81] But sit-lie ordinances cannot be used as a pretext to arrest peaceful protesters or other individuals whose mere presence a city finds objectionable.[82] Therefore, the best practice is to adopt an ordinance that uses purely objective criteria, such as time of day, limited sections of the city, or certain lengths of time.

First Amendment Best Practice: Use the following criteria to draft a sit-lie ordinance that will comply with Oregon law and the First Amendment.

- It should not target any expressive conduct or speech, including acts of protests or written signage;
- It should be enforced only during certain times of day when sidewalks see increased traffic;

[78] *See, e.g.*, H.B. 3115, 81st Ore. Leg. (2021).

[79] *Roulette v. City of Seattle*, 97 F.3d 300, 303-04 (9th Cir. 1996); *see also Amster v. City of Tempe*, 248 F.3d 1198, 1199-200 (9th Cir. 2001).

[80] *Id.*

[81] *Id.*

[82] *Brown v. Louisiana*, 383 U.S. 131, 142 (1966) (holding that breach of the peace statute, which was constitutional as written, could not be used as a pretext to arrest participants of a sit-in to protest Jim Crow segregation).

- It should not apply to all public spaces but should be as limited as possible (*e.g.*, sidewalks narrower than a certain width);

- It should be limited to areas with significant pedestrian traffic or to areas that present a safety risk to individuals who may choose to sit or lie, such as near traffic; and

- It should not be used to criminalize houselessness or result in the arrest of people experiencing houselessness.[83]

D. City Government as an Employer

Much of this chapter focuses on city government's interactions with the public. However, city employees also have First Amendment rights, and a city must honor those rights as well. This is a complicated issue because the city is both an employer and a government body. Employers have wide latitude to control what their employees say in (and out) of the workplace; by contrast, government entities have little power to do this and are expressly forbidden from doing so in many cases.

Courts have therefore laid out a series of tests to determine when a government can act as an "employer" and control employees' speech and when it must act as a government entity and refrain from doing so.[84] In other words, there are limits on how and when a city can suspend, demote, or fire an employee based on the employee's speech or expression.

In this context, the general rule is that city employee speech is protected when "the speech is made as a private citizen on a matter of public concern."[85] But it is not protected if the employee is speaking pursuant to their job duties as a public employee.[86] "Not protected" speech can be grounds for discipline—*e.g.*, firing, demotion, suspension, etc.[87] If speech is protected, however, it cannot be grounds for discipline. One reason for drawing this distinction is to protect the city employee's free speech rights. Another is to protect the community's First Amendment interest "in receiving the well-informed views

[83] Criminalizing homelessness or arresting all homeless persons is a violation of Oregon law (*see* H.B. 3115) and could be considered cruel and unusual punishment under the United States Constitution. *Anderson v. City of Portland*, No. 3:08-cv-1447-AA, 2009 WL 2386056 (D. Or. Jul. 31, 2009).

[84] *Garcetti v. Ceballos*, 547 U.S. 410, 418-19 (2006) (drawing distinction between government as an employer, who has "a significant degree of control over their employees' words and actions," and the government's responsibility to honor employees' free speech rights).

[85] *Id.* at 419.

[86] *Id.* at 418-19.

[87] *Id.*

of government employees engaging in civic discussion."[88] In other words, the public deserves to know what its city employees think about the government they help run.

If a city employee believes that the city has punished them for protected speech, they can bring a retaliation claim. This claim is subject to a five-part court-created test that is used to determine if the adverse employment action (firing, demotion, etc.) was the result of retaliation or was a legitimate act by the government as an employer.[89]

First, the employee must show that:

1) they spoke on a matter of public concern;
2) they spoke as a private citizen rather than a public employee; and
3) the relevant speech was a substantial or motivating factor in the adverse employment action.[90]

If the employee succeeds in proving all three criteria, then the city government must show that either (4) it had an adequate justification for treating the employee different than other members or the public[91] or (5) it would have taken the adverse employment action even absent the protected speech.[92]

The first factor in the test is relatively straightforward. Matters of public concern can range from taxes to wrongdoing within a department to racial equity.[93] But matters of public concern do not include, for example, issues relating to the employee's shift schedule or lunches stolen from the breakroom.

The second factor is more complicated. A city employee acts as a private citizen when their speech (1) is directed towards a person who they would not normally interact with in their daily work and (2) does not interfere with the regular operation of the city.[94] When a city employee makes statements "pursuant to their official duties," however, they are not speaking as a private citizen, and their speech is not protected.[95] For example, courts have found that writing an internal memorandum that arose out of an employee's usual responsibility to advise their supervisor was not protected speech.[96] Writing a letter

[88] *Id*. at 419.
[89] *Barone v. City of Springfield, Ore.*, 902 F.3d 1091, 1098 (9th Cir. 2018).
[90] *Id*.
[91] *See, e.g., City of San Diego v. Roe*, 543 U.S. 77 (2004) (holding that city had a legitimate interest in disciplining police officer who sold in an online auction a video of himself stripping off his uniform and masturbating).
[92] *Id*.
[93] *See, e.g., Pickering v. Bd. of Educ. Of Twp. High Sch. Dist. 205*, 391 U.S. 563, 564-65 (1968); *Connick v. Myers*, 461 U.S. 138, 148 (1983); *Barone*, 902 F.3d at 1098.
[94] *Barone*, 902 F.3d at 1098 (citing *Pickering*, 391 U.S. at 569-70).
[95] *Id*. (citing *Garcetti*, 547 U.S. at 421).
[96] *Id*.

to the editor in a newspaper, however, is protected.[97] (Importantly, it does not matter what an employee's job description says; the question is a practical one that considers an employee's actual tasks and duties, not any formalized job description or employment agreement.)[98]

The third factor asks whether the speech was a substantial or motivating factor for the employee being fired, demoted, etc. This question is as it sounds: did a city do something to an employee because of comments the employee made in their capacity as a private citizen?[99]

If all three criteria are met, it is a city's duty to show either that it had an adequate justification for treating the employee differently than other members of the public or that it would have fired or demoted the employee regardless of the protected speech.[100] These are fact-based questions that will vary based on context.[101]

The bottom line is that a city government, when acting as an employer, has some control over its employees' speech. But that control is not limitless, and city employees do not sacrifice all of their First Amendment rights by working for the government. Cities should therefore be cautious when disciplining employees for what they say, keeping in mind the *Barone* factors discussed above from the very beginning of the disciplinary process.

E. Elections

This handbook provides a separate chapter on Election Law—which should be used as the primary resource on election-related law. However, election law interacts with the First Amendment in a couple of important ways. One is campaign finance laws; the other relates to restrictions on government employees' speech.

1. Campaign Finance

Campaign finance is a broad topic and this section is not intended to explore the topic in depth—but will instead only summarize two important aspects of campaign finance as they relate to the First Amendment. (An overview of Oregon's campaign finance rules is provided in the election law chapter.)

---

[97] *Pickering*, 391 U.S. at 569-70.

[98] *Barone*, 902 F.3d at 1099-100 (holding that sheriff deputy's remarks regarding racial profiling at a City Club event were within the course of her official duties because her role required her to do community outreach and receive citizen complaints).

[99] *Moser v. Las Vegas Metro. Police Dept.*, 984 F.3d 900, 906 (9th Cir. 2021) (holding that this factor was satisfied because city police department demoted officer based on posts he made on his private Facebook page).

[100] *Barone*, 902 F.3d at 1098.

[101] *Eng v. Cooley*, 552 F.3d 1062, 1071-72 (9th Cir. 2009).

First, campaigning for office is a type of speech that is protected from most interference from the government. That does *not* mean that it cannot be regulated at all. For example, the Oregon Supreme Court has held that campaign finance limits (limits on how much money a person can donate to a candidate) do not violate the First Amendment or Article I, Section 8, simply because they regulate conduct (giving money) rather than speech.[102] This ruling is important for many reasons, but one is that it allows city governments to impose campaign finance limits in city elections. It also means that candidates for city office should be mindful of any current state limits on campaign contributions (since they may have changed from those in effect during a previous campaign).

Second, there is a distinction between speech on behalf of a candidate and speech on behalf of a ballot measure or public policy issue. In short, spending and campaigning on behalf of a candidate is subject to more regulation and oversight than similar activity on behalf of a ballot measure or policy.[103] Without describing the specific nuances of these regulations—which exceed the scope of this chapter—the reason for the distinction is that there is no risk of corrupting or bribing a ballot measure.[104] This distinction is important to keep in mind when a city chooses to adopt campaign finance regulations.

2. Public Employee Political Speech

State campaign finance law prohibits public employees, including city employees, from participating in campaign activity during work hours.[105] As explained in the chapter on Election Law, it works this way:

> ORS 260.432 includes three main requirements that affect cities and city employees. First, the law prohibits any public employee from engaging in certain political activity during work hours. Specifically, public employees cannot solicit money, services, or influence, and cannot otherwise support or oppose a candidate, measure, or political committee. Second, the law prohibits any person from attempting to "coerce, command, or require" a public employee to engage in the prohibited conduct. Third, the law requires that a notice be posted in all public workplaces about the law; this requirement applies to all public employers, including cities and other municipal corporations.

This campaign finance law is modeled on the federal Hatch Act, which imposes similar restrictions on federal government employees. The United States Supreme Court

---

[102] *Mult. Co. Home Rule*, 366 Or. at 312-13.
[103] *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765 (1978); *FEC v. Wisc. Right to Life, Inc.*, 551 U.S. 449 (2007).
[104] *Wisc. Right to Life*, 551 U.S. at 478-79.
[105] ORS 260.432.

has upheld the Hatch Act on the grounds that the government's interest in maintaining the efficiency and integrity of official offices outweighs the infringement on public employees' speech rights during the workday.[106] Similarly, the state statute, ORS 260.432, has never been held to violate Article I, Section 8—although the Oregon Supreme Court has held that more restrictive statutes that limit *all* political activity, even during non-working hours, by public employees do violate the Oregon Constitution.[107]

ORS 260.432 carves out an exception for the rights of public employees to "express personal political views" while at work.[108] The Oregon Secretary of State interprets this exception to mean that a public employee may communicate verbally about politics and wear buttons, t-shirts and other political clothing, and may post campaign signs in their workplace.[109] However, this expression can be limited by content-neutral local policies, particularly where the employee becomes a disruption to the workplace or to the organization as a whole.[110]

F. Municipal Courts

Many cities have municipal courts that adjudicate violations of city codes and ordinances, as well as some misdemeanor crimes. These courts encounter the First Amendment in a variety of ways, and although this section is presented as part of the "Free Speech" section of this chapter, courtroom proceedings sometimes implicate the other protections in the First Amendment as well. There is no body of law specific to courtrooms; so instead of a comprehensive legal analysis, here is a synopsis of some of the common ways in which the First Amendment presents itself in courtroom proceedings.

- **Sentencing.** Courts have broad latitude when imposing sentences and can consider nearly any information about the defendant, including information that was not admissible at trial. However, courts *cannot* consider a defendant's political beliefs or membership in a group or organization *unless* that information is relevant to the crime at issue.[111] So, for example, a municipal court could not rely on a defendant's membership in a white supremacy group to impose a harsher sentence on them for driving while intoxicated. But the court could mitigate the

[106] *United Public Workers of America v. Mitchell*, 330 U.S. 75, 96-97 (1947).
[107] *See, e.g., Oregon State Police Officers Assn. v. State of Ore.*, 308 Or. 531, 534-35 (1989) (holding that statute was unconstitutional where it prohibited state police officers from engaging in any political activity).
[108] ORS 260.432(2).
[109] Or. Secretary of State, Restrictions on Political Campaigning by Public Employees at 7-8 (2016), https://sos.oregon.gov/elections/Documents/restrictions.pdf (last accessed Apr. 18, 2022).
[110] *See id.*
[111] *State v. Fanus*, 336 Or. 63 (2003); *Dawson v. Delaware*, 503 U.S. 159 (1992).

sentence on the basis that the defendant joined Alcoholics Anonymous. The reason is that membership in a white supremacy group has no relationship to the crime, but AA membership does. Therefore, using membership in a racist organization as a justification to enhance the sentence is tantamount to punishing the defendant for belonging to an objectionable group. (Doing so would violate their freedom of association, which is discussed later in this chapter.)

- **Treatment Programs**. Municipal courts often handle low-level crimes and violations, including impaired driving and minor drug possession charges. The sentences for those infractions often include participation in a treatment program, some of which are run by religious organizations. As discussed later in this chapter, the government cannot discriminate against religious organizations. So, if a religiously affiliated treatment program is otherwise accredited and meets the court's criteria for a court-sanctioned program, the court must offer it as an option to defendants in exactly the same way it offers secular programs.

- **Public Comments.** In much the same way city councils have significant latitude over their meetings, judges have control over behavior in their courtrooms. A courtroom is a nonpublic forum[112]—which means that it is not a public space traditionally set aside for speech (such as a sidewalk or park), nor is it designated specifically for that purpose (such as a city hall conference room that is made available for community meetings). Speech restrictions in a courtroom need only be (1) reasonable and (2) viewpoint neutral.[113] Otherwise, judges can exercise significant control over who speaks and for how long in their courtrooms.

- **City codes.** Municipal courts often enforce city ordinances and codes. As explained elsewhere in this chapter, city codes are sometimes written or applied in a way that targets protected speech that should not be punished. Judges should be aware of the rules throughout this chapter and should decline to enforce obviously unconstitutional laws.

G. Commercial Speech

Much of the "speech" referenced in this chapter relates to public policy, personal beliefs, or political activism. But the First Amendment protects commercial speech

[112] *See, Mead v. Gordon*, 583 F. Supp. 2d 1231, 1239 (D. Or. 2008).
[113] *Id*.

too.[114] Commercial speech includes advertising, packaging, signs, and branding, among other activities. Businesses are subject to government regulation, which often has the collateral effect of regulating commercial speech. This section examines some of the common ways that city codes interact with commercial speech.

1. Advertising

Advertising—the means by which companies speak directly to consumers—is perhaps the most common and obvious form of commercial speech. It may be subject to government regulation because it is invasive (*e.g.*, telemarketers, home solicitors, etc.) or contains a visual element (*e.g.*, signage, billboards, etc.). This section focuses on types of advertising that *cities* are most likely to regulate: signs and billboards.

First, it is permissible for cities to impose a permit scheme on signs and billboards that relies on objective criteria, such as lighting, zoning, and size.[115] These are considered "time, place, manner" restrictions like the ones discussed above.[116] A city may also charge a fee for sign permits, as long as it is not unreasonable and does not exceed the cost of the permit program.[117]

What is *not* permissible is to create a permit system that distinguishes between the messages found on signs or billboards.[118] For example, it is unconstitutional to adopt a law that distinguishes between signs that advertise or relate to the activity on the property (*e.g.*, "Gas here" at a gas station, "Pray for Peace" at a church) and signs that advertise or communicate more generally (*e.g.*, "Pray for Peace" at a gas station or Gas: 10 miles on a billboard).[119] This is because those types of regulations seek to control the content of the message—not the sign itself.[120]

Commercial speech is not limited to private property. Governments can use public property, such as airport terminals or public transit systems, to create a "limited

---

[114] *Northwest Advancement, Inc. v. State of Ore. Bur. of Labor, Wage and Hour Div.*, 96 Or. App. 133, 140 (1989). **Note:** The analysis under Article I, Section 8 is more protective of commercial speech than the analysis adopted by federal courts under the First Amendment. This section therefore focuses on cases arising under the Oregon Constitution. However, there are recent cases that address First Amendment and sign regulation to include: *Reed v. Town of Gilbert*, 576 US 155 (2015) (signaling when a sign regulation should be considered content-neutral), *City of Austin v. Reagan National Advertising*, 596 US 61 (2022) (holding that strict scrutiny standard of review applied to content-based restrictions and intermediate scrutiny applied to content-neutral restrictions.)

[115] *Outdoor Media Dimensions, Inc. v. Dep't. of Transp.*, 340 Or. 275, 286-88 (2006).

[116] *Id*. at 288.

[117] *Id*. at 290-91.

[118] *Id.* at 293-95.

[119] *Id*.

[120] *Id*.

public forum" for the purpose of allowing commercial advertising.[121] When it does so, it should allow "selective access" and categorical subject-matter limitations (*i.e.*, prohibiting ads for alcohol and tobacco), with pre-screening of ads.[122] In the context of commercial speech on public property, this kind of control is acceptable, much like control over a city council meeting is also acceptable under the First Amendment.

First Amendment Best Practice: If implementing a signage law requires a person to read the sign itself to determine if there is a violation, this is a red flag that the law is an unconstitutional content-based law.[123]

2. Zoning

Cities have broad latitude in imposing zoning ordinances that regulate where certain types of activities are allowed. Within those ordinances a city can categorize businesses in almost any way it chooses, becoming even so specific as to allow ice cream parlors but not dental offices in residential areas.[124] Likewise, it is not a violation of the First Amendment if zoning regulations have the effect of restricting speech as long as they are not targeted at the speech itself.[125] This rule is much like other rules found throughout this chapter: targeting speech itself or the content of speech is unconstitutional, but neutral, generally applicable rules are not.

With zoning ordinances, cities can adopt laws that target "location, time, manner, intensity, or invasive effect" of businesses.[126] In doing so, the ordinances may generally restrict where commercial businesses can be located, and that restriction may in turn limit where, for example, a bookstore can be located.[127] This is permissible[128] because a zoning law that focuses on a category of "commercial business" is neutral as to any speech that takes place within the business. It is irrelevant that the specific business affected by the ordinance is a bookstore; it matters only that it is a commercial business

[121] *Seattle Mideast Awareness Campaign v. King County*, 781 F.3d 489, 497 (9th Cir. 2015 (citing *Lehman v. City of Shaker Heights*, 418 U.S. 298, 303 (1974); *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 682 (1992)).

[122] *Seattle Mideast Awareness Campaign*, 781 F.3d at 497-98.

[123] *See also, Clear Channel Outdoor, Inc. v. City of Portland*, 243 Or. App. 133 (2011) (holding that city could distinguish between free-standing signs and signs painted on building walls, but it could not distinguish between painted advertising and painted murals).

[124] *See, Tidyman*, 306 Or. at 182 ("The constitution does not limit locational regulation to broad categories of structures or enterprises; if a city chooses to allow ice cream stores or beauty shops in residential areas but not taverns or dental offices, no guaranteed right like free expression is invaded.").

[125] *Id*. at 182-83.

[126] *Id*. at 183.

[127] *Id*.

[128] *Id*.

and not, for example, an apartment building, which is not zoned as a "business" but as a multi-family residential unit.[129] Similarly, it is not unconstitutional to deny a zoning variance for a church[130] or a newsstand (or similar, expressive activities) if the decision to deny the variance is based on criteria independent of the religious activity or speech taking place in those locations.[131]

But it is *not* permissible to create a zoning ordinance that restricts, for example, the location of adult bookstores.[132] This is because such an ordinance would impose a government regulation on the basis of the speech contained in the store—*i.e.*, the city is treating adult bookstores differently than other, similar businesses (bookstores, theaters) *because* adult bookstores contain obscene, sexual, or pornographic content.[133] This does not mean that a zoning ordinance that regulates adult bookstores is *never* constitutional. But in order to be considered permissible under the First Amendment, the ordinance must be premised on the specific, objective effects of an adult bookstore's location—such as increased traffic flow, crime rates in other adult bookstore locations, or a documented effect on housing prices.[134]

The bottom line is that although cities can zone buildings and businesses based on almost any possible criteria, they cannot use zoning ordinances to protect citizens from hearing offensive speech or to restrict the proliferation of certain speech.

a. "Vice" Industries

Zoning laws often seek to regulate the location of certain activities that are considered unsavory or undesirable. Examples may include strip clubs, liquor stores, or cannabis dispensaries. The same rules that apply to zoning laws generally apply to these "vice" industries. Here is how it works:

---

[129] *Id*.

[130] Importantly, zoning restrictions for churches must also comply with the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), which protects religious practice from land use laws that either impose a "substantial burden" or treat a religious institution on "less than equal terms" as non-religious institutions. 42 U.S.C. § 2000cc(a) and (b). In other words, cities may impose zoning restrictions on churches but may not treat them differently because they are religious institutions. *See Centro Familiar Cristiano Buenas Nuevas v. City of Yuma*, 651 F.3d 1163, 1171-73 (9th Cir. 2011). Similarly, a city cannot impose zoning requirements so onerous as to make it virtually impossible to site a particular church, for example. *See Int'l Church of Foursquare Gospel v. City of San Leandro*, 673 F.3d 1059, 1070-71 (9th Cir. 2011).

[131] *See Milwaukie Co. of Jehovah's Witnesses v. Muen*, 214 Or. 281 (1958); *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750 (1988).

[132] *Tidyman*, 306 Or. at 185-86.

[133] *Id*.

[134] *Id*. at 188-89 (explaining that zoning ordinance would need to focus on harms other than the harm of being exposed to offensive speech); *Ore. Entertainment Corp. v. City of Beaverton*, 172 Or. App. 361, 369-70 (holding that city's denial of conditional use permit for 24-hour adult video store was not unconstitutional because it based its denial on criteria such as crime rates and effects on rental vacancies).

- **Liquor Stores.** No free speech rights are implicated because zoning laws would be regulating the product, not any message. A city should not, however, impose a ban on signs advertising alcohol sales.

- **Cannabis Dispensaries.** No free speech rights are implicated for the same reason as liquor stores; but cities should not impose a ban on signs advertising cannabis.

- **Strip clubs**. As discussed above, nude dancing is considered "expressive activity." Therefore, although strip clubs can be zoned the same way as other commercial activities they cannot be targeted or singled out on the basis that they offer nude dancing because that would be an unconstitutional restraint on expressive conduct.

3. City Permits for Private Businesses

Private businesses and nonprofits sometimes seek permits to conduct events on city property. For example, a farmer's market might seek a permit to use a city park on Saturdays—or a nonprofit might seek a permit to sponsor a run through downtown. The issue of permits is discussed elsewhere in this section and in this chapter. But the key rule to keep in mind is this: permit schemes must rely on objective, consistent criteria (*e.g.*, location, time, crowd size, etc.) and cannot be tied to the purpose or message of the group seeking the permit.[135]

Beyond that general rule, a couple additional rules are important to keep in mind when issuing permits to commercial activity. First, a city cannot use the permit system to censor the content of media being shown during an event.[136] Permits must be issued on an objective, neutral basis and should not involve reviewing the content of a movie, a theater production, pamphlets, or any other expressive material.[137]

Second, private entities that use public property—such as a farmer's market—must contend with other members of the public who also have free speech rights in those spaces. This situation implicates two First Amendment rights: the individual's right to speak and the private group's right to control its message (discussed in greater detail elsewhere in this chapter). For example, a person who stands on the fringe of an event in a public park and shouts sexist epithets at women will undoubtedly have an effect on the event and its patrons' experience.[138] However, in spite of the potential for interference with the event, a city cannot ban or evict a speaker, even if their speech interferes with a

[135] *Shuttlesworth v. City of Birmingham, Ala.*, 394 U.S. 147, 150-51 (1969).
[136] *City of Portland v. Welch*, 229 Or. 308 (1961) (en banc).
[137] *Id*. at 320-21.

[138] *Gathright*¸439 F.3d at 575.

private event.[139] It also cannot allow permittees to evict individuals for exercising their free speech rights—*i.e.*, the farmer's market cannot remove people for reasons the city would not otherwise be allowed to rely on to do the same.[140] The city can, however, impose reasonable "time, place, manner" restrictions, as discussed elsewhere in this chapter.[141] The exception to this rule is if a person attempts to *participate* in an event in such a way that changes or confuses the message of the event.[142] This issue is discussed at length in the "Freedom of Association" section of this chapter.

III. Freedom of Religion

Section Overview

- Government cannot favor religion or inhibit it. It must remain neutral to religion in every circumstance.
- Cities should focus holiday displays on quasi-secular symbols, such as Christmas trees and menorahs, and avoid religious symbols such as nativity scenes.
- Prayer before public meetings can be acceptable, but it should not involve preaching, and it should not be led by city officials.

This section focuses primarily on three situations that commonly arise for city governments: public religious displays, prayer, and ceremonies. Religious freedom issues arise in many other contexts, however, and general principles apply regardless of the situation.

The constitutionality of prayer at public events outside the context of public meetings may depend on whether the prayer is government or private speech. The two can be distinguished. [143] A government may not promote or favor religion or coerce the

[139] *Id*. at 578-79.
[140] *Id*. at 581.
[141] *Id*. (upholding injunction that allowed city to remove speakers whose presence creates an "insurmountable" impediment to pedestrian or vehicular traffic).
[142] *Hurley v. Irish-Am. Gay, Lesbian, and Bisexual Group of Boston*, 515 U.S. 557 (1995).
[143] *Santa Fe Indep. Sch. Dist. v. Doe*, 530 US 290, 302 (2000) (concluding "'there is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect'" (quoting *Bd. of Educ. v. Mergens*, 496 US 226, 250 (1990) (plurality op))); *accord Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 US 819, 841 (1995).

consciences of students, schools also may not discriminate against private religious expression by students, teachers, or other employees.

Under a recent Supreme Court case, *Kennedy v. Bremerton School District*, the Court abandoned the previous and long standing "*Lemon* test" because it "invited chaos" in lower courts, leading to "differing results" and in its place adopted a "reference to historical practices and understandings" test.[144]

Kennedy provides guidance to determine whether an individual's religious practice is public or private. A two-step evaluation is needed to determine if prayer by a public-school employee while working is protected First Amendment Constitutional activity.[145]

Step 1 asks whether the person is speaking in an "official duty" role. If the answer is yes, the district then can presumptively control and discipline that speech because it is governmental speech but must go to Step 2 for further evaluation to see if the employee can overcome this presumption.

Step 2 is an analysis of the speech and its consequences and asks whether the speech is private or said within the scope of duties. If it is private, it cannot be regulated. If it is within the scope of the duties of employment, it can be controlled or disciplined. The Step 2 analysis is "a delicate balancing of the competing interests surrounding the speech and its consequences."[146]

At this second step, courts are to consider whether an employee's personal speech interests are outweighed by "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[147]

The overarching rule is neutrality.[148] City codes, ordinances, laws, and programs must treat religious groups and organizations exactly as they treat secular groups and organizations.[149] This rule runs counter to a common misconception that the government is prohibited from giving money or other support to religious groups. In fact, the opposite is true: the government cannot treat religious groups differently than secular groups—for better or for worse.[150] This is the same principle found in the rule against viewpoint discrimination: the government must remain neutral and objective and cannot

---

[144] 597 US 507, 510 (2022) (citing *Town of Greece v. Galloway*, 572 US 565, 576 (2014)).

[145] *Id.* at 527.

[146] *Id.* at 528.

[147] *Id*.

[148] *Good News Club v. Milford Central School*, 533 U.S. 98, 114 (2001).

[149] *Id*.; *see also Espinoza v. Mont. Dep't. of Rev.*, 140 S. Ct. 2246, 2255-57 (2020) (holding that Montana could not withhold government aid to religious institutions).

[150] *Id*.

favor one perspective over another. And the inverse is also true. If a law is neutral and generally applicable, it is not unconstitutional just because it happens to create an incidental burden on religious freedom.[151]

Beyond those general principles, which apply to any law or ordinance a city adopts, the following categories present common or frequent issues for city governments.

A. Public Religious Displays

Public religious displays fall into two categories: private displays on public property and public displays erected by a city. The former scenario—private displays on public property—often involves a cross erected in a public park as a memorial or protest. Cities should allow these displays unless they forbid *all* private memorials.[152] The exception would be if the cross were erected in a location (*e.g.*, the roof of city hall) that was likely to imply that the government was endorsing the Christian religion.[153] In that case, a court would likely order the cross removed.

The latter scenario—public displays erected by a city—is less permissive. Because a city cannot endorse a religion, it generally cannot display religious iconography (*e.g.*, the Ten Commandments) because this implies that the government is endorsing the Judeo-Christian religious tradition.[154] This goes back to the principle of neutrality discussed above.[155] The government has an obligation to remain neutral on the subject of religion, and displaying religious texts or symbols is not considered neutral.[156]

Another circumstance where this issue arises is in connection with holiday displays. Many cities erect Christmas trees or nativity displays each December. There is no categorical rule against holiday displays, but there are two guidelines. First, holiday displays on public property should not include explicitly religious iconography (*e.g.*, nativity scenes), but can include iconography that carries both a secular and religious message, such as a Christmas tree or a menorah.[157] Second, if the city's holiday display is on private property and includes a variety of otherwise-secular iconography, it can include a nativity scene or other explicitly religious symbols.[158]

---

[151] *Empl. Div., Dep't. of Human Resources of Ore. v. Smith*, 494 U.S. 872 (1990), superseded by statute *vis-à-vis* federal government only; *City of Boerne v. Flores*, 521 U.S. 507 (1997).

[152] *See Eugene Sand & Gravel*, 276 Or. at 1026.

[153] *Id*. (holding that erection of cross in city park was constitutionally allowable because it did not create any "excessive entanglement" with the city).

[154] *McCreary Co. v. ACLU of Kentucky*, 545 U.S. 844 (2005).

[155] *Id*. at 875-76.

[156] *Id*.

[157] *See, e.g., County of Allegheny v. ACLU*, 492 U.S. 573 (1989).

[158] *Lynch v. Donnelly*, 465 U.S. 668 (1984).

First Amendment Best Practice: In order to avoid legal controversy with holiday displays, confine them to secular or quasi-secular symbols, such as Christmas trees and menorahs.

B. Prayer

Prayer before a public meeting is sometimes permissible. For example, prayer is permissible at the beginning of a public meeting where it is "meant to lend gravity to the occasion and reflect values long part of the Nation's heritage" and delivered by a chaplain who delivers a prayer that can "find appreciation among people of all faiths."[159] But a prayer cannot be used to "denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion."[160] This tradition of opening prayers delivered by a chaplain is referred to as the "legislative prayer tradition."[161]

In most other situations, however, prayer at public meetings is prohibited. For example, prayer at public meetings is not permissible when members of the audience—particularly children—are required to be present for the prayer.[162] Prayer at public meetings is also unlikely to be permissible if public officials—rather than a chaplain—lead the prayer, because public officials leading the prayer gives the appearance of the government endorsement of a particular religion.[163]

For example, public officials acting in their official capacities may not lead prayer, devotional readings, or other religious activities.[164] Nor may school officials attempt to persuade or compel students to participate in prayer or other religious activities or to refrain from doing so.[165]

First Amendment Best Practice: Ask local clergy from a variety of faiths to offer a pre-meeting invocation—or offer none at all. A good substitute is a moment of silence.

---

[159] *Town of Greece v. Galloway*, 572 U.S. 565, 582-83 (2014).

[160] *Id*. at 583.

[161] *Freedom From Religion Foundation, Inc. v. Chino Valley Unified Sch. Dist. Bd. of Educ.*, 896 F.3d 1132, 1145 (9th Cir. 2018).

[162] *Id*.

[163] *See Lund v. Rowan County*, 863 F.3d 268, 278-79 (4th Cir. 2017).

[164] *School District of Abington Township, Pennsylvania v Schempp*, 374 US 203 (invalidating state laws and policies requiring public schools to begin the school day with Bible readings and prayer); *Engel v. Vitale*, 370 US 421 (invalidating a state law and regulation directing the use of prayer in public schools); *Stone v. Graham*, 449 US 39 (1980) (per curiam) (holding that a state statute requiring posting of Ten Commandments on walls of every public school classroom was unconstitutional).

[165] *Kennedy*, 597 US 507 (2022) (concluding that the football coach in that case did not coerce, require, or ask any students to pray, nor seek to persuade them to participate in his private prayer).

C. Ceremonial Considerations

Finally, religious freedom issues sometimes arise in ceremonial contexts. The Oregon Constitution clearly states that there can be no religious qualification for office[166] and requires that "the mode of administering an oath, or affirmation shall be such as may be consistent with, and binding upon the conscience of the person to whom such oath or affirmation may be administered."[167] This means that elected officials cannot be required to swear on a Bible or to say "under God." Instead, the oath of office must comport with the elected official's own beliefs and conscience—and should be modified accordingly. To the extent that a city charter addresses oaths of office, it should mirror the language of Article I Section 7 and should not require any particular religious oath.

IV. Freedom of the Press

Section Overview
• The government cannot prevent the publication of unflattering, sensitive, or embargoed stories. • The standard for a public official to sue a press outlet for libel is very high, and these lawsuits are almost never successful.

Much of the interaction between the press and city government is controlled by state statutes relating to public meetings and access to public records. Those laws and guidance from the Oregon Attorney General's office are found in the Attorney General's Public Records and Meetings Manual.[168] This section does not discuss those laws but does provide a link to them in the footnotes.

First Amendment law is specific to the press. The rules and principles outlined elsewhere in this chapter apply equally to the press. Media companies are subject to the same zoning and signage laws that regulate other companies; reporters have the same free speech rights in meetings and online as do other private individuals; and, as with any other group or entity, city governments cannot discriminate against reporters or media outlets because of their viewpoint.

---

[166] Or. Const. art. I, § 4.
[167] Or. Const. art. I § 7.
[168] Ellen F. Rosenblum, Attorney General's Public Records and Meetings Manual, Or. Dept. of Justice (June 2019), https://www.doj.state.or.us/wp-content/uploads/2019/07/public_records_and_meetings_manual.pdf (accessed Feb. 28, 2022).

This section therefore focuses on two issues that arise most often with respect to the press: prior restraint and libel laws. These issues are not only applicable to the press, but because they arise most often in that context they are included in this section.

1. Prior Restraint

"Prior restraint" refers to the practice of preventing someone from speaking before they attempt to do so.[169] The prior restraint issue arises in many circumstances, but most often with respect to the media because that is most often where sensitive information is published.[170] The prohibition on prior restraint means, as a practical matter, that city officials cannot take any action to prevent a newspaper, TV station, or other media outlet from publishing information—other than to try to persuade them not to do so. This also means that the common practice of embargos on news announcements must be based on nothing more restrictive than the honor system. Newspapers cannot be punished for breaking an embargo, and cities cannot use the court system to enjoin a news story prior to publication.

2. Libel

Because media outlets are in the business of publishing photos and news stories, they are the most common recipients of libel claims. "Libel" is a civil action alleging that someone published a defamatory statement. Bringing a libel claim against a media outlet is difficult—and it is not enough to merely allege that the outlet printed false information. There are two primary reasons for these legal barriers. One arises from case law, the other arises from state statutes.

First, when alleged false statements relate to a public figure[171] in connection with a question of public interest, the First Amendment requires a higher burden of proof.[172] The plaintiff must show not only that the statements were false but that the defendant—the media outlet—knew of the falsity or acted in reckless disregard of its falsity.[173] That is a hard standard to meet because few media outlets publish false statements on purpose. The higher burden of proof therefore forecloses most libel claims brought by public officials.

---

[169] *See e.g.*, *State ex rel. Sports Management News v. Nachtigal*, 324 Or. 80, 87-88 (1996).

[170] *Id.* at 83 (Adidas brought suit against a sports magazine in order to enjoin it from printing adidas trade secrets).

[171] "Public figure" can include general public figures, such as a governor or a mayor, and limited-purpose public figures, such as a PTA president who heads up a campaign in favor of a new school bond.

[172] *Staten v. Steel*, 222 Or. App. 17, 37 (2008) (relying on *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)).

[173] *Id*.

Second, Oregon has enacted a statute that allows a defendant—*e.g.*, media outlets—to move to "strike" (dismiss) libel claim under certain circumstances.[174] These motions are allowed against libel claims (1) arising out of legislative, executive, or judicial proceedings; (2) relating to any issues under consideration in those proceedings; (3) arising out of statements made in a public place in connection with an issue of public interest; or (4) relating to the exercise of the rights to free speech or to petition the government on any issue of public interest.[175] If the motion is granted, the libel claim is dismissed.[176]

Taking these two standards together, a libel claim brought by an elected or city official against a media outlet is difficult to win.[177] An alternative to a libel claim is to make a formal demand for a retraction or correction[178]; but beyond that—and for the reasons discussed here and throughout this chapter—the government has little power to control what the press publishes.

V. Freedom of Assembly

Section Overview

- Freedom of assembly incudes two freedoms: to assemble in public spaces and to associate with groups or organizations of one's choosing.
- Cities can regulate protests and demonstrations but should do so using neutral, generally applicable permitting systems and time, place, manner constraints.
- Groups cannot be forced to admit members whose membership would detract from their purpose or message.

Freedom of assembly involves two freedoms: the freedom to assemble in public (to protest, picket, demonstrate, etc.) and the freedom to associate with groups of one's choice.[179] Although these freedoms derive from the same clause of the First Amendment, they are distinct and raise distinct issues and considerations.

---

[174] ORS 31.150.
[175] ORS 31.150(2)(a)-(d).
[176] ORS 31.150(1).
[177] These standards apply to any allegedly defamatory material, whether or not it is published by a media outlet. This section focuses on the press, but libel suits can be brought against anyone who disseminates an allegedly false statement.
[178] ORS 31.215.
[179] *Shuttlesworth*, 394 U.S. at 152 (holding that the First Amendment protects picketing, parading, and similar public demonstrations); *Williams v. Rhodes*, 393 U.S. 23, 30 (1968) (identifying freedom of association; here, freedom to associate with a particular political party).

A. Protests and Demonstrations

Protests, picketing, and demonstrations touch on some of the same issues already discussed in the "Free Speech" section of this chapter. For example, cities can regulate public gatherings using time, place, manner constraints—just as they can with speech.[180] And the same rules apply to these restraints: they must be reasonable and objective in that they (1) do not prohibit assembly entirely; (2) apply to everyone using the sidewalk, park, or other public space at issue; and (3) have nothing to do with the subject matter of the protest or the opinion of the participants.[181] This issue also implicates viewpoint discrimination: it is impermissible to target protests or demonstrations on the basis of the viewpoint or opinion being espoused.[182]

Protests and demonstrations also raise issues of speech versus conduct. Political activists often use expressive conduct to illustrate or emphasize a point or draw attention to an issue. This kind of expressive conduct is protected by the First Amendment. Examples might include flag burning,[183] wearing uniforms, badges, armbands, or other attire intended to convey a political message,[184] or carrying placards, signs, or flags.[185]

Sometimes, however, protests and demonstrations involve conduct that is not expressive and is therefore not protected. This is especially true in bigger protests, where a larger number of people creates a greater likelihood that some people will behave in a way that exceeds the bounds of protected activity. Examples of non-expressive conduct that is not protected and can be grounds for an arrest include physical assaults, rioting[186], or property damage.

---

[180] *Police Dept. of City of Chicago v. Mosley*, 408 U.S. 92, 98 (1972) ("We have continually recognized that reasonable 'time, place and manner' regulations of picketing may be necessary to further significant governmental interests."); *State v. Babson*, 355 Or. 383, 407-08 (2014) (en banc).

[181] *Mosley*, 408 U.S. at 97-99 (holding that ban on labor picketing was unconstitutional because it targets picketing on the basis of subject matter); *Barr v. Am. Ass'n. of Political Consultants, Inc.* 140 S. Ct. 2335, 2347 (2020) (holding that it was unconstitutional to create statutory exception for robocalls seeking to collect government-owned debts); *Eagle Point Educ. Ass'n./SOBC/OEA v. Jackson Cnty. Sch. Dist. No. 9*, 880 F.3d 1097, 1105-06 (9th Cir. 2018) (holding that restrictions adopted prior to teacher strike were unconstitutional because they were not reasonable and targeted a particular viewpoint).

[182] *Eagle Point*, 880 F.3d at 1106-07.

[183] *Johnson*, 491 U.S. at 404-06.

[184] *Tinker v. Des Moines Ind. Comm. Sch. Dist.*, 393 U.S. 503, 505 (1969).

[185] *Collin v. Smith*, 578 F.2d 1197, 1201 (7th Cir. 1978), *cert. denied Smith v. Collin*, 439 U.S. 916 (1978); *Stromberg v. Cal.*, 283 U.S. 359 (1931).

[186] *State v. Chakerian*, 325 Or. 370 (1997).

1. Permits and Licensing

Protests and demonstrations raise additional considerations beyond those already discussed elsewhere in this chapter. One of those considerations is "discretion," which refers to the government's ability to make choices about when and to whom permits are issued or when to make arrests. Many city governments use a permit system to manage activities and events such as parades, concerts, fundraisers, and private events in public parks. However, a permitting system can function as a prior restraint on assembly and speech—which means that the system can allow a government to preemptively prevent people from exercising their freedom of speech and freedom of assembly rights. Because of this, courts have created rules governing the criteria cities can rely on when deciding whether to issue permits.

A license or permit system must have "narrow, objective, and definite standards" to guide whoever makes the decision whether to issue permits.[187] The system cannot allow city officials to rely on their own judgement about the public welfare, peace, health, good order, morals, convenience, or similarly abstract, subjective concepts.[188] This is because allowing officials to use their discretion as to who can have a permit opens the door to decisions about whose speech is worth hearing and whose is not, which, as explained elsewhere in this chapter, is never allowed.[189] That does not mean that city officials can never exercise discretion—but they cannot exercise "unbridled" or "unfettered" discretion.[190]

So, for example, a permit system can distinguish between expressive and non-expressive activity—for example, between an anti-war demonstration and a farmer's market.[191] But a permit system cannot distinguish between an anti-war protest and an anti-vaccine protest, for example. A permit system can also allow city officials to put conditions on the permit that are designed to keep the event safe, allow for multiple activities in one public space, and control the flow of traffic.[192] This includes requiring participants to remain on sidewalks, requiring a particular route, imposing waste removal requirements, and similar conditions.[193] It is also acceptable to impose a permit fee, to require documentation showing indigent status in order to waive the fee, and to require proof of insurance.[194] Finally, a city can impose advance-notice requirements if the city

---

[187] *See Shuttlesworth*, 394 U.S. at 150-51.
[188] *Id*. at 150.
[189] *Id*.
[190] *Long Beach Area Peace Network v. City of Long Beach*, 574 F.3d 1011, 1019-20 (9th Cir. 2009) (citing *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 755-56 (1988)).
[191] *Id*. at 1027-28.
[192] *Id*. at 1028.
[193] *Id*.
[194] *Id*. at 1028-32.

allows for alternative means of expression for truly spontaneous events—but it must have a legitimate interest (*e.g.*, blocking traffic, disrupting businesses, etc.) before requiring 24-hours' or more notice.[195]

The bottom line is that cities may permissibly require permits for parades, demonstrations, and protests (among other events), and cities can impose conditions and requirements on obtaining those permits. Cities cannot, however, use the permit system to discriminate between groups or viewpoints, and cannot use the permit system to make speech in public spaces virtually impossible.

First Amendment Best Practice: Draft permitting ordinances as specifically as possible. Identify exactly which documents are necessary to show proof of insurance or financial status, provide clear criteria for conditional permits, create a consistent fee schedule, and identify typical routes and hours of use that are compatible with large-scale events.

B. Freedom of Association

The other half of the "freedom of assembly" is the freedom of association: the freedom to join, or not join, a particular group. Practically, this means that people cannot be punished for joining a group[196], cannot be forced to disclose what groups they belong to[197], and cannot be forced to join a group they do not want to join or whose views they do not share.[198]

Much of what constitutes "freedom of association" is addressed elsewhere, whether through freedom of assembly, freedom of speech, or campaign finance laws, which are discussed at length in the Election Law chapter of this handbook. However, one important note for cities is that, in some cases, the freedom of association prohibits a government from enforcing non-discrimination laws. Because people have the right to associate in groups that espouse particular beliefs or that support particular messages, they have a right to control who participates in those groups *if* the membership of the group has some bearing on the group's message.

For example, a St. Patrick's Day parade that is designed with one message in mind—celebrating St. Patrick's Day—can exclude floats that carry a different message,

---

[195] *Id*. at 1036-38 (relying on *Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022 (9th Cir. 2006)).

[196] *De Jonge*, 299 U.S. 353; *Dawson v. Delaware*, 503 U.S. 159 (1992).

[197] *NAACP v. Button*, 371 U.S. 415 (1963); *Americans for Prosperity Foundation v. Bonta*, 141 S. Ct. 2373 (2021).

[198] *Janus v. AFSCME Council 31*, 138 S. Ct. 2448, 2463 (2018); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984).

even if that message is one that is otherwise protected by public accommodation laws.[199] On the other hand, a chamber of commerce association, whose purpose is to promote local business, cannot exclude women as members because the sex of the group's members is irrelevant to its message.[200]

This is another complicated area of law. In order to apply it correctly, consider the following four questions:

1) Is a private organization or membership group involved? *If yes*:

2) What is its message or its mission?

3) Does the excluded membership have a relationship to that message or mission? *If yes*:

4) Would inclusion of that membership negate or dilute the message, or cause confusion about what it is?

If the answer to No. 4 is "yes," then the government cannot use public accommodation laws to require the group to accept the excluded members. The freedom to associate carries with it the freedom *not* to associate.[201]

VI. Freedom to Petition the Government

Finally, the First Amendment recognizes a right to petition the government for the redress of grievances.[202] The right to petition the government guarantees the right to direct speech *to the government*—a necessary part of self-governance.[203] However, regardless of where speech is directed, it is analyzed under the freedom of speech principles described earlier in this chapter.

[199] *Hurley*, 515 U.S. 557 (holding that St. Patrick's Day parade could exclude gay pride float); *see also Green*, 533 F. Supp. 3d at 997-98.
[200] *Roberts*, 468 U.S. at 623.
[201] *Id*.
[202] U.S. Const. amend. I; *Wayte v. U.S.*, 470 U.S. 598, 610-11 (1985).
[203] *McDonald v. Smith*, 472 U.S. 479, 482-83 (1985).

VII. Enforcement of the First Amendment

Section Overview

- Individuals and private entities can sue the government for infringing their First Amendment rights.
- They can seek money damages or declaratory or injunctive relief.
- They can sue in state or federal court.

If a person or group believes that their First Amendment rights have been violated, they can sue a city. The primary means of bringing a First Amendment lawsuit against a city government is through 42 U.S.C. § 1983, usually referred to as a "Section 1983 claim." Section 1983 allows a person to bring suits concerning statutes, ordinances, regulations, customs, or usage that causes a deprivation of constitutional rights.[204] The statute allows the plaintiff to seek money damages (compensatory relief) or equitable, or prospective, relief—which typically refers to either declaratory or injunctive relief.[205] "Declaratory" relief is a court order declaring a law unconstitutional. "Injunctive" relief is a court order requiring a city to stop enforcing an unconstitutional law. Punitive damages and attorneys' fees are also potential outcomes of a successful § 1983 claim.

Importantly, a finding that part of a statute is unconstitutional does not mean that the entire statute is unconstitutional.[206] This principle is called severability. It is also possible for a court to give a "narrowing construction" to a statute that is written too broadly.[207] These principles make it possible for a court to preserve parts of a law or mechanisms of enforcement, rather than striking it down completely. If a court applies one of these principles, it will not issue a sweeping injunction to strike down the entire law. Further, if a court does issue an injunction that prohibits a city from enforcing the law, the court will often explain why the statute is unconstitutional—which provides guidance that the city can use to draft a narrower, permissible law.

A person can bring a First Amendment lawsuit in either state or federal court. Because the claim arises under a federal statute and alleges a violation of federal civil

---

[204] 42 U.S.C. § 1983.

[205] *Id.*; *see also Outdoor Media*, 340 Or. at 285 (explaining that where plaintiff is not seeking money damages, the only remedy available is injunctive relief.)

[206] *Outdoor Media*, 340 Or. at 300; *City University v. Oregon Office of Educ. Policy*, 320 Or. 422, 425 (1994)

[207] *State v. Moyle*, 299 Or. 691 (1985) (en banc) (applying narrowing construction to harassment statute to confine its meaning to apply only to threats of imminent physical injury).

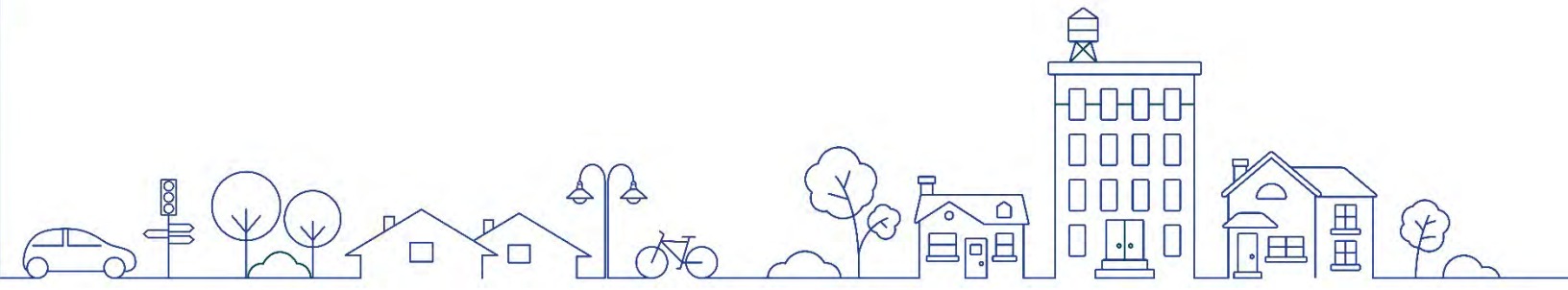
rights, it can be filed in federal court under federal question jurisdiction.[208] If it is filed in federal court, the first step is for a federal district court—located in Portland, Eugene, Medford, or Pendleton—to hear the suit. Any eventual decision can be appealed to the Ninth Circuit Court of Appeals and, potentially, the United States Supreme Court.

Alternatively, the suit can be filed in state court—usually in the circuit court in the county where the plaintiff lives, or the city is situated. Any eventual decision in that court can be appealed to the Oregon Court of Appeals and, potentially, the Oregon Supreme Court. Finally, any decision that relies on an interpretation of the First Amendment could potentially be appealed to the United State Supreme Court. However, a decision that relies on an interpretation of Article I, Section 8 can almost never be appealed to the United State Supreme Court because that cannot interpret or enforce a state constitution.[209]

[208] 28 U.S.C. § 1331.

[209] The exception is if the state supreme court interprets the Oregon Constitution in a way that violates the First Amendment.

CHAPTER 29:
CODE ENFORCEMENT



League of Oregon Cities

Published by the League of Oregon Cities
August 2023

Chapter 29: Code Enforcement

Code enforcement is the enforcement of local government ordinances and state laws that are designed to protect the public's health, safety, and welfare. "Code enforcement" is a general term that describes the processes and tools that local governments use to gain compliance with property maintenance, housing, building, and zoning codes.

This chapter will discuss the applicable laws and legal issues for gaining compliance. The legal issues discussed below include: (i) the benefits of code enforcement; (ii) the regulation authority of local governments; (iii) types of code enforcement ordinances; and (iv) enforcement methods such as court action taking control of problem properties. Lastly, this chapter will provide tips to achieve successful outcomes.

I. WHY CODE ENFORCEMENT?

"One unrepaired broken window is a signal that no one cares, and so breaking more windows costs nothing."[1]

The purpose of code enforcement could best be described as based on the broken window theory.[2] The broken window theory asserts that if a damaged window or graffiti is quickly repaired or removed, the neighborhood maintains its appearance of order and care.[3] On the other hand, if damage is not repaired, more graffiti, vandalism, and damage may result due to the seeming apathy.[4] In other words, the theory is that you can change the social norms by repairing damage and increase the feeling of safety, value of property, quality of life and prevent further decline.[5] This theory as applied to law enforcement is controversial, but largely remains unstudied as applied to code enforcement.[6]

Code enforcement often serves as communities' first line of defense for addressing deteriorating homes, substandard housing conditions, vacant properties, and neighborhood decline.[7] As discussed below, complaint and strategic code enforcement programs organize critical assets, resources, and actions into a dynamic and adaptive system.[8]

---

[1] George L. Kelling & James Q. Wilson, *Broken Windows*, VANITY FAIR (1982).
[2] *Id*.
[3] *Id*.
[4] *Id*.
[5] *Id*.
[6] Bernard E. Harcourt & Jens Ludwig, *Broken Windows: New Evidence from New York City and a Five-City Social Experiment*, 73 U. CHI. L. REV. 271, 73 (2006) (finding that a program that rehoused inner-city project tenants in New York into more-orderly neighborhoods did not reduce crime).
[7] Joe Schilling, *Stabilizing Neighborhoods through Strategic Code Enforcement*, HOUSING MATTERS (March. 13, 2019), available at: https://housingmatters.urban.org/articles/stabilizing-neighborhoods-through-strategic-code-enforcement (last accessed August 31, 2023).
[8] *Id*.

For many cities, dedicated code enforcement employees investigate and work with property owners and tenants to obtain voluntary compliance with state and local codes.[9] These informal efforts in notice, negotiation, and community education can take a substantial amount of time and resources, but they serve as the primary methods for gaining compliance.[10]

When dealing with specific properties, the most important question is to ask is, "What is the cause of the blight?" A structure is blighted when it exhibits objectively determinable signs of deterioration sufficient to constitute a threat to human health, safety, and public welfare.[11] Determining the cause of the blight on a specific property or neighborhood can be the most effective tool to identify the tool to use in obtaining compliance. As discussed below, some of the potential tools include:

- Implementation of cross-functional teams to work toward common goals in areas where the community has become blind to code compliance issues;
- Creation of "land banks" to acquire and clean up land for development;
- Seeking court-ordered receivership for bank-foreclosed properties where the banks have little incentive to improve and sell properties;
- Adoption of the International Property Maintenance Code as a housing standard to improve substandard housing; and
- Requiring vacant properties to register with cities to allow cities to track and monitor vacant properties.

In addition to blight issues, code enforcement can be used to enforce land use or business regulations. Property used or developed without the proper local government approvals often presents health and safety issues. Code enforcement can be a tool to investigate and obtain compliance with land use and business regulation ordinances. This chapter focuses on blight, however, many of the tools discussed below may be applied to land use and business regulation enforcement. More information about business regulations can be found in this Handbook – Chapter 23: Licensing and Regulation. Information about land use can be found in Chapter 25: Land Use and Development.

II. Code Enforcement Law

A. Police Power

If a local government has identified that it wishes to enact an ordinance to deal with an issue impacting its community, the local government should review its own authority to enact the regulation. The source of the authority for local governments to enact laws for the public health,

[9] *See, e.g.*, City of Tualatin, https://www.tualatinoregon.gov/building/code-compliance-and-enforcement; (last accessed August 31, 2023).
[10] *Id*.
[11] https://www.govinfo.gov/content/pkg/FR-2010-10-19/pdf/2010-26292.pdf Federal Register vol. 75, No. 201 (10/19/2010) p.64325.

safety and welfare of its citizens, is known as "police powers." [12] Per the U.S. Constitution, the states are reserved the police powers.[13]

For cities in Oregon, the police power is contained in the Oregon Constitution.[14] In addition, the Oregon Legislature has delegated to the cities to define their own public nuisances by ordinance.[15] The exception to this delegation of police power is when the state has expressly or impliedly preempted the local government's authority to regulate.[16]

Local governments may also be limited by the U.S. and Oregon Constitutions. One example of this limitation is the U.S. Constitution's Eighth Amendment. In *Martin v. City of Boise*, the Ninth Circuit Court of Appeals held that it was a violation of the U.S. Constitution's Eighth Amendment of cruel and unusual punishment to enforce criminal penalties for sitting, sleeping, or lying outside on public property for individuals who cannot obtain shelter.[17]

More information about police powers and Oregon's home rule can be found in this Handbook – Chapter 2: Home Rule and Its Limits.

B. Types of Local Ordinances

Cities have the authority to regulate conduct impacting the safety and welfare of their citizens unless preempted by state law and may choose whether to enact administrative or court enforcement procedures. As discussed below, a city may choose to adopt model codes published by commercial enterprises or enact its own ordinances.

i. International Property Maintenance Code

The International Code Council ("ICC"), a commercial enterprise, publishes the International Property Maintenance Code ("IMPC") as model code for local governments.[18] The IMPC is intended to establish the "minimum maintenance standards for basic equipment, light, ventilation, heating, sanitation and fire safety" in existing buildings.[19] The code provides administrative procedures for enforcement, as well as general requirements for maintenance.[20] It

---

[12] *See* US Const, Amend X states that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."
[13] *Id*.
[14] *See* Or Const, Article XI, § 2, and Article IV, § 1(5).
[15] ORS 221.915; *See Lincoln Loan Co. v. City of Portland*, 317 Or 192 (1993).
[16] *See City of La Grande v. Public Emp. Retirement Bd.*, 281 Or 137, 140 (1978); *Thunderbird Mobile Club, LLC v. City of Wilsonville*, 234 Or App 457, 474 (2010); LEAGUE OF OR. CITIES, LEGAL GUIDE TO OREGON'S STATUTORY PREEMPTIONS OF HOME RULE (2020), https://www.orcities.org/download_file/385/0 (last accessed April 27, 2023)
[17] 920 F3d 584, 616 (9th Cir 2019); See also *Johnson v. Grants Pass*, the Ninth Circuit extended Martin to tents, cars and civil citations when the homeless person engages in conduct to protect themselves from the elements when there is no shelter space is available. 50 F4th 787 (9th Cir 2002); *See also* ORS 195.530 prohibiting regulations for enforcement.
[18] *See* INTERNATIONAL PROPERTY MAINTENANCE CODE, PREFACE (2021) *available at* https://codes.iccsafe.org/content/IPMC2021P1/preface#IPMC2021P1_FmPREFACE_FMSecAdoption (last accessed on August 31, 2023).
[19] *Id.*
[20] *Id.*

is a copyrighted code, and the ICC prohibits local governments from distributing the model code, including but not limited to publishing the code on its website as part of its ordinances.[21] Rather, the ICC makes the IPMC available for free in a non-downloadable form on the ICC's website.[22] If a local government is concerned about public access to the IPMC, the local government can choose to adopt its own ordinances. [23]

ii. Enacting Own Ordinances

If a local government wishes to adopt its own ordinances, in lieu of or in addition to the IPMC, the local government generally adopts an ordinance that punishes the offense by municipal court or circuit court. When the city chooses a court enforcement procedure, state law provides the procedures for enforcement of an ordinance in court.[24] Local governments wishing to adopt their own ordinances generally adopt ordinances addressing blight in the following areas:

Exterior

- Broken windows
- Broken doors
- Loud noise
- Junk vehicles
- Trash and debris
- High grass or weeds
- Peeling paint
- Sagging roof
- Deteriorated porch
- Couches on porch
- Boarded Property[25]

Interior

- Broken windows
- Fire alarms
- Mold
- Sewage backup
- No heat
- No water
- Bug infestation
- Lead paint hazards

When drafting code enforcement ordinances, a city should consider the following:

- Who will be subject to the ordinance?
- What is the purpose?
- How will you enforce the ordinance?
- What is the recommended penalty?

Example ordinance

No person shall park or allow to park a vehicle in the front or side yard of a residential property, except on a driveway or other approved surface. Violation of this section is a Class C violation.

[21] *See* INTERNATIONAL PROPERTY MAINTENANCE CODE, COPYRIGHT (2021) *available at* https://codes.iccsafe.org/content/IPMC2021P1/copyright (last accessed on August 31, 2023).
[22] *Id.*
[23] *Id.*
[24] ORS 153.010 to 153.121.
[25] Some cities have not only required that all windows and doors are securable, but that in the case of windows, that a type of unbreakable plexiglass is used. *See* Jessica Dupnack & Amber Ainsworth, *Detroit adds plexiglass instead of boards to windows of vacant homes that can be saved*, DETROIT FOX NEWS, Sept. 16, 2021, available at https://www.fox2detroit.com/news/detroit-adds-plexiglass-instead-of-boards-to-windows-of-vacant-homes-that-can-be-saved (last accessed August 31, 2023).

Although cities may specify what acts create an offense, the penalty and procedure to prosecute the violation follow ORS chapter 153. Cities may specify the class of the offense such as a Class A, B, C, D or E violation, or specify the amount of the fine.[26] However, the specified maximum fine must in an amount less in amount that the maximum fine for the offense by the statute, or if a specified class, that is lower than the statutory classification for the offense.[27] Excellent examples of code enforcement ordinances can be found online.[28]

iii. Vacant Property Registration

Vacant property registration is a tool intended to address abandoned or vacant properties.[29] Properties which have been abandoned, and where structures are left open and unsecured, not only have a negative impact on community value, but also create conditions that invite criminal activity and foster an environment that is unsafe and unhealthy.[30]

The purpose of vacant residential property registration programs is to protect neighborhoods from becoming blighted through the lack of adequate maintenance and security of vacant properties.[31] With registration, cities can better track, monitor and address issues associated with abandoned and foreclosed properties.[32] Most Oregon cities do not require a fee to register, but property owners are required to provide and maintain current contact information.[33] Some cities require regular inspections and to post contact information in the event of an emergency.[34]

Not all vacant properties are due to blight; some vacant properties are caused by seasonal housing and demand for vacation rentals.[35] Cities may wish to weigh how a vacant property registration requirement coordinates with business regulations on short-term rental housing.

---

[26] ORS 153.025.
[27] *Id*.
[28] *See, e.g.*, city of Salem, Salem Revised Code § 50.100 *et seq*., https://library.municode.com/or/salem/codes/code_of_ordinances?nodeId=PTIICOOR_TITIVHESA_CH50PRMA_S50.265ABJUMOVE (last accessed August 31, 2023); *See, e.g.*, City of Bend, Bend Code §13.10 *et seq*. https://bend.municipal.codes/BC/13 (last accessed August 31, 2023).
[29] *See* Symposium, *New Data on Local Vacant Property Registration Ordinances*, 15 CITYSCAPE: A JOURNAL OF POLICY DEVELOPMENT AND RESEARCH CITYSCAPE 289 (2013).
[30] Michele Steinberg & Meghan Housewright, *Addressing Vacant Property in the Wildland Urban Interface*, 55 IDAHO L. REV. 59 (2019).
[31] Benton C. Martin, *Vacant Property Registration Ordinances*, 39 REAL ESTATE LAW JOURNAL 6 (2010).
[32] *See, e.g.*, city of Medford, Vacant Residential Property Registration Ordinance of the City of Medford, Medford Code § 7.950 *et seq*., https://medford.municipal.codes/Code/VRPR (last accessed August 31, 2023).
[33] *See, e.g.*, city of Sweet Home, https://www.sweethomeor.gov/ced/webform/vacant-building-registration (last accessed August 31, 2023).
[34] *Id*.
[35] Tim Henderson, *The Nation's Vacant Homes Present an Opportunity — and a Problem* (Nov. 22, 2022) available at:| https://stateline.org/2022/11/22/the-nations-vacant-homes-present-an-opportunity-and-a-problem/ (last accessed August 31, 2023).

iv. Chronic Nuisance Ordinances

Chronic nuisance ordinances, also known as "excessive police calls for service" ordinances, have been adopted by many cities to respond to properties that regularly demand attention from local government for less serious, but regular, offenses.[36]

Such ordinances require a specific number of calls within a period of time for specific calls such as disorderly conduct, theft, prostitution or controlled substances. The city tracks the number of violations and can issue penalties to the property owner. If the enforcement mechanism is administrative, rather than enforced in court, it is important to provide due process (written notice and right to be heard) to the property owner.[37]

Critics of chronic nuisance ordinances criticize enforcement of chronic nuisance ordinances as a potential violation of the First Amendment or discrimination of people of color, domestic violence survivors or those with disabilities.[38] Cities should be cautious about enforcement of chronic nuisance ordinances to ensure that enforcement, as applied to the property, do not violate the business or resident's constitutional rights.

III. Enforcement Methods

Code enforcement relies on several tools to remedy blight in our communities. When the property poses serious threats to public safety and/or the responsible parties refuse to comply, cities can issue citations, take cases to court, and in some cases, directly abate these public nuisances and recover the costs against the property owner.

A. Voluntary Compliance

The first goal for code enforcement is voluntary compliance.[39] Voluntary compliance involves notifying the responsible party of a violation and educating the person on the code requirements. The "responsible party" is often identified by cities as the property owner and/or

[36] Kathleen Gallagher, *Chronic Nuisance Ordinances*, Local Initiatives Support Corporation, available at: https://www.lisc.org/media/filer_public/16/04/16046c59-6f06-45f7-89f9-274da3430edf/chronic_nuisance_ordinances.pdf (last accessed August 31, 2023).
[37] *See, e.g.*, city of Portland, Chronic Nuisance Property, Portland Code Chapter 14B.60, available at: https://www.portland.gov/code/14/b60 (last accessed August 31, 2023).
[38] Jarwala, Alisha and Singh, Sejal, *When Disability Is a 'Nuisance': How Chronic Nuisance Ordinances Push Residents with Disabilities Out of Their Homes*, 54 HARV. C.R.- C. L. L. REV. 875 (2019), available at: https://ssrn.com/abstract=3415952 (last accessed August 31, 2023).

[39] *See, e.g.*, city of Tualatin, available at https://www.tualatinoregon.gov/building/code-compliance-and-enforcement (last accessed August 31, 2023); *See, e.g.*, city of Newberg available at https://www.newbergoregon.gov/police/page/code-compliance (last accessed August 31, 2023).

the person responsible for the control, use and condition of the property.[40] If the person fixes the issue, this is voluntary compliance. This is the most effective way to solve the problem.

These informal efforts including notice, negotiation, and community education can take a substantial amount of time and resources but avoid costly court actions and abatement. If a city pursues an action in court or a hearings officer, it may be important to demonstrate that the city gave many opportunities to the responsible party to allow voluntary compliance and to educate them.

B. Inspection Warrants

Inspection warrants are a useful way to determine whether someone has violated the ordinance. If the code enforcement officer is denied entry to the property, an inspection warrant is an order, in the name of the court, directing an inspection of a property.[41] An inspection warrant can be by administrative order issued by a hearings officer as well.[42]

Regardless of whether the inspection warrant is obtained in municipal court or through an administrative hearings officer, it is best practice to adopt an ordinance that allows for application for an inspection warrant. To apply for an inspection warrant, the court requires probable cause (a substantial objective basis for believing that, more likely than not, an offense has been committed) to believe that there is a violation of the ordinance.[43] The affidavit applying for such a warrant should demonstrate that it is likely that there is a code enforcement violation.[44]

C. Municipal Court

If a city's efforts to obtain voluntary compliance are ineffective, the city may prosecute code enforcement violations in municipal court.[45] A violation is an offense created by a "county, city, district or other political subdivision of the state" by enacting an ordinance that declares an act to be an offense"[46] Specific types of code offenses created by ordinance are discussed above.

---

[40] *See, e.g.*, city of Creswell, Creswell Municipal Code § 2.70.020, available at https://www.codepublishing.com/OR/Creswell/html/Creswell02/Creswell0270.html (last accessed August 31, 2023).
[41] *See Parks v. City of Klamath Falls*, 82 Or App 579 (1987) (inspection warrant not a violation of the Fourth Amendment and Article I, Section 9); *see also Accident Prevention Division v. Hogan*, 37 Or App 251 (1978) (holding that when cause is demonstrated that inspection warrants do not violate the Fourth Amendment).
[42] "We have upheld the constitutionality of administrative searches at a time when Article I, section 9, was construed the same as the Fourth Amendment. *State ex rel. Accident Prev. Div. v. Foster*, 31 Or App 291 (1977)." *Parks v. City of Klamath Falls*, 82 Or App 576 (1987).
[43] *Camara v. Municipal Court*, 387 US 523, 87 SCt 1727, 18 LEd2d 930 (1967) (probable cause required for housing inspection warrant); *State v. Bridewell*, 306 Or 231 (1988).
[44] *Id.*
[45] ORS 221.339.
[46] ORS 153.008(1)(c).

Complaints for code enforcement violations must contain the name of the court, the name of the city, the name of defendant, a statement of the violation "that can be readily understood by a person making a reasonable effort to do so," the date time and place of the alleged violation and signed by the enforcement officer.[47] Often, code enforcement complaints use the uniform citation form adopted by the Oregon Supreme Court because it meets the statutory requirements. Such uniform citation forms include a summons that meets state law for the time and place at which the person cited is to appear in court.[48]

Service of the complaint is accomplished by delivery to the person cited.[49] Many cities adopt ordinances specifying the methods of how service may be accomplished; for example, many cities state that service may be done by mail or by personal service.[50]

The defendant must appear by the time indicated by the summons, which accompanies delivery of the complaint.[51] The defendant can either request a trial or plead no contest.[52] The city attorney will not represent the city unless counsel for the defendant appears.[53] However, the code enforcement officer or official issuing the citation may present evidence, examine and cross examine witnesses and make arguments.[54] Trials are bench trials without a jury.[55] In addition, the pretrial discovery rules in ORS 135.805 to 135.873 apply.[56] The Oregon Supreme Court may adopt rules for the conduct of violation proceedings, but at the time of this publication, no such violation-specific rules exist.[57] The defendant is not entitled to a defense counsel provided at public expense if only violations are included.[58]

In lieu of a trial, a municipal court may establish a violations bureau, which may specify certain violations that, in the opinion of the violations bureau, result in the reduction of a fine or dismissal of the ticket if the offense is fixed (also known as a "fix it" ticket).[59] Such violations include violations of state law that may include traffic offense, wildlife law violations and boating laws.[60]

---

[47] ORS 153.048.
[48] ORS 153.051.
[49] ORS 153.054
[50] *See, e.g.*, Lincoln City, Municipal Code § 1.16.060, available at https://www.codepublishing.com/OR/LincolnCity/ (last accessed August 31, 2023).
[51] ORS 153.061.
[52] *Id*.
[53] ORS 153.076.
[54] ORS 153.083.
[55] ORS 153.076; *but see State v. Benoit*, 354 Or 302 (2013) (where defendant was arrested and charged with a crime, but prosecutor elects to treat offense as a violation, defendant is entitled to a jury trial).
[56] *Id*.
[57] ORS 153.033.
[58] ORS 153.076.
[59] ORS 153.800.
[60] *See, e.g.*, Presiding Judge Order No. 22-007 for the Counties of Umatilla and Morrow, available at: https://www.courts.oregon.gov/rules/Documents/UMA_PJO_22-007_ViolationsBureauReauthorized.pdf (last accessed August 31, 2023).

If the court finds the defendant guilty, the court can impose a fine, costs allowed by law and any other provision authorized by law.[61] The court retains a large amount of discretion. For example, a court could impose the following:

- Up to the maximum fine authorized by ordinance;
- A daily fine amount until the offense is remedied if authorized by ordinance;
- Award of costs to the city for work done to abate the violation; or
- Work to be completed by a certain date, or the imposition of fines.

Appeals from municipal court judgments depend on whether the court is a court of record. If the municipal court is not a court of record, the appeal is made to the circuit court.[62] If the municipal court is a court of record, the appeal is made to the court of appeals.[63] The state of Oregon maintains a registry of the courts of record available at: https://www.courts.oregon.gov/courts/Pages/other-courts.aspx

Once a municipal court enters its judgment and all appeals have been resolved, the city may enforce the court's judgment. For a detailed discussion on how to enforce municipal court judgments, see Chapter 6, Municipal Courts.

D. Circuit Court

i. Local Ordinance Violations

If a city does not have a municipal court, the city may prosecute code enforcement offenses in circuit court. Circuit court has concurrent jurisdiction with municipal court for ordinance violations.[64] A city with a population of 300,000 or less may enter into an agreement with the state to provide municipal court services with "all judicial jurisdiction, authority, powers, functions and duties of the municipal court."[65] Prosecution of violations in circuit court shall be by the city attorney and in the name of the city.[66]

The prosecution of code ordinance violations in circuit court follows ORS chapter 153 like municipal court, as discussed above. However, since circuit courts primarily adjudicate criminal and civil cases, many local governments choose to utilize their own municipal courts to ensure that the code enforcement cases are given sufficient attention.

[61] ORS 153.090.
[62] ORS 138.057.
[63] ORS 138.057.
[64] ORS 221.339.
[65] ORS 221.357.
[66] ORS 221.315.

ii. Civil Causes of Action

In addition to ordinance violations, a circuit court has jurisdiction over civil causes of actions such as public nuisance, injunctions, and restraining orders.[67] A local government may wish to pursue these causes of action if it does not have a municipal or justice court, or it wishes to have a circuit court order finding that a defendant is responsible for its actions. Such civil actions are used for the worst offenders.[68]

iii. Public Nuisance

A public nuisance is interference with an interest or right common to the general public, by action of another, when the action is such that the law attaches responsibility for the action.[69] Types of acts to which the law attaches responsibility are culpable conduct including negligent, reckless or intentional invasions of public interests, or the operation of an abnormally dangerous activity.[70] Specific elements of a public nuisance are the following: (1) substantial interference with right or interest common to general public; (2) interference is unreasonable; (3) culpable conduct, and (4) causation.[71]

Interference with interest or rights common to the general public generally consists of interference with public health, public safety, public peace, the public comfort or public convenience.[72] A plaintiff in a nuisance case may recover compensatory damages (damages for incurred losses such as injuries) and, in appropriate cases, punitive damages.[73]

iv. Injunctions and restraining orders

Pursuant to ORS 30.315, a city may bring an action to enjoin a person or property from violating its ordinances for the public morals, health, or safety.[74] If a court enjoins a person from further violating its ordinances and if a person violates the court order, the defendant risks contempt of court.

---

[67] Or Const, Art VII (Original), § 9 (circuit courts have all judicial authority and jurisdiction not vested in another court).

[68] *See* Kyle Iboshi, *'Our worst nightmare': Squatters turn farmland into junkyard near Sandy*, KGW8, June 6, 2018, available at: https://www.kgw.com/article/news/investigations/our-worst-nightmare-squatters-trash-property-near-sandy/283-561758141 (last accessed August 31, 2023).

[69] RESTATEMENT (SECOND) OF TORTS § 821B; *Stroda v. State*, 22 Or App 403 (1975).

[70] *Id.*

[71] *See e.g., Jewett v. Deerhorn Enterprises, Inc.*, 281 Or 469, 473 (1978); *Carvalho v. Wolfe*, 207 Or App 175, 181-182 (2006); *Gronn v. Rogers Constr., Inc.*, 221 Or 226, 239 (1960).

[72] RESTATEMENT (SECOND) OF TORTS § 821B.

[73] *McElwain v. Georgia-Pacific Corp*., 245 Or 247, 249(1966).

[74] ORS 30.315 states that a city may bring action, "against any person or property to enforce requirements or prohibitions of its ordinances or resolutions when it seeks: * * ***** [t]o require or enjoin the performance of an act affecting real property; (d) [t]o enjoin continuance of a violation that has existed for 10 days or more; or (e) [t]o enjoin further commission of a violation that otherwise may result in additional violations of the same or related penal provisions affecting the public morals, health, or safety."

Temporary restraining orders and preliminary injunctions are available after a city files either a public nuisance action as described above or an action pursuant to ORS 30.315. To obtain the injunction or restraining order, the city must demonstrate a likelihood of success on the merits of the nuisance case and that continuation of the nuisance will cause irreparable harm.[75]

A city that chooses to undertake an injunction can be very effective because noncompliance results in a contempt proceeding. However, obtaining a judgment or injunction in circuit court may be time consuming and expensive.

E. Administrative Action

Another type of enforcement is to utilize administrative action. Administrative action does not require a court; rather, the decision to impose a penalty is made by either the city or a hearings officer.

The Oregon Administrative Procedures Act (APA) does not apply to the decisions of local governments; rather, the APA deals exclusively with the administrative operation of Oregon agencies in the executive branch of state government.[76] The procedures to take administrative action are created by a city's ordinances.[77]

For example, cities use administrative actions for specific items such as abating a nuisance or utilizing the administrative process instead of a court process. The administrative process is best suited to non-serious, non-emergency violations. Administration enforcement may include fines and hearings.

Since the administrative process can be more informal, it can be faster and more cost effective than a court process. However, an administrative order does not carry the same weight as a court order and therefore, defendants may not heed the order.

A common administrative action is abatement of code enforcement violations by the city, with the city taking a lien for the out-of-pocket costs and a penalty to encourage prompt payment to the city. To take administrative action in such a case, the city needs to provide due process to the responsible party.[78] Due process is necessary to avoid liability for violating the property owner's constitutional rights.[79] Due process is obtained by giving written notice to the responsible party and providing an opportunity to be heard.[80]

---

[75] ORCP 79.
[76] *See* ORS 183.310(1).
[77] *See Oregon Administrative Law* § 1.53 to 1.56 (Oregon CLE 2010 & Supp 2016).
[78] *State v. Koenig*, 238 Or App 297 (2010) (finding that "lawfully directed" for purposes of proving criminal trespass in the second degree required due process to be administratively excluded from the county offices).
[79] *Id.*
[80] *See* US Const, Amend XIV states that no state shall "deprive any person of life, liberty, or property without due process of law."

F. Code Enforcement Liens

Code enforcement liens, also known as "municipal liens" are a method for recovering either the costs for abatement of code violations or penalties.[81] A lien is a fee or fine attached to a property that is out of compliance with city's building, property maintenance and/or zoning codes.[82]

As discussed above, many cities use administrative actions such as abatement to address code violations. As part of the ordinance authorizing that action, cities may establish that such abatement action is a lien and immediately payable to the city. Failure to pay the municipal lien in a timely manner can result in increasing penalties or foreclosure of the lien, as discussed below. If a property has a lien on it, it may be difficult to sell, refinance or borrow against it.

Such liens are filed in a city's lien docket, but that lien docket is not recorded with the county clerk.[83] Further, cities can use an electronic lien record if the city records in the county clerk's real property records a notification giving constructive notice that all such municipal liens are maintained as electronic lien records with the city.[84] To determine whether there is a municipal lien, a property owner must contact the city in question.

Municipal liens are usually paid off when the property is sold. Although code enforcement liens can be an effective way of recover out-of-pocket costs, if those costs and/or monetary penalties are not reasonable, cities may never recover out-of-pocket costs because the responsible party will not pay.

III. Taking Control of Problem Properties

For cities encountering difficult code enforcement properties, taking control of problem properties is the last resort. As discussed below, cities can take control of problem properties through land banks, receivership, or foreclosure of code enforcement liens.

A. Land Banks

Land banks are local governments or non-profit organizations created to acquire unproductive, vacant, and developable property to be "banked" for development. Banked properties can be tax foreclosed, vacant or distressed properties. Land banks hold, manage, and redevelop property in order to return these properties to productive use to meet community goals, such as increasing affordable housing or stabilizing property values.[85] For example, vacant

[81] ORS 93.643
[82] *Id*.
[83] *Id*.
[84] *See* ORS 93.643(1)(b) (stating that a "city may give constructive notice of a governmental lien by maintaining a record of the lien in an electronic medium that is accessible online during the regular business hours of the city.")
[85] *See* Local Housing Solutions, available at: https://localhousingsolutions.org/housing-policy-library/land-banks/ (last accessed August 31, 2023).

properties that are too small to be developed can be acquired by land banks to combine with an adjacent property for development.[86] Or a land bank may acquire a distressed residence to redevelop it for affordable housing.[87]

No specific statute allows cities to operate residential land banks because it is within the general powers of the city to acquire and sell property.[88]

For brownfield properties, or properties that may have environmental contamination, cities were reluctant to acquire brownfield sites because of liability to share in the cost of cleanup due to ownership.[89] In response, the Oregon Legislature enacted ORS 465.600 to 465.621 to allow a public authority to acquire, hold, manage and transfer property to new owners without any environmental liability.[90]

Land banks are used by some of the nation's biggest cities such as Detroit and Dallas. In Oregon, the city of Eugene has a land bank program for "future affordable housing development."[91] Effective use of land banks requires a plan for acquisition and for development strategies.

B. Receivership

The Oregon Housing Receivership Act authorizes local governments to apply to a circuit court to appoint a receiver for a problem property.[92] The appointed receiver secures the property, pays all expenses such as utilities, repair, and insurance costs, and cleans up the property.[93] Once the work is complete, the court reviews the costs. Costs awarded include an administrative fee and reimbursement for the work necessary to cure code violations, and the work to return the property to a "previous good state," as long as the expenditures were reasonable and necessary.[94] If the responsible party fails to pay the costs within 60 days, the receiver can file a lien and that lien is superior to all other liens except taxes.[95]

---

[86] *See* Center for Community Progress, Land Bank Frequently Asked Questions, available https://communityprogress.org/resources/land-banks/lb-faq/ (last accessed August 31, 2023).
[87] *Id*.
[88] See ORS 223.005.
[89] 42 USC § 9601 *et seq*. (Comprehensive Environmental Response, Compensation, and Liability Act of 1980 holds the owner or operator of a contaminated property could be held responsible for the property's cleanup, based solely on their current ownership of the property).
[90] For an excellent discussion on ORS 465.600 to 465.621, *see* Kelsey Zlor, *Lots of Opportunity: Using Oregon's Land Banking Legislation to Spur Brownfield Redevelopment*, available at: https://scholarsbank.uoregon.edu/xmlui/bitstream/handle/1794/19955/Zlevor_final_project_2016.pdf?sequence=4&isAllowed=y (last accessed August 31, 2023).
[91] *See, e.g.*, city of Eugene, available at Housing Development Incentives | Eugene, OR Website (eugene-or.gov) (last accessed August 31, 2023).
[92] ORS 105.420 to 105.455.
[93] ORS 105.435.
[94] ORS 105.435; *See City of Portland v. Ristick*, 150 Or App 1 (1997)
[95] ORS 105.445.

If a city wishes to utilize the Oregon Housing Receivership Act, it must serve a notice on all interested parties and apply for receivership with the circuit court.[96] Although the city does not need to be the receiver, the court may appreciate if the city identifies persons or entities willing to operate as a receiver.[97]

Since a receivership lien has a higher priority than all other liens, the Oregon Housing Receivership Act is a powerful tool to motivate reluctant impacted lienholders take responsibility to repair and cure code violations.

C. Foreclosure

In general, foreclosure is a legal procedure to seize a property after the property owner fails to repay their debts secured by liens. Holders of liens will initiate foreclosure and may purchase the property for the amount of the lien. For cities, they can initiate foreclosure for municipal liens.

Why do foreclosure? Cities can collect some or all of their unpaid municipal liens. Further, foreclosure activity may spur resolution on many other properties. Lastly, for some properties, it may be difficult for the city to determine who is the owner and who is the person(s) responsible for the code violations.

In Oregon, cities may use the summary foreclosure or the judicial foreclosure process. Regardless of the path chosen, there is not much case law or precedent on foreclosure of municipal liens. This uncertainty causes many elected officials to pause before undertaking a foreclosure action. If foreclosure is chosen, the public may perceive that the city is taking citizen's homes. Contrast that with the perception that the city is doing something to resolve the problem. Cities considering a foreclosure process should consider who will be responsible for the program and who will communicate with the citizens. Cities should also consider their proposed foreclosure properties carefully so that their actions reflect the public sentiment on foreclosure.

i. Summary Foreclosure

Any local government is authorized to use the summary foreclosure process, also known as non-judicial foreclosure.[98] Although the statutes provide a procedure for summary foreclosure, the local government may adopt its own procedures.[99]

---

[96] ORS 105.430.

[97] ORS 105.430(7) (stating that a receiver may be a "housing authority", "urban renewal agency", a "private not-for-profit corporation, the primary purpose of which is the improvement of housing conditions", or a city agency designated as responsible for the rehabilitation of property).

[98] ORS 223.505 to 223.595.

[99] ORS 223.510.

A local government may foreclose a municipal lien one year from creation of the lien, assessment or installment becomes due and payable.[100] If the lien, assessment or installment is bonded, the local government may foreclose the lien 60 days after it is entered into lien docket.[101] After the lien is delinquent, the recorder may transmit to the treasurer a list describing each lien and the property description.[102] Upon receipt of the list, the treasurer shall try to collect the liens by advertising and selling the property upon which the municipal lien is filed.[103] The treasurer shall notice the sale of the property once a week for four successive weeks in a daily or weekly newspaper of general circulation in the county.[104] The published notice shall include the name and owner of the property, the amount unpaid on the lien and the date, time, and place of the sale.[105] In addition to the publication, notice is mailed to the owner of the real property at the last known address and the occupant or the property, if any.[106] Any interested person requesting notice under ORS 86.806 or any other person have a lien or any interest shall be sent the notice via registered or certified mail at least 60 days prior to the sale.[107] Like the judicial foreclosure process, when a city does not provide lienholder with notice of its foreclosure sale, as required by ORS 223.523(2), the lien is not foreclosed.[108]

After the sale of the property, the local government conveys a certificate of sale to the purchaser, subject to a one-year period of redemption.[109] The owner, legal representative, successor in interest or any other person having a lien on the property can redeem property for the foreclosure purchase price, interest and a penalty.[110] If no redemption is made within the year, the local government delivers a deed to the purchaser.[111] The deed is a fee simple title and shall grant immediate possession of the real property to the grantee.[112]

If no bid is received for the property, the local government may purchase the property for the amount of the lien and the cost of advertising and sale.[113] Or, alternatively, in the discretion of the recorder may again be offered for sale no sooner than three months after the sale, except for assessments for streets may be undertaken immediately.[114]

As a result, the summary foreclosure is non-judicial and therefore, a faster and more certain process. The foreclosure may require the administrative infrastructure to ensure that the proper procedures are followed, like providing notice. Cities like Portland have developed their

---

[100] ORS 223.510.
[101] *Id.*
[102] ORS 223.515.
[103] ORS 223.520.
[104] ORS 223.523(1)
[105] *Id*.
[106] ORS 223.523(2).
[107] *Id*.
[108] *See State By and Through Director of Veterans Affairs v. Myers*, 114 Or App 291 (1992).
[109] ORS 223.530, ORS 223.535; ORS 223.550.
[110] ORS 223.656; ORS 223.593.
[111] ORS 223.570; Upheld in *State Const. Corp. v. Scoggins*, 259 Or 371 (1971), but see dissenting opinions.
[112] ORS 223.575; ORS 223.580.
[113] ORS 223.545.
[114] ORS 223.560.

own infrastructure and adopted procedures to ensure that the rights of the public and property owners are balanced. [115]

ii. Judicial Foreclosure

In addition to the summary foreclosure process, local governments may foreclose liens through the courts. [116] Judicial foreclosure is the traditional manner of foreclosing a delinquent debt secured by any lien or mortgage. Foreclosure follows the procedure in ORS 88.010 to 88.100.[117]

In addition to the rights granted to the local government in ORS chapter 88 as a lienholder, the prevailing local government may be awarded reasonable attorney fees.[118] Further, the local government foreclosing the lien may bid at the execution sale an amount not exceeding the court judgment of the amount of the lien, along with the interest, costs, penalties and attorney fees.[119] Local governments are not entitled to deficiency judgments against the successful purchaser.[120]

The judicial foreclosure takes longer than the summary foreclosure because it requires judicial action. Similar to the discussion above, a judicial foreclosure may have more weight than a summary foreclosure. Local governments are encouraged to review both foreclosure methods for particular properties to determine if foreclosure may help it accomplish its compliance goals.

IV. Successful Code Enforcement

As discussed above, a successful code enforcement program relies on the following factors: (1) strong ordinances and laws; (2) strong code enforcement cases; and (3) taking control of problem properties. In addition to the legal factors, below are some best practices to supplement the factors creating a successful code enforcement.

A. Code Enforcement Officers[121]

Effective code enforcement officers lead a city's efforts in code enforcement programs and build strong relationships with key stakeholders in the community. Hiring officers that can

---

[115] *See* city of Portland, Foreclosure Administrative Rules LIC § 14.05 available at https://www.portland.gov/policies/licensing-and-income-taxes/assessments-liens/lic-1405-foreclosure-administrative-rules (last accessed August 31, 2023).
[116] ORS 223.610.
[117] ORS 223.620.
[118] ORS 223.615.
[119] ORS 223.645.
[120] ORS 223.650.
[121] This discussion on code enforcement officers is courtesy of League of Oregon Cities, *Successful Code Enforcement Considerations*, LOCAL FOCUS (2023), available at: https://www.orcities.org/application/files/9116/7814/3966/Q12023LF.pdf (last accessed April 31, 2023).

strike the balance between properly enforcing a city's codes and providing good customer service to its constituents is no easy task. A successful code enforcement officer excels in these areas:

1. **Knowing their code.** Successful code enforcement officers are experts on their city's codes. They are extremely proficient at knowing what the code regulates and what it does not. The best code enforcement officers can point to relevant sections of their city's code when questioned by superiors and members of the public.

2. **Reviewing their city's code annually.** Code enforcement officers likely work with their city's codes more than any other city employee. It is often the code enforcement officer who finds the code's flaws or the proverbial loopholes. Successful code enforcement officers annually review their city's code so that, when necessary, appropriate amendments can be submitted to their city council.

3. **Believing in interdepartmental cooperation.** An exemplary code enforcement officer works cooperatively with employees from various city departments. Code enforcement officers regularly interact with problem properties that necessitate the involvement of numerous city departments. Knowing which employees in the various departments need to be involved in resolving the issues at a property is a unique and ideal skill.

4. **Participating in successful community outreach.** A quality code enforcement officer not only knows their city's code, they also educate property owners and community members about the code's requirements. Code enforcement officers with high rates of success are those who frequent neighborhood association meetings, engage with the chamber of commerce, and have regular contact with key stakeholders in the community. Making sure the community knows the code as well as they do is the mark of a successful code enforcement officer. To accomplish this, code enforcement officers may need to communicate code changes to residents in ways such as putting information in utility bills or publishing updates in a city newsletter.

5. **Engaging with citizens who are in violation of the city code.** Notifying property owners that they are in violation of the city's code is never a fun task. While it can be easier to try and deal with code violations via written notices, emails, and phone calls, effective code enforcement officers know that sometimes face-to-face contact is the most efficient way to remedy a violation. Meeting with a person whose property is in violation of the city code allows the code enforcement officer the opportunity to fully explain the violation, listen to the reasons behind the violation, and engage with the property owner in how to successfully and most expeditiously achieve compliance.

6. **Enforcing the city's code consistently and equally.** Successful code enforcement officers are fair code enforcement officers. A fair code enforcement officer is one that enforces the city's code equally against all property owners, regardless of their position in the community or the location of the property.

B. Methodology

Most cities practice only complaint-driven code enforcement, largely for cost reasons.[122] Complaints result in an inspection and a warning letter to the violator, followed by a notice of citation if action to correct the violation have not been taken by the property owner.[123] However, complaint-driven code enforcement will only result in addressing properties that have result in a complaint and may not address wide-spread issues.

The opposite approach, called systematic code enforcement, most typically is employed when a local community determines that a particular area needs a concentrated maintenance effort to remain vital.[124] A building code is methodical because inspections during new construction occur when certain items are complete and prior to their being enclosed by future phases of construction.[125] Systematic code enforcement could be used to address a large number of complaints in a particular geographic area or if a neighborhood contains a high percentage of rental properties and landlords can be forced to reinvest in their properties.[126]

For these reasons, cities should consider using systematic code enforcement, in addition to complaint-driven methods, in circumstances where a large number of properties in a neighborhood require investigation and review.[127]

C. Effective Court Hearings

As discussed above, the purpose of code enforcement is to gain voluntary compliance through education. However, if the responsible party has not corrected the violation, it is best to prepare for a case in front of a judge or hearings officer. The following tips assist the code enforcement officer prepare for the officer's presentation of the case in chief to the judge:

(1) **Ensure legality.** It is crucial to avoid issues of trespass. Code enforcement officers should either get written consent to inspect a property, or as discussed above, obtain an

---

[122] *See* Municipal Research and Services Center of Washington (MSRC), Code Enforcement, available at: https://mrsc.org/explore-topics/legal/regulation/nuisances-regulation-and-abatement/code-enforcement#:~:text=Most%20code%20enforcement%20programs%20are%20complaint-driven.%20Complaints%20result,have%20not%20been%20taken%20by%20the%20property%20owner. (last accessed May 31, 2023).

[123] *Id*.

[124] *See* Useful Community Development, How to Make Code Enforcement Work for Your Neighborhood, available at: How to Make Code Enforcement Work for Your Neighborhood (useful-community-development.org) (last accessed May 31, 2023).

[125] *Id*.

[126] *Id*.

[127] For additional tips, please see: Steven E. Barlow, Daniel M. Schaffzin, and Brittany J. Williams, *Ten Years of Fighting Blighted Property in Memphis: How Innovative Litigation Inspired Systems Change and a Local Culture of Collaboration to Resolve Vacant and Abandoned Properties*, , 25 A.B.A. J. of Affordable Housing 347 (2017), available at: https://www.americanbar.org/content/dam/aba/publications/journal_of_affordable_housing/volume_25_no_3/ah-25-3-07-barlow.pdf (last accessed May 31, 2023).

inspection warrant. Consult with your city attorney to determine where the officer may legally be to avoid claims of trespass.

(2) **Pictures of the violations**. During the inspection, officers should take sufficient pictures. Pictures are more effective than words in describing code violations. Multiple pictures should be taken, starting from the sidewalk, and approaching the violation to demonstrate what the code enforcement officer is observing.

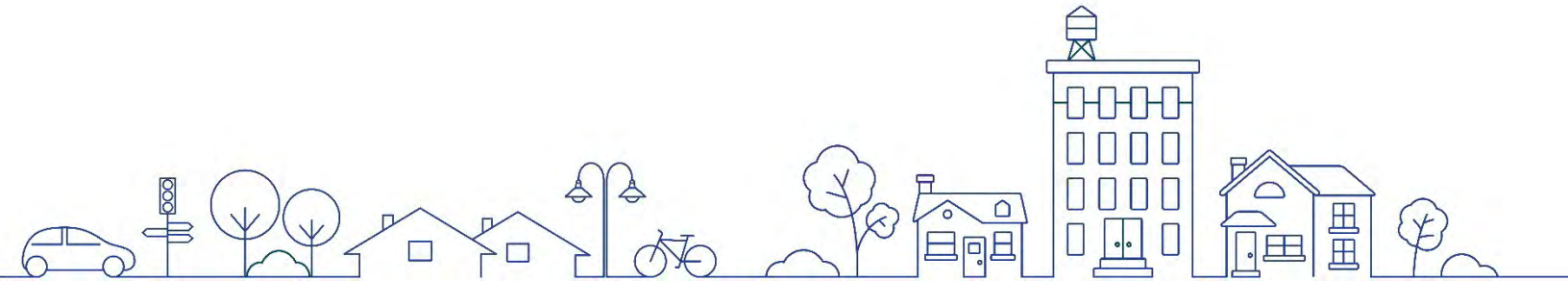
(3) Sufficient notice. It is often important to the hearings officer or judge to demonstrate that the city educated the defendant on the code violation and attempted to resolve the issue without resorting to a citation. Officers should be prepared to prove in court that they spoke to the responsible party and gave at least one opportunity to cure the violation.

(4) Trial scripts. Unlike police officers, code enforcement officers are often not experienced in testifying in court. If the defendant is not represented in counsel, the code enforcement officer is also responsible for not only presenting the case in chief, but also cross examining the defendant. For these reasons, a simple script about how to introduce evidence into the record and the information to present to the judge will often make the code enforcement officer more comfortable with trial preparation. Consult with your city attorney to prepare such a script or to get additional advice about trial preparation.

Oregon Municipal Handbook

CHAPTER 30:

ABUSE REPORTING



League of Oregon Cities

Published by the League of Oregon Cities
February 2021

Table of Contents

Chapter 30: Abuse Reporting

Introduction

In Oregon, there are statewide mandatory abuse reporting laws that address when an individual is required by law to report suspected or known cases of child or elder abuse. This chapter will provide a brief overview of a city official's potential responsibilities relating to mandatory abuse reporting.

Disclaimer: These materials are not intended to substitute for obtaining legal advice from a competent attorney. Rather, these materials are intended to provide general information regarding mandatory abuse reporting requirements and provide city officials with general knowledge of when they may have a duty to report abuse.

Child Abuse Reporting

Child abuse is defined to include:

- Any assault of a child and any physical injury to a child which has been caused by other than accidental means, including any injury which appears to be at variance with the explanation given of the injury;
- Any mental injury to a child;
- Rape of a child;
- Sexual abuse;
- Sexual exploitation;
- Negligent treatment or maltreatment of a child;
- Threated harm;
- Buying or selling a person under 18 years of age;
- Permitting a person under 18 years of age to enter or remain in or upon premises where methamphetamines are being manufactured; and
- Unlawful exposure to a controlled substance or unlawful manufacturing of a cannabinoid extract that subjects a child to substantial risk of harm to the child's health or safety.[1]

DHS Abuse Hotline:

Reports of abuse or neglect of any child or adult may be made to the Oregon Department of Human Services by calling: **1-855-503-SAFE (7233)**.

A child is defined as an unmarried person under the age of 18, or under the age of 21 and residing in or receiving care or services at a child-caring agency.[2] The mandatory child abuse reporting law creates a duty that requires mandatory reporters to report suspected or known cases of child abuse to the appropriate officials.

[1] ORS 419B.005(1).
[2] ORS 419B.005(2).

Who has a duty to report?

ORS 419B.005 specifically lists individuals who are considered a mandatory reporter. The list of mandatory reporters includes medical doctors, attorneys, licensed professional counselors, firefighters, EMTs, law enforcement officers, and social workers. Furthermore, the list of mandatory reporters includes all employees of a public organization that provides "child-related services or activities" – such as youth groups or centers, and summer or day camps.[3] As such, if the city offers one of these child-related services or activities, it is possible that all employees of the city – regardless of the employee's involvement with the specific child-related service or activity are mandatory child abuse reporters.

Further, in the 2021 Legislative Session, HB 3071 amended ORS 419B.005 to include the language in subsection (6)(s): "An ***elected official*** of a branch of government of this state or a state agency, board, commission or department of a branch of government of this state or ***of a city***, county or other political subdivision in this state." This amendment became operative as of January 1, 2022, and city elected officials are now bound by the state mandatory reporting statutes.

What does the mandatory reporting duty require?

Any mandatory child abuse reporter having reasonable cause to believe that any child with whom the official comes in contact with must immediately report or cause a report to be made in the manner required in ORS 419B.015.[4] The reporting requirement may be accomplished orally by telephone or otherwise to a local Oregon Department of Human Services (DHS) office, a DHS representative or to a law enforcement agency within the county in which the person making the report is located at the time of contact.

The DHS provides information and training for mandatory child abuse reporters. Further information on Oregon's child abuse reporting requirements may be accessible at: https://www.oregon.gov/dhs/ABUSE/Pages/mandatory_report.aspx.

Elder Abuse Reporting

Elder abuse is abuse of an elderly person which includes:

- Any non-accidental physical injury or injury which appears to be at variance from the explanation given of the injury;
- Neglect;
- Abandonment;
- Willful inflection of physical pain or injury;
- Verbal abuse;
- Financial exploitation;
- Sexual abuse;

- Involuntary seclusion for the convenience of a caregiver or to discipline the elderly person; and
- A wrongful use of physical or chemical restraint.[5]

An elderly person is defined to include any person 65 years of age or older.[6]

Who has a duty to report?

For the purposes of elder abuse, the list of mandatory reporters is similar to the list of mandatory reporters for child abuse purposes. For example, the list of mandatory elder abuse reporters includes medical professionals and first responders.[7] However, the list of mandatory reporters does not include employees of a public organization that provides "child-related services or activities." This means that unlike mandatory child abuse reporting, employees of cities with certain child-related programs may not be considered mandatory elder abuse reporters by virtue of the city having such child-related programs. A complete list of mandatory elder abuse reporters may be found under ORS 124.050(9).[8]

What does the mandatory reporting duty require?

Similar to child abuse reporting, mandatory elder abuse reporters must immediately report instances of alleged or known elder abuse to the DHS, a local DHS office, or a local law enforcement agency.[9]

The DHS provides further information, guidance and training relating to elder abuse on its website accessible at: https://www.oregon.gov/DHS/seniors-disabilities/SUA/Pages/Adult-Abuse-Prevention.aspx.

Failure to Report

A mandatory reporter making a good faith report of child or elder abuse receives immunity from criminal or civil liability.[10] Failure of a mandatory reporter to report of suspected or know case of abuse or cause a report to be made as required is a Class A violation which carries a maximum penalty of $6,250 in fines and 364 days of imprisonment.[11]

For additional information and resources related to mandatory reporting requirements and child and elder abuse, please visit the DHS's website at: https://www.oregon.gov/odhs/report-abuse/pages/default.aspx.

[3] ORS 419B.005.
[4] ORS 419B.010.
[5] ORS 124.050(1).
[6] ORS 124.050(2).
[7] ORS 124.050(9).
[8] A list of mandatory elder abuse reporters listed under ORS 124.050(9) is attached as Appendix B.
[9] OAR 411-020-0020.
[10] ORS 124.075; ORS 124.060; ORS 419B.025.
[11] ORS 124.990; ORS 419B.010(5).

Appendix A

List of Mandatory Reporters: Child Abuse[12]

- Physician or physician assistant licensed under ORS Chapter 677 or naturopathic physician, including any intern or resident.
- Dentist.
- School employee, including an employee of a higher education institution.
- Licensed practical nurse, registered nurse, nurse practitioner, nurse's aide, home health aide or employee of an in-home health service.
- Employee of the Department of Human Services, Oregon Health Authority, Early Learning Division, Department of Education, Youth Development Division, Office of Child Care, the Oregon Youth Authority, a local health department, a community mental health program, a community developmental disabilities program, a county juvenile department, a child-caring agency as that term is defined in ORS 418.205 or an alcohol and drug treatment program.
- Peace officer.
- Psychologist.
- Member of the clergy.
- Regulated social worker.
- Optometrist.
- Chiropractor.
- Certified provider of foster care, or an employee thereof.
- Attorney.
- Licensed professional counselor.
- Licensed marriage and family therapist.
- Firefighter or emergency medical services provider.
- A court appointed special advocate, as defined in ORS 419A.004.
- A child care provider registered or certified under ORS 329A.030 and 329A.250 to 329A.450.
- An elected official of a branch of government of this state or a state agency, board, commission or department of a branch of government of this state or of a city, county or other political subdivision in this state.
- Member of the Legislative Assembly.
- Physical, speech or occupational therapist.
- Audiologist.
- Speech-language pathologist.

[12] ORS 419B.005(6).

- Employee of the Teacher Standards and Practices Commission directly involved in investigations or discipline by the commission.
- Pharmacist.
- An operator of a preschool recorded program under ORS 329A.255.
- An operator of a school-age recorded program under ORS 329A.257.
- Employee of a private agency or organization facilitating the provision of respite services, as defined in ORS 418.205, for parents pursuant to a properly executed power of attorney under ORS 109.056.
- Employee of a public or private organization providing child-related services or activities:
    - Including but not limited to youth groups or centers, scout groups or camps, summer or day camps, survival camps or groups, centers or camps that are operated under the guidance, supervision or auspices of religious, public or private educational systems or community service organizations; and
    - Excluding community-based, nonprofit organizations whose primary purpose is to provide confidential, direct services to victims of domestic violence, sexual assault, stalking or human trafficking.
- A coach, assistant coach or trainer of an amateur, semiprofessional or professional athlete, if compensated and if the athlete is a child.
- Personal support worker, as defined in ORS 410.600.
- Home care worker, as defined in ORS 410.600.
- Animal control officer, as defined in ORS 609.500.
- Member of a school district board or public charter school governing body.
- An individual who is paid by a public body, in accordance with ORS 430.215, to provide a service identified in an individualized written service plan of a child with a developmental disability.

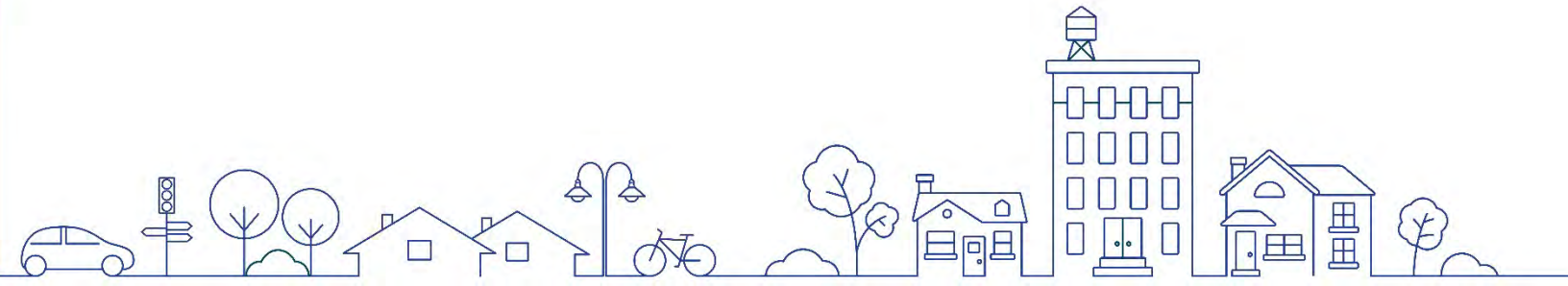
Appendix B:

List of Mandatory Reporters: Elder Abuse[13]

- Physician or physician assistant licensed under ORS Chapter 677, naturopathic physician or chiropractor, including any intern or resident.
- Licensed practical nurse, registered nurse, nurse practitioner, nurse's aide, home health aide or employee of an in-home health service.
- Employee of the Department of Human Services or community developmental disabilities program.
- Employee of the Oregon Health Authority, local health department or community mental health program.
- Peace officer.
- Member of the clergy.
- Regulated social worker.
- Physical, speech or occupational therapist.
- Senior center employee.
- Information and referral or outreach worker.
- Licensed professional counselor or licensed marriage and family therapist.
- Elected official of a branch of government of this state or a state agency, board, commission or department of a branch of government of this state or of a city, county or other political subdivision in this state.
- Member of the Legislative Assembly.
- Firefighter or emergency medical services provider.
- Psychologist.
- Provider of adult foster care or an employee of the provider.
- Audiologist.
- Speech-language pathologist.
- Attorney.
- Dentist.
- Optometrist.
- Chiropractor.
- Personal support worker, as defined in ORS 410.600.
- Home care worker, as defined in ORS 410.600.
- Referral agent, as defined in ORS 443.370.

[13] ORS 124.050(9).

CHAPTER 31: LEAGUE OF OREGON CITIES



League of Oregon Cities

Published by the League of Oregon Cities
April 2021

Table of Contents

Chapter 31: League of Oregon Cities

Introduction

The League of Oregon Cities (LOC) is the trusted, go-to resource that helps Oregon city staff and elected leaders serve their cities well and speak with one voice. The LOC provides cities what they need to build thriving communities, through advocacy, training, and information. Created in 1925 through an intergovernmental agreement of incorporated home rule cities, the LOC is essentially an extended department of all 241 Oregon cities.

The LOC's mission is to support city leaders and state legislators in building a strong Oregon by connecting with all Oregon cities, sharing vital information, and advocating on their behalf. The organization's vision is that all Oregon cities effectively govern, provide municipal services, and freely exercise their home rule authority to build vibrant, resilient communities that Oregonians are proud to call home.

Governing Documents

The LOC has three core governing documents: the Intergovernmental Agreement that formalized the LOC as it exists today; the Constitution; and the Bylaws. While the LOC Board of Directors has created other policies to govern internal and external affairs, it is these three documents that provide the main framework for the organization.

Intergovernmental Agreement

Although the LOC was formed in 1925, it did not organize itself under an Intergovernmental Agreement until 1983. Intergovernmental agreements are permitted under ORS Chapter 190 as a way for governmental entities to work cooperatively with one another to further economy, efficiency, and shared interests. To be a member of the LOC, a city must have executed the Intergovernmental Agreement and paid its annual dues.

The Intergovernmental Agreement specifically provides that the LOC has the following purposes and functions:

1. To maintain an organization to secure cooperation among the cities of the state by thorough study of local problems, and in the application of efficient methods to local government;

2. To provide a means whereby officials may interchange ideas and experiences and obtain expert advice;

3. To collect, compile and distribute to municipal officials information about municipal government and the administration of municipal affairs;

4. To engage in the study and preparation of uniform ordinances and practices;

5. To formulate and promote such legislation as will be beneficial to the cities of the state and the citizens thereof and to oppose legislation detrimental thereto, but not to expend monies in favor of or in opposition to any public measure initiated by or referred to the people, or for or against the election of any candidate for public office;

6. To provide such services to cities as cities may authorize and require through the LOC, including but not limited to assistance in collective bargaining with employees, liability, casualty, and health insurance, and the provision of joint facilities for local governments with other governmental units acting singly or cooperatively. To that end, the LOC may create or participate in appropriate entities and trusts which are suitable and convenient for carrying out its purposes;

7. To secure harmony of action among municipalities in matters that affect the rights and liabilities of cities;

8. To institute or participate in litigation in the name of a member city, upon request of such city, or in its own name for the purpose of securing a determination relative to the rights and liabilities of cities of Oregon under any constitutional provision, statute or ordinance; to appear as a friend of the court in any court proceeding wherein the rights and liabilities of cities are affected; to appoint or employ counsel for the purpose herein mentioned;

9. To adopt and amend, from time to time, such rules, regulations, constitution, and bylaws as are not inconsistent with the Intergovernmental Agreement; and

10. To do any and all other things necessary or proper for the benefit of the cities of Oregon which the cities themselves might do singly or in cooperation with other units or agencies of government.

In addition to outlining the purpose behind the LOC, the Intergovernmental Agreement also requires cities to pay an annual dues assessment based upon their respective populations, provides that the LOC shall be governed by a Board of Directors comprised of 15 voting members, requires the LOC to hold an annual conference, and identifies the executive director as the chief administrative officer of the organization.

The Intergovernmental Agreement is perpetual. The dissolution of the LOC as a whole, requires two-thirds of its members to vote for said dissolution. Amendments to the Intergovernmental Agreement are possible, but they require the unanimous consent of all 241 cities.

Constitution

The LOC had its Constitution before it had an Intergovernmental Agreement. When the LOC was originally established in 1925, and until the Intergovernmental Agreement was adopted in 1983, the organization was governed by its Constitution. The current Constitution is an expansion of the policies and ideas outlined in the Intergovernmental Agreement.

The Constitution is the document which provides specificity for how cities become and cease to be members of the LOC. To become a member of the LOC, the Constitution requires a city to pay the dues rate for the year they join and adopt the Intergovernmental Agreement. If a city wishes to withdraw from the LOC, the Constitution requires them to provide six months written notice to the executive director. The written notice has to be in the form of a resolution or adopted by the city council. Should a city fail to pay its annual dues, the Constitution allows the LOC Board of Directors to strike that city from the League's membership rolls.

While the Intergovernmental Agreement establishes a 15-member voting LOC Board of Directors, the Constitution provides more context to the specific makeup of the voting members. Per the Constitution, 13 of the 15 voting board members must be elected officials in member cities, and two members must hold an appointed position with a member city. Non-voting members are also permitted by the Constitution, they include any past president of the organization who continues to hold elected city office with a member city and one additional appointed person with a member city. It is the Constitution that sets the term limits for each member of the LOC Board of Directors.

Within the Constitution administrative guidance is also provided. Directions on how LOC Board of Directors and membership meetings are conducted is provided. The Board of Directors is specifically directed to adopt Bylaws to govern the proceedings and meetings of the LOC.

Amending the Constitution must occur at an annual meeting or a special meeting called for the specific purpose of amending the Constitution. A constitutional amendment is only successful if two-thirds of the voting delegates present at a meeting support it.

Bylaws

The Bylaws set forth, in relative details, the procedures the LOC Board of Directors must follow when conducting its business. Of the three documents governing the LOC's affairs, it is the Bylaws that are the most comprehensive and most regularly used by the Board of Directors and LOC staff.

Within the opening pages of the Bylaws, the authority and power of the LOC Board of Directors and executive director are more fully explained. There is a clear deviation of power and duties between the Board of Directors and executive director, resembling the deviation of power between a city council and city manager. For example, the Board of Directors has the power to establish LOC goals and its annual budget, whereas the executive director is the chief executive officer of the LOC, responsible for carrying out the policies of the Board of Directors, which includes being responsible for the adopted budget.

It is the LOC Bylaws that provide the specific procedures for how persons are elected to, and in the case of vacancies appointed to, the Board of Directors. Each year, prior to the annual membership meeting, held in conjunction with the LOC's Annual Conference, persons interested in being considered for a position on the Board of Directors submit their application to LOC. The applications are reviewed by the LOC Nominating Committee, the members of which are appointed by the LOC President, with the Nominating Committee reserving the right to interview

applicants. After reviewing all applications, the Nominating Committee will forward a slate of candidates to the membership for a vote during the annual business meeting. Vacancies in Board of Directors positions are generally filled by the Board of Directors.

The Bylaws allow for the LOC Board of Directors to seek guidance from and partner with committees, affiliate organizations, and caucuses. Committees are small groups specifically created by the Board of Directors to focus on particular issues. Specific committees created by the Board will be more fully discussed in a later portion of this chapter. Affiliate organizations are organizations composed of local government officials, that have been formerly recognized under a constitution or bylaws and have been recognized as a partner by the Board of Directors. The two most well-known affiliate organizations are the Oregon Mayors Association and the Oregon City/County Management Association, both of which are discussed more fully in chapter 32. Caucuses are affinity groups composed of local government officials, which have been formally recognized under a constitution or bylaws, have been positively recommended by the Equity & Inclusion Committee, and recognized by the Board of Directors. Caucuses, like affiliates, are more fully described in chapter 32.

Finally, the Bylaws are where the various membership categories of the LOC, of which there are three, are described. Full membership is limited to cities who have adopted the Intergovernmental Agreement and paid their membership dues. When a city is a full member of the LOC, they are entitled to avail themselves of all services provided by the LOC and their representatives are permitted to serve on the LOC Board of Directors. Associate memberships are available to certain public bodies that are not the State, a city, or a county, and the body has paid the annual dues membership. By becoming an associate member of the LOC, a public body is eligible to receive insurance services through CIS. The final membership category is the sponsorship membership – which allows persons or entities the ability to sponsor LOC or its events, which allows that sponsor to receive certain benefits typically related to marketing endeavors.

Board of Directors

The LOC Board of Directors is comprised of four officers, eleven voting directors, and several non-voting directors. Working together, the Board of Directors is responsible for shaping the mission and goals of the LOC.

Officers of the Board of Directors include a President, Vice-President, Treasurer, and the Immediate Past President. Each officer position is for a one-year term. When a person is elected Treasurer, they serve in that role for one year and then automatically assume the position of Vice-President the next year. After serving a one-year term as Vice-President, the person in that position automatically assumes the position of President. When a person's one-year term of President concludes, they automatically become the Immediate Past President. To be an officer, a person must hold an elected position with a member city.

Each of the eleven voting directors serves a three-year term. Nine of the voting director positions are reserved for persons who hold an elected position with a member city. The other

two voting director positions are reserved for persons who hold the position of city manager or assistant city manager with a member city.

Non-voting members of the LOC Board of Directors include one person who holds the position of a city manage or assistant city manager with a member city, any past president who continues to hold an elected position with a member city, and the executive director. The board's non-voting members actively and equally participate in all Board of Directors meetings and functions, the only difference between them and other members is that they do not vote on issues before the Board of Directors.

The positions reserved for city managers or assistant city manager with member cities are linked together; LOC staff generally described those three positions as: non-voting city manager; voting city manager; and senior city manager. When a person is elected to the non-voting city manage position they hold that position for one year. When that one-year term is completed, the person is automatically elevated to the position of voting city manager, where they serve a one-year term. Once the year concludes in the voting city manager position, the person automatically becomes the senior city manager for a one-year term. The senior city manager is a member of the LOC Board of Director's Executive Committee.

Because the Board of Directors is comprised of 15 voting members, eight members constitute a quorum. A majority of the members present is required for the Board to take any action.

As the LOC is a public entity organized under ORS Chapter 190, Board of Directors meetings must comply with the Oregon Public Meetings Law. Generally, the Board of Directors holds five meetings per calendar year. During these meetings, the Board of Directors reviews matters related to LOC's strategic plan, lobbying efforts, litigation matters, event programming, financial matters, and any other issue that has the potential to impact the LOC or its member cities. With the exception of executive sessions, Board of Directors meetings are open to the public and all are welcome to attend.

Committees

The LOC Board of Directors has created seven committees. Two of the seven committees were created via the Bylaws, the remaining five committees were created via a Board of Directors resolution. Any Board of Directors recognized caucus is permitted to appoint, with the President's approval, one of its members to serve on six of the seven committees: Budget Committee; Bylaws Committee; Conference Planning Committee; Equity & Inclusion Committee; Finance Committee; and Nominating Committee.

In addition to these seven general committees, there also exists seven policy committees. The seven policy committees are charged with analyzing policy and technical issues, they recommend positions and strategies the LOC should take during State legislative sessions.

Budget Committee

The LOC Budget Committee was established via the Bylaws. It is a six member standing committee of the Board of Directors. The purpose of the Budget Committee is to assist the executive director in the preparation of the annual budget and with any other financial matters as deemed appropriate by the Board of Directors.

Members of the committee serve one-year terms. The committee is comprised of the President, Vice-President, Treasurer, Immediate Past President, Senior City Manager, and one finance director serving a member city who has been appointed by the President.

Meetings of the committee occur as needed. However, the committee typically meets at least once or twice a year, typically during the months between April and June as it helps the executive director develop a budget to submit to the Board of Directors during the Board of Directors' June meeting.

Bylaws Committee

The LOC Bylaws Committee was established via a resolution adopted by the Board of Directors. It is an ad-hoc committee of the Board. The purpose of the Bylaws Committee is to assist the Board of Directors in ensuring LOC's governing documents conform to law, are reflective of the desires and needs of LOC's members, and ensures the mission and vision of the LOC are met. The committee is directed to ensure LOC's governing documents are maintained in an efficient, effective, and updated condition for sue by the Board of Directors, LOC staff, and the LOC members.

There is no set number of committee members. Because the committee is ad-hoc in nature and is generally convened no more than every three to five years, the committee is typically comprised of any Board member who wishes to volunteer their time to serve on the committee.

Meetings of the committee occur as needed. As noted, the Board of Directors only convenes the committee when it is specifically needed, or every three to five years to perform a comprehensive review of all governing documents.

Equity & Inclusion Committee

The LOC Equity & Inclusion Committee was established via a resolution adopted by the Board of Directors. It is a seven to 13 member standing committee of the board. The purpose of the committee is to assist the LOC Board of Directors and executive director in their oversight of LOC policies, initiatives, and strategic goals related to diversity, equity, and inclusion. This committee is intended to be comprised of current and former diverse municipal officials who are responsible for helping the LOC bring about cultural changes necessary for the LOC, both internally and externally, to be equitable, inclusive, welcoming, and enriching for all.

Members of the committee serve three-year staggered terms. The members are appointed by the LOC Board President, upon the recommendation of the committee. When appointments to the committee are made, the following factors are to be considered:

- The committee is to be comprised of persons who have a proven interest in the work of the LOC and its members.
- There is representation from as many geographic regions of the state as reasonably possible, ensuring that no more than three members from any one region serve on the committee at a time.
- There is always one position reserved for a representative from the city of Portland.
- There is representation from cities with small, medium, and large populations.
- There is representation from underserved and underrepresented communities.
- The committee must include at least one appointed official.
- There can be no more than three formerly elected or appointed municipal officials serving on the committee.
- The appointments must comport with the intent and purpose of the LOC Equity Lens.

Meetings of the committee occur on an as-needed basis. Although, the committee meets regularly and consistently throughout the calendar year.

Finance Committee

The LOC Finance Committee was established via a resolution adopted by the Board of Directors. It is a seven member standing committee of the Board. The purpose of the committee is to assist the Board of Directors in fulfilling its oversight responsibilities with respect to reviewing and monitoring the spending policy of the LOC consistent with the Strategic Plan. The committee reviews and monitors the LOC budget, including program management appropriations and capital spending, while simultaneously providing the executive director and finance director financial analysis, advice, and oversight of the LOC's fiscal resources and expenditures.

Members of the committee serve three-year staggered terms. The members are appointed by the LOC President, upon the approval of the Board of Directors.

Meetings of the committee occur prior to each regularly scheduled Board of Directors meeting and on an as-needed basis.

Legal Advocacy Committee

The LOC Legal Advocacy Committee was established via resolution adopted by the Board of Directors. It is a committee comprised of an unlimited number of attorneys who specialize in municipal law in the state of Oregon. The purpose of the committee is to review requests for amicus support, identify opportunities for the LOC to participate as amicus or otherwise participate in litigation. This committee is advisory to the executive director.

Meetings of the committee occur on an as-needed basis. The committee is typically only convened upon the LOC being asked to participate as amicus.

Legislative Committee

The LOC Legislative Committee was established via resolution adopted by the Board of Directors. It is standing committee comprised of at least eight members. The purpose of the committee is to provide immediate insight and guidance to the executive director and legislative director during legislative sessions when the LOC must take a position on a bill or amendment that could result in conflict between established Board of Directors policies or could result in an impact that could not have been reasonably foreseen when the Board of Directors was establishing its legislative priorities.

Meetings of the committee occur on an as-needed basis.

Nominating Committee

The LOC Nominating Committee was established via the Bylaws. It is a standing committee comprised of seven members. The purpose of the committee is to consider applications for open LOC Board positions and present a slate of candidates to the members during the annual business meeting.

Members of the committee include the Immediate Past President, Vice-President, one Past President, three current Board of Directors members, and three city officials not currently serving on the Board of Directors, all of whom are appointed by the President. In making appointments to the Nominating Committee, the President is required to take all reasonable steps to ensure the committee makeup does not include more than one person from each of the 12 regions of the state.

Meetings of the committee occur solely for the purpose of selecting a slate of candidates to recommend to the membership during the annual business meeting. Typically, the Nominating Committee meets the Thursday before the annual membership meeting.

Policy Committees

As noted above, there are seven LOC policy committees, which are created to give advice and make recommendations to the Board of Directors as part of its legislative policy development process. Policy Committees may be called upon to participate in proposed revisions to the Oregon Municipal Policy, review of areas to recommend that the LOC take proactive and defensive positions in the State legislative process and serve as focus groups when necessary to assist LOC staff in assessing policy issues.

1. *Community Development*. The LOC Community Development Policy Committee reviews policy decisions and recommends legislative positions and strategies related to: land use;

parks and recreation; housing; solid and hazardous waste; air quality; and economic development.

2. *Energy & Environment*. The LOC Energy & Environment Policy Committee reviews policy decisions and recommends legislative positions and strategies related to: energy conservation and efficiency; renewable energy generation; clean energy economic development programs; right-of-way and franchise management; natural gas utilities; and restructuring the electric industry.

3. *Finance & Taxation*. The LOC Finance & Taxation Policy Committee reviews policy decisions and recommends legislative positions and strategies related to: property/income taxation; school finance; local government debt instruments; infrastructure funding; public budgeting; state revenue sharing; and financing economic development.

4. *General Government*. The LOC General Government Policy Committee reviews policy decisions and recommends legislative positions and strategies related to: public safety; fire; courts; elections; ethics; ADA; libraries; human resources; and public contracting.

5. *Telecom, Broadband & Cable*. The LOC Telecom, Broadband & Cable Policy Committee reviews policy decisions and recommends legislative positions and strategies related to: telecommunications franchising; management of the public right-of-way; advances in telecom technology; and the efficient provision of telecom services.

6. *Transportation*. The LOC Transportation Policy Committee reviews policy decisions and recommends legislative positions and strategies related to: streets and roads; traffic safety; public transit; and rail.

7. *Water/Wastewater*. The LOC Water/Wastewater Policy Committee reviews policy decisions and recommends legislative positions and strategies related to: water supply and water quality issues, including water conservation, and the safe drinking water program; and the federal Clean Water Act.

LOC Departments

The LOC, from a personnel standpoint, is comprised of five departments: Communications; Finance; Intergovernmental Relations; Legal Research; and Member & Administrative Services. All five departments are led by the executive director, who is appointed by the Board of Directors to serve as the chief operating officer of the organization – responsible for the day-to-day manager of LOC operations and its staff.

Communications

The LOC's Communications team provides both external and internal services. It informs and helps educate members and key LOC stakeholders through electronic communications, publications, and social media platforms, while also supporting other LOC departments with

marketing materials, legislative information, legal resources and conference resources in both hard copy and app formats.

1. *E-newsletter & Quarterly Magazine*. The *LOC Bulletin* is a weekly e-newsletter that provides members with updates about bills that could impact cities and encourages support or opposition. It has expanded from serving as strictly a legislative communication tool to becoming "that Friday email" – as members often call it – that also informs cities about grants and other helpful resources. The LOC's quarterly magazine, *Local Focus*, zeros in on topics relevant to city leaders, ranging from housing, disaster resilience, council-staff relations, and law enforcement issues to funding and innovative ways to obtain other resources. Each edition of *Local Focus* involves extensive coordination of articles, photos, editing, graphic design and advertising.

2. *Media and Public Relations*. When members of the media want to know more about how legislation and policy matters will impact cities, they turn to the LOC. A recent example of the LOC's proactive media outreach involved Gov. Kate Brown's report on potential ways to reform PERS. The LOC issued a statewide press release and used social media to state its position that the proposal wasn't inclusive of all employers and any resolution needs to focus on all public employers.

3. *Social Media and Podcast*. The LOC's social media presence includes Facebook, YouTube and Twitter. Facebook has proven to be an extremely effective platform for communicating with members, while Twitter is a positive tool for communicating with legislators and the media. Social media posts serve to make the public aware of what the LOC does while also highlighting the work of cities and the importance of city issues.

   In addition, the LOC hosts and produces a bi-weekly podcast called *City Focus*, providing timely, relevant information to cities, legislators, media, and the public by highlighting specific topics in quick-paced 20 to 30-minute segments. The discussions include policy, legal issues and advocacy in a relaxed, conversational style designed to inform, educate, and entertain.

4. *Website*. The LOC website is a treasure trove of information and resources for city officials, including upcoming trainings and events, legislative updates, a newsfeed of city-related media articles, a publications library, city job board and city official directory. The Communications team manages the website and coordinates creation of content and images.

5. *Sponsorships and Vendor Programs*. As part of its marketing and business development function, the Communications team also focuses on business development for the LOC. This is achieved through sponsorship of the fall and spring conferences, vendor participation in the annual trade show, and the LOC Business Partner Program, which provides a renewable annual partnership for the business community.

6. *Graphic Design and Photography*. The Communication team's graphic design services encompass all electronic and print publications, marketing materials, website design,

social media, promotional materials, and the annual calendar the LOC provides for members. In addition, the department provides photographs of all LOC Events as well as videos and graphics for an array of platforms

Finance

The Finance department is responsible for the fiscal health of the LOC, it manages the organization's funds and plans for its expenditures. It is the LOC department that ensures efficient financial management and fiscal control necessary to support all of LOC's endeavors and operations.

1. *Bookkeeping*. The Finance department is involved in the day-to-day recording, analysis, and interpretation of the LOC's financial transactions. This includes manage the cash flow into and out of the LOC to ensure the organization has enough funds to meet its needs.

2. *Budgeting and Forecasting*. The Finance department works closely with the executive director and other department managers to prepare the LOC's annual budget, based on three- to five-year forecasts. In this role, the department helps the executive director fulfill the fiscal needs of each department, develop staffing strategies, and plan asset purchases and expansions.

3. *Procurement Management*. The LOC partners with NPPGov to provide cooperative procurement services to the LOC membership, and other governmental entities. It is the Finance department that manages the relationship with NPPGov and takes the lead on all cooperative procurement practices entered into by the LOC.

4. *Payroll*. The Finance department handles the organization's payroll needs and processes. This includes working directly with employees on contributions, deductions, and pension matters.

Intergovernmental Relations

The core mission of the Intergovernmental Relations (IGR) team is effective legislative advocacy on behalf of 241 cities across Oregon. Our message starts with protecting home rule, which is our first analytic screen for any proposed policy. With annual sessions, the IGR team focuses on legislative activity year-round. Most of our collective energy is spent on state politics, but we also advocate at the federal level, working with Oregon's congressional delegation and the National League of Cities to advance the LOC's priorities.

1. *State-Level Advocacy*. The IGR team consists of six lobbyists, and brings nearly 100 years of combined professional experience to the job.

   IGR's primary audience are the 90 members of the Oregon Legislature, the governor, statewide elected officials, and the state agencies whose regulation and policies impact cities. Our success depends on the relationships built with everyone involved in the

legislative process, solid partnerships, and support from the LOC's membership. During a legislative session, IGR responds to inquiries and advocate for cities 24/7, and during the long session years coordinates and hosts "City Day at the Capitol," which effectively provides an opportunity for LOC members to engage the Legislature in the Capitol.

The IGR team is effectively the LOC's front line in passing legislation that makes sense and is helpful to communities across Oregon. IGR also spends considerable energy working to stop legislation that presents cumbersome oversight or limits or preempts local decision-making. The IGR staff covers the full range of legislative issues, from land use and taxation to water quality and ethics and everything in between. During a typical long session (occurring in odd-numbered years) the IGR team is tracking more than 1,000 bills.

2. *Rule Making*. Each lobbyist is also responsible for review and comment on agency rulemaking to ensure city policy perspectives are heard. New rules are often proposed in response to the prior session's new legislation or changes to the regulatory process.

3. *Member Communications*. During a legislative session, the IGR team provides updates from the Capitol every Friday in the *LOC Bulletin*, where they may also include critical action alerts on legislation and request membership contact their legislators. IGR also works within the LOC's seven policy committees during the session for assistance in reviewing proposed legislation, legislative strategy and preparing testimony.

4. *Policy Committees*. Legislative policy committees and special work groups are the foundation of the LOC's policy development process. Composed of city officials and staff appointed by the board president, the committees analyze policy and technical issues to develop legislative priorities and establish positions on other issues. An IGR professional staffs each committee, conducting research, preparing materials, and providing professional assessment. Policy committee members are appointed for two-year terms.

5. *Creating Educational Resources*. The IGR team creates reference materials for LOC members and other stakeholders, including surveys, charts, presentations, and reports. These resources not only assist with advocacy efforts, but are also for city use, including the annual State Shared Revenue Report. Surveys include the Annual Road Condition Report; SDC survey; Water/Wastewater/ Stormwater Rate Survey; and Utility and Franchise Fees Survey. The team has also traditionally prepared legislative bill summaries and a list of bills that cities need to act upon to comply with new laws.

6. *Grassroots Advocacy*. The IGR team works to train and organize city officials, other government partners, business and community leaders statewide to speak with a unified voice on issues that matter to Oregon communities. The objective of the League's grassroots advocacy program is to influence decisions that legislators make about issues that impact shared constituents and their communities. This is accomplished by mobilizing city officials to work with legislators and candidates at home in their districts and in Salem during the legislative session.

Legal Research

The core mission of LOC's Legal Research department (LRD) is to provide information and technical assistance to elected and appointed city officials who have questions about their duties, city operations, city governance, and various state and federal statutes. In addition to assisting city officials, the LRD is also tasked with providing general counsel services to the LOC itself, both to employees and the board of directors.

1. *Information & Technical Assistance*. The LRD provides elected and appointed city officials with information and technical assistance in three keyways:
    - Staffing the LOC member inquiry line;
    - Creating educational resources; and
    - Acting as trainers at LOC workshops, seminars, and conferences.

2. *Member Inquiry Line*. The member inquiry line provides access to LRD staff, who answer questions about best and common municipal practices, provide direction on statutory requirements (such as public meetings law, local government budget law, election law, etc.), and point members in the direction of other resources to assist them in overcoming challenges and meeting their city's goals. LOC members can access the member inquiry line in one of two ways – via phone or via email. LRD staff does not provide legal representation or advice to members via the inquiry line, but it does allow members the opportunity to seek guidance on how to resolve common municipal questions.

   Assistance provided through the member inquiry line takes many forms. For example, if a member calls with a basic question about the requirements of properly posting a notice of an upcoming public meeting, LRD staff can provide them with a copy of the statute that outlines the notice requirements, while simultaneously providing a model notice they can use as a template for noticing their own meeting. Or, if a council is considering adopting a new ordinance and wants copies or samples of what other cities across Oregon or the country have adopted, they can contact the member inquiry line, and LRD staff will provide them samples and give them some tips on best practices that the city may want to consider when adopting the new ordinance.

3. *Creating Educational Resources*. Oregon is a big state, and the LOC's membership is massive—so assisting every member in person, over the phone, or via email is impossible. As such, LRD staff create educational resources that members can use as starting points in understanding complicated legal issues and as reference tools when trying to resolve local community concerns. And while not every city in Oregon is the same, meaning that what works in Milton-Freewater may not necessarily work in Gold Beach, LRD's educational resources cover the statutory requirements of an issue and provide municipal best practices so that individual cities can understand their base line and build up from there to meet their own individual community's needs.

Educational resources come in four types: guides, models, FAQs, and white papers. Guides provide a comprehensive explanation and a how-to manual on one particular area of municipal law – for example, LRD has produced a guide on local transient lodging taxes. Models are sample ordinances or policies covering a broad range of issues facing cities. FAQs are short, easy-to-read resources that answer questions regularly posed to LOC by its members. White papers are essentially a legal memorandum wherein complicated legal issues are dissected and explained.

4. *Training*. LOC's training program is developed and managed by the Member Services & Administration Department. However, these training programs are often led by LRD staff. Given the expertise of LRD staff in common areas of municipal practice, they are often tasked with being the primary trainer for workshops that cover the fundamentals of working for or representing an Oregon municipality. LRD staff regularly provides trainings on the following topics: council-manager form of government, council relationships, public records, public meetings, ethics, public contracting, local budget law, land use and home rule.

5. *General Counsel Services*. The LRD provides general counsel legal services to LOC staff and the LOC Board of Directors. In providing these services, LRD attorneys regularly: negotiate, draft and review contracts; perform legal research and analysis; give legal advice to LOC employees and the Board of Directors; draft internal governing policies; and generally act as the LOC's attorneys of record.

Member & Administrative Services Department

The Member and Administrative Services department manages the internal services of the League and supports the LOC Board of Directors, the LOC Foundation, the Oregon City/County Management Association, and the Oregon Mayors Association. It also provides educational resources and other services for members.

1. *Annual and Spring Conferences*. Each Fall, the LOC Annual Conference draws nearly 800 attendees, about 600 of whom are LOC members, making up the largest gathering of local officials within the state each year. The Member and Administrative Services Department works with other staff and an external committee of members to plan and execute the event. In 2019, the LOC added a spring conference for local government officials, and the department helps to organize that conference as well as managing registration for both conferences.

2. *Trainings*. From November through January, following local elections every two years, the department leads "Elected Essentials," a training program for city leaders who have recently been elected. These workshops are offered in 12 regions around the state. In the year between elections, the LOC offers its "Local Government Fundamentals" training program that touches on similar information as "Elected Essentials," but in a shorter format. The Fundamentals training is offered for members who missed the "Elected Essentials" training or would like a refresher course. The LOC is also providing more on-demand training and fields member requests for specific training topics. In addition, the

Member and Administrative Services Department oversees the Local Government Management Certificate for a host of pre-determined training areas that are listed on the LOCs website.

3. *Small Cities Program.* A member of the department attends each of the Small Cities Network meetings that are scheduled year-round in 12 regions statewide. The Small Cities meetings allow local officials and others across the state to gather and share information about what is happening within their communities. The LOC representative also provides a written summary of the news that is shared during these meetings. The meetings often include a featured guest speaker and provide a forum for Q&A sessions, as well as serving to build and maintain relationships among attendees.

4. *Internal Administrative Services*. The department's staff serve as the LOC's primary receptionist as well as others who answer telephone calls, respond to email inquiries, manage IT support, and oversee the management of LOC assets. The department also provides continuous updates to the LOC's membership database. In addition, the department arranges meeting space and catering for the LOC and for other organizations that have requested to use the space. The LOC shares its office building, the Local Government Center in Salem, with similarly situated organizations serving different types of local government entities. The Member and Administrative Services Department represents the LOC on the committee that manages the building. Anytime someone in the LOC team needs supplies, repairs or new furniture, the department manages those requests.

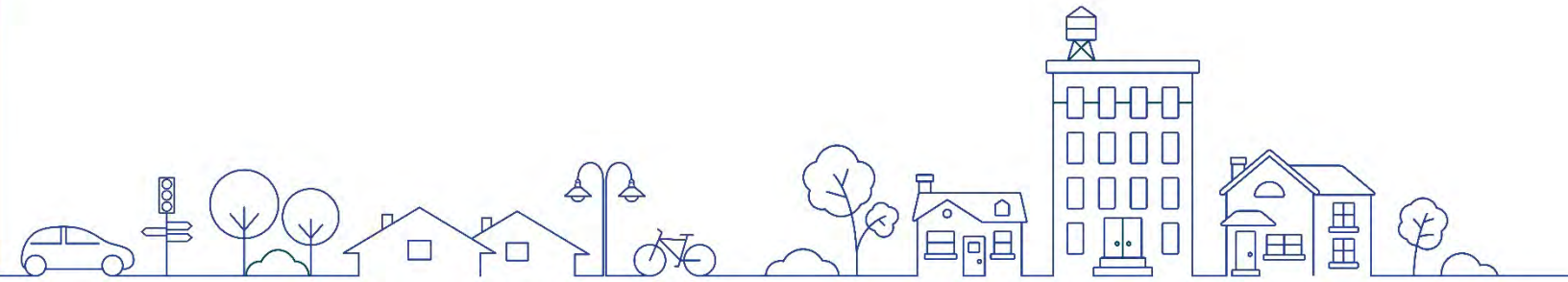
Conclusion

The LOC, its Board of Directors, and staff, take pride in the assistance and support provided to Oregon's 241 home rule cities.

Oregon Municipal Handbook

CHAPTER 32:

LOCAL GOVERNMENT ASSOCIATIONS



League of Oregon Cities

Published by the League of Oregon Cities
March 2021

Table of Contents

Chapter 32: Local Government Associations

Introduction

At their core, cities are autonomous governments with the utmost local control. However, cities and other local governments can greatly benefit from membership in cooperatives and associations available to local governments and their officials. This chapter will provide local government officials with a list of various state, national, and international local government associations that may be of benefit to themselves and their cities.

Local and State Associations

Local and state membership associations typically provide education, advocacy and networking among targeted groups of officials.

League of Oregon Cities – www.orcities.org

The League of Oregon Cities supports city leaders and state legislators in building a strong Oregon by connecting all Oregon cities, sharing vital information and advocating on their behalf. As the go-to place for and about cities, the LOC provides various resources, education and advocacy for cities. The LOC, which maintains full-time staff in Salem, is supported primarily by dues paid by member cities.

Oregon Mayors Association – www.oregonmayors.org

Established in 1972, the Oregon Mayors Association is a voluntary association of Oregon mayors. Its constitution and by-laws specify several purposes for the organization: to increase the knowledge and ability of persons serving as mayor; to promote the exchange of information and ideas among mayors; to provide opportunities for meeting and discussion of the special functions of the office of mayor; to provide collective efforts for influencing state programs and legislation; and to further the programs and objectives of the League of Oregon Cities.

Oregon City/County Management Association – www.occma.org

The Oregon City/County Management Association (OCCMA), established in 1958, is a voluntary association of persons who hold the position of administrator, manager or assistant administrator or manager of a city or county in Oregon. Its constitution and by-laws specify three purposes for the association: to support professional management in local government by increasing the knowledge and ability of administrators and managers; by promoting the exchange of information between members; and by offering personal support to members. The OCCMA is also dedicated to sustaining the functions and aims of the International City/County Management Association.

Oregon City Attorneys Association

The Oregon City Attorneys Association, established in 1984, is a voluntary association of appointed city attorneys of any city that is a member of LOC, or any other attorney employed by a city or by a law firm that represents cities. The association serves as an advisory body of the LOC on programs that relate to matters of interest to city attorneys.

Oregon City Planning Directors Association - www.ocpda.org

The Oregon City Planning Directors Association, established in the mid-1970s, is an association of persons who hold the office of chief planning administrator. The organization's by-laws specify three purposes: 1) to serve as an advisory body of the LOC on programs that relate to planning and community development; 2) to assist and support the LOC in representing planning community development interests to local, state and federal agencies and the Legislature; and 3) to provide a forum for city planning directors to share information and community problems and solutions.

Oregon Association of Municipal Recorders - www.oamr.org

The Oregon Association of Municipal Recorders (OAMR), established in 1983, is a voluntary association of recorders or deputy or assistant recorders of any Oregon city, county, regional government, district or other municipality. The OAMR is closely affiliated with the International Institute of Municipal Clerks (IIMC). The purpose of the association is: "To provide educational experiences of the highest quality for the recorder, and to promote professionalism."

Oregon Economic Development Association - https://oeda.biz

The Oregon Economic Development Association (OEDA) is Oregon's economic development community. OEDA represent stakeholders from 150+ cities, counties, regional EDOs, ports, utilities, DMOs, chambers, SBDCs, and partners in finance, entrepreneurship & workforce. It works on the front lines of Oregon's economy- creating jobs, retaining and attracting businesses across key sectors, and building dynamic regional economies. The OEDA connects its network through economic development training, conferencing, essential resources, and powerful advocacy in Salem as the only voice dedicated to advancing economic development policy in Oregon.

Oregon Government Finance Officers Association - https://ogfoa.org

The Oregon Government Finance Officers Association, established in 1957, is a voluntary association of persons (appointed or elected) who have responsibility for governmental finance or accounting in a city, county, special district, port, community college or state agency. School districts and private sector finance professionals are eligible for associate membership.

Oregon Association of Chiefs of Police – www.policechief.org

Established in 1953, the Oregon Association of Chiefs of Police (OACP) is a voluntary association of persons employed within the state as chiefs of police. Its mission statement identifies the OACP as "dedicated to helping communities achieve the highest level of physical safety and an accompanying sense of well-being through progressive police leadership." The organization implements this mission through executive training, community safety education, applied research, scholarships and by monitoring legislation.

Oregon Fire Chiefs Association - https://ofca.org

The Oregon Fire Chiefs Association (OFCA) proudly serves Oregon's fire service. A membership organization, the OFCA strives to provide leadership and valued services to support fire chiefs and administrative officers throughout the state through information dissemination, professional development, advocacy and networking.

Oregon Municipal Judges Association – www.omjaonline.com

The Oregon Municipal Judges Association (OMJA) participates in arranging continuing educational training sessions for municipal judges. It maintains a listserv system for judges to gain access to other municipal court judges and justices of the peace, whose two associations trade off on annual conferences in Oregon.

Oregon Code Enforcement Association - www.oregoncode.org

The Oregon Code Enforcement Association (OCEA) is a professional organization for code enforcement officers in cities and counties across the state of Oregon. Members are from government agencies that provide codes for health, safety, and welfare of its citizens and guests. The OCEA provides professional support, training and networking for code enforcement officers and hosts two conferences each year with job-related training and professional development and encourage networking among officers from across jurisdictions.

Oregon Building Officials Association – www.oregonbuildingofficials.com

With more than 1,100 individual member representatives throughout the state of Oregon, the Oregon Building Officials Association (OBOA) provides valuable industry information and high-quality education to building officials and department staff teams. The OBOA is also looked to by contractors, building designers, architects, and engineers as a strong partner and provider of excellent programs and services.

Councils of Government

Councils of government are voluntary associations of local governments (including a variety of special districts) designed to provide a broad range of services to their members. The services provided within each council of government region are generally authorized by a board of directors consisting of elected officials representing the regional membership, and are coordinated by paid staff supervised by an executive director, who is accountable to the board of directors. Councils of government generally promote interaction and dialog among local units of government, and enhance a collective awareness regarding relevant regional issues by using seminars, workshops and other mechanisms for encouraging regional discussion. The following are the councils of governments in Oregon:

- Oregon Cascades West Council of Governments – www.ocwcog.org
  Serving local governments and agencies in Linn, Benton, and Lincoln counties.

- Mid-Willamette Valley Council of Governments – www.mwvcog.org
  Serving local governments and agencies in Marion, Polk, and Yamhill counties.

- Rogue Valley Council of Governments – www.rvcog.org
  Serving local governments and agencies in Jackson and Josephine counties.

- Lane Council of Governments – www.lcog.org
  Serving local governments and agencies in Lane County.

- Central Oregon Intergovernmental Council – www.coic2.org
  Serving local governments and agencies in Crook, Deschutes, and Jefferson counties.

National and International Associations

Similar to their local and state cousins, national and international associations provide similar networking opportunities and advocacy services to its members.

National League of Cities – www.nlc.org

The National League of Cities (NLC) is an organization comprised of city, town and village leaders that are focused on improving the quality of life for their current and future constituents. With more than 90 years of dedication to the strength, health and advancement of local governments, the NLC has gained the trust and support of more than 2,000 cities across the nation. The NLC's mission is to strengthen local leadership, influence federal policy and drive innovative solutions.

United States. Conference of Mayors – www.usmayors.org

The United States Conference of Mayors is the official non-partisan organization of cities with a population of 30,000 or more. Each city is represented in the conference by its chief elected official, the mayor. Conference members speak with a united voice on organizational policies and goals. Mayors contribute to the development of national urban policy by serving on one or more of the conference's standing committees. The primary roles of the conference are advocacy, best practices, business connections, promotion, and networking.

International City/County Management Association – www.icma.org

The International City/County Management Association's (ICCMA) vision is to be the leading association of local government professionals dedicated to creating and supporting thriving communities throughout the world. The ICCMA does this by working with its more than 11,000 members to identify and speed the adoption of leading local government practices in order to improve the lives or residents. The ICCMA offers membership, professional development programs, research, publications, data and information, technical assistance, and training to thousands of city, town, and county chief administrative officers, their staff, and other organizations throughout the world.

Government Finance Officers Association – www.gfoa.org

The Government Finance Officers Association members form a diverse group of individuals, from entry-level employees to senior managers who work for a broad range of governments, including cities, towns, and other municipalities of all sizes; county governments; school districts and special districts; public employee retirement systems; states and provinces; schools of administration and public affairs; libraries; federal agencies; and accounting firms, law firms, investment banks, and consulting institutions. The GFOA provides timely information, practical educational opportunities, high-qualify professional publications, and the latest information on best practices relating to government financial management.

International Municipal Lawyers Association – www.imla.org

The International Municipal Lawyers Association (IMLA) is a non-profit, professional organization that has been an advocate and resource for local government attorneys since 1935. IMLA services as an international clearinghouse of legal information and cooperation on municipal legal matters. IMLA collects from and disseminates information to its membership across the United States and Canada and help governmental officials prepare for litigation and develop new local laws.

Affinity Groups and Associations

Like their industry-specific cousins addressed above, there are various local government groups that serve their membership based on identification with a certain affinity group. These groups may be wholly independent or be in partnership with one of the above associations.

Oregon Local Government People of Color Caucus

The Oregon Local Government People of Color Caucus works to promote positive and effective relationships among city officials of color, their communities, political leaders, the LOC and its affiliate entities, build and increase capacity of city officials of color and supports pipeline for people of color to engage in and serve in local government. The Oregon Local Government People of Color Caucus serves as a resource to the LOC in the formulation of its policy agenda and prepares and advances city officials of color to serve in positions of leadership within the LOC and its affiliate organizations.

Local Government Hispanic Network – www.lghn.org

The purpose of the Local Government Hispanic Network (LGHN) is to encourage professional excellence among Hispanic/Latino local government administrators, to improve the management of local government, to provide unique resources to Hispanic local government executives and public managers, and to advance the goals of professional, effective and ethical local government administrations. The LGHN works with other organizations such as the ICMA which shares common goals.

National Black Caucus of Local Elected Officials - https://www.nlc.org/initiative/national-black-caucus-of-local-elected-officials-nbc-leo

The National Black Caucus of Local Elected Officials (NBC-LEO) is a group within the NLC that represents the interests of African America municipal officials and provides a forum to share ideas and develop leadership experience. Established in 1970, NBC-LEO is a space for members to express themselves, share best practices and ensure that NLC's policies and programs benefit their community. The NBC-LEO serves as a vehicle for members to discuss problems and explore solutions, debate policy issues, and contribute to the success of American cities and towns. The group meets three times a year in person and hosts a variety of webinars and programs throughout the year.

Asian Pacific American Municipal Officials – https://www.nlc.org/initiative/asian-pacific-american-municipal-officials-apamo

Established within the NLC in 1985, Asian Pacific American Municipals Officials (APAMO) is a caucus within the NLC that provides municipal officials who identify and ally with the Asian Pacific American to connect with their colleagues in a forum to share ideas and develop leadership experience. The group typically means in person at the NLC Congressional City Conference and City Summit. Additionally, APAMO hosts a variety of webinars and programs throughout the year.

Hispanic Elected Local Officials – https://www.nlc.org/initiative/hispanic-elected-local-officials-helo

The Hispanic Elected Local Officials (HELO) Constituency Group is a caucus within the NLC that represents the interests of Hispanic and Latino local elected officials. The HELO is a space for members to make meaningful connections with fellow Hispanic and Latino local officials, share best practices and advocate for policies that benefit their community. The HELO provides guidance to the NLC Board of Directors and Federal Advocacy Committees and influences NLC platforms. In recent years, the HELO has promoted the education of Hispanic youth, immigration reform, bilingual education, voting rights and minority business enterprise programs.

LGBTQ+LO – https://www.nlc.org/initiative/lesbian-gay-bisexual-transgender-local-officials-lgbtlo

The LGBTQ+LO is a caucus within the NLC that provides municipal officials who identify and ally with the LGBTQ+LO community to connect with their colleagues in a forum to share ideas and development leadership experience. The LGBTQ+LO group encourages the active involvement and participation of Gay, Lesbian, Bisexual, Transgender, and Queer municipal officials and provides a forum to network and share best practices.

Women in Municipal Government – https://www.nlc.org/initiative/women-in-municipal-government-wimg

Women in Municipal Government (WIMG) is a caucus within the NLC that serves as a forum for communication and networking among women in local elected officials and their colleagues. The group works to raise awareness about issues of concern to women and encourages women to seek public office in their communities. WIMG has successfully forges a prominent role for women in the development of the NLC's National Municipal Policy and its agenda for the nation's cities and towns. WIMG serves as a vehicle for members to discuss problems and solutions, debate policy issues, and contribute to the success of American cities and towns.

Young Municipal Leaders – https://www.nlc.org/initiative/young-municipal-leaders-yml

The Young Municipal Leaders (YML) group is dedicated to helping municipal leaders and staff tackle the leadership challenges of today and tomorrow. The YML is an initiative within the NLC and is open to elected officials and city staff 18-40 years old. The YML creates a forum to share best practices and bring together city leaders past and present to bridge the cultural and generational gap in municipalities.