LEAGUE OF OREGON CITIES

CITY HANDBOOK

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A. INTRODUCTION

Oregon Blue Book

There are almost 1500 units of local government in Oregon. The *Oregon Blue Book* lists 36 counties, 242 cities, 197 school districts, 20 education service districts, almost 1,000 special service districts of which there are 28 kinds, and 14 regional governments.

Local government forms and functions have evolved through decisions of the state legislature, the people of the state as a whole, and the people and officials of each local government. Local government units, their forms of organization, their characteristics, numbers, creation and growth are discussed in this chapter of the *Handbook*.

B. THE UNITS OF LOCAL GOVERNMENT

INDEPENDENT UNITS

Local governments are considered to be independent if they have sufficient autonomy or discretion in managing their affairs to distinguish them as separate from another unit. They may be "general purpose," with many basic purposes and functions, or "special purpose", with only one or a few basic purposes and functions.

GENERAL PURPOSE UNITS The two types of general purpose local government in Oregon are cities and counties. Counties were the first units of local government formally created in Oregon. Counties, more than any other type of local government, are agencies of the state and assist the state with many state functions. Every part of the state is within one of the 36 counties. Cities, however, have traditionally enjoyed the greatest autonomy of any local government unit. Cities have more complete home rule than counties. The area and people within a city are also part of a county.

SPECIAL PURPOSE UNITS 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 water control; irrigation; ports; regional air quality control authorities; fire; hospital; mass transit; sanitary districts and authorities; people's utility; domestic water supply districts and authorities; cemetery; park and recreation; metropolitan service; special road; road assessment; highway lighting; health; vector control; water improvement; weather modification; geothermal heating; transportation; county service; chemical control; weed control; emergency communications; diking; and soil and water conservation districts. These non-school districts are sprinkled throughout the state, serving both urban and rural populations.

NON-INDEPENDENT ENTITIES

Some local government organizations that resemble local government units lack sufficient autonomy to be counted as independent units because the governing body of such units is the county or city governing body. For example, a county service district has its own boundaries, financing authority, and other characteristics separate from the county government; but, because it is under the jurisdiction of the county governing body, it is part of county government and it is not an independent unit of government. Urban renewal agencies and many housing authorities are considered subordinate, rather than independent, units for the same reason.

OVERLAPPING UNITS

ORS 197

A geographical area may be within the boundaries of several local government units. For example, the area inside incorporated city limits is also within a county and one or more school districts, and it may be within one or more special districts, such as a port district or a park and recreation district. Because the same territory is served by several local governments, state law requires that local officials must cooperate and coordinate their activities and establish service boundaries. Occasionally, conflicts between local governments find their way into the court system. Although the courts have evolved a rule against dual conflicting jurisdictions (i.e., "two municipal corporations may not exercise the same powers in the same territory at the same time,"[1]), the cases usually also involve specific issues of statutory or constitutional interpretation, and thus are likely to be decided on other grounds.

C. LOCAL GOVERNMENT BOUNDARIES

BOUNDARY DETERMINATIONS

ORS 199
ORS 222

The establishment, dissolution, or change in boundaries of local government units is governed almost completely by the state constitution and state statutes. Procedures also vary depending on the particular circumstances (e.g., whether an election is requested by petition, required by city charter or whether a health hazard exists, etc.).

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[1] Dillon, Municipal Corporations, 354 (5th ed. 1911). *See also*, *State ex rel. Meyer v. County Court of Washington County*, 213 Or 643, 650, 326 P2d 116 (1958).

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CITY BOUNDARIES

The location of a city boundary determines many conditions that affect the property and other interests of persons who live on either side of it. As one long-time observer of Oregon local government stated:

> Where local governmental boundaries run is a decisive factor regarding, for example, whence one gets fire protection, where his child goes to school, how he can use his land, whether his dog can run at-large, what his tax bill totals, whether a special district he has helped establish may continue in existence, and how much he indirectly benefits from state funds allocated to local government.[2]

Because of the importance of boundaries and because of the controversy that often arises when city boundary changes are proposed, Oregon law provides numerous procedural safeguards against arbitrary boundary changes. The result is a somewhat complicated set of requirements for petitions, hearings and elections. In Multnomah, Washington, and Clackamas Counties, served by the Metropolitan Service District (Metro), some additional standards and procedures are required.

CITY INCORPORATION

ORS 221
LOC Publication: Incorporation Guide

City incorporation occurs when residents of an area decide that the public services needed by the area can be provided best by an independent general purpose government. The decision to incorporate must come from the voters residing in the area. An area that has at least 150 residents and is not included in another city may be incorporated as a city. An economic feasibility statement concerning the proposed city must be filed with the county clerk. On receiving a petition signed by the required number of legal voters in the proposed city, the county governing body conducts a hearing to determine appropriate boundaries, calls an election in the area as originally proposed or as adjusted, and, if a majority of those voting approve the proposal, the city is incorporated. The most recent city to be incorporated in the state is the City of La Pine in 2007.

LCDC Brochure on Statewide Planning Goals

It should be noted that a proposed incorporation is a land use decision and, as such, involves application of the statewide planning goals. The Land Conservation and Development Commission (LCDC) has adopted rules for the incorporation of cities and the rules provide guidance to cities and counties on how to apply LCDC Goals 2, 3, 4, 11, and 14 to the incorporation process.

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[2] Orval Etter, "Local Governmental Boundary Control: Basic Considerations,"Local Boundaries: Two Position Papers (Eugene: Central Lane Planning Council, 1968).

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MERGER AND CONSOLIDATION

ORS 222

Two or more cities may unify and become one by merger or consolidation. In a merger, one city goes out of existence and its territory becomes part of another. In consolidation, both cities go out of existence and a new city is formed. In a consolidation, unincorporated areas may be included along with the city areas. A merger or consolidation is achieved only with separate voter approval from each area involved.

DISINCORPORATION

A city that has no debt may surrender its charter and disincorporate by following procedures for petition and election contained in state law.

ANNEXATION

ORS 222

Annexation is the process by which additional land becomes part of a city. Annexation generally must be sought by the residents or owners of the land in the area. It also must be acceptable to the city. Through annexation, city services become available to residents previously outside of the city. There are various means of annexing properties into cities as described in state law. Additionally, 37 cities now mandate by charter city wide elections on annexation petitions.

ANNEXABLE TERRITORY Under the general municipal annexation law, in order to be annexable to a city, territory must lie outside other cities or be contiguous to the city or separated by no more than a public right-of-way, stream, bay, lake, or other body of water. A general rule is that all annexations must be reasonable in that the annexation represents the actual growth of the town or the area is needed for the extension of services or to supply lots for town residences or businesses and is mutually beneficial to the property and the City. Additionally, certain very narrowly described industrial properties were exempted from annexation by the legislature.

COMPLIANCE WITH LCDC GOALS City annexations must be consistent with goals developed by the Land Conservation and Development Commission or with the city's acknowledged comprehensive plan. The acknowledged plan establishes the area of potential annexation through its urban growth boundary and, before a city council may proceed with an annexation, the council must make findings demonstrating plan compliance.

CONTRACT ANNEXATION Contract annexation occurs when an owner of land outside of the city seeks a service but the city is unwilling or unable to annex the land at the time of the request. The city and the landowner enter into a written agreement stating that the city will provide the service before the land is annexed and that the landowner consents to the annexation later

ORS 222

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at the option of the city. The area served must be within the urban growth boundary unless an amendment to the urban growth boundary is being made.

ORS 308

FINANCIAL EFFECT OF ANNEXATION – For the fiscal year following annexation, a city's Measure 50 assessed value increases by the Measure 50 assessed value of the property annexed. The city's permanent rate is then applied to this value. Notice of boundary changes must be given the county assessor and the State Department of Revenue by March 31st of any year for the property to be taxed.

ORS 222

DIFFERENTIAL TAXATION There is a statutory provision for cities to tax newly annexed territory at a specified ratio of the highest rate of taxation applicable to other property in the city. The differential may be applicable for not more than ten years after annexation. The council specifies the ratio in the annexation ordinance, and it may provide for increasing the ratio during the ten-year period. Differential taxation was intended to reduce the political obstacles to annexation, one of which was apprehension that taxes on annexed property would rise. Because a city sometimes cannot provide full services immediately, tax differential provides tax equity by deferring full taxation until full service is established.

IMPACT OF ANNEXATION ON SPECIAL DISTRICTS The effect of annexation on special districts serving the annexed territory varies depending on the type of district and whether part or all of the district is annexed. Most districts are dissolved if their entire area is annexed. If only part of a district is annexed, the council may withdraw the annexed part or leave it as part of the district and withdraw it at a later time. For certain districts, that decision must be made by March 31st to be effective for the next fiscal year.

WITHDRAWALS

ORS 222

Annexations extend the boundaries of cities. The opposite action, withdrawal, retracts city boundaries by removing territory from a city. The Oregon Supreme Court has held that cities have home rule power to disconnect territory and has upheld the right of cities to do so by charter amendment. State law also provides for withdrawal of territory from a city.

BOUNDARIES OF UNITS OTHER THAN CITIES

COUNTY BOUNDARIES Oregon counties were created by special acts of the Legislature, with the exception of Hood River County (created by statewide initiative in 1908) and Jefferson and Deschutes counties (created by local elections under general state law in 1914 and 1916, respectively). Counties may be merged or consolidated by special act of the Legislature, but no such unification has ever taken place. General law prescribes a procedure for

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county merger, but it is so rigorous that it has never been attempted. Cour boundary changes are not subject to the jurisdiction of local government boundary commissions.

ORS 198

SPECIAL DISTRICT BOUNDARIES –The District Boundary Procedure Act of 1971 governs boundary determination of most special districts. The law outlines procedures for formation of special districts: how they may operate; how they may merge, consolidate, or annex additional territory; how territory may be withdrawn; and how they may be dissolved or become inactive.

D. FORMS OF GOVERNMENT

A city's form of government defines its internal organizational structure; the relations among 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. Nonetheless, issues do arise on questions of governmental form, and a general understanding of alternative approaches is useful to city councilors.

MAJOR VARIABLES IN GOVERNMENTAL FORM

Although there are three basic forms of city government, rarely does the organization of a city adhere completely to one form. A city's governmental form depends on the way its charter deals with several types of variables. (In a few cities that have no charter, state statute provides the form of government.)

ELECTION VERSUS APPOINTMENT While all city councilors are elected, the mayor may be either elected by the people or appointed by the council from among its own members. Most city administrative officers and municipal judges are appointed, but about a dozen Oregon cities elect the municipal judge, and a few cities elect the city clerk, recorder, or treasurer. In Portland, the mayor and other members of the council also function as administrators of the city departments.

TERRITORIAL REPRESENTATION Election to the council can be either at-large or by district or ward. Some cities use a combination of these approaches: nomination from a district and election at-large. Cities that elect by district must comply with the one-person, one-vote requirement, which means that elected officials must represent roughly equal numbers of the population.

NONPARTISANSHIP In contrast to most Oregon county governments and to city governments in some other parts of the United States, elective offices in Oregon cities are filled by nonpartisan elections. This is a matter of tradition

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and choice, since nothing in the state Constitution prevents a city from adopting a charter provision for partisan elections.

COUNCIL SIZE AND TERM 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. Many cities have two-year terms for the mayor, even though the councilors serve for four years. A few city charters provide a limit for the number of terms that one individual may serve as mayor or councilor.

SEPARATION OF POWERS AND FUNCTIONS Local government in the United States often does not operate under the separation of powers that is required for the federal government by the United States Constitution and for state governments by state constitutions. However, charters and statutes often require some type of separation of powers and functions in local government. In traditional council-manager government, the charter accords legislation and other basic policy making to the city council; administration, to the city manager; and adjudication, to the municipal judge.

EXECUTIVE AUTHORITY The key variable that characterizes different forms of city government is the way executive authority is structured. A city's chief executive power may be vested in a single officer or it may be divided among several offices (in Oregon, only Portland has a plural executive). The chief executive body or office may be elective or appointive, and its powers may be extensive or limited in relation to the powers of the council and other executive officers.

BASIC FORMS OF CITY GOVERNMENT

MAYOR-COUNCIL FORM In the mayor-council form of city government, the elected council is the legislative and basic policy-making body of the city. Council committees such as parks, public works, public safety, etc., often are responsible for day-to-day oversight of city activities, and may appoint or recommend the appointment of some or all administrative personnel of the city. Some administrative offices, boards, and commissions may be popularly elected. The mayor, who in some instances is popularly elected and in others is appointed by the council from its own members, is ceremonial head of the city and presiding officer of the council. Often, the mayor does not appoint administrative personnel, has no special administrative responsibility, and has no power to veto ordinances adopted by the council. Oregon cities that operate under the 1893 or 1941 law on municipal incorporation or on charters closely patterned on the mayor-council version of the *Model Charter for Oregon Cities* (2004 ed.) have this form of government. Most small cities in Oregon have this form.

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In some mayor-council cities, the mayor is the chief executive of the city. This is called a strong mayor form of government. In addition to being

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 general responsibility for proper administration of city affairs. The mayor may have the power to veto ordinances adopted by the council. Beaverton and a few small cities have this form of government.

COMMISSION FORM Only Portland has the commission form of government in Oregon.[3] In this form the voters directly elect the city's major department heads, who collectively function as the city council. The mayor's role is largely ceremonial in most commission cities, although in Portland the mayor has the power to assign and reassign bureaus among the five city commissioners –a power that is used to strengthen the mayor's leadership role in city government.

ICMA Resources on Council-Manager Form of Government

COUNCIL-MANAGER FORM Most Oregon cities with populations over 2,500 have the council-manager or council-administrator form except Portland and Beaverton. The chief characteristic of this form is that the 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.

The theory underlying the council-manager plan is that the council sets policy and the manager carries it out.

As noted in Chapter 2, an absolute separation between policy and administration does not really exist in city government or in other local governments. However, the council-manager plan works best when the council exercises its responsibility for policy leadership and respects the manager'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. However, the charters do not prohibit, and may affirmatively provide for, the council discussing administrative matters with the manager in open meetings.

Many small cities in Oregon have established a city administrator position instead of a city manager position. This is usually 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 others the administrator may share administrative duties

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3 At least two Oregon cities (Oregon City and Warrenton) use the term "commission" to refer to the city governing body. However, these cities have structural features that do not fit the model of the commission form of city government.

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with the council or its committees, including hiring and firing department heads.

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Thank you to

- William Kirby, Assistant City Attorney, City of Beaverton
- Glenn Klein, City Attorney, City of Eugene

for updating this chapter in the Fall of 2010.

Names listed in alphabetical order.

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A. SOURCES OF LAW

Local governments, which are not mentioned in the United States Constitution, are basically creatures of the state. They are subject to federal restrictions on states, but the main sources of law governing them are the state constitution and statutes and decisions of state courts.

City charters and ordinances are the sources of law that govern a city's actions and decisions on matters reserved exclusively for local control under home rule. However, local laws may not conflict with the state constitution or certain state laws that are intended to preclude inconsistent local enactment.

CONSTITUTIONAL PROVISIONS

Oregon Constitution

Several provisions for local government and more numerous restrictions on it appear in the Oregon Constitution. For example, Article IV gives voters of counties, cities, and districts the initiative and referendum; Articles IV and XI authorize municipal home rule; and Article VI provides for county home rule.

Many restrictions on government in general contained in Article I, Oregon's Bill of Rights, also apply to local government. For example, no local law may infringe on religious freedom or restrain free speech or a free press. Other constitutional limits and restrictions include property tax limitations, prohibitions against lending the credit of a city or county, and regulation of city candidate election dates.

STATUTORY PROVISIONS

Oregon Revised Statutes

A substantial portion of the Oregon Revised Statutes is devoted to local government. For example, ORS chapters 201 to 215 deal with county government exclusively. ORS chapters 221 to 227 deal with city government. The Local Budget Law is in chapter 294, and chapter 250 contains the provisions for local use of the initiative and referendum.

Many ORS chapters deal with both state and local government. Chapter 197 on land conservation and development bears on land use control by both state and local governments. Retirement of public employees, covered in chapter 237, relates to most local governments as well as to state government. Requirements regarding public contracts are in chapter 279.

Local government officials frequently refer to the statutes, but they should seek legal advice when making interpretations or drawing conclusions from statutory provisions.

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JUDICIAL DECISIONS

Judicial decisions that interpret constitutions, statutes, charters, or ordinances are an important source of law affecting local governments. Cases such as *La Grande/Astoria v. Public Employees Retirement Board*, 281 Or 137 (1978) (reinterpreting the municipal home rule amendments of the state constitution), and *Fasano v. Board of County Commissioners*, 264 Or 574 (1973) (interpreting county planning statutes), are examples of judicial decisions that have had profound impacts on local governments in recent years.

B. THE CORPORATE CHARACTER

Units of local government are political subdivisions of the state, and all are public municipal corporations. Because of the urban connotation of the word "municipal," the phrase "municipal corporation" may be confusing when applied to counties and special districts, but it is legally appropriate. Because cities historically have been general purpose governments while other entities have more limited purposes, the courts have sometimes made a distinction between cities (labeling them municipal corporations) and counties, school districts, and special districts (designating them quasi-municipal corporations). This distinction is no longer appropriate for counties.

Whether municipal or quasi-municipal, each city and county is a corporation and, as such, is a legal entity that may enter into contracts and acquire, hold, and dispose of property in its own name, without its constituents being named as parties.

Because a corporation, including a public corporation, is an artificial person, it can act only through natural persons. To bind or otherwise act officially for the corporation, these persons must be agents of the corporation. Their acts as agents are acts of the corporation, and the corporation may be held liable for acts of its agents if the acts are performed within the scope of their authority.

C. THE POWERS OF LOCAL GOVERNMENT

The law grants local governments powers of various types to carry out their functions. The powers differ in many respects from the powers of private corporations.

CLASSIFICATION BY PURPOSE

POWER TO ACQUIRE, MANAGE, AND DISPOSE OF PROPERTY Local governments have the power to acquire, hold, and dispose of property to carry out their central functions. The general principles of the law of property

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apply, for the most part, to publicly owned property, but local government is subject to some rules that are not applicable to private parties. Often, local government has the power of eminent domain – that is, the power to condemn property for a public purpose and to take title to the property after paying just compensation for it. Public property, however acquired, generally must be used for some purpose of the government that owns it, and in many cases it must be used only for the specific purpose for which it was acquired. Disposition of public property by sale, exchange, or other method is often subject to certain procedural requirements, including public notice and hearing. ORS chapters 35, 221 and 271.

POWER TO EMPLOY PERSONS Public employment is usually on a voluntary, contractual basis, but is subject to certain policies and procedures that are not applicable to private employment. Generally, a higher standard of fairness and nondiscrimination is required. Many civil service or merit systems require open competition in recruitment and promotion, permit appeal and a hearing on terminations, and provide for other special procedures.

POWER TO RAISE REVENUE Money is necessary to carry out government functions, and local governments are granted a variety of financial powers: to levy taxes; impose fees; levy assessments for public improvements; impose service charges; sell goods and services; and to borrow money, particularly through bond issues, to pay for capital improvements.

The powers to tax and to levy assessments have no counterpart in the private sector. As compulsory processes, these powers are limited by constitutional, charter, and legislative restraints, including the requirement that taxation be for a public purpose; that assessments be based on special benefits received by the property assessed; that, in some instances, tax measures must be subject to the referendum; and that budgeting conform to certain requirements of procedure and format.

POWER TO ENTER INTO CONTRACTS Local government contracts, which are necessary to the proper performance of functions and services, are subject to the general law of contracts, but they pose some problems not common to private contracts.

ORS 279
ORS 190

Local governments are required to let contracts over a specified amount through competitive bidding and to comply with several other statutory requirements for public contracts. ORS chapter 279. Other statutes include special requirements for intergovernmental contracts, such as a contract between a city and a state agency, a county or a special district. ORS chapter 190.

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POWER TO REGULATE PERSONS Power to enact and enforce regulatior that control the conduct of individuals is referred to as police power, alth it is far broader than the specific function of policing and law enforcement.

Police power includes the power to preserve and promote "the order, safety, health, morals, and general welfare of the public." For example, police power has commonly been exercised through regulations such as licensing certain professions, businesses, and occupations. Licensing provides a means of enforcing controls by withholding or revoking the licenses of those who do not comply.

Police power is sometimes broadly described as the authority to enact any law that contributes to the public welfare and is within constitutional limits. Thus, establishment of sites and facilities for refuse and garbage disposal, zoning regulations, and prohibition of certain activities for aesthetic reasons (such as wrecking yards) are examples of exercises of police power in Oregon.

CLASSIFICATION BY CHARACTER

LEGISLATIVE, EXECUTIVE, AND JUDICIAL POWERS If a power is exercised to require or prohibit certain conduct – independent of an existing legal requirement or prohibition – the exercise is legislative: that is, lawmaking. If the purpose is to execute or administer a requirement or prohibition, the power is executive or administrative. If the purpose is to settle a dispute about a requirement or prohibition or how it is to be interpreted or applied, the power is judicial. For example, passage of a zoning ordinance is a legislative act; issuance of building permits, under most circumstances, is an executive or administrative act; a decision concerning the propriety of fining an alleged violator of a zoning ordinance is judicial.

Separation of these powers among different officers is a constitutional requirement for federal and state governments, but it is not a requirement for local governments in Oregon. Most local governments have only partial separation of powers, or none at all.

EXPRESS AND IMPLIED POWERS The most famous statement about the powers of local governments is Dillon's Rule:

> It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers and no other: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the accomplishment of the declared object and purposes of the corporation –not simply convenient, but indispensable. Any fair, reasonable substantial doubt concerning the

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> existence of power is resolved by the courts against the corporation, and the power is denied.[4]

According to Black's Law Dictionary, express powers are those "Declared in terms, set forth in words. Directly and distinctly stated . . . Manifested by direct and appropriate language."

Implied powers are those incidental to or essential for the exercise of express powers. Implied powers are not "set forth in words," but rather are found in the opinions of the courts.

INTRAMURAL AND EXTRAMURAL POWERS Most local government powers are intramural – that is, they can be exercised only inside the boundaries of the particular local government. Only a provision of the state constitution or a state statute may authorize extramural powers the exercise of a power outside the local government's territory. Such authorization has been granted in several instances, such as giving cities the power to acquire land for parks or to build and maintain sewage and water facilities outside city limits. (ORS chapters 224, 225 and 226)

ORS 224

ORS 225

ORS 226

Constitutional or statutory authority also is required for local governments to exercise power with respect to property or employees of the state, federal, or other local governments. For example, the state statutes that permit application of city land use and development regulations to property owned by other governmental jurisdictions. (ORS 227.286)

ORS 227

D. CITY HOME RULE

STATUTORY HOME RULE

LOC Publication: Home Rule in Oregon Cities

The term home rule refers to the extent to which a city may set policy and manage its own affairs. It already has been observed that without any home rule, state law completely controls the existence, form of organization, functions, powers, and finances of local government. In actual practice, all states allow local governments at least some home rule through state laws that are permissive in form or otherwise vest discretion with local government officials over certain kinds of decisions. This form of home rule is referred to as statutory home rule.

Statutes enacted by the Oregon Legislative Assembly delegate a broad range of home rule powers to cities. Many examples could be cited, such as the power to regulate the use of private land, condemn property for public use, and build and operate street, water, sewer, and other public facility

ORS 221

[4] J. Dillon, Municipal Corporations, sec. 237 at 488-450 (5th ed. 1911) (emphasis in original).

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systems. Some statutes delegate powers in broad terms. For example, a city operating under the 1941 incorporation act may "take all action necessary or convenient for the government of its local affairs." ORS 221.410(1).

CONSTITUTIONAL HOME RULE

Oregon Constitution, Article XI, Section 2

In Oregon, and in several other states, there are provisions in the state constitution that establish home rule on a more stable basis than can be accomplished under statutory home rule alone. Under Oregon constitutional home rule provisions, the voters of cities have taken from the state legislature and reserved to themselves the power to adopt and amend their own city charters. (Oregon Constitution, Article XI, section 2)

LOC Publication: Model Charter for Oregon Cities

These constitutional home rule powers reserved to the voters are in addition to home rule powers delegated to cities by state statute. The voters of Oregon cities, with a few exceptions, have taken advantage of the constitutional power to enact charters.

GENERAL GRANT OF POWERS

Most city home rule charters include a "general grant of powers" provision that permits the governing body of a city to take actions allowed under federal and state constitutions and laws. The general grant of powers allows maximum discretion for local governments to decide matters relating to their organization, powers, functions, and finances without recourse to the state legislature.

City charters that do not have the federal grant of powers have enumerated powers – that is, specific authorizations for the city to exercise certain powers (e.g., issue bonds, acquire and hold property) and perform certain functions (e.g., license and regulate business, construct and maintain public facilities). Charters with enumerated powers, by their very nature, provide limited authority and must be amended when powers or functions are found lacking.

INTERPRETATION OF HOME RULE

LOC A-Z Index: Resources on Home Rule

There are two basic aspects of home rule, whether statutory or constitutional. The first aspect involves a local government's legal power to act on a given matter in the absence of a state law either authorizing or prohibiting it to act on that specific matter. Under the common law construing municipal powers (Dillon's Rule, quoted above), a local government's legal authority to act had to be express, implied, or essential and, if state law were merely silent, the local government had no authority to act at all.

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In Oregon, both the broad statutory grants of power to cities and the powers reserved to the people under the city home rule amendments have liberated local governments from their subservience to specific statutory authorizations. Although issues about authority still arise, cities in Oregon usually do not need to find legal authority for intramural actions in state law.

The second aspect of home rule involves the scope of local powers when there is a conflict between a local enactment and a state law. This aspect of home rule has given rise to a great deal of judicial controversy, and the resolution of conflicts between local and state enactments is still subject to considerable uncertainty.

However, a new test to resolve conflicts between state and local enactments was established by the Oregon Supreme Court in *La Grande/Astoria v. Public Employees Retirement Board*, 281 Or 137 (1978). The court in this case observed that previous tests tended to involve the courts in political or policy decisions for which principled criteria for decision making were inadequate or nonexistent. *La Grande/Astoria* held that a state law requiring cities to provide certain employees with retirement systems that are equal to or better than the Public Employees Retirement System was enforceable against cities that had their own retirement systems. According to this holding, state laws directed at substantive social, economic, or other regulatory concerns prevail over conflicting local enactments, while state laws that prescribe local government organization and processes may be required to yield to conflicting local enactments. In *La Grande/Astoria*, the court stated:

> 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 persons 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 local 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.

281 Or 137 at 156. On the basis of *La Grande/Astoria*, the supreme court has subsequently held that binding arbitration procedures imposed by statute on a local government do not violate constitutional home rule prerogatives. *City of Roseburg v. Roseburg City Firefighters*, 292 Or 266 (1981).

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A different test is used to resolve state and local conflicts in the area of criminal law. In *City of Portland v. Dollarhide*, 300 Or 490 (1986), the Oregon Supreme Court interpreted the portion of the home rule amendment that states that cities may enact and amend their charters "subject to . . . (the) criminal laws" of the state. The court held that a mandatory minimum penalty for prostitution, imposed by the city in its ordinance, could not stand because the state did not impose such a penalty for the same offense. The court found that, while the language of the constitution is a limitation on the power of local governments to enact criminal laws, city ordinances governing criminal conduct are not incompatible with state law unless the legislature specifically preempts the field and as long as the city imposes a penalty that is not greater that the statutory minimum or maximum for the same criminal conduct.

E. LIMITATION ON POWERS

Powers of local government are subject to statutory, constitutional, judicial, and charter limitations.

Even though the U.S. Constitution does not mention local government, the limitations on state power, including due process and equal protection, bear on local governments because they are considered parts of the state. Numerous state constitutional limitations also affect local government, including taxing and bonding limitations, limitations on the purposes for which public funds may be expended, and others.

Statutory limits constrain local government actions in a variety of ways, such as limits on expenditures in excess of the duly adopted budget, prohibitions against secret meetings of governmental bodies, defining unfair labor practices, and many others.

A few limitations are purely judicial. The requirement that city ordinances be "reasonable" is a judicial standard, as is the prohibition against two municipal corporations exercising the same powers in the same territory at the same time.

Additional limitations commonly appear in city and county charters. For example, the limits on floating and bonded debt, and procedural requirements for adopting ordinances.

F. CONSTRUCTION OF POWERS

Local charters and ordinances, as well as state statutes, are subject to the general rules of statutory construction; that is, rules for ascertaining the meaning of ambiguous legislation. In general, grants of power to local government are strictly construed, and doubt is usually resolved against the local government and in favor of the individual. To overcome this rule of strict

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construction, most city charters include a requirement that they be liberally construed.

G. LEGAL COUNSEL

LOC A-Z Index: Resources on City Attorney

The city attorney's office has many roles and functions. In addition to prosecution functions, the city attorney is charged with interpreting how the law applies to city programs and activities; assisting in development of legislative and administrative policies within the framework of the law; drafting ordinances, resolutions, contracts, agreements, and other legal documents; attending meetings and answering inquiries from citizens; defending and prosecuting suits and actions; and playing a general advisory role to the city council and administrative officers.

Some larger cities contract with a law firm to perform the function of legal counsel, while others have attorneys on staff. Small cities that are unable to justify the cost of full-time legal services can usually secure part-time services. Often, they have access to a firm or individual who is experienced in local government legal matters and perhaps is serving as legal counsel for several small cities or other local governments.

The council should routinely consult the city attorney in making decisions on city affairs. In addition to providing professional and technical services such as preparation of formal opinions and drafting of legal documents, a city attorney can supply informal advice regarding other matters, which may minimize the city's chances of being sued or even of being criticized unnecessarily for a particular decision.

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Thank you to

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Names listed in alphabetical order.

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City councilors have many official responsibilities. Essential ingredients for proper job performance of a city councilor are a thorough knowledge of the community, its people, and its problems, as well as the roles of individual councilors and the council as a whole. A major purpose of this handbook is to provide city councilors and other municipal officials with a basic understanding of the roles of the city council, its individual members, and the issues they will confront.

A. ROLES OF ELECTED OFFICIALS

Most city councilors consider the formulation of city policy to be their primary responsibility. They are also concerned with the way in which policy is administered, although the extent of their involvement in administration depends on the size of the city and its form of government.

WHAT IS POLICY?

Classroom definitions of "policy" and "administration" do not always fit real-life situations. The traditional distinction between policy and administration has been that policy is the process of deciding what is to be done, while administration is the process of implementing the policy. However, any issue or decision can become a "policy" matter when it is seen as one of great importance to the city or as one that is, or might become, controversial.

While it might be helpful if policy and administration could always be defined and separated, city councilors usually have major responsibilities in both areas. Understanding these responsibilities will increase the ability of the council, councilors, and the staff to get their job done.

POLICY ROLE OF THE CITY COUNCIL

The city council clearly has the dominant voice in policy matters, but this responsibility is shared. They share this responsibility with city administrators, other city employees and private citizens. Administrators take part in the policy-making process when they make recommendations to the council, and many city charters will require them to do so. Administrators also set policy when they make decisions on specific matters that are not clearly covered by existing ordinances or regulations. Citizens assist in the policy-making process by participating in council meetings, serving on committees formed by the council, and by becoming members of boards created by council.

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 administrators or city employees may be involved in policy formulation, only the council may pass an ordinance, adopt a comprehensive plan, or

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otherwise put into final form a plan or course of action. In addition, the budget is the major vehicle for making city policy decisions– and only the council may adopt the budget.

THE POLICY PROCESS For a 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. It may be helpful to think of the policy process 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 OF THE COUNCIL

ADMINISTRATIVE ROLE THROUGH SIZE & FORM OF GOVERNMENT The council is collectively responsible for the oversight of administration in every city, 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 will rely on part-time employees, contracted professional services to assist with various issues and volunteers. Somewhat larger cities have full-time employees. Even so, councilors may still perform administrative

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functions or oversee projects, usually through council committees. As ci grow and the complexity of their operations increases, 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, and the abilities of the councilors.

Even without regard to differences in city size, the council's administrative role will vary according to the form of government. The forms of city government are described in Chapter 1 of this handbook. Under the council-manager form of government there are likely to be both practical and legal limits to the council's administrative and supervisory activities. Administrative authority is vested in a professional manager who is appointed and removed by the council and who is charged with hiring most other city employees. Under the commission form there is maximum council involvement in administration matters because each member of the council is also a city department head who is charged with hiring the other city employees.

ADMINISTRATIVE ROLE THROUGH COUNCIL ACTIONS There are several ways in which city councils can, and do, influence city administration. This administrative role follows naturally from the policy-making role of the council. The most common actions taken by a council that affect administration are ordinance enactment, special investigations, approval of appointments, public hearings, the budget process, legislative audits, review of administrative rules, and agency reporting requirements. Through these actions, the council exercises significant control over administration, even if the administrative branch is structurally separated from the council.

COMMUNICATIONS BETWEEN COUNCIL AND STAFF

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

- The city employee is responsible to his or her immediate supervisor and cannot take orders from a 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 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

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to make the request during a regular council meeting or to a specific manager or administrator.

LIAISON ROLE OF CITY COUNCILORS TO OTHER BODIES

Due to the increasing complexity of city government, city councilors will also play a role in maintaining communications with the many organizations and groups that are interested in city affairs, or by participation on various boards or commissions created by local governmental entities.

City councilors will 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), civic groups, etc. These appointments are usually made by the mayor with the consensus of the council. The councilor's role is to participate on the board, commission or committee in way that represents the best interests of the city. 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.

ORS 190

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. This 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.

B. CITY COUNCIL ACTIONS

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 or motion before the council.

QUORUM AND VOTES

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 in order to transact business. The number needed to create a quorum is usually a majority of the council. Thus, for a seven member council, a quorum is four or more. Even if there are vacancies, the quorum requirement remains at four, unless the charter provides otherwise. The charter may also

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provide that fewer than a quorum may meet solely for the purpose of compelling the attendance of absent members.

The affirmative vote of a majority of the members present at a meeting will usually be sufficient for a council decision. Thus, for a seven member council with a quorum of four in attendance, a decision may be made by three members. However, some charters require all decisions to be made by a majority of the council. For the seven member council, therefore, the affirmative vote of a quorum will always be required.

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.

LOC A-Z Index:
Resources on Ordinance

LEGISLATIVE, QUASI-JUDICIAL, AND ADMINISTRATIVE ACTIONS

The city council is the legislative body of the city, yet the council may take legislative, quasi-judicial, or administrative action. The distinction between legislative and administrative action is important in the context of the citizen initiative and referendum power reserved by the Oregon Constitution. Only legislative actions may be initiated or referred; administrative actions (which include quasi-judicial actions in this context) cannot. Administrative actions are generally those types of decisions that are internal and relate to city operations.

The distinction between legislative and quasi-judicial actions is important in the context of the type of meeting the council holds and the form of decision it renders. Local government bodies will need to be sensitive to the distinction between quasi-judicial and legislative actions because of the important differences in the meeting procedures to be used. Erroneous classification can lead to actions being reversed or remanded due to procedural defects. The distinction between these two types of actions is discussed in this section.

LEGISLATIVE ACTION A legislative action adopts laws or policies generally applicable to all persons within the city or to a broad class of persons. The city council has broad discretion in making legislative decisions, subject to any limitations imposed by the city charter or provisions in state or federal law.

Legislative actions often follow much simpler procedures than quasi-judicial actions. For example, sometimes notice of a legislative action is not required but may be desired, whereas notice of a quasi-judicial action is always

required. Where and how notice is provided may also vary depending on whether the action is legislative or quasi-judicial.

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It is more difficult for an aggrieved member of the public to attack the vali of a legislative action. The courts will uphold legislative action unless it was unauthorized, unconstitutional, or the result of arbitrary and capricious action. When taking legislative action, there is no requirement for a governing body to be impartial in arriving at a decision. In legislative proceedings, unless provided for by charter or statute, there is no right to counsel, cross-examination, nor to demand that a decision be based on findings, unless required by statute or the city's code.

QUASI-JUDICIAL ACTION A quasi-judicial action is narrower in scope than a legislative action, because it applies specific rules or policies to a particular situation. The action might involve one person, or a small group of persons, and once initiated, must be carried through to a final decision. The law also imposes procedural safeguards for those whose interests are affected by a quasi-judicial action, requiring notice, a public evidentiary hearing, and in many instances, appeal rights.

The most common example of quasi-judicial action is in the land use context when a property owner requests approval from the city for a particular use, permit or zoning of their property. When taking quasi-judicial action, the local government body will apply specific criteria to the facts of the situation. While these actions may be of little interest to the residents of the city as a whole, they are often of intense interest to the property owners and their immediate neighbors.

The common procedural elements to a quasi-judicial action include:

- Notification of pending decision. This may include publication, mailing and/or posting. There are detailed requirements for the content of the notice;
- Providing public access to application materials and staff reports prior to the hearing;
- Reading of a script at the beginning of the hearing describing participants' rights at the hearing and the procedures to be used;
- Providing an opportunity for the applicant and general public to be heard. This includes the opportunity for the applicant to rebut evidence;
- Providing an impartial decision-maker whose impartiality is ensured through rules addressing conflict of interest, ex parte contacts and bias;

- In certain circumstances, allowing a continuance of the hearing, or leaving the record open for more evidence or argument;
- Adopting a decision that includes findings;
- Keeping a record of the hearing; and
- Notification of final decision and appeal rights.

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ADMINISTRATIVE ACTION As noted above, administrative actions are typically related to the internal workings of city operations. In the council-manager form of government, administrative actions will also more likely be taken with respect to the workings of the city council. Generally, no formalities or procedures are required to take administrative actions other than those required by council rules.

FORMS IN WHICH COUNCIL ACTION IS TAKEN

The form of city council action can take various shapes and includes ordinances, resolutions, motions, consensus, and administrative rules and orders. Generally, legislative actions are made by ordinance, resolution, motion, or consensus, and quasi-judicial actions are made by administrative rule or order. However in certain circumstances, there will be some cross-over.

ORDINANCES Legislative authority is properly exercised in the form of ordinances, which are usually used to add, amend, or repeal sections of the city's code (the city's compilation of general laws). For example, ordinances are used to establish a sign code, regulate pinball machines, or levy a transient room tax. Ordinances may also involve any other subject matter where the intent is to establish a long-term rule, policy or procedure. However, the best practice is to preserve the use of ordinances for legislation that is subject to referendum and use resolutions or other actions for the exercise of non-legislative (or administrative) authority. Note, that an ordinance may be required under certain circumstances by statute, city charter or city code. Some common examples include: (a) granting franchises; (b) withdrawing annexed territories from special districts; (c) condemning real property; (d) levying assessments; and (e) adopting zone changes and comprehensive plan amendments. Note that any of these actions may be quasi-judicial in nature.

Procedures for adopting or enacting (the terms are used interchangeably) ordinances are usually included in the city charter, but may also be found in the city's code. Formal action, with adoption by a majority of the council is required to enact an ordinance. As noted above, the mayor may or may not have veto authority.

The specific procedures to adopt ordinances vary, but they commonly involve both time and reading requirements. The time requirement pertains to the number of meetings at which the ordinance must be considered by the council before it can be adopted. Most commonly, an ordinance is considered and voted upon at two meetings, although charter provisions may allow consideration and voting to take place at one meeting if the full council is in attendance and the vote is unanimous. The reading requirement pertains to the number of times the ordinance is read in full (verbatim) and/or by title only. Most charters allow for reading by title only.

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Votes on ordinance are usually required by charter to be taken by roll-call vote. After the final roll-call vote, if an ordinance is adopted, the city recorder signs and dates it and, if no veto is exercised, the mayor usually signs it within a few days.

In most cities, an ordinance takes effect 30 days after it is enacted unless it provides for a specific effective date beyond the 30 day period. An ordinance remains in effect until amended or repealed by another ordinance, or rejected by a referendum. An ordinance may also contain its own expiration date.

A council may also adopt an ordinance on an emergency basis, in which case the ordinance will go into effect immediately or within a time period less than 30 days. For an emergency ordinance, the council must first determine whether an emergency exists. The courts usually uphold the council's judgment unless the ordinance or the circumstances provide clear evidence to the contrary. Some charters require a greater than normal majority vote to attach an emergency clause to an ordinance, and some require the clause to include a specific statement of the facts that constitute the emergency. Because an emergency ordinance becomes effective immediately (or in less than 30 days), there is not time to circulate referendum petitions before it goes into effect. However, emergency ordinances may be repealed through the initiative process.

Lastly, some ordinances will contain a discussion providing the legislative history, or historical explanation, for the action being taken. In some cases, written findings are required by statute or the local code to be adopted with the ordinance explaining the basis for the decision made by the ordinance.

QUASI-JUDICIAL Quasi-judicial decisions are typically made in a document entitled “Findings of Fact, Conclusions of Law and Decision, Order” or some variation of these. The decision is not adopted as an ordinance (unless required by statute or local code, such as with respect to zone changes and comprehensive plan amendments) nor is it adopted as a resolution. However, the procedure for adopting the decision contained in the statutes or local code must be carefully followed to ensure an enforceable quasi-judicial decision.

RESOLUTIONS Councils formally exercise their administrative or non-legislative authority in the form of resolutions. These decisions normally implement requirements of city ordinances and state statutes and deal with matters that are special or temporary. Examples include city budgets, budg amendments, financial transfers, public contracts, fees and charges, adoption of an official position on regional, state, or global matters, call an election, council rules, and city personnel rules. Unless the city charter requires that certain action be taken by resolution, many of these types of actions can be taken by approving a motion without adopting a resolution. A resolution is preferred when a written record of the action is required or desired.

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A resolution is usually effective upon adoption, unless a different date is specified. Resolutions can be adopted at one meeting with one vote; the vote does not need to be a roll-call vote unless required by charter or the city's code. A resolution is effective until its purpose is accomplished or, in cases where the resolution adopts rules or a program of an ongoing nature, until the resolution is amended by another resolution or by an ordinance.

Most charters and city codes do not provide for a procedure for adoption of resolutions. Resolutions are, therefore, adopted by a majority vote on a motion to adopt the resolution.

MOTIONS & CONSENSUS Motions are less formal than ordinances and resolutions, but more formal than a consensus. Motions are the vehicle for calling for a vote on any matter before the city council, including ordinances, resolutions and orders. Motions can be used to express an opinion, adopt or establish a policy, or direct further action.

Motions are made orally and need only be seconded to be brought to discussion and vote. A motion must be adopted by a majority vote. The only documentation of a motion is in the council minutes.

Consensus refers to an informal acknowledgement that a majority of the council agrees on a particular position. No formal vote is taken. Although the action is not binding, it can be used to provide staff with the general direction in which the council wishes to proceed with respect to a particular matter.

ADMINISTRATIVE RULES AND ORDERS Administrative rules and orders refer to the authority a city code may delegate to the city manager to adopt rules to implement provisions of the city code or other ordinances, to act in an emergency, or to establish fees or delegate duties. The code will provide specific procedures that must be followed before adoption and implementation.

C. CITY COUNCIL ORGANIZATION

Although city councils and other legislative bodies are not organized in the hierarchical structure ordinarily found in administrative agencies and businesses, they nevertheless require some formal internal organization. Most councils share the organizational structure described in this section.

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MAYOR

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 the form of government . See Chapter 1 – Local Government in Oregon for a description of how the form of government may affect the mayor's role on the city council.

In most cities the mayor presides over council meetings and participates in discussions. In many, the mayor may vote only to break a tie vote while in other cities, the mayor votes on every matter before the council. Some charters may also provide the mayor the authority to veto ordinances approved by the council (and a procedure to override the veto).

Depending on charter provisions, the mayor may appoint certain staff members, such as the city manager, city attorney and police chief, subject to council approval. Similarly, with council approval the mayor may also appoint committees. Most mayors also sign all ordinances and other records of proceedings approved by the council, and in small cities they may sign all orders to disburse funds.

PRESIDING OFFICER

In addition to the mayor, who ordinarily presides over meetings of the city council, most cities also have a council president or mayor pro tem, who presides over the council in the mayor's absence and may perform other functions of the mayor at those times.

The functions of the mayor or other presiding officer are to call the meeting to order; announce the order of business as provided in the agenda; state motions, put them to a vote, and announce the result of the vote; prevent irrelevant or frivolous debate or discussion; maintain order and decorum; and otherwise enforce the council's rules and appropriate parliamentary procedures.

COMMITTEES OF THE COUNCIL

ORS 294

Oregon law requires each municipal corporation to establish a budget committee to assist with the budget process. Other council committees can

be divided generally between standing committees and special or ad hoc committees. Standing committees continue indefinitely until terminated by the council. Not all cities have these committees, but when they do exist they may be assigned to develop recommendations to the full council and exercise oversight over certain city departments or groups of departments (e.g., public safety committee, public works committee) or they may be charged with a continuing problem (e.g., finance, economic development).

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Special committees are established to study and make recommendations to the whole council on specific problems or decisions. They cease to exist after they have completed their assignments. Examples of special committee assignments might include site investigations for a proposed public facility or study of a proposal to consolidate the police and fire departments.

The power to establish and appoint committees may be fixed by charter. The Model Charter for Oregon Cities prepared for LOC by Thomas Sponsler, Beery Elsner Hammond (2004) provides that the mayor “appoints members of commissions and committees established by ordinance or resolution." In the absence of a charter provision, the council is free to create its own procedures. However, committees are subject to the same open meeting laws and requirements as the council (see Section D, below).

D. COUNCIL MEETINGS

PUBLIC MEETINGS LAW

ORS 192

Oregon's Public Meetings Law, ORS 192.610 to 192.710, requires that decisions of public bodies be arrived at openly and, to that end, gives members of the public the right to attend all meetings of governing bodies at which decisions about the public’s business are made or discussed, with a few specific exceptions. In addition, a city charter or local ordinances may contain provisions which regulate open meetings.

GOVERNING BODIES SUBJECT TO THE PUBLIC MEETINGS LAW A governing body is defined by the Public Meetings Law as a deliberative body of a governing body such as a city that consists of two or more members who have the authority to make policy or administrative decisions or recommendations for the city. This includes all city councils, as well as planning commissions, budget committees, library boards, citizen advisory committees, council committees, and others, whether their functions are to make decisions or are purely advisory and only make recommendations. Ad hoc committees of department heads or other informal groups will generally not be subject to the Public Meetings Law, but it is always wise to consult the Public Meetings Law directly beforehand to make sure.

MEETINGS SUBJECT TO THE PUBLIC MEETINGS LAW The Public Meetings Law applies when a quorum of a governing body subject to the law convenes on any matter to conduct public business. Public business is conducted whenever the public body discusses any policy or administrative matters that pertain to the city, make a decision, or deliberate toward a decision on those matters.

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A public meeting may be held using different forms of technology such as the telephone, email or newer forms of electronic communications such as texts. Care must be taken so as not to inadvertently hold a public meeting, through the use of electronic communications, such as chat rooms or even e-mail which can easily happen if a quorum of city councilors are discussing a city matter preliminary to making a decision. The best practice is to limit such communications to among fewer than a quorum of the public body. If the public body desires to hold a public meeting by telephone conference call or other form of electronic communication, arrangements must be made for the public to hear what is said, such as attaching speakers to the telephone system. It may be more difficult to meet the requirements of the public meetings law for meetings using other forms of electronic communication until that form of communication can be made available to the public.

Note that although judicial proceedings and state agency contested cases (as defined by state law) are not subject to the Public Meetings Law, a quasi-judicial proceeding (see Section E, below) conducted by a city council, such as a hearing and deliberation on a zone change, is not exempt from the open meeting requirements because it is not considered a judicial proceeding, and land use decisions are required to be made in public.

LOCATION AND NOTICE REQUIREMENTS In addition to the basic requirement that governing body meetings be open to the public, meetings may not be held at a place where discrimination on the basis of race, color, sex, age or national origin is practiced. In addition, meetings are to be held at a place accessible to the disabled, and a good faith effort to have an interpreter available for the hearing impaired when requested to do so should be made. Smoking is prohibited at public meetings.

In general, meetings may not be held outside the city limits, although there are some exceptions to that rule. One exception is for training sessions, so long as no public business is discussed or conducted. Another exception is for joint meetings between public bodies. In that case, the meeting must be held within the geographic boundaries of the area over which one of the bodies has jurisdiction, or at the nearest practical location.

Except in emergencies, reasonable notice of the time and place of any public meeting must be provided to the public. Reasonable notice is at least 24

hours; fewer than 24 hours notice may be provided only in cases of emergency in which case notice must be provided as soon as practicable.

The notice must include a list of the principal subjects to be discussed and must identify any matters to be taken up in executive session. However, additional subjects not anticipated or listed may be considered at the meeting. The notice must be given to the "interested persons including new media that have requested notice." Because unintentional violations of ope meeting requirements may strain relations with the media, councils should be especially careful to make sure that media receive notice of all meetings, including executive sessions.

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MINUTES Written minutes of all meetings are required, ORS 192.650, except that executive sessions may be just tape recorded. The written minutes serve as a source of information for the governing body and the public. Minutes of a council meeting validate or prove that ordinances and other actions have been approved. Minutes are always available to the public under the Public Records Law. ORS 192.410 to 192.505. The minutes must be approved at a subsequent meeting of the public body, subject to any corrections.

Minutes generally include a record of what took place, but not every word that was said. Speeches, statements or discussions are not ordinarily transcribed verbatim, except when the information is necessary to understand what took place. Some council rules or policies may provide for more detailed information in written minutes.

OAMR: City Recorders Procedures Manual

The written minutes and contain the following minimum information: (a) members present; (b) motions, proposals, resolutions, orders, ordinances and measures proposed and their disposition; (c) results of all votes; (d) the substance of any discussion on any matter; and (e) a reference to any document discussed at the meeting. For a meeting called with less than 24-hour notice, the minutes must also describe the emergency justifying the short notice.

The city clerk or recorder is usually responsible for recording, indexing and storing council minutes.

EXECUTIVE SESSIONS Closed-door executive sessions are authorized in limited and specifically identified circumstances. No final action may be taken at these meetings and the media generally cannot be excluded from attendance.

ORS 192

Executive sessions may be held to discuss certain matters specified by law, ORS 192.660, including:

- Initial employment of public officials and employees;

- Dismissal or disciplining of an officer or employee or performance evaluation of an officer or employee, unless the officer or employee requests an open meeting;
- Matters pertaining to the functions of a public hospital medical staff;
- Deliberations with persons designated to negotiate real property transactions;

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- Deliberations with persons designated to conduct labor negotiatior
- Discussion of records that are exempt from public inspection (for these executive sessions, media may be excluded);
- Negotiations involving matters of trade and commerce when the unit of government is in competition with other areas;
- Legal rights and duties of a public body with regard to current litigation or litigation likely to be filed;
- Review and evaluation of an executive officer, public officer, employee or staff member, unless an open hearing is requested by the person being reviewed; or
- Negotiations regarding public investments.

Labor negotiations otherwise subject to the public meetings law may be held in executive session at the request of both sides.

Executive sessions must be noticed in the same manner as any other meeting as to time and place. However, in lieu of specific information regarding the subject matters to be discussed, the statutory authority for the executive session must be stated in the notice.

As noted above, representatives of the news media may attend executive sessions, (except those involving labor negotiations) but the council may direct them not to publish specific information. This is done by the presiding officer giving specific instructions to any news media in attendance at the beginning of the executive session. If, however, the news media reveal information obtained at an executive session, there is no legal sanction for the violation. The council may adopt rules regarding who qualifies as news media for executive session purposes, which is increasingly important in today's electronic information age amidst the proliferation of news sources.

During executive session, the public body may deliberate and discuss, but the Public Meetings Law prohibits it from making a final decision during an executive session. To take action, the public body must return to an open session.

Councilors should not disclose what was discussed in an executive session with persons who were not in attendance. Disclosure negates the public policy protections provided by the Public Meetings Law and may result in a waiver of any confidentiality privilege attached, such as with respect to discussions with legal counsel. Although nothing in the Public Meetings La prohibits disclosure, the council's rules of procedure, city ordinances, or th city charter may prohibit disclosure and impose penalties ranging from pub censure to loss of office. In addition, disclosure may violate an individual's privacy rights, exposing the councilor and the city to liability. Willful disclosure for the purpose of harming another or for pecuniary gain could constitute an ethics violation or official misconduct. ORS 162.415, 162.425 and 244.040(4). Lastly, disclosure violates the trust and confidence of the public and other city officials in you and the council as a whole.

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ENFORCEMENT PROCEDURES A person adversely affected by a decision of the governing body may file an action in circuit court claiming the governing body has violated the public meetings law. If the person bringing the action prevails in court, the governing body or its members individually may be liable for attorney fees. The court may issue an injunction to prevent further violations, or it may require the body to repeat the action that was the subject of the violation. Complaints alleging violation of the law may also be made to the Oregon Ethics Commission. Such complaints are directed to members of the body as individuals and are handled the same as ethics laws violations. For additional information on this subject, see Chapter 4 – Ethics and Conflicts of Interest.

However, violation of the public meetings law does not necessarily make action of the governing body invalid. The law provides that a decision shall not be voided if the governing body reinstates the decision in compliance with the law. This means that, generally when a lawsuit is filed for a violation of the public meetings law, the result will be a court order requiring the governing body to comply with the law or a determination that the law does not apply. However, a court could void a governing body's action if after considering the circumstances, it concluded that other remedies would be inadequate because the violation was the result of intentional disregard, or willful misconduct of the members.

Example of Council Rules of Procedure
LOC A-Z Index: Resources on Sample Rules, etc.

The policy statement of the law makes it clear that legal interpretations of close questions should be resolved in favor of public access to information.

RULES OF PROCEDURE

Most city councils in Oregon have adopted resolutions or ordinances establishing rules of procedure for meetings. These rules are designed to promote efficiency and consistency in conducting council business and to avoid waste of council, staff and citizen time.

ORS 192

LOC A-Z Index: Resources on Ordinance

Rules commonly cover the time and frequency of meetings, order of business, method of designating the presiding officer and mayor pro tem, decorum and behavior, limitation of debate, voting, parliamentary procedur preparation and distribution of agendas, and preparation of council minutes

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AGENDA

The agenda is a list of items of business to be considered at a specific meeting. The items on the agenda should follow the formal order of business prescribed in the council's adopted rules.

Essentially a tool designed to aid in transacting business expeditiously and fairly, the agenda also may be an effective public relations tool. For instance, the agenda may be written to give the background for at least the major items of business and may include some explanation of council rules and other information to help citizens understand council proceedings.

Responsibility for preparation of the agenda usually rests with the city clerk or recorder with the assistance of the city manager or administrative officer. The mayor or any councilor may have a matter placed on the agenda if that is permitted by the rules, and the agenda may be reviewed and approved by the mayor before it is distributed.

Relevant background material, reports, and supporting documents are prepared to aid councilors in analyzing matters on the agenda. The agenda and supporting material should be made available to councilors well in advance of meetings. In many cities the media also receive the agenda and related materials, so they can disseminate the information in the community. Agenda outlines, without background material, are normally posted at city hall and on the city's website in addition to being made available to the public at the meeting.

CONSENT CALENDAR Routine items of business that require a vote but are not expected to require discussion or explanation are often placed on part of the agenda called the consent calendar. They are voted on as one item and help to reduce the length of the agenda and the council meetings.

When the consent calendar is used there should be a note of explanation to the public, that items on the calendar are not discussed separately, because the procedure might be misunderstood by persons who are not familiar with the process. Cities that use a consent calendar provide in the council rules for transfer of items from the consent calendar to the regular agenda on request of a councilor or by vote of the council.

PARLIAMENTARY PROCEDURE

Parliamentary procedure is a set of rules that regulate and standardize the way deliberative bodies conduct business. They supplement and are subordinate to the rules of procedure established by statute, charter, ordinance or resolution.

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Many cities have adopted *Robert's Rules of Order Newly Revised* or anotl work on parliamentary procedure, but the city council may modify the standard procedures to conform to local preferences. For example, *Rober* precludes debate on a motion to "lay on the table," but a special council rule might provide for limited debate.

E. PUBLIC RECORDS

The Oregon Public Records Law protects the public's right to information. Under these laws, the written record of public business is available to any person, regardless of the person's identity, motive, or need, with some important exceptions. Thus, a basic principle behind the Public Records Law is that the burden of proof regarding nondisclosure of a public record falls on the public body or public official, not on the person asking for the record. The exceptions to the Public Records Law are known as exemptions. Despite the lengthy catalogue of exemptions contained in the Public Records Law, the law must always be viewed in favor of disclosure, unless the law expressly prohibits disclosure.

PUBLIC BODIES COVERED BY THE PUBLIC RECORDS LAW

ORS 192

The Public Records Law, ORS 192.410 to 192.505, applies to all public bodies, including governing bodies, officers, departments, commissions, etc. Based on the above definition, all city councils are subject to the Public Records Law and the Law will by extension apply to all departments, committees and agencies of the city.

RECORDS COVERED BY THE PUBLIC RECORDS LAW

The Public Records Law broadly defines a public record to implement the policy that the Public Records Law is primarily a disclosure law. The definition of public record in ORS 192.410(4) makes it clear that the Public Records Law applies to all government records of any kind. A public record is "any writing that contains information relating to the conduct of the public's business . . . regardless of physical form or characteristics." ORS 192.410(4). A "writing" is also broadly defined to include all formats, from handwriting to electronic formats. ORS 192.410(6). Consequently, a public record includes handwritten notes taken at a council meeting, and all forms

of electronic communications, including e-mails, so long as the record contains information relating to the conduct of the public's business.

DISCLOSURE OBLIGATIONS AND PROCEDURES

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LOC A-Z Index: Resources on Public Records

Every person has a right to inspect any nonexempt public record, regarc of who they are or why they want to see the record. Thus, a city's disclos obligation extends to any request regardless of the identity, motive, or n unless an exemption from disclosure permits consideration of those factors.

Of course, city officials need not allow anyone to inspect every file in city hall and the Public Records Law allows the city council to adopt reasonable rules to protect the records and the continuing functioning of city government. It is also permissible to establish reasonable fees to reimburse the city for the cost of making records available, which can include personnel as well as copying costs. The Public Records Law provides, however, that any person may request a fee waiver which the city must grant if the public interest warrants doing so.

All governing bodies subject to the Public Records Law are required to designate a records officer and have a public records disclosure policy and in many cities, the city recorder is the public records officer. The public records disclosure policy will typically require that all public records requests be submitted to the records officer on a form provided by the city. The form will require the person requesting the disclosure to identify the records to be examined so they can be located and made available in a reasonable manner. The form will also ask if the person would like to simply inspect the records or receive copies. For large requests, the city will be required to provide a written estimate of the total fees and may require a deposit.

If the records contain both exempt and nonexempt material, the portions that are exempt may be deleted or redacted and the cost of doing so may be included in the fees charged.

A public records request is usually directed to the city, but there may be circumstances when it is direct to a public official, such as a city councilor. It is generally only appropriate to submit the request to a city councilor when the city councilor has custody of the record in question, in which case the city councilor will have the obligation to respond to the request. If the city has custody of the record, then it would be appropriate to direct the request to the city to respond to the request.

The city is required to provide a written response to all requests for disclosure of public records within a reasonable period of time after receiving the request. The response must provide a reasonable opportunity to inspect the requested nonexempt records, or provide the requested copies. The

contents of the response must meet the statutory requirements in ORS 192.440.

If the city denies access to a record or denies a fee waiver request, the requestor may petition the district attorney to issue an order reversing the city's denial. There is no statutory time limit within which the petition must b filed, although the statute does impose strict time limits on the city's response to the petition. The decision of the district attorney may be appealed to the circuit court. If an elected official denies access to a record the requestor may bypass the district attorney and petition the circuit court directly. If the city loses at circuit court, the city will be ordered to pay the prevailing party's attorney fees and costs. Otherwise, there is otherwise no penalty for improper denial.

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EXEMPTIONS

While there are many, the exemptions from disclosure under the Public Records Law are limited in nature and scope. These limitations flow from the emphasis on disclosure and open government. As a consequence, courts interpret public records law exemptions narrowly and presume that the exemptions do not apply. Even if a public record is exempt from disclosure, that does not prohibit the public body from disclosing the information, except for a few instances where the disclosure is prohibited by law. In most cases, the public body has discretion to disclose a record or information that falls into one of the exemptions under the law because an exemption means that the public body is not required to disclose it, not that it is required withhold disclosure. Finally since most exemptions are not stated in absolute terms, a case-by-case evaluation of the record request in light of the public interest of disclosure will need to be weighed against the interest in confidentiality.

ORS 192

Most of the exemptions under the public records law are contained in ORS 192.501 and 192.502. All of the exemptions in ORS 192.501 are considered conditional exemptions because the record may be withheld from disclosure "unless the public interest requires disclosure." The city's decision applying a conditional exemption must show why the need for confidentiality outweighs the public interest in disclosure. The conditional exemption list in ORS 192.501 includes records pertaining to litigation, trade secrets, criminal investigations, personnel examinations, private business operations, real estate appraisals (prior to acquisition or sale), employee relations, circulation of library books, collection agency investigations, personnel discipline actions, computer programs, and archaeological sites.

ORS 192

ORS 192.502 lists several additional conditional exemptions that conditionally exempt from disclosure such records as internal advisory communications, information of a personal nature, and confidential submissions. These records are exempt from disclosure only if the public

interest does not warrant disclosure but each exemption has its own slightly different test for evaluating public interest. The remainder of the exemptions in ORS 192.502 are stated in absolute terms and do not require a balancing of interests because the state legislature has already determined that the confidentiality interests outweigh public disclosure interests as a matter of law.

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As of January 1, 2012, records, communications and information received counties and cities in connection with applications for economic development funds, services, support or assistance are exempt from disclosure. However, records relating to those incentives become public after they are awarded. ORS 192.502.

In evaluating a conditional exemption, the identity of the person requesting the information and the circumstances of the request are *irrelevant* to the determination of whether the information fits within the category of the exemption, but may be relevant in weighing the public interest in disclosure.

Lastly, as noted above, if a record contains both exempt and nonexempt material, it may be appropriate to disclose only the nonexempt material.

F. SAMPLE AGENDAS

CITY OF X

Council Agenda/Meeting Procedures

January 1, 2050 - 7:00 p.m.

I. Call to Order

II. Roll Call

III. Approve Minutes of meeting held 9 June 1986

IV. Business from the City Recorder

V. Business from Public Works Superintendent

VI. Business from Police Chief

VII. Business from Fire Chief

VIII. Business from Audience

IX. Correspondence:

a. Letter from Port of Umatilla (copy attached)

b. Letter from Anderson-Perry & Associates (copy attached)

X. Old Business:

a. Delinquent water bills

b. Street Paving Projects

c. 21 Card Game

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d. Stop sign at Fifth and Main Sts.

e. Vacant Council position

f. Drug problem in School Dist.

g. Repair of Railroad crossings

h. Water and Sewer Grants (see enclosed Sewer grant package)

i. Planning Fee Schedule

XI. New Business:

a. Business License approval

XII. Business from City attorney

XIII. Business from the Council

XIV. Other business – Payment of the bills

XV. Adjournment

City of Y - COUNCIL AGENDA

January 1, 2050 - 7:30 p.m.

1. ROLL CALL

1.1 Approval of Council Minutes:

2. APPEARANCE OF INTERESTED CITIZENS

the following 30-minute period is the time provided by Council for questions or statements by persons in the audience on ANY item of city business which appears on this agenda except those referring to zone changes or other land use requests. Questions or statements on items which do not appear on this agenda will be allowed at the end of this meeting. Comments shall be limited to five (5) minutes per person.

3. PUBLIC HEARINGS

(a) Public hearing to consider amendments to the Revised Code, Chapter 122.010 (Increased Residential Density - Intent and Purpose), to extend the sunset provision date for IRDs from January 1, 1987, to January 1, 1991, and to correct a scrivener's error in Chapter 122.

Attached: Staff Report (CD) and Planning Commission Report

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Recommended Action: Deliberate at this meeting

4. CALENDAR OF ORDINANCE BILLS

4.1 First Reading of Ordinance Bills (Pass to Second Reading):

(a) 123, relating to extension of the sunset provision for Increased Residential Density (IRD) standards, amending SRC 122.010 and 122.020; and declaring an emergency.

Note: See 3.a.

Recommended Action: Suspend Council Rules and pass at this meeting.

Introduced by Mayor Miller

4.2 Second Reading of Ordinance Bills (Final Approval):

5. MANAGEMENT REPORTS

5.1 Reorganization of General Services:

6. CONSENT CALENDAR

6.1 Calendar of Resolution:

6.2 Purchasing Report:

6.3 Supplementary Purchasing Report:

6.4 Information Reports and Routine Items:

6.5 Liquor License Applications:

6.6 Communications (Commissions, Boards and others):

7. POLICY MATTERS

7.1 Mayor's Items:

7.2 Policy Matters – Councilors:

8. APPEARANCE OF INTERESTED CITIZENS

This additional time is provided by the Council for questions or statements on ANY item of city business except those referring to zone change or land use requests. Comments shall be limited to five (5) minutes per person.

9. OTHER

10. ADJOURN

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Thank you to

- Carolyn Connelly, Attorney, Local Government Law Group, P.C.
- Christy Monson, Attorney, Local Government Law Group, P.C.

for updating this chapter in the Fall of 2010.

Names listed in alphabetical order.

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A. INTRODUCTION

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.

It is often easy to recognize when a government action is unethical:

- A city employee accepts a bribe;
- A county commissioner votes to award a contract to a company in which he has a large financial investment; or
- A city councilor accepts an all expenses paid golfing trip to Hawaii from a city contractor.

But sometimes, whether a government 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.

Ethical issues are easier to analyze, address and confront when government officials have spent time contemplating what it means to act ethically, what the public expects of government officials, and what government officials expect of themselves.

WHAT IS ETHICS?

Markkula Center for Applied Ethics

It is important to separate broad ethical philosophies from the laws governing public officials. Ethics in general is the branch of philosophy dealing with values relating to human conduct, with respect to the rightness and wrongness of certain actions and to the goodness and badness of the motives and ends of such actions. Oregon's Government Ethics laws are a narrow subset of ethics, set forth in Oregon statutes which govern a public official's conduct and which prohibit personal financial benefit for a public official if that benefit was gained by that person because of their status as a public official.

The following discusses the broad philosophy of ethics, in general. While these broad philosophies are not expressly discussed in the Oregon Government Ethics statutes, they will assist you as a public official as you analyze, address, and confront different ethical issues. Oregon Government Ethics statutes will be discussed later on in this handbook.

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As explained by the Markkula Center, ethics is not:

- Just about your feelings – while feelings may help us decide what is ethical, we may feel good when doing something unethical or feel bad when following an ethical approach that is hard to follow;
- Just about following what society determines is ethical – some community norms are ethical and should be followed, but others, such as the acceptance of slavery in the United States when our country was founded, lead to unethical behavior;
- Just about religion – while most religions set forth ethical standards to follow, one need not be religious to be ethical;
- Just about following the law – the law often sets a minimum standard to follow, but merely following the law does not always result in ethical behavior. In addition, following some laws may in fact result in unethical behavior.

As explained by the Markkula Center, "simply stated, ethics refers to standards of behavior that tell 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." If our ethics are not based on feelings, religion, law, or accepted social practice, what are they based on? Many philosophers and ethicists have helped us answer this critical question. They have suggested at least five different sources of ethical standards we should use.

FIVE SOURCES OF ETHICAL STANDARDS

- The Utilitarian Approach: Which option will produce the most good and do the least harm?
- The Rights Approach: Which option best respects the rights of all who have a stake?
- The Fairness or Justice Approach: Which option treats people equally or proportionately?
- The Common Good Approach: Which option best serves the community, as a whole, and not just some members?
- The Virtue Approach: Which option leads me to act as the sort of person I want to be?

Each approach helps determine what standards of behavior can be considered ethical. There are still problems to be solved, however. The first problem is that we may not agree on the content of some of these specific

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approaches. We may not all agree to the same set of human and civil rights. We may not agree on what constitutes the common good. We may not even agree on what is a good and what is a harm. The second problem is that the different approaches may not all answer the question "What is ethical?" in the same way.

Nonetheless, each approach gives us important information with which to determine what is ethical in a particular circumstance. And much more often than not, the different approaches do lead to similar answers.

ETHICAL DECISION MAKING

When confronted with difficult ethical decisions, it is helpful to explore the issue, possible solutions, and the consequences of those solutions. To do this, experts advise we follow a specific, planned, decision-making process. A careful exploration of the issues, assisted by the insights and perspectives of others, is the best way to make good ethical choices in difficult situations.

B. GOVERNMENT ETHICS: OREGON'S STATUTORY STANDARDS

CONSTITUTIONAL PROVISIONS

US Constitution, 14th Amendment
Oregon Constitution, Article II, Section 10

- Due Process Clause of the 14th Amendment to the United States Constitution:
  - The right to an unbiased and impartial decision-maker
  - The right to a fair process
- Prohibition on holding incompatible offices:
  - Article II, section 10 of the Oregon Constitution – no person shall hold more than one lucrative office at the same time
- Bribery and threat prohibitions:
  - Article II, section 7 of the Oregon Constitution – every person shall be disqualified from holding office who has been given a bribe during his or her term of office

CRIMINAL PROVISIONS: FEDERAL LAW – HONEST SERVICES

FRAUDS AND SWINDLES 18 U.S.C. § 1341 Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or

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promises, or to sell, dispose of, loan, exchange, alter, give away, distribute supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both.

HONEST SERVICES 18 U.S.C. § 1346 The term "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services.

CRIMINAL PROVISIONS INVOLVING PUBLIC OFFICIAL ETHICAL STANDARDS: OREGON REVISED STATUTES

The statutes below provide criminal penalties for acts which may also constitute ethical violations under Oregon law. This means that a public official who engages in those behaviors will not only be subject to Oregon's Ethics Law penalties, but may also face criminal liability.

ORS 162.025 – BRIBE RECEIVING

ORS 162

- A public servant 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.
- Bribe receiving is a Class B felony

ORS 162.405 – OFFICIAL MISCONDUCT IN THE SECOND DEGREE

ORS 162

- 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.

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- Official misconduct in the second degree is a Class C misdemeanor.

ORS 162.415 – Official Misconduct in the First Degree

ORS 162

- 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.
- Official misconduct in the first degree is a Class A misdemeanor.

ORS 162.425 – Misuse of Confidential Information

ORS 162

- 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.
- Misuse of confidential information is a Class B misdemeanor.

ORS 163.275(g) – Coercion

ORS 163

- 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.
- Coercion is a Class C felony.

ORS 164.075(h) – Theft by Extortion

ORS 164

- A person commits theft by extortion when the person compels or induces another to deliver property to the person or to a third person

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by instilling in the other a fear that, if the property is not so delivered, the actor or a third person will in the future . . . 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; or

- Theft by extortion is a Class B felony.

ORS 162.305 – Tampering with Public Records

ORS 162

- 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.
- Except as provided in paragraph (b) of this subsection, tampering with public records is a Class A misdemeanor.
- Tampering with records relating to the Oregon State Lottery is a Class C felony.

NON-CRIMINAL PROVISIONS: OREGON REVISED STATUTES

Some Oregon statutes provide for financial penalties for unethical acts of a non-criminal nature. These statutes sometimes also impose personal liability upon a public official. This means that the public official will be personally responsible for paying any civil penalties out of his or her own pocket. Misconduct under these statutes can also implicate criminal liability.

PROHIBITION OF POLITICAL ACTIVITIES

ORS 260

ORS 260.432 prohibits public employees 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, while "on the job during working hours." 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.

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MISUSE OF PUBLIC FUNDS

ORS 294

ORS 294.100(1) makes it unlawful for "any public official" to spend public funds for any purpose not authorized by law, and subsection (2) of this statute makes public officials personally liable for 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 she/he 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 anyway.

OPEN MEETING LAWS

ORS 192

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 Oregon’s public meeting laws that decisions of governing bodies be arrived at openly.

ORS 192.610 *et. seq.* mandates that public entities conduct their meetings in the public, unless a specific provision in the law allows for the meeting to be conducted in private (these private meetings are called “executive sessions” under Oregon law). If a quorum of a governing body is meeting to decide or deliberate toward a decision on any matter, the meeting must be held at a publicly-noticed place and time.

ORS 192.660 lists the specific executive sessions which are permitted under the law. This list includes such meetings as: meetings to consider dismissal or discipline of a public employee; meetings to review and evaluation of a chief executive officer; meetings to discuss certain public safety issues; and meetings to deliberate with legal counsel regarding litigation.

Before a public body meets in executive session, it must make sure that the meeting and the process for calling the meeting qualifies under a specific executive session statute. While many statutes permit executive sessions, each are narrowly tailored to address limited circumstances. If the subject of a government’s proposed meeting does not fit within one of these statutes, the executive session is prohibited and the meeting must be held in open session. We advise that governments consult with their attorney if they have questions regarding executive sessions.

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. ORS 192.685.

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C. ORS CHAPTER 244: GOVERNMENT ETHICS

ORS 244

In ORS 244.010 *et. seq.* the Legislature has declared its policy reasons for enacting Oregon’s ethics laws. These include that: (1) service as a public official is a public trust; and (2) public officials should put loyalty to the

highest ethical standards above loyalty to government, persons, political party, or private enterprise.

ORS Chapter 244 applies only to Public Officials, their relatives or members of their households. In general, this statute focuses on preventing a public official from receiving financial gain or avoiding a financial detriment to that official because of his or her status as a public official. All rules in this statute, including the conflict of interest rules, the gift rules, and the limiting of future employment opportunities, are focused on preventing an Oregon public official from receiving a financial benefit based solely on his or her position as a public official. Below is a list of the actions regulated by Oregon ethics laws, the definitions used in this statute, and the general prohibitions provided in this statute.

ORS CHAPTER 244 REGULATES

ORS 244

- Conflicts of Interest
- Solicitation and Acceptance of Gifts
- Solicitation and Acceptance of Honoraria
- Future Employment Opportunities
- Use of Confidential Information
- Representing Private Interests
- Interests in Public Contracts
- Reporting of Economic Interests
- Nepotism

DEFINITION OF A PUBLIC OFFICIAL – ORS 244.020(14)

You are a public official for the purposes of ORS Chapter 244 if you are:

- Elected or appointed to an office or position with a state, county, or city government;
- Elected or appointed to an office or position with a special district;
- An employee of a state, county, city agency or special district; or
- An unpaid volunteer for a state, county, city agency or special distri

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CONFLICTS OF INTEREST

ORS 244.020(1) defines “actual conflict of interest” and ORS 244.020(12) defines “potential conflict of interest”. In brief, a public official is met with a conflict of interest when participating in official action (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.

Actual and Potential Conflicts

The difference between an actual conflict of interest and a potential conflict of interest is determined by the words “would” and “could.” An actual conflict of interest occurs 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 relative of the official is associated. A potential conflict of interest 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 of that official is associated.

What To Do if a Conflict Exists?

For both actual and potential conflicts, a public official must announce or disclose the nature of a conflict of interest. The way the 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. ORS 244.120(1)(c).

- Elected Officials or Appointed Members of Boards and Commissions: An elected public official, other than a member of the 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. ORS 244.120(2)(a) and ORS 244.120(2)(b).

- A public official does not need to announce the exact amount of the financial benefit he or she stands to gain. Instead, the public official must explain the specific nature of the conflict.

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- Potential Conflict of Interest: Following the public announcement, the public official may participate in official action on the issue that gave rise to the conflict of interest.

- Actual Conflict of Interest: Following the public announcement, the public official must refrain from any further participation in,

discussion, or voting on the issue that gave rise to the conflict of interest. ORS 244.120(2)(b)(A). It is also a good idea for the public official to step down or away from his or her seat during the discussion to avoid any appearance of impropriety.

- City or County Planning Commission Members: City or County Planning Commission Members may not participate in any Commission proceeding, if the Commission member has a direct or substantial financial interest in the proceeding. This rule also applies to any direct or substantial financial interests of the Planning Commission's relatives or business interests. ORS 244.135.

Rule of Necessity

ORS 244

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. The public official must make the required announcement and refrain from any discussion, but may participate in the vote required for official action by the governing body. ORS 244.120(2)(b)(B). These circumstances do not arise often.

This provision does not apply in situations where there are insufficient votes because of a member's absence when the governing body is convened. Rather, it applies where a quorum is lacking 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, as an exception to the Conflict of Interest rules, should discuss this issue with their legal counsel prior to taking any action.

Class Exemptions from the Conflict of Interest Rules

The following circumstances may exempt a public official from the requirement of making a public announcement or giving a written notice describing the nature of a conflict of interest:

- 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 official position. ORS 244.020(12)(a).

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- If the financial impact of the official action would impact the public official, relative, or business of the public official to the same degree as other members of an identifiable group or "class". ORS 244.020(12)(b). It is important that the public official discuss a class exemption with legal counsel prior to acting upon it, as the Oregon Ethics Commission has yet to provide specific standards for what qualifies as a "class" under this provision. Therefore, a public official

may subject him/herself to personal financial liability if he/she is 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 501(c) of the Internal Revenue Code. ORS 244.020(12)(c).

Announcing Conflicts

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 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 he or she participates 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 he or she receives an application or otherwise participates in official action on a matter that gives rise to a conflict of interest.

The "But For" Prohibition – ORS 244.040(1)

ORS 244

Public officials may not use or attempt to use their official position or office to obtain a financial gain or to avoid a financial detriment for themselves, their relatives, the members of their household, or a business with which the public official, a relative of the public official or member of the public official's household is associated, if the opportunity would not otherwise be available "but for" their holding the official position or office. This means that a public official may not use his or her official position to reap a financial benefit for him or herself, his or her family, or his or her household members. Below are some exceptions, definitions and rules regarding this "but for" prohibition on public official financial benefits.

Exceptions to the "But For" Prohibition – ORS 244.040(2)

The "but for" prohibition does not apply to:

- Any part of a public official's official compensation package;
- An honorarium not otherwise prohibited by law;
- Reimbursement of approved expenses;
- 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;

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- 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 in ORS 244.020; or
- Contributions to a legal expense trust fund.

GIFTS AND THE OREGON GIFT LIMIT: ORS 244.025

The general rule is that a public official, a relative, or household member of the public official may not solicit or receive any gift with a value in excess of $50 in any calendar year from a source that could reasonably be known to have a legislative or administrative interest in that public official's actions, votes, or decisions. For purposes of this rule, a candidate for public office is considered a public official.

It is important to remember that the statutory definition of "gift" and "legislative and administrative interest" are different than many people's common every day definitions of these terms, as discussed below.

DEFINITION OF GIFT – ORS 244.020(6)(A)

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. 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.

Plainly speaking, under this statute, a gift is something given to the public official, a relative or member of the public official's household. If something is given to a public official and the public official makes a payment of equivalent value for it, it does not qualify as a gift and is not subject to the $50 limit. Instead, it is merely an exchange of a good for a fair value. If the public official pays a discounted price, however, the item may qualify as a gift and may be subject to the $50 limit. The rationale for this limitation is that the giver may be giving the good to the public official to curry favor.

When offered, the public official should inquire whether the same discount is given to members of the general public on the same terms. If the gift is give to members of the general public on the same terms and conditions, it will not be subject to the gift limitation.

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DEFINITION OF GIFT AND EXCEPTIONS TO THE $50 GIFT LIMITATION – ORS 244.020(6)(B)

The law provides several exemptions from the definition of gift and from the $50 gift limit, as listed below. These exemptions operate to allow public officials to accept these types of gifts, even if they exceed the $50 gift limit.

There are several exemptions from the definition of a gift for the purposes of ORS Chapter 244:

ORS 244

- Campaign Contributions;
- Gifts from relatives or members of the household;
- Unsolicited tokens or awards of appreciation, such as a plaque with a resale value of less than $25;
- Informational material related to the performance of official duties;
- Contributions to legal defense funds;
- Admission, food and beverages for the public official, the public official's household member, or the public official's staff at a reception, meal or meeting where the public official represents his or her government body;
- Reasonable expenses paid by any unit of the federal government, a state or local government, a Native American Tribe, a membership organization to which the governing body pays dues, or a 501(c)(3) not-for-profit corporation for attendance at a convention, fact-finding mission or trip, or other meeting if the public official is scheduled to deliver a speech, make a presentation, participate on a panel, or represent his or her governmental unit;
- Reasonable food, travel or lodging expenses when the public official is representing his or her governmental unit on (1) an officially sanctioned fact-finding mission or trade-promotion or (2) in officially designated negotiations, or economic development activities, where receipt of the expenses is approved in advance;
- Food or beverage consumed by a public official acting in an official capacity in association with the review, approval, execution of documents or closing of a borrowing, investment or other financial transaction;
- Waiver or discount of registration expenses or materials provided at continuing education event that a public official or candidate may attend to satisfy a professional licensing requirement;

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- Expenses paid by one public official to another public official for the purpose of travel inside Oregon to participate in an event in an official capacity;
- Food or beverage at a reception where the food and beverage are provided as an incidental part of the reception and no cost is placed on the food or beverage;

- Entertainment that is incidental to the main purpose of the event;
- Entertainment provided at an event where the public official is acting in an official capacity representing his or her governmental entity for a ceremonial purpose: and
- 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.

ORS 244

Definition of a "Legislative or Administrative Interest" – ORS 244.020(9)

A public official may not receive more than $50 in gifts, in the aggregate, from anyone with a "legislative or administrative interest" in that public official's decisions or actions. If a giver of a gift does not have a legislative or administrative interest in the public official receiving the gift, that gift is not subject to the $50 limitation. For this reason, understanding what constitutes a "legislative or administrative interest" under Oregon law is critical.

ORS 244.020(9) defines a "legislative or administrative interest" as an economic interest distinct from any interest the general public may have in any matter subject to your decision or vote when acting in your official capacity or any matter that would be subject to a decision or vote of a candidate who, if elected, would be acting in a public official capacity.

In other words, a gift is only subject to the $50 gift limitation if the giver has an interest in a public official's decision or vote. If the giver merely has an interest in the governmental entity, he or she would not necessarily have an interest in the official's actions.

Definition of Relative – ORS 244.020(15)

The gift limits apply not only to public officials, but also to their relatives and household members. The law defines "relative" as:

- A spouse;
- Any children or spouse's children;
- Siblings, spouses of siblings, parents or spouse's parents;
- Any person for whom the public official or candidate has a legal support obligation; or
- Any individual for whom the public official provides benefits arising from the public official's public employment or from whom the public

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official or candidate receives benefits arising from that individual's employment.

Remember that the gift restrictions apply not only to a public official and his/her relatives, but also to members of a public official's household or business, or any business with which the public official or his or her relatives are associated. These relevant definitions are set forth, below.

Definition of Member of the Household – ORS 244.020(10)

Member of the household means any person who resides with the public official or candidate.

Definition of Business – ORS 244.020(2)

"Business" means any corporation, partnership, proprietorship, firm, enterprise, franchise, association, organization, self-employed individual and any other legal entity operated for economic gain, but excluding any income-producing not-for-profit corporation that is tax exempt under section 501(c) of the Internal Revenue Code with which a public official or a relative of the public official is associated only as a member or board director or in a nonremunerative capacity.

Definition of Business with which a Person is Associated - ORS 244.020(3)

"Business with which the person is associated" means:

- Any private business or closely held corporation of which the person or the person's relative is a director, officer, owner or employee, or agent or any private business or closely held corporation in which the person or the person's relative owns or has owned stock, another form of equity interest, stock options or debt instruments worth $1,000 or more at any point in the preceding calendar year;

ORS 244

- Any publicly held corporation in which the person or the person's relative owns or has owned $100,000 or more in stock or another form of equity interest, stock options or debt instruments at any point in the preceding calendar year;
- Any publicly held corporation of which the person or the person's relative is a director or officer; or
- For public officials required to file a statement of economic interest under ORS 244.050, any business listed as a source of income as required under ORS 244.060(3).

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Definition of Source of Gift – OAR 199-005-0030

"Source of a gift" means the person or organization that pays the cost of the gift and receives no reimbursement for the expense from another person or organization.

GIFT CHECKLIST – ASK YOURSELF

- Am I a "public official" under ORS 244.020(14), a "candidate" under ORS 244.020(4), or a "relative" or "household member" of a public official or candidate under ORS 244.020(15)?
- Does the giver have a "legislative or administrative interest" in my decisions, actions or votes?
- Does the giver have an "economic interest" that is "distinct from that of the general public" in any of my "decisions" or "votes"? ORS 244.020(9) and OAR Chapter 199, Division 5.
- Have I received something of economic value, including forgiveness of a debt, for free or at a discounted that is not available to the general public on the same terms? ORS 244.020(6)(a).
- Does an exception to the gift definition apply? ORS 244.020(6)(b)(A)-(P).

HONORARIA PROHIBITION – ORS 244.042

A public official or candidate may not solicit or receive, whether directly or indirectly, honoraria for the public official, candidate or any member of the household of the public official or candidate if the honoraria are solicited or received in connection with the official duties of the public official.

EXCEPTIONS – ORS 244.042

ORS 244.042 does not prohibit:

- The solicitation or receipt of an honorarium or a certificate, plaque, commemorative token or other item with a value of $50 or less; or
- The solicitation or receipt of an honorarium for services performed in relation to the private profession, occupation, avocation or expertise of the public official or candidate.

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DEFINITION – ORS 244.020(7)

"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.

Future Employment: Prohibition – ORS 244.040(3)

Public officials may not solicit or accept the offer, pledge or promise of future employment based upon any understanding that a vote, official action or judgment would be influenced by the offer.

Confidential Information: Prohibition – ORS 244.040(4) & (5)

Current or former public officials may not use or attempt to use confidential information gained through their positions as public officials for financial gain. See, OAR 199-005-0035(5) for the definition of "Confidential information".

Representing Private Interests: Prohibition – ORS 244.040(6)

Public officials may not represent a private client for a fee before a governing body when the public official is a member of that same body.

Interests in Government Contracts: Prohibition – ORS 244.047

- A public official who authorized or had a significant role in a contract 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.
- A member of a board, commission, council, bureau, committee or other governing body who has participated in the authorization of a public contract may not have a direct, beneficial, financial interest in the public contract for two years after leaving the official position.
- OAR 199-005-0035(6) indicates that "authorized by" means that a public official performed a significant role in the selection of a contractor or the execution of the contract. A significant role can include recommending approval of a contract, serving on a selection committee or team, having the final authorizing authority, or signing a contract.

Financial Reporting Requirements: ORS 244.050 and 244.060

- Public officials are required to file only the Annual Statement of Economic Interests (SEI). With the passage of SB 30 (2009), public officials are no longer required to file Quarterly Public Official Disclosure Forms.

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ORS 244

- The next filing deadline is April 15, 2013. Any public official who holds office on April 15, 2013 is required to file an Annual Statement of Economic Interests, even if the public official did not hold office during the 2012 calendar year.

- Annual Statements of Economic Interests are like taxes – they disclose information regarding the previous calendar year. As such, a 2013 Annual Statement of Economic Interests must disclose economic interests held between January 1, 2012 and December 31, 2012.

WHO MUST FILE – ORS 244.050

- In counties, elected officials, such as commissioners, assessors, surveyors, treasurers and sheriffs must file, in addition to planning commission members and the county's principal administrator.
- In cities, all elected officials, the city manager or principal administrator, municipal judges and planning commission members file reports.
- Some members of the board of directors for certain special districts must file.

STATEMENT CONTENT – ORS 244.060

The SEI must disclose information about:

- Businesses in which you or a member of your household were an officer or director;
- Businesses under which you or a member of your household did business;
- Sources of income received by you or a member of your household that produce 10 percent or more of the total annual household income;
- All honoraria exceeding $15 received by you or a member of your household;
- All real property within the geographical boundaries of your city (residential, commercial, vacant land, etc. other than your principal residence) in which you or a member of your household had any ownership interest, any option to purchase or sell, or any other right of any kind in real property, including a land sales contract if the real property is located within the boundaries of the governmental entity you serve; Any compensated lobbyist who was associated with a business with which you or a member of your household was also associated;

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- The amount of any expenses with an aggregate value exceeding $50 provided to you when you participated in a convention, mission, trip or other meeting if you delivered a speech, made a presentation,

participated on a panel or represented your city, provided that the payment was made by the federal government, a state or local government, a Native American tribe that is recognized by federal law or formally acknowledged by a state, a membership organization to which your city pays membership dues or a not-for-profit corporation that is tax exempt under section 501(c)(3) of the Internal Revenue Code;

- The amount of any expenses with an aggregate value exceeding $50 provided to you when you participated in a mission or negotiation or economic development activity as a representative of your governmental entity; and
- For individuals or businesses that (1) did business with, or reasonably could be expected to do business with your city; or (2) have a legislative or administrative interest in your decisions or votes, you must disclose information about:
    - Debts of $1,000 or more owed by you or a member of your household to any person, other than loans from state or federally regulated financial institutions (banks) or retail credit accounts;
    - Businesses in which you or a member of your household had a personal, beneficial, or investment interest with a value of more than $1,000; and
    - Each person for whom you performed a service for a fee of more than $1,000, unless prohibited from doing so by law or a professional code of ethics.

NEPOTISM: PROHIBITION – ORS 244.177

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 relative or 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 complying with conflict of interest disclosure requirements, public officials are 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. Further, a public official may not participate in any interview, discussion or debate regarding the employment of a relative or household member.

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Exceptions:

- The term “participate” does not include serving as a reference, providing a recommendation, or performing other ministerial acts that are a part of the public official’s normal job functions.
- A public official may be involved in personnel action involving a relative or household member in an unpaid volunteer position.

ORS 244

Supervision: Prohibition – ORS 244.179

A public official acting in an official capacity may not directly supervise a person who is a relative or member of his or her household.

Exceptions:

- The supervision is of a relative or household member who is an unpaid volunteer.
- The public body adopts policies specifying when a public official acting in an official capacity may directly supervise a person who is a relative or member of the household

Relative Defined – ORS 244.175(4)

The definition of “relative,” for the purposes of the nepotism statute, is broader than the definition of relative used in other ethics statutes. “Relative” for purposes of nepotism prohibitions means the spouse of the public official, any children of the public official or of the public official’s spouse, and brothers, sisters, half brothers, half sisters, brothers-in-law, sisters-in-law, sons-in-law, daughters-in-law, mothers-in-law, fathers-in-law, aunts, uncles, nieces, nephews, stepparents, stepchildren or parents of the public official or of the public official’s spouse.

Member of Household Defined – ORS 244.175(2)

“Member of the household” means any person who resides with the public official.

Enforcement: ORS 244.260 and 244.350

- The Oregon Government Ethics Commission may not investigate any conduct that occurred more than four years before a complaint is filed. ORS 244.260(10).
- The Oregon Government Ethics Commission may impose civil penalties up to $5,000 for a violation of any provision of Chapter 244 ORS 244.350(1)(a).
- The Oregon Government Ethics Commission may impose civil penalties up to $1,000 for a violation of the executive session

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provisions of the public meetings laws, unless the violation occurred when a public body acted on advice of legal counsel. ORS 244.350(2)(a).

- The Oregon Government Ethics Commission may impose a late filing penalty of $10 per day for the first 14 days and $50 for each day thereafter for failure to file a statement of economic interests, up to a maximum of $5,000. ORS 244.350(4)(c).

ENFORCEMENT: ORS 244.360

In addition to civil penalties imposed under ORS 244.350, the Oregon Government Ethics Commission may impose upon the public official a civil penalty in an amount equal to twice the amount the public official or other person realized as a result of the violation, if the public official or any other person has financially benefited by violating any provision of ORS Chapter 244.

ENFORCEMENT: ORS 244.380

- If a public official continues to refuse to file a statement of economic interests even after the Oregon Government Ethics Commission has imposed monetary penalties, the Oregon Government Ethics Commission may notify the public official's government agency to cease paying the public official and the public official may not exercise any official duties until the required statement is filed.

- Candidates in the same position will have their names removed from the ballot or, if they have been elected or nominated, will not be given a certificate of nomination or election.

D. OREGON GOVERNMENT ETHICS COMMISSION (OGEC)

Oregon Government Ethics Commission Website

MANUAL ON GOVERNMENT ETHICS

ORS 244

ORS 244.320 requires the Oregon Government Ethics Commission to prepare and publish a manual on government ethics that explains the provisions of Chapter 244. The manual, and any updates to the manual must be approved by a vote of the Commission. 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.

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STAFF ADVICE

ORS 244.284 provides for informal staff advice, which may be offered in several forms, such as orally, by e-mail, or by letter. In a letter of advice, the facts are restated as presented in the request and the relevant laws or regulations are applied. The answer will conclude whether a particular action by a public official comports with the law. The Commission may consider whether an action by a public official that may be subject to penalty was taken in reliance on staff advice.

STAFF ADVISORY OPINION

ORS 244.282 authorizes the executive director to issue a staff advisory opinion upon receipt of a written request. The opinion is issued in a letter that restates the facts presented in the written request and identifies the relevant statutes. The letter will discuss how the law applies to the questions asked or raised by the facts presented in the request. The Commission must respond to any request for a staff advisory opinion within 30 days, unless the executive director extends the deadline by an additional 30 days. The Commission may impose only a written letter of reprimand, explanation or education for any good faith action taken in reliance upon a staff advisory opinion, unless it is determined that the person who requested the opinion omitted or misstated material facts in the opinion request.

COMMISSION ADVISORY OPINION

ORS 244.280 authorizes the Commission to prepare and adopt by vote a Commission Advisory Opinion. This formal written opinion also restates the facts presented in a written request for a formal opinion by the Commission. The opinion will identify the relevant statutes and discuss how the law applies to the questions asked or raised by the facts provided in the request. These formal advisory opinions are reviewed by legal counsel before the Commission adopts them. The Commission must respond to any request for an advisory opinion within 60 days, unless the Commission extends the deadline by an additional 60 days. The Commission may not impose a penalty on a public official in reliance upon any good faith action taken on a Commission Advisory Opinion, unless it is determined that the person who requested the opinion omitted or misstated material facts in the opinion request.

CONTACT INFORMATION:

Oregon Government Ethics Commission
3218 Pringle Rd. SE, Suite 220, Salem, OR 97302-1544
Telephone: 503-378-5105
Fax: 503-373-1456

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Website: www.oregon.gov/ogec
Email: ogec.mail@state.or.us

DEFENDING YOURSELF AGAINST ETHICS ALLEGATIONS

CityCounty Insurance Services (CIS)

- City/County Insurance Services, Special Districts Association of Oregon, or other insurance coverage may apply under certain circumstances
- ORS 244.205 Legal Defense Fund
- The Oregon Government Ethics Commission can authorize a public official to establish a trust fund to be used to defray expenses incurred when mounting a legal defense in any civil, criminal or other legal proceeding that relates to or arises from the course and scope of duties of the person as a public official.

STEPS TO CONSIDER WHEN FACING A PERSONAL CONFLICT OR POTENTIAL ETHICS VIOLATION:

- Respect the legislative institution;
- Follow the law;
- Seek legal counsel;
- Ask advice;
- Take a leadership role;
- Meet your own standards;
- Be aware of the appearance factor; and
- Prepare to defend your decision.

E. CHILD ABUSE REPORTING

Department of Human Services Website

MANDATORY REPORTING

Legislation that became effective on January 1, 2013 significantly expanded the number of people required to report child abuse. ORS 419B.005 requires all employees of a public or private organization that provides “child-related services or activities” – such as youth groups or centers, scout groups or camps, summer or day camps, and survival camps – to report child abuse to either law enforcement or Child Protective Services when there are reasonable grounds to conclude that abuse has occurred. Because the new legislation applies to all employees of public organizations

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that provide child-related services, it is possible that all city employees – from maintenance workers to city managers – of cities that provide child-related services will become mandatory reporters on January 1, 2013. The DHS website provides information on child abuse and neglect and how to report it.

FAILURE TO REPORT

Failure for a mandatory reporter to notify either law enforcement or a local office of Child Protective Services is a Class A violation. It is important to note that: (1) the organization employing a mandatory reporter is not liable if its employee fails to report, and (2) a mandatory reporter making a good faith report of child abuse receives immunity from civil liability.

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Thank you to

- Oregon Association of Municipal Recorders (OAMR)

for updating this chapter in the Fall of 2010.

CHAPTER 5 – ELECTIONS

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A. MUNICIPAL ELECTIONS

OVERVIEW

Voters influence the policies and actions of government at its most local (and presumably most responsive) level by electing municipal officials and voting on local measures. Mayor and council positions are the elective offices most frequently found on Oregon city ballots, while other officials, such as city recorders and utility board members, are only occasionally elected. Measures that appear on city ballots are proposed by city officials or by voters through the initiative and referendum process, and they run the gamut from fiscal and land use planning issues to the legalization of social gambling.

ORS 221
ORS 246
ORS 249
ORS 250
ORS 251
ORS 254
ORS 260

The Secretary of State is charged with obtaining and maintaining uniformity in the application, operation and interpretation of election laws. Oregon laws applicable to city elections are found in ORS chapters 221 (Organization and Government of Cities), 246 (Administration of Election Laws; Vote Recording Systems), 249 (Candidates; Recall), 250 (Initiative and Referendum), 251 (Voters' Pamphlets), 254 (Conduct of Elections) and 260 (Campaign Finance Regulation; Election Offenses). Additionally, many Oregon city charters and ordinances also contain municipal election provisions. Under the administrative framework established by statutory law, the city elections officer is subordinate to the county clerk, who, in turn, is subordinate to the Secretary of State. The Secretary of State's office provides manuals on local elections, initiative and referendum, recall, and campaign finance regulations, among others, for use by local government officials.

Oregon state election laws were changed in 1979 to achieve greater statewide uniformity and local budgetary savings and to increase public participation in the electoral process. The county clerk's responsibilities for conducting city elections were expanded and city authority to set the dates for special elections, determine precinct boundaries, print ballots, and prescribe nomination deadlines were reduced or eliminated. Essentially, the new statutory regulations have streamlined Oregon's electoral system, but at some expense to local discretion and control.

ORS 221

Secretary of State Elections Manuals

ELECTION OF MUNICIPAL OFFICERS

ELECTION DATES Cities are bound by the Oregon Constitution to hold regular elections for municipal officers on the same dates that state and county primary and general biennial elections are held: the third Tuesday in May and the first Tuesday after the first Monday in November in even-numbered years. (Oregon Constitution, Article II, section 14a.) State statutes provide for special elections for municipal officers on other dates if death,

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resignation, or other events reduce the membership of a city's governing body below that constituting a quorum, ORS 221.160, and the charter does not provide a procedure.

QUALIFICATIONS City offices generally are nonpartisan and may be held by any resident city elector. Although some qualifications are imposed by state law and the state constitution, residency requirements often are set by city charter provisions. For example, most charters require from six to twelve months prior residence in the city before a person may hold an elective office.

NOMINATIONS State law provides that all nominating petitions and declarations of candidacy for municipal office be filed with the city clerk, recorder or auditor (i.e., the chief city elections officer). Procedures for securing nominations vary among city charters and ordinances.

A few city charters provide for primary elections to designate nominees to run later in a general election, and some cities allow nomination by a convention of voters or precinct delegation representatives. However, the method used most frequently to secure nominees for city office in Oregon is the petition. To withdraw from an election, a candidate must file a withdrawal statement with the city elections official with whom the candidacy declaration was filed. All candidates for public office, including elective municipal officers, are required to comply with state laws regulating campaign finances.

INITIATIVE, REFERENDUM, AND RECALL

Oregon has had direct voter initiative and referendum since 1902, when the state constitution was amended to provide for these procedures.

The initiative is the power to propose and enact or repeal laws independent of the legislative body. The referendum involves submitting measures already enacted by the governing body to a vote of the people. In 1906, these powers were extended to voters of local government units. Oregon Constitution, Article IV, section 1. The power to recall public officials before expiration of their terms was added in 1908. Oregon Constitution, Article II, section 18.

These are forms of citizen participation in government that must be considered by local government officials. The procedure for citizens to exercise the initiative or referendum with reference to city measures is prescribed by either statute or ordinance and must be followed explicitly. Instances where a city council itself submits a measure to the voters are also subject to definite legal provisions.

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CITY PROCEDURES FOR INITIATIVE AND REFERENDUM The amendment that extended the initiative and referendum to voters of local government units was originally a part of the 1906 constitutional amendment providing f municipal home rule and is now Article IV, section 1(5), of the Oregon Constitution. This provision authorizes cities to provide locally for the procedure by which the powers of initiative and referendum are exercised as to all "local, special, and municipal legislation of every character in or for their municipality or district." The procedure may be created by charter provision, ordinance or state law. However, the state constitution provides that cities may not require petition signatures of more that 15 percent of the qualified voters for the initiative or 10 percent for the referendum.

The steps to be followed by citizens of cities to exercise the initiative or referendum include:

- Preparation and filing of a prospective petition;
- Preparation of a ballot title for the measure by the city attorney;
- Circulation of the petition and ballot title for signatures;
- Filing the signed petition with the city recorder (if a referendum, the signatures usually must be submitted within 30 days after enactment of the ordinance);
- Checking the signatures for authenticity; and
- Placing the measure on the ballot, if the petition has the required number of authentic signatures.

COUNCIL SUBMISSION OF MEASURE FOR REFERENDUM In instances where a city council itself submits a measure to the voters, the procedure usually involves the following:

- Ordering submission of the measure at an election on a specified date;
- Preparation of a ballot title for the measure; and
- Submission of the measure at the election.

PETITION SIGNATURE REQUIREMENTS As it applies to cities, the constitutional amendment does not specify the base for measuring the percent of voters required to invoke a referendum or an initiative. City ordinances in some instances state that the base number for computing the number of signatures required shall be the number of votes cast for mayor or council at the last election in which a mayor or councilor was elected.

Secretary of State's Recall Manual

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RECALL The recall amendment states that every elected public officer is subject to recall by popular vote.

A petition to recall a public officer must contain signatures equaling at least 15 percent 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. After a recall petition is successfully filed, the officer has five days in which to resign. If there is no resignation, a special recall election is ordered to be held within 35 days.

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. A city official may not be recalled during the first six months of a term.

Vacancies resulting from a recall are treated the same as vacancies caused by death or resignation. Typical city charter provisions call for such vacancies to be filled by city council appointment.

PROCEDURES

TIMING Except for recall elections, the dates on which nonemergency public elections may be held in Oregon are limited to:

- The second Tuesday in March
- The third Tuesday in May
- The third Tuesday in September
- The first Tuesday after the first Monday in November

National, state, county and city primary and general elections are held on the May and November dates in even-numbered years. City candidates and measures may be submitted to city voters on these two primary or general election dates.

ORS 250

BALLOTS According to state law, all ballot titles must contain a caption with a maximum of 10 words, a description of not more than two words, and a summary of up to 175 words.

ORS 251

VOTERS' PAMPHLETS Cities have the option of compiling, printing and distributing their own voters' pamphlets for measures and candidates to be voted upon exclusively by city voters. Provisions are made for inclusion of pictures and statements of municipal candidates in the state voters' pamphlet.

RECOUNTS Effective January 1, 2012, an automatic vote recount may be triggered in certain non-partisan primary elections if there is a tie or if one candidate is within one-fifth of one percent of a majority vote. In this rare occurrence, cities are obligated to pay for the cost of the recount. ORS 258.280.

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B. ADVISORY ELECTIONS

Unless limited by their charters, Oregon cities may hold advisory elections on any of the statutorily specified election dates. Advisory elections are rare, are not legally binding, and are held only to obtain citizen advice and direction.

C. EMERGENCY ELECTIONS

ORS 221

Although all elections in Oregon except recall elections are limited to the dates prescribed by state statute, an election may be held on a different date if necessary to avoid "extraordinary hardship to the community." In an emergency, the city council must hold a public hearing, with appropriate public notice, to verify the emergency and make findings. The city must then give at least 47 days' notice to the county elections officer who will conduct the election. Considering the time needed to complete this process, one of the dates specified by statute often will be the earliest time available for the election.

VOTE-BY-MAIL

Since 1981, the legislature has authorized voting by mail. The law, as enacted in 1981 was fairly limited, but it has since been expanded to include all elections. The ballots are mailed directly to voters and are returned by mail or in person to designated places of deposit.

INFORMATION ACTIVITIES

ORS 260
ORS 294

City money and city employees' time may not be used to promote a yes or no vote on a measure once the prospective petition is filed with the elections official. Cities may provide factual information on the measure, but the distinction between information and promotion is sometimes difficult to discern. When preparing informational material on an election issue, the city attorney should be consulted to ensure that the material does not have a promotional bias. City officials may be personally liable for city funds expended if their activities are determined by a court to be promotional rather than merely informational. ORS 260.432 and 294.100.

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D. DUTIES OF LOCAL ELECTIONS OFFICIALS

COUNTY CLERK

ORS 246

A statute enacted in 1979 designates the county clerk as the only elections officer authorized to conduct an election in Oregon. The duties of the county clerk basically consist of establishing precincts and polling places, preparing ballots and sample ballots, receiving and processing the votes, and supervising local elections officials.

CITY ELECTIONS OFFICIALS

City elections officials are responsible for city election duties that are not performed by the county clerk. Such duties include accepting and verifying filing materials for nominations or petitions, preparing voters' pamphlets, preparing and submitting proposed ballot titles to the county clerk, and preparing and publishing election notices.

City elections officers keep records of petitions that are filed by candidates or citizens proposing city measures, implement processes provided by city charter, and deliver various certificates regarding city elections to the county clerk. The chief city elections officer is required by state law to file certified statements of candidates and measures with the county clerk at a specified time before an election. Information sent to the county includes measure numbers, proposed ballot titles, and information concerning candidates for office. Responsibility for accepting, inspecting, verifying and preserving pre-election contribution and expenditure statements is delegated to the city elections official.

Oregon Secretary of State

ORESTAR

In 2005 and 2007, the Oregon Legislature adopted legislation that changed the way campaign finance information is reported. As a result, all political committees and chief petitioner committees must electronically file campaign finance transactions via the Secretary of State's Oregon Elections System for Tracking and Reporting, or ORESTAR. This system can be found online at the Oregon Secretary of State website.

The county clerk processes election ballots and delivers an abstract of votes on city measures and candidates to the chief city elections officer following the election. This abstract contains the final, official results of the election, summarized and signed by the county clerk. The chief city elections officer is authorized to canvass the votes on each city measure. If two or more of the approved measures contain conflicting provisions, the chief city elections officer proclaims which is paramount.

Finally, not later than 30 days after the election, the chief city elections officer prepares and delivers certificates of nomination or election to each

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city candidate who received the most votes for nomination or election to office.

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Thank you to

- Joel Morton, Senior Attorney, Metro

for updating this chapter in the Fall of 2010.

CHAPTER 6 – RELATIONS WITH OTHER GOVERNMENTS

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A. INTRODUCTION

One of the basic facts that an official of a city, county or other local government unit must learn is that a local government unit is not really a completely independent, self-governing entity.

The city is connected financially and legally to a complex, interlocking, and interdependent system of governments – federal, state and local. Local government officials must devote their attention and energies not only to the internal affairs of their organizations but also to a sometimes bewildering array of intergovernmental concerns.

B. INTERLOCAL RELATIONS

Intergovernmental relations among local governments in the same community are perhaps the most visible. Most citizens are likely to be residents of several overlapping local government units in addition to the city.

CITY-COUNTY RELATIONS

The city-county connection is mostly defined by law, but some aspects are negotiated voluntarily by city and county officials. Examples of each are given in the following subsections.

GENERAL LEGAL RELATIONS Legal questions sometimes arise concerning the jurisdiction of county governments inside city limits. Expanded exercise of police power by counties under home rule charters and under powers delegated by the legislature in recent years has made this more of an issue than it once was.

Some questions of jurisdiction are covered by statute. For example, 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.

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 relegated to itself under its charter the power to regulate the same subject."

LOC A-Z Index:
Resources on ORS
Finance and Taxation

SPECIFIC STATUTORY RELATIONS Many state laws, both mandatory and permissive, regulate city-county relations in specific matters. 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. State law also requires counties to conduct city elections, stipulates that an area

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newly annexed to a city retains county zoning until the city changes it, and regulates city-county relations in other ways.

Counties also administer a number of services that extend to residents of cities as well as unincorporated areas – public health and mental health programs, property document recording, solid waste disposal, food stamp distribution, and others.

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. There are also disagreements as to the timing and conditions of transfer of a county road to the city, including the standards to which the roads must be improved prior to transfer. City councils and county governing bodies in many areas hold joint periodic meetings to keep communications open on these and other issues.

INTERLOCAL CONTRACTS AND AGREEMENTS

Most interaction among local governments is carried out under formal contracts or agreements, and by informal cooperative arrangements for the provision of specific services or facilities by two or more units. Combinations may be between cities and counties, cities and neighboring cities, cities and school districts or special districts, etc.

ORS 190

STATUTORY BASIS Intergovernmental contracts and agreements are authorized under an Oregon law, ORS chapter 190, that permits a unit of local government to enter into an 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 has authority to perform.

A unit of local government may also cooperate with an agency of the state or federal government. Cooperative agreements with an agency of another state must be submitted to the attorney general for review prior to execution.

SCOPE OF SERVICES UNDER INTERGOVERNMENTAL ARRANGEMENTS Some of the most common interlocal agreements are those that provide for sale of water by a city or water district to other cities or water districts, contracts for firefighting services by a city or fire district to other cities or fire districts, and contracts for provision of police or jail services by the county sheriff to one or more cities in the county. In addition to these kinds of contracts, cooperative agreements have been used for some highly complex intergovernmental arrangements and transactions. Some examples are:

- Cooperative library services in Marion, Polk and Yamhill counties, which involved an area wide tax levy by Chemeketa Community College and various shared-service arrangements with cities in the three counties.
- Ownership and operation of a joint city hall-school district administration building in Gresham, providing for joint use of public reception area, switchboard, meeting rooms, technical library, and lunchroom.
- Sharing of equipment owned by Polk County, Monmouth, Independence, and Dallas, and a general agreement among the same parties to meet periodically, review additional possibilities for cooperation, and oversee administration of several existing cooperative agreements.

GUIDELINES FOR INTERLOCAL COOPERATION A decision to enter into a cooperative arrangement with one or more local governments cannot be made on the basis of general principles alone, but must be made in the context of the particular circumstances. The National Association of Counties' Research Foundation has published a checklist of questions relevant to such a decision. In general, the questions include 1) legal considerations, including specific legal powers and limitations of the parties, provisions of state statutes, and liability arising from contract performance; 2) financing considerations, e.g., the need to provide, where appropriate, for charging the full cost of services to contracting parties, the equitable distribution of revenues from the cooperative operation, etc.; 3) political and policy considerations, such as the effect on local control of pooling resources, and the level of mutual trust and confidence among the contracting parties; and 4) the impact of the arrangement on existing resources of the parties, including the impact on personnel already involved in providing the service, new demands on the capital plant of the unit that will provide the service, and similar considerations.

INTERGOVERNMENTAL COUNCILS

FEDERAL AND STATE SUPPORT Councils of government are voluntary associations of local governments (including a variety of special districts) designed to provide a broad range of services for their members. The services provided within each council of government (COG) 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.

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Councils of government encompass 28 of Oregon's 36 counties and includ almost 93% of the state's population. These organizations 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.

On a more specific level, each COG provides a unique mix of direct service delivery, technical assistance, and regional coordination and cooperation. The diversity of services provided by each COG is unique in both size and scope because the needs, issues, and expectations within each region are unique. This diversity, however, also challenges the ability of state agencies to recognize and appreciate the potential role of COGS in statewide service delivery.

Oregon's councils of government generally deliver one or more of the following categories of services:

- Transportation planning;
- Economic and community development;
- Land use planning;
- Small business development;
- Job training;
- Natural resources planning (protection and preservation);
- Services to senior citizens and the disabled;
- Housing rehabilitation;
- Small-group facilitation (e.g., strategic planning, team-building);
- Grant preparation and administration;
- Data collection and management ;and
- Cooperative governmental services (e.g., regional telephone operations).

The only exception to the typical structure of COGs in Oregon is Metro, which functions as a true regional government encompassing the 24 cities within the Portland metropolitan area. Metro's services include regional transportation planning, solid waste management, and urban growth boundary management. It also manages several regional public facilities, including the Oregon Zoo and sports and entertainment complexes. Metro's unique status as a regional government enables it to exercise taxation and enforcement authority within its area of jurisdiction.

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C. STATE-LOCAL RELATIONS

Even in states such as Oregon where cities have broad grants of home rule power, cities must still work with the state legislature, state agencies and state courts. Home rule applies only to matters that do not affect the interest of the state as a whole or of other local governments on such matters as the environment, economic development, public health, and many other areas of public concern. Conflicts sometimes are inevitable, and it is occasionally necessary that they be resolved by court action.

OREGON STATE GOVERNMENT OVERVIEW

THE OREGON LEGISLATIVE ASSEMBLY The organization of the state legislature and its functions, procedures, and methods are of vital importance to local government officials. 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.

The legislature's powers are broad. It may enact laws on any subject not specifically prohibited by the state or federal constitutions. It may not, however, enact laws that infringe on constitutional home rule powers and powers expressly delegated to the federal government.

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.

With the passage of Measure 71 in November 2010, Oregonians approved a constitutional amendment requiring the Oregon Legislature to meet annually. This change requires the Legislative Assembly to meet each year, limits regular sessions to 160 calendar days in odd-numbered years and 35 calendar days in even-numbered years, and allows regular session to be extended by five days with an affirmative vote of two-thirds of the members of each chamber. Legislative activity continues during the interim through numerous interim committees, task forces, and standing committees. Moreover, either the Governor or a majority of members of both chambers can call the legislature into special session.

Local government officials receive information from many sources about bills that might affect them, but one of the most important is the Weekly 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.

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EXECUTIVE BRANCH AGENCIES City and county governments have many direct contacts with state agencies, and it is necessary for local government officials to be familiar with the organization of the state executive branch and with state agencies that have a major impact on city and county programs and finances. Probably the best source of general information about state government is the *Oregon Blue Book*. It provides organization charts, descriptions of state programs and activities, names of key officials and board or commission members, and addresses and phone numbers of individual agencies. The following list of state agencies with programs that affect local government is not complete, but it illustrates the kinds of state departments, agencies and services of which local officials should be aware.

Oregon Blue Book

- **DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT** *(DLCD)* Administers statewide land use goals and rules; reviews city and county comprehensive plans and land use ordinances and may appeal amendments thought to be in conflict with statewide goals or acknowledgment orders; provides grants-in-aid and technical assistance, both from its main office in Salem and field offices around the state.

DLCD Website

- **DEPARTMENT OF ENVIRONMENTAL QUALITY** *(DEQ)* Promulgates standards for air and water quality and enforces them through a permit system (except in Lane County where the county and its cities have established a regional air pollution authority that administers the state standards); establishes standards for noise control and conducts limited enforcement through complaint investigation; provides planning assistance; issues permits; enforces standards; administers grants-in-aid; provides technical assistance and advice on a wide range of matters such as water and air quality, solid waste, and recycling.

DEQ Website

- **DEPARTMENT OF REVENUE** Promulgates rules and regulations and supervises county assessors in administration of the ad valorem tax system; appraises utility, timber, and industrial property for ad valorem tax purposes; offers official interpretations and technical advice and assistance to local governments in administering the state local budget law; offers other services, including state administration of locally enacted income, sales, or employment taxes.

Department of Revenue Website

- **DEPARTMENT OF TRANSPORTATION** *(ODOT)* Constructs and maintains state highway system; administers federal and state grants-in-aid for city and county street and road systems; administers federal and state grants-in-aid for transportation facilities and programs other than motor vehicles, including airports and public

ODOT Website

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transit, and for various categories of parks and open space; provide technical assistance and advice regarding these and other transportation and park matters.

Secretary of State Web Site

- **SECRETARY OF STATE** Prescribes local government audit standards, maintains a list of approved auditors, and supervises implementation of audit recommendations; prescribes rules and supervises the administration of elections.

State agencies with programs affecting local governments may adopt rules and regulations that have the force of law. But the Administrative Procedures Act excludes agency action "directed to . . . other units of government which do not substantially affect the interest of the public" from the definition of a rule. Therefore, unless the "substantially affect" language applies, local governments do not have the same rights to notice, hearing and other procedural rights accorded to private individuals. Local governments must be vigilant in tracking agency actions and proposed rules. Much of the work of the League of Oregon Cities involves representing local government interests with respect to the numerous state-agency programs that affect them.

JUDICIAL BRANCH 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 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. For additional information about the legal framework of local government, see Chapter 1 Local Government in Oregon.

STATE-LOCAL INTERACTION

LOC Publication: City-State Relations Taskforce Report

The state deals with local governments in several ways, most of which can be characterized either as actions to control local governments in some way or as actions that provide assistance to local governments.

The state exercises control over local governments by 1) preempting their authority or jurisdiction over certain matters; 2) imposing limitations or constraints on their activities (usually in financial matters); or 3) mandating certain functions, activities, or expenditures. Varying degrees of state supervision and enforcement accompany these preemptions, limitations, and mandates.

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The state assists local governments by providing financial aid in the form of shared revenues, grants, and reimbursements. It also assists local governments through a variety of cooperative activities and technical assistance programs.

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 are such preemptions as those in the state traffic code and the state law on obscenity. Under these laws, local governments are merely preempted from enacting local ordinances or regulations that conflict with state law. A 1986 Oregon Supreme Court case, *City of Portland v. Dollarhide*, 300 Or 490 (1986), 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.

LIMITATIONS Limitations and constraints are used extensively to regulate local governmental finance policy and administration. The statutory debt limits, and limits on the length of time for which a serial levy may be approved, are examples of this kind of state action. The state also has imposed limitations and constraints in other areas of local concern, including the conduct of local elections, political activity of public employees, and public contracting.

MANDATES Mandates differ from preemptions and limitations in that they require some specified local government action, while preemptions prevent local government action, and limitations determine the extent or manner in which a local government may act on an otherwise discretionary matter.

Studies have defined mandates generally to include any state action that requires increased local government expenditures. Mandates may be imposed either by statute or administrative rule, and they may take the form of either direct orders or conditions attached to an otherwise voluntary action, such as acceptance of a grant-in-aid. Among hundreds of examples of mandates that might be cited are laws and regulations requiring local governments to prepare and implement comprehensive plans, provide unemployment and workers' compensation for their employees, and enforce certain state standards for operations of local lock-ups and other corrections facilities.

Local governments acknowledge that some state mandates are necessary, because they deal with matters of statewide concern that require uniformity of treatment – for example, public health and safety and property tax administration. Others may be desirable because they effectuate sound

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public policies, such as providing compensation for injured workers or establishing the right to bargain collectively regarding employee relations.

However, local governments object to mandates that they regard as unnecessarily intrusive. For example, cities object to a law that requires preparation of five-year revenue projections. Generally, they object to state mandates that impose additional costs but provide no additional state revenue with which to meet the added costs.

Oregon Constitution, Article IX, Section 15

In November, 1996, the voters enacted an amendment to the constitution that requires the legislature to reimburse local governments when a program is mandated. The requirement can be overridden by a three-fifths vote of each house of the legislature. See Article XI, Section 15 of the Oregon Constitution.

Under Article XI, section 15 of the Oregon Constitution, local governments 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. There are several exceptions to this power, however, so local governments should consult with their legal counsel to determine whether and to what extent the power applies to an unfunded mandate imposed by the state.

SUPERVISION State supervision of local government activity is always associated with state mandates, although not all mandates are made subject to supervision by any particular state agency.

However, mandates that local jails contain certain facilities and observe certain operating practices, as well as many others, require supervision from a state agency that is specifically charged with enforcement.

FINANCIAL AID City revenues collected by the state as a percent of total city revenues have been stable or declining over the past several years. Cities cite various reasons to support their entitlement to city revenues collected by the state, including the need to compensate for state-mandated expenditures, restrictions imposed by the state on the ability of local governments to raise money from property taxes, and various reasons related to specific programs, such as local law enforcement costs attributed to state liquor laws.

D. FEDERAL-LOCAL RELATIONS

Important and complex interactions have developed between local governments and the federal government despite the fact that the United States Constitution does not mention local governments. Cities and counties are subject to the same federal constitutional limitations and their charters

and ordinances bear the same relation to federal powers as do state constitutions and statutes.

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OREGON CITIES AND FEDERAL PROGRAMS

Despite a reduction in federal funds, cities remain subject to many federal laws and regulations. Federal powers derived from the Commerce Clause and the Fourteenth Amendment of the U.S. Constitution have been exercised to subject cities to a variety of requirements in such areas as nondiscrimination, employment policy (including minimum ages, maximum hours, and occupational health and safety), and environmental quality. Moreover, many crosscutting federal regulations remain applicable to cities that receive money from any federal source, including such requirements as removal of architectural barriers in public buildings and facilities, Davis-Bacon prevailing wage requirements on public contracts, historic preservation requirements, uniform relocation requirements, etc.

E. DEALING WITH OTHER GOVERNMENTS

Local government officials deal constantly with other local governments and with state and federal agencies on administrative matters of mutual concern. When special problems arise, including problems that indicate the need for policy or program revision by another government at the same or a different level, local government officials may need to establish direct contact with legislative committees or headquarter offices of state or federal agencies. They may use the services of several organizations that have special expertise in intergovernmental relations in making these contacts.

LOCAL GOVERNMENT ASSOCIATIONS

League of Oregon Cities Website

LEAGUE OF OREGON CITIES The League of Oregon Cities is readily available to city officials for information and assistance on intergovernmental matters. This organization, which maintains a full-time staff in Salem, is supported primarily by dues paid by member cities. The League of Oregon Cities, organized in 1925, is governed by a board that includes the president, vice president, immediate past president, treasurer and 11 members elected at large at the annual conference.

Legislative committees and special work groups are the foundation of the League's policy development process. Composed of city officials, these groups are charged with analyzing policy and technical issues and recommending positions and strategies for the League. In addition, the League of Oregon Cities staff rely on the input and expertise of committee members as they advocate for city interests in the legislature and with state and federal agencies.

LOC Policy Committees include the following:

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- Community Development;
- Energy;
- Finance and Taxation;
- General Government;
- Legal Advocacy;
- Human Resources;
- Telecommunications, Cable and Broadband;
- Transportation; and
- Water.

The League of Oregon Cities publishes a monthly news magazine called the Local Focus, and an electronic Weekly Bulletin each Friday. It provides regional training though the Oregon Local Leadership Institute (OLLI), coordinates a Small Cities Support Network, provides a legal inquiry service, conducts research, provides other services to member cities, and functions as the cities' representative to state legislative bodies and state agencies. The mission of the League of Oregon Cities is to be the effective and collective voice of Oregon's cities and their authoritative and best source of information and training.

Two insurance programs are operated for cities: an Employee Benefits Service (EBS) for medical/dental and life insurance, and the City/County Insurance Service (CIS) for liability/property and workers' compensation insurance. Several statewide professional public employee organizations are affiliated with the League. They include the Oregon Mayors Association (OMA), Oregon Section of the Oregon City/County Management Association (OCCMA), Oregon Municipal Finance Officers Association (OMFOA), Oregon City Attorneys Association (OCAA), Oregon Municipal Recorders Association (OAMR), Oregon City Planning Directors Association (OCPDA), and Association of Oregon Redevelopment Agencies (AORA). The League provides staff support to OMA and OCCMA by producing newsletters, coordinating conferences, and other activities.

NLC Website
USCM Website
ICMA Website
GFOA Website
IMLA Website

NATIONAL ORGANIZATIONS Many national organizations serve city interests in federal government affairs. For instance, with headquarters in Washington, D.C., the National League of Cities (NLC), U.S. Conference of Mayors (USCM), International City/County Management Association (ICMA), Government Finance Officers Association (GFOA), and the International Municipal Lawyers Association (IMLA) are funded through dues paid by individual cities and, in some cases, by state organizations. They also may receive federal grants for a portion of their revenue. They hold annual

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conventions, mid-year legislative conferences, and other national and regional meetings of many kinds, and they keep cities informed of federal affairs through weekly newspapers and other publications.

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CHAPTER 7 – WORKING WITH THE PUBLIC

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Two of the most important tasks of local government officials are to determine citizen opinion and to ensure that citizens have sufficient information to form intelligent opinions. For these tasks to be carried out successfully, the city should have an active public information program and must provide opportunities for citizen participation.

A. CITIZEN PARTICIPATION

LOC A-Z Index: Resources on Citizen Involvement

The proverbial "two-way street" is important in achieving effective citizen participation in city government. Success depends on both the attitudes and interests of citizens and city officials. Citizens need to know that their efforts are recognized and considered in the decision-making process. Public hearings, advisory committees, neighborhood associations, volunteer participation, public opinion polls, and interest groups are several avenues in the "two-way street" of citizen participation.

PUBLIC HEARINGS

With the exception of elections, public hearings are the most traditional and most prevalent way of getting citizens involved in local government decisions. There are several ways to make public hearings effective:

- *Schedule Appropriate Time*: Select a time that is convenient for the public.
- *Provide Adequate Physical Facilities*: Location, accessibility for the handicapped, acoustics, an adequate sound system, seating capacity and seating arrangements are all factors to be considered in arranging a public hearing. Public Meetings law requirements must be observed for public hearings (see Chapter 3 – section D – Council Meetings).
- *Conduct Prehearing Conferences*: 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.
- *Make an Opening Statement*: The presiding officer should open the hearing with a clear statement of the subject being considered and the procedures to be followed.
- *Establish Definite Procedural Rules*: Standard procedural rules for hearings have been established by many city councils. The rules can

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include time limits for speakers, registration of speakers, order of testimony, and provision for closing the hearing.

- *Provide for Staff Assistance*: Procedures vary, but a staff member may provide introductory remarks that present facts about the issue or present a staff recommendation, or both. After public testimony, staff may answer questions raised during the hearing. Staff should not comment during the period provided for citizen's testimony.
- *Debriefing*: In closing a hearing, the presiding officer should identify follow-up action needed for unresolved problems or questions and announce when and how action will be taken.

ADVISORY COMMITTEES

There are many reasons for setting up citizen advisory committees and many ways to use them. A committee might be established to conduct an in-depth study of a special issue and to serve as a sounding board for city action proposals. Some committees are organized to improve communication with specific segments of the community, while others may help resolve conflicts between competing groups.

An advisory committee is generally created by city council resolution, and its members are appointed by the mayor or council. The resolution should describe the responsibilities and scope of activity of the committee and may also provide for a work program, time limit, requirements for reports, staff support, and financing. City councilors may be appointed as regular members of such committees, as ex officio members, or they may be given liaison roles.

Most 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 are subject to Oregon Public Meetings law requirements (see Chapter 3 – section D – Council Meetings).

NEIGHBORHOOD ASSOCIATIONS

LOC A-Z Index: Resources on 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

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argue that neighborhood groups tend to be parochial units that contribute to political factioning and a lack of cooperation with city hall or other community institutions, and that council leadership can be diluted unless councilors are willing to cultivate good relations with neighborhood leaders and residents.

PUBLIC OPINION SURVEYS

Another common method to determine citizen opinion and to increase citizen participation in local government decisions and activities is the use of public opinion surveys. A good survey has a clear goal. 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.

Depending on the goals, surveys require varying levels of assistance. The most reliable and unbiased results probably can be obtained by professional polling or survey organizations. If cities conduct their own surveys, technical advice may be available from staff, local colleges, or other outside sources. Help with folding, stapling, envelope stuffing, mailing, and coding responses is usually available from civic groups and other volunteers. If the questions are brief, surveys can be enclosed with utility bills.

VOLUNTEERS

LOC A-Z Index:
Resources on 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 in some way, whether serving in elective positions, on appointed boards or commissions, or participating in other ways, such as volunteering as a parks and recreation referee, librarian or firefighter.

While economic benefits of volunteerism are obvious, particularly when existing staff or funds are insufficient to carry out city programs, the improvement in public relations is of equal importance. There is often no more effective way to explain the intricacies of the governing process than by directly involving citizen volunteers.

There are pitfalls, however. Difficulties can be minimized and the effectiveness of volunteers can be enhanced by following a set of guidelines for their use. For example:

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- Carefully recruit and select volunteers;
- Clearly define volunteers' functions and provide the necessary training and orientation;

- Assign staff to check with volunteers periodically to answer questions and express appreciation for their efforts;
- Set time limits and establish work schedules for volunteer work, when appropriate;
- Check with the city attorney regarding possible liability in connection with proposed volunteer activities; and
- Check with the personnel officer regarding fringe costs and other liabilities.

B. COMMUNICATIONS POLICIES AND PROGRAMS

LOC A-Z Index: Resources on Communications

In order to effectively deal with the full spectrum of issues and situations confronting local government, written policy guidelines governing the dissemination of public information must be developed. Much like a city personnel manual, written policy guidelines create a framework for public issues to be dealt with in an objective fashion with all sides aware of the ground rules.

In developing policy guidelines on the level of citizen input, general categories that contain the most common issues facing local government can be created with each category linked to a stated objective. The objective criteria can serve to dictate the appropriate level of citizen input. For example, a category dealing with emergency issues would contain criteria addressing the issues' impacts on the health, welfare, or safety of the community's citizens. Action on a health annexation due to failing septic systems should be based on the recommendations and technical expertise of city or other professional staff. By contrast, a category including the land use development plans of a city would rely on extensive input from the general public as well as appropriate citizen advisory groups. The controlling criteria in this instance would take into consideration the long-range impact that these decisions will have on the city's physical development. A good communication program requires the structure offered by written policy guidelines as well as targeting efforts to insure that the appropriate individuals and medium are involved in the process.

In order for citizen participation to be effective, cities must not only solicit citizen opinion, but also must give citizens sufficient facts to formulate a reasoned position. A good communication program requires targeting, i.e., deciding who needs the information and what medium will convey it best.

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IDENTIFYING PUBLICS

"Publics" may be thought of as groups of individuals, organized or unorganized, with common interests and objectives. Everyone in a

community is a member of many publics: taxpayer, voter, political party member, merchant, parent, fisherman, student, union member, and consumer. Because everyone identifies with several publics, the strength of each public varies depending on the issue. If the issue is development of recreational facilities, the fact that an individual is a physical fitness enthusiast may be overshadowed by the fact that he or she is also a taxpayer.

When making communication decisions, officials need to know what publics are affected. If there is a general interest, information can be broadcast to all members of the community. If the issue is of interest to only a few, such as a land use decision affecting a small group of property owners, or a water rights issue affecting only people who fish, time and money can be saved by targeting information to only the affected publics.

COMMUNICATIONS MEDIA

LOC A-Z Index: Resources on Media Relations

PRESS, RADIO AND TELEVISION 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 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 helps establish good media relations. For example, such a policy could:

- Make the city clerk responsible for helping reporters obtain routine information from city records;
- Define and assign media relations duties and identify the kinds of inquiries employees may handle directly and those that should be referred to other city officials;

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- Encourage department heads and other administrators to maintain an open-door policy toward the media;
- Insist on full and frank disclosure of information whenever possible; and
- Require informal training sessions for department heads and other key officials to explain public information policies and to describe media practices regarding quotations, deadlines, use of photographs and news releases, and the advantages and limitations of press conferences.

News releases provide information for articles or for background and leads to other stories. Releases can be used best for announcement of a public ceremony, the text or abstract of a speech, changes in city functions or procedures, biographical information about a new city appointee or employee, or summaries of city reports 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 the release convey information in simple, direct terms.

It is important to be aware of and to accommodate the different procedures and requirements of various media. Newspapers have different schedules and deadlines, depending on whether they are published daily, weekly, in the morning, or in the evening. They usually assign one or more reporters to cover city affairs so that more in-depth and detailed coverage is given.

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 the dissemination of local disaster information.

Television presents unusual demands and opportunities. TV conveys images and action – a fire truck racing toward a burning building is more interesting than a city manager reading fire-loss statistics. Therefore, cities can release similar information to different media – a press release for details and a photo opportunity with background information. Artwork, maps, charts, graphs, photographs and slides can help television tell the visual story. Television and radio both require complex issues and situations to be accurately compressed into a few words.

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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.

PERSONAL MEDIA This includes speeches and presentations by government officials at civic affairs and service club meetings, personal contact through correspondence and conversations, appearances on radio or television discussion programs, publication of letters and articles in newspapers, and posting information on social media.

Personal appearances by government officials reduce the impersonality of government and expose officials to direct citizen feedback. Citizens often feel more comfortable expressing their views face-to-face at an informal meeting than testifying at a formal hearing or writing a letter. Speeches and discussions can be flexible and geared to specific audiences. Personal contacts provide valuable opportunities for communication by handing out pamphlets and publications.

The greatest communication impact occurs when city officials and employees are engaged in daily city business. People performing the functions of government influence the city's public image. To do their job properly, they must be aware of how their actions affect citizen perceptions of government.

The art of dealing with members of the public, especially in difficult situations, is a characteristic that all city staff need training in, but it becomes particularly critical for certain key personnel (i.e., city manager, police officers, county clerks). Often, the first and only exposure a citizen may have with city hall is the result of a situation that, unfortunately, is adversarial in nature and can range from a traffic ticket to a controversial public hearing. When the outcome of the particular situation is not resolved to the satisfaction of the particular individual, city staff must exercise the necessary damage control to insure that all city programs or activities are not condemned. The precise form this action will take will vary depending on the staff person involved. Generally, attentive listening to the citizen and a simple explanation of what the city must consider in rendering a decision is a first step. If people understand the relevant facts, are treated courteously, and given are every consideration that the circumstances will allow, the integrity of the process and the city will be enhanced.

CITY COUNCIL PUBLICATIONS AND REPORTS These publications include handbooks, special reports, annual reports, bulletins, posters, films, slide shows, and various other visual displays. Some cities publish an annual report, either separately or attached to the budget document. An annual report was originally just an accounting of yearly municipal activities, but it is now seen as an informative public relations tool. Special brochures are used to describe special programs or services, such as city recreational programs,

local improvement assessment procedures, and energy conservation programs.

DEVELOPING A COMMUNICATIONS PROGRAM

Four basic phases that a government communications model comprises have been identified:

1. **FACT-FINDING AND FEEDBACK:** The process of communications begins with determining public opinion. This requires defining publics, conducting opinion surveys and polls, and providing various methods of active citizen participation.

2. **ORGANIZING AND PLANNING:** An effective communications program requires careful organization and planning, including a written policy statement or set of guidelines that assigns staff responsibility, provides funding for reports and other communication devices, and provides training in public relations.

3. **ACTION AND COMMUNICATION:** A city government cannot expect to have a good public image if it fails to assist the media or to provide information about city functions and problems. Cities should develop media relations programs, publications, audiovisuals, and personal contacts with various publics.

4. **EVALUATION:** Periodic evaluation of the communications program will help keep the city's efforts on target and determine whether the goals and objectives of the program are being met.

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Names listed in alphabetical order.

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As a member of the governing body of a municipal corporation, you have assumed a tremendous responsibility. The financial management of your city and the annual budget process receive a lot of attention. New financial procedures, practices, regulations and constraints befall the city almost daily. Yet, residents expect councilors to oversee the city with appropriate policies and controls. This chapter reviews the many areas of financial management and budgeting in which councilors become involved.

A. OREGON PROPERTY TAX SYSTEM

LOC A-Z Index: Resources on Property Taxes

The Oregon property tax system continues to be a primary focus of Oregon citizens. While property tax revenue makes up only a portion of most city budgets, it is usually a critical resource supporting daily operations. Therefore, it is important to understand the Oregon property tax system because it affects how the city is financed. Both the Oregon Constitution and Oregon Revised Statutes limit the amount and types of tax a city may impose.

The Oregon Constitution contains several key provisions on property tax limitations. The oldest provision limited the amount of property taxes that a local government may levy without a vote of the people. The voter approved tax levy was called a tax base This limitation, first adopted in 1916, was repealed and replaced by Ballot Measure 50 in 1996.

Oregon Constitution, Article XI, Section 11(b)

However, the first property tax limitation came in 1990 with the passage of Ballot Measure 5. Article XI, Section 11(b), Oregon Constitution. Ballot Measure 5 imposed a tax rate limit on local governments: one for schools (kindergarten through community colleges), and one for all other local governments.

Ballot Measure 50 was adopted by the voters in November 1996. Together with Measure 5, this ballot measure governs the current property tax system. BM 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.

BALLOT MEASURE 5 LIMITATION

Oregon local governments are limited to billing each property tax account no more than $10.00 per $1,000 of market value plus any voter approved general obligation bonded debt (school districts have a $5.00 limit). The actual amount an individual property owner pays in property taxes each year still depends on four factors:

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- The total amount levied by the various local government taxing unit
- The currency and accuracy of the market value of the individual property. The market value of property is to be determined as of January 1 of each year by the county assessor.

- The Measure 50 assessed value of the property; and
- The $10.00 tax rate limit in the state constitution.

The tax rate is generally expressed in dollars per $1,000 of assessed value. The tax rate of each taxing district in which property is located is multiplied by the Measure 50 assessed value of the property. If the actual taxes will exceed the $10.00 per $1,000 of real market value limit for general government operations, the assessor reduces the levies to bring them down to the limit. Voter approved debt service is not included in the $10.00 limit; so the actual total tax rate may be higher than $10.00, but the portion that goes for operations may not exceed $10.00.

BALLOT MEASURE 50 LIMITATION

Ballot measure 50 changed the Oregon property tax system again by amending the state constitution. Some key features of the measure include:

- Creation of a maximum assessed value for each property in 1997 equal to 90% of the 1995-96 real market value;
- The establishment of a permanent tax rate for each local government and school district set by the state;
- A cap on assessed value growth of 3% annually, except for new construction, subdivision, remodeling, rezoning, loss of special assessment or exemption;
- Allowance for a Local Option Levy (see following discussion on Other Levies);
- Limitations on debt financing to bonds for capital construction or improvements; and
- New requirements on voter turnout for Local Option Levies and Bonded Debt.

After Ballot Measure 50 was adopted, the state legislature adopted enabling laws and the state established each jurisdictions permanent property tax rate. No action of the city may increase the permanent rate. The permanent tax r is applied to the assessed value of property, which is the lower of either the market value or the maximum assessed value of the property each year.

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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 property tax to pay those bonds.

Annually, the county assessor reviews each property tax account and applies Ballot Measure 50 limitations first and then applies Ballot Measure 5 limitations in order to produce the tax bill.

Tax Rate Effect on $125,000 House

(Rate X 100 = Tax Bill)

Taxing Jurisdiction	Tax Rate x	Value = ($125,000/1,000)	Total Tax on $125,000 House
City X	$4.00	125	$500.00
County Y	$2.66	125	$332.50
Park District	$1.25	125	$156.25
Total Tax Bill for Local Governments	$7.91	125	$988.75

* Tax rate is per $1,000 of market value.

REAL MARKET VALUES AND ASSESSED VALUES

Ballot Measure 50 created two values for each property. 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. The maximum assessed value was established for each property based on a calculation that was made in the year after Ballot Measure 50 was approved. Maximum assessed values were established in 1997 as the 1995-96 real market value minus 10 percent. The Maximum Assessed Value increases by three percent a year plus additions for new construction, subdivision, remodeling, rezoning, loss of special assessment or exemption.

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.

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 Ballot Measure 50 passed, the assessed values of many properties are substantially lower than their real market values. 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 conditions. Once the real market value falls below the maximum assessed value, it becomes the assessed value for tax purposes that year. 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.

COMPRESSION (BALLOT MEASURE 5 LIMIT)

When the total of a local government (non-school) tax rates on a property for all purposes except payment of general obligation bonds exceed $10 per $1,000 of real market value, the property is said to be in compression. All property tax levies except levies for general obligation bonds are subject to compression.

Local option levies are subject to “special compression.” 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. Compression is calculated separately for each property, so it is possible for one property to be in compression, and for the neighboring property not to be.

If a property is in compression the local option levies are reduced first. If a property is subject to multiple local option levies then all local option levies are reduced proportionally. 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 (RMV).

Tax rates and compression can be confusing, because permanent tax rates are calculated and reported based on assessed values, which are usually lower than real market values. However, the Measure 5 limit is calculated based on real market values. Because of this it is quite common for an area to have more than $10 in combined tax rates for all general government purposes and the property owner is billed the full amount of the tax because the tax still does not exceed the Measure 5 limit. This is because the tax rates calculated on assessed value are still less than $10 per $1,000 of market value. If you live in a community that experiences compression, the County Assessor is the expert on this calculation in your area.

Example of Computation of the Local Government Tax Rate for a house with an Assessed Value of $100,000 and a Real Market Value of $150,000 – Not In Compression

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Taxing District	**Permanent Tax Rate (AV)**	**Amount of tax**
City X	$5.50	$550.00
County Y	$4.50	$450.00
Park district	$1.25	$125.00
Total	$11.25	$1,125.00
Ballot Measure 5 limit For property ($10 x $150,000/1,000)	$10.00	$1,500.00
Remaining tax capacity for this property		$375.00

Example of Computation of the Local Government Tax Rate for a house with an Assessed Value of $100,000 and a Real Market Value of $150,000 – In Compression

Taxing District	Permanent Tax Rate (AV)	Amount of tax before M5 limit	Proportionate Levy Reduction due to M5 limit	Amount of Tax Billed after compression
City X	$7.50	$750.00	($46.87)	$703.13
County Y	$5.50	$550.00	($34.38)	$515.62
Park district	$3.00	$300.00	($18.75)	$281.25
Total	$16.00	**$1,600.00**	($100.00)	**$1,500.00**
Ballot Measure 5 limit for property	$10.00	**$1,500.00**		

OTHER TAX LEVIES

A city may determine through the budget process that it needs additional funds to operate. State law allows for local option levies, either for a specific or general purpose. The three types of levies available to cities, including the tax rate, are:

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Type of Levy	Length	Purpose	Other Limitations
A. Permanent Tax Rate	indefinite	general	subject to BM 5 limitations
B. Local Option Levy			
1. Fixed Dollar	Up to 5 years	Any purpose	levy the same dollar amount each year, subject to BM 5 limitations and special compression
	Up to 10 years	capital purposes only	
2. Fixed Rate	Same as fixed dollar	Same as fixed dollar	levied as maximum rate per $1,000 AV; must estimate amount raised for each year, subject to BM 5 limitations and special compression
C. 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 BM 5 limitations

Local option levies for capital purposes may be for the lesser of ten years or the useful life of the assets. The asset (project) is also defined in statute to 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.

TAX ELECTIONS

There are election rules and hearing requirements regarding tax levy elections. There are special guidelines on how money measures are stated; local officials should consult with your City Attorney, the County Clerk or State Elections Division for specific ballot language.

Voter approval of the sale of bonds grants the city the authority to levy enough annually to pay the annual principal and interest obligation of the bonds.

SOME FEES ARE LIMITED BY BALLOT MEASURE 5 Part of Ballot Measure 5 limits the kinds of taxes and fees that are charged to property or property owners. If a charge on property or property owners does not comply with Ballot Measure 5, then the charge may be subject to compression, and may need to be collected by the county assessor. This is usually impractical, so most city charges are either not imposed on property or property owners, or are carefully written so they comply with Ballot Measure 5's limits.

If it is not clear whether a charge will be subject to Ballot Measure 5's limits the council may adopt an ordinance or resolution that classifies whether or not a tax, fee, charge or assessment is subject to the limitation. Taxpayers then have 60 days in which to challenge the classification. The council may also petition the Oregon Tax Court to determine that its classification is correct. If the city chooses not to classify revenues, ten or more taxpayers may challenge the tax, fee, charge or assessment within 60 days after the statement imposing the tax, fee, charge, or assessment is mailed to any one of the petitioners. The city may enact a classification ordinance/resolution at any time. It is important to know that changing the amount of the tax, fee, charge, or assessment does not open the door for taxpayer challenges. However, if the city changes the characteristics, attributes or purposes of the revenue, a new 60-day time frame for taxpayer challenge is created. Finally, depending on the outcome of a challenge, the city may be required to refund "excess funds" to the petitioners.

ASSESSMENT POLICIES AND ADMINISTRATION

Assessment of property is primarily done by the county assessor. The Oregon Department of Revenue appraises manufacturing properties valued over $1 million, public utilities, and certain timberland. County assessors must track both market and assessed values (as noted above, BM 5 requires market value and BM 50 requires assessed value). Oregon law requires all real property in each county to be appraised using a method of appraisal approved by the Department of Revenue administrative rules.

To do the appraisal, the assessor divides each county into appraisal areas, neighborhoods, value areas, or hot spots. Each year appraisers from the assessor's office estimate the real market value for properties within identified re-appraisal areas. Properties that are not included in the re-appraisal area are valued based upon market trends identified by the assessors certified ratio study.

Oregon law required that all property be valued as of the assessment date for the tax year. BM 50 changed the definition of the assessment date from July 1 at 1:00 a.m. to January 1 at 1:00 a.m. By choosing one particular day in the assessment year as the basis for taxation, the legislature has tried to ensure that all taxpayers are treated equitably.

BM 50 legislation created a Board of Property Tax Appeals (formerly called the Board of Equalization) and eliminated the Board of Ratio Review. Property owners who think that the value is too high may appeal to the board after they receive their tax statement in the third week of October and up to 5:00 p.m. on December 31. The Board of Property Tax Appeals is composed of three members selected by the county clerk. The board is a very important part of maintaining a fair and equitable property tax system in Oregon. If property owners, after appealing locally, are still not satisfied, they have further appeal

rights at the Magistrate Division of the Oregon Tax Court, the Regular Division of the Oregon Tax Court and the Oregon Supreme Court.

B. BUDGETING

ORS 294

Budgeting is an annual process by which cities identify the types and levels of services that can be provided within the constraints of available resources. Since the initiation of the budgeting process in the late 19th Century, the main objective of municipal budgeting has been to achieve control over public revenues (particularly taxes) and expenditures. However, the uses of budgeting have broadened as cities have grown more sophisticated and the practices, uses and procedures have become more complex.

LOC A-Z Index:
Resources on Budget Laws and Procedures

In directing a local government's efforts to fulfill its mission, the budget is one of the most powerful tools available to government leaders. It determines who gets what and expresses how the legislative body intends to address the community's needs and fulfill its goals.

Most citizens think of the budget as strictly a financial tool in which the budget allocates the city's resources. However, as a public document, it can serve many purposes, such as:

- A communication tool for elected officials and the administration to communicate decisions to the citizens and staff;
- A decision-making document which staff uses as a tool to ensure financial integrity;
- A management audit tool to measure performance;
- A policy tool for the mayor and council to express the goals and priorities for the next year;
- An implementation tool that translates the goals into action plans; and
- The financial plan of the city for the next twelve months.

To avoid some of the more serious errors and omissions that hamper goo budgeting practices, the city should include in the annual budget docume

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- A clearly written budget message outlining council goals and how budget addresses the goals and any major policy changes;
- Historical revenue and expenditure data on which the validity of financial projections can be assessed (state law requires two years of actual data: the current year budget as well as the proposed or adopted year's budget);

- A link between revenues and expenditures (such as how current year revenues compare to current year operating expenses);
- A list of funded positions;
- Fiscal policies stating the need, purpose and appropriate level of contingency accounts or fund balances;
- Debt service requirements; and
- A list of capital projects, their funding source and impact on future operating expenses.

BUDGET TYPES

There are four general types of budgets that have evolved over the years. Many city budgets are a combination of some or all of these four types:

- The **LINE ITEM BUDGET** is the most common budget type. It lists how much will be spent for every account item, by fund and department. Expenditures are broken into several categories: personnel services (salaries and benefits), materials and services, capital outlay and nondepartmental (transfers, reserves, contingencies, unappropriated fund balances). The line item budget is considered the simplest form of budget. It is basically used as a financial control tool.
- The **PROGRAM BUDGET** divides departmental budgets into programs. In some cases a program may cross departments. There is generally a narrative description of the program along with its cost and number of employees. Program budgeting makes it easier to know what the service priorities are and their total cost. A program budget usually requires more staff time to put together.
- The **PERFORMANCE BUDGET** is a program budget tied to performance. The budget shows where priorities lie and provides information necessary to decide if the priorities are correct. Developing meaning performance measures is time consuming and difficult. Once measurements are developed, it is often just as hard to develop acceptable service levels and to weigh competing needs. One of the positive aspects of a performance budget is that it communicates the amount of services you provide, i.e., the performance budget tells not only that the library checks out books but how many. It may also relay how efficiently it checks out books, i.e., 50 books per day per employee.

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- A **ZERO-BASED BUDGET** *(ZBB)* is a management planning process which requires an analysis, evaluation and justification of all levels of service associated with an identifiable function. It requires:

- scrutiny of old or existing activities as closely as new or proposed activities;
- reallocation of resources from low priority activities to higher priority activities;
- emphasis on alternatives for levels of expenditures and methods of providing services; and
- allowance for budget reduction or expansion in a planned, rational manner.

  ZBB requires the development of decision units (budget units) by dividing the budget units into decision packages (service levels). This allows the budget committee or council to analyze the packages and prioritize or rank the decision packages. Cities will use a variation of a zero-based budget and allocate a base budget of so many dollars and then evaluate, weigh and allocate decision packages over the base.

OREGON BUDGET LAW

ORS 294

Oregon Budget Law is found in ORS Chapter 294. The Oregon Department of Revenue administers this law and publishes the Local Budgeting Manual which serves as a basic reference document on the local budgeting process in Oregon. The law establishes standard procedures for preparing, presenting, and administering the budget. It requires citizen involvement through a budget committee and public hearings before the budget may be adopted.

The law requires a budget message to be prepared by the budget officer. The message should:

- Explain the budget document;
- Contain a brief description of the proposed financial policies of the municipal corporation for the ensuing year or ensuing budget perio

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- Describe in connection with the financial policies of the municipal corporation, the important features of the budget document;
- Set forth the reason for salient changes from the previous year or budget period in appropriation and revenue items; and
- Explain the major changes in financial policy. ORS 294.403

If the budget committee holds more than one meeting, the budget message must be given at the first meeting of the budget committee when the proposed budget is presented to the committee. ORS 294.426(2)(a).

Under ORS 294.438, cities must also include a financial summary with each budget that details resources, expenditures, full time employees per program, changes since last year, taxes to be imposed, and statement of indebtedness. Cities must also, upon request, make available a list of employee salaries, other than hourly or part-time employees. ORS 294.388(5).

The budget committee must issue a meeting notice that contains the following:

- The purpose, time and place of the meeting or meetings and the place where the budget document is available;
- That the meeting is a public meeting where deliberations of the budget committee will take place; and
- If the meeting described in the notice is a meeting at which the budget committee will receive questions and comments from members of the public, that any person may ask questions about and comment on the budget document at that time.

If the notice of the budget committee meeting is published only by publication in a newspaper, the notice must be published at least two separate times, not more than 30 days before the meeting date and not less than five days before the meeting date. The notice may also be published once in a newspaper and once on the city's website, subject to some limitations. If the notice is published by mailing or hand delivery, the notice must be mailed with the United States Postal Service or hand delivered not less than 10 days before the meeting date. ORS 294.426.

ORS 294.333 now requires notice of a change in the city's basis of accounting to be part of the notice of budget hearing under 294.416.

The budget committee is composed of the council and an equal number of citizens. It must elect a chair and secretary. Its function is to receive the budget message from the budget officer, receive public input on the proposed budget prepare minutes of the meetings, request information from the staff, amer and/or approve the budget for council adoption and set the property tax le The council is required to adopt the budget no later than the last day of th fiscal year, June 30. The budget and related filing forms must be filed with County Assessor by July 15.

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BUDGET CYCLE

Most cities adopt annual budgets, but they have the option of approving a biennial budget. There are four distinct stages in the annual budget cycle.

- The **FORMULATION STAGE** begins when the staff develops long range financial projections, presents budget assumptions to the budget committee, and begins to estimate revenues and expenditures and compiles them into a **PROPOSED BUDGET**.

- The **APPROVAL STAGE** involves the budget committee receiving the proposed budget, providing notice of, and holding a public hearing and recommending the **APPROVED BUDGET** for council **ADOPTION** of the final budget. The council must hold another public hearing and has the final authority to change the approved budget. However, if the change increases the property tax levy or increases a fund's approved expenditure by more than 10%, the budget must be referred back to the budget committee and notices must be published again.

- The **IMPLEMENTATION STAGE** begins on July 1 (the first day of the fiscal year). Occasionally, the budget may need to be adjusted. The city council has the authority to amend the budget through a resolution or ordinance (usually the mechanism used to amend the budget is the same mechanism used to adopt the budget). Appropriations may be moved from one department to another by a transfer resolution. Recognition of unanticipated revenues, such as grants, gifts or bond proceeds, may also be appropriated through ordinance or resolution adopted by the council.

- It is important to note that appropriations give the right to spend what has been approved by the council, but not spend additional revenues received. Any amount of revenue may be received without changing the budget. However, if there is a need to spend additional revenue during the fiscal year, a supplemental budget must be adopted. Under certain circumstances, the supplemental budget will resemble the budget process. State law defines which supplemental budget process must be used.

- The final stage, **EVALUATION STAGE**, is conducted at the close of th fiscal year. This results in the preparation of the annual audit and financial report.

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EXAMPLE OF A BUDGET CYCLE

FORMULATION STAGE

- October – Develop long range financial projections
- November – Capital Improvement Program developed
- December – Annual audit presented to Council (by 12/31); CIP work continues; Start preparing budget assumptions and instructions

DEVELOPMENT STAGE

- January – Budget committee approves budget assumptions; Departments prepare budgets

- February – City administrator/recorder reviews budgets with departments
- March – Proposed budget finalized

APPROVAL STAGE

- April – Budget Committee begins deliberations
- May – Budget committee approves budget for Council adoption
- June – Council adopts budget

IMPLEMENTATION- EVALUATION STAGE

- July – Start new fiscal year; close old year; File budget papers and certify tax levy to county by 7/15
- August – Annual audit begins
- September – Annual audit continues

FINANCIAL PLANNING

Preparing expenditure forecasts and reviewing existing and alternative revenue sources, rate structures and charges are important processes in finance and management policy. More and more cities do five to ten year projections and present them early to the budget committee and/or city council. The projections help to give the staff guidance on the direction for preparing the next year's budget. They may also highlight the need for review of various fees and charges, such as utility fees or systems development charges.

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C. FINANCIAL MANAGEMENT

In addition to the budgeting process, there are several other areas that councilors need to be aware of.

ACCOUNTING SYSTEMS

City governmental accounting consists of recording the city's financial transactions and reporting them back to management, the city council and the public. Governmental agencies must comply with generally accepted accounting principles (GAAP), as promulgated by the Government Standards Accounting Board (GASB).

A unique aspect of governmental accounting is its structure. Governmental accounting is based on a fund structure, which makes it different from private sector accounting. There are seven types of funds:

- The **GENERAL FUND** accounts for all financial resources except those accounted for in other funds and finances most of the major activities of the city.
- **SPECIAL REVENUE FUNDS** account for the receipt of revenues that have been earmarked for specific activities. For example, the state gas tax must be receipted and accounted for in a separate special revenue fund.
- **ENTERPRISE FUNDS** account for business-type activities which are self-supported by user charges. The water or sewer funds are examples. Costs that could be accounted for in an enterprise fund include debt service and depreciation of equipment.
- **CAPITAL PROJECT FUNDS** account for the acquisition of capital facilities. Revenues may be derived from bond proceeds, interfund transfers or grants. Bond proceeds to build a new city hall or fire station would be accounted for in a capital projects fund.
- **DEBT SERVICE FUNDS** account for the financing of interest and retirement of principal of general long-term debt. These funds include special assessment or Bancroft bond funds.
- **INTERNAL SERVICE FUNDS** account for the financing of goods and services provided by one department to all other departments on a cost reimbursement basis. Garage functions and facilities maintenance are common functions accounted for in an internal service fund.
- **TRUST AND AGENCY FUNDS** account for assets held by the city in trustee capacity or as an agent for individuals, private organizatio governmental units, and/or other funds. A library gift and memoria is an example.

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ORS 223
ORS 294

State law affirms the need for separate funds. There are specific requirements for separate funds for Bancroft bond debt service, ORS 223.285, and reserves, ORS 294.525.

BASIS OF ACCOUNTING

In addition to being aware of the fund structure, it is important to know that there are different ways of recording transactions. This is called the basis of accounting. Oregon local governments use either the full accrual, modified accrual or cash basis of accounting, or a combination of the three. The General Fund and special revenue funds normally use modified accrual while enterprise funds use full accrual accounting. With cash accounting, revenue is recorded only when it is received and expenditures only when actually spent. Modified accrual accounting recognizes expenditures when they are incurred and

revenues when they are received. Accrual accounting records revenue when earned or when taxes become a lien on the property, and expenditures are recorded when a liability is incurred, even though part or all of the payment may be made in another accounting period.

INTERNAL CONTROLS

The city is responsible for establishing and maintaining an internal control structure designed to ensure that the assets of the city are protected from loss, theft, or misuse and to ensure that adequate accounting data are compiled to allow for the preparation of financial statements in conformity with generally accepted accounting principles. The internal control structure should be designed to provide reasonable, but not absolute, assurance that these objectives are met. The concept of reasonable assurance recognizes that (1) the cost of the control should not exceed the benefits likely to be derived; and (2) the valuation of costs and benefits requires estimates and judgments by management.

ANNUAL FINANCIAL REPORT AND AUDIT

ORS 297

Oregon law requires an annual independent audit (ORS 297.435 exempts some small cities from this requirement under certain conditions). The required audit must be prepared by the Secretary of State or by an independent accountant who is licensed as a municipal auditor by the State Board of Accountancy. The Secretary of State's office has extensive supervisory powers over implementation of audit findings, including the power to withhold certa state payments until compliance is achieved.

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Some audits go beyond generally accepted accounting procedures and au requirements and provide a comprehensive annual financial report (CAFR goals of these reports are comprehensiveness and readability. These reports include a statistical history, letter from the administrator or finance director discussing the year, and extensive notes about the finances of the city.

Finally, some cities may conduct performance auditing. Performance auditing moves beyond purely financial and legal concerns to address both efficiency of operations and effectiveness of programs. Few cities have established performance auditing systems, but councilors may find such a system useful in establishing policies and programs and in evaluating those policies and programs in the achievement of overall goals.

GASB 34

LOC A-Z Index: Resources on GASB Statement No. 34

In June 1999, the Governmental Accounting Standards Board (GASB) issued GASB Statement No. 34, Basic Financial Statements-and Management's Discussion and Analysis-for State and Local Governments. Without a doubt,

GASB Statement No. 34 represents the most important single change in the history of accounting and financial reporting for state and local governments.

Governments traditionally have focused their reporting on groupings of "funds" rather than on the government "taken as a whole." The new financial reporting model will retain this traditional focus on funds, but at the same time will insist that fund financial statements be accompanied for the first time by financial statements that focus on the overall government (i.e., "government-wide" financial statements). Under the new financial reporting model, governments will focus on major individual funds rather than on fund types (with aggregated information presented for the total of all nonmajor funds). Under the specific rules provided in GASB Statement No. 34, a typical government is likely to have anywhere from four to six such major funds.

The new financial reporting model has three major changes from previous practice. The new requirements are: budgetary comparisons need to present the original budget in addition to the final amended budget; a budgetary comparison for the general fund and individual major special revenue funds must be included; and, governments will only be required to present the budgetary comparison as "required supplementary information," following the notes to the financial statements, rather than as a basic financial statement in its own right.

HOW GASB 34 HAS HELPED.

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After GASB 34 Citizen and Elected Officials are better able to:

- Assess the finances of the government in its entirety, including the year's operating results;
- Determine whether the government's overall financial position improved or deteriorated;
- Evaluate whether the government's current year revenues were sufficient to pay for current year services;
- See the cost of providing services to its citizenry;
- See how the government finances its programs--through user fees and other program revenues versus general tax revenues;
- Understand the extent to which the government has invested in capital assets, including roads bridges, and other infrastructure assets;
- Make better comparisons between governments; and
- The annual reports give government officials a more, comprehensive way to demonstrate their stewardship in the long term in addition to the

way they currently demonstrate their stewardship in the short term through the budgetary process.

GASB Statement No. 34 requires that financial statements always be accompanied by a narrative introduction and analytical overview of the government's financial activities in the form of "management's discussion and analysis" (MD&A). This ensures that narrative analytical information is presented. Prior to GASB 34, only those governments who elected to publish a Certified Annual Financial Report (CAFR) added the narrative analysis. The league strongly recommends that you carefully review the MD&A memo and if any of it is not clear that you seek clarification from your City Manager or Finance Director.

When governmental activities are included with other activities in the new government-wide financial statements, the focus for those activities will be on changes in total resources.

The consequences of placing money into specific funds (often directed by law) is that the funds may only be used for the stated purpose. This is often confusing to citizens who may see a large balance in one fund and not understand the limitations on how the resources may be used. We recommend you become familiar with the permissible uses and limitations of each fund so you can explain it to your constituents.

Governments are required to capitalize all future infrastructure acquisitions *and report on existing infrastructure assets.*

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D. DEBT MANAGEMENT

LOC Publication: Debt Issuance Manual

Most cities find it necessary to borrow money from time to time (e.g., to buy a fire truck or build a new wastewater treatment plant). Borrowings are not everyday occurrences, and they deserve special care.

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 an Oregon 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”).

For example, a city might be able to borrow money for a project from a state agency, from a commercial bank, or through an underwriter who will sell the city's bonds in the public securities markets. That city might be able to use general obligation bonds, full faith and credit loans, notes or revenue bonds to finance the project. Market conditions can change, and a method of financing that was ideal for one city project may be inappropriate for another project.

For many borrowings, an Oregon city can choose to do any of the following kinds of borrowings:

- **GENERAL OBLIGATION BONDS** pledge the "full faith and credit" of the city, and permit the city to levy an additional property tax that is sufficient to pay the bonds. Because these bonds are secured by this additional property tax, voter approval is required. General obligation bonds are usually the most secure form of borrowing available to a city, and therefore usually have the lowest cost.

- **REVENUE BONDS** are secured by a pledge of a specific revenue source or tax source, typically do not require voter approval and are usually subject to referral. The interest rates and other costs of revenue bo are usually higher than for general obligation bonds, and depend gr on the type of revenues that are pledged to pay the bonds.

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- Local improvement district or "Bancroft" bonds are bonds that are issued to finance the costs of local improvements that are assessed against neighboring property. Assessed property owners are entitled to pay the assessment, with interest, over at least ten years. Cities use those payments to pay the local improvement district bonds.

- **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.

Because the options may be complex and market conditions may be changing rapidly a city will usually benefit from engaging the services of outside experts early, so the city can make the most advantageous choices. The following outside experts are available to assist with most financings:

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- **NATIONALLY RECOGNIZED BOND COUNSEL** These are lawyers wh specialize in helping governments borrow money. They are typicall hired by the city, work for the city, are paid by the city, and give an opinion to lenders that the borrowing is enforceable, and (in appropriate cases) that the borrowing qualifies for tax-exemption or other federal subsidies. Most lenders will not loan substantial amounts to a city unless the city provides an opinion of nationally recognized bond counsel.

- **FINANCIAL ADVISORS** These are people with financial expertise who help governments obtain the most favorable terms on borrowings. They are hired by the city, work for the city and are paid by the city.

- **LENDERS AND UNDERWRITERS** These are lenders who loan money to governments. They are selected by the city and are typically paid from the proceeds of the city's borrowing. They work for the lending institution that employs them, and therefore may have a conflict of interest in advising the city about what best serves the city's interests. Every city borrowing has a lender.

TAX-EXEMPTION AND OTHER FEDERAL SUBSIDIES

ORS 287a

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 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”).

Recently Congress authorized “subsidy” bonds such as “Build America Bonds.” These are taxable bonds that are eligible for a federal interest subsidy that reduces the interest expense, sometimes below the interest expense associated with tax-exempt bonds.

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 usually very important to have bond counsel determine whether a project v qualify for tax-exempt or subsidy bond financing as soon as possible.

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DEBT LIMITS

ORS 287a

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, facilities for water supply, treatment or distribution, for sanitary or storm sewage collection or treatment, for hospitals or infirmaries, for gas, power or lighting, or for off-street motor vehicle parking facilities.

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 three (3) percent of the real market value of the city.

ORS 223

The city charter may also contain debt limits, either on long-term or short-term financing. For example, a city charter may contain a debt limit on “voluntary floating indebtedness,” i.e., debt that is not voter approved is not secured by an identified source of payment, like utility revenues or local improvement district assessments. The finance and/or legal staff should review these limits each time the council commits the city to long-term or short-term financing.

DISCLOSURE

ORS 287a

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.

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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 insure 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.

E. TREASURY MANAGEMENT

ORS 294

The city receives and spends money daily. Usually, the finance director, treasurer or city recorder manages the daily cash needs to ensure adequate funds are available to pay the city's bills and invests funds not needed for immediate payments. The goal of many investment programs is safety and principal protection rather than income earnings.

Even though there are state laws governing investment instruments, ORS 294.035, many cities have developed a formalized investment policy that identifies appropriate types of securities in which to invest. Diversification, liquidity, maturity, default risk, investment return goals and staff responsibilities are factors to consider when investing government funds. The State Treasurer's Oregon Short Term Fund Board will review the policy and provide guidance.

LOCAL GOVERNMENT INVESTMENT POOL

The Oregon Local Government Investment Pool (LGIP) was created by the 1973 Legislature. It directs the State Treasurer to make investments for participating local government units. Local governments are limited to investing $20 million. Most local governments participate in the pool.

The pool may invest in a variety of instruments not allowed by individual local governments. The high liquidity of the pool is one of its main benefits. Cities often have funds available for short periods, and the pool provides an opportunity to invest relatively small amounts for periods as short as one day and at competitive investment rates.

BANKING SERVICES

Banking services include the collection of funds, disbursement services, investment services and credit services. The trend toward better services and improved technology is apparent in the city's banking relations. Diversifyi city's banking relations among the financial institutions within the commu may be politically acceptable, but may not be the best policy for efficient management. By consolidating, the finance staff will have an easier time controlling and auditing cash flows for different functions and purposes. As of January 1, 2004, cities have the option of banking with credit unions, in addition to traditional banks.

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CONCLUSION

Local Government leaders need a sound understanding of local finances to be good stewards of the public's money. While financial administration is not a highly visible management responsibility, good money management is essential to ensuring that the ways and means can be found to fund the city's functions and that adequate internal controls are in place to ensure the city's financial integrity.

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Thank you to

- Alexandra Sosnkowski, City Attorney, City of Vernonia

for updating this chapter in the Fall of 2010.

CHAPTER 9 – PURCHASING AND PUBLIC CONTRACTS

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A. INTRODUCTION

Public contracts are generally the purchase, sale or lease of personal property (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, and to a lesser extent by the Oregon Constitution and local charters.

The public contracting statutes require all public bodies to procure public contracts through a competitive process, with some exceptions and permitted exemptions. Familiarity with these statutory requirements is essential for a valid procurement. These materials will provide an overview of Oregon's public contracting laws, identify the various types of public contracts subject to the laws, describe how to legally procure a public contract, and provide tips on drafting a local public contracting code.

ORS 279
ORS 279a
ORS 279b
ORS 279c

Oregon's public contracting statutes are found in ORS Chapters 279, 279A, 279B, and 279C and are commonly referred to as the Public Contracting Code. In 2003, the Public Contracting Code received a major legislative overhaul as previously all public contracting provisions had been contained in one chapter, ORS Chapter 279. The 2003 legislative changes divided the code into the various subchapters which make the Code much more user friendly.

OAR 137-046
OAR 137-047
OAR 137-048
OAR 137-049

In addition to the Public Contracting Code, the Attorney General must prepare and maintain model rules of procedure (administrative rules) under the Code for public contracting. These rules are found at OAR Chapter 137 Divisions 46 through 49 and are updated following each legislative session.

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.

B. PUBLIC CONTRACTING OVERVIEW

HISTORICAL BASIS—COMPETITIVE PROCUREMENT

Historically, public contracting codes required that all public contracts be procured through the competitive bidding process. Today, public contracting codes continue to require that public contracts be procured through some sort of competitive process, whether by competitive bidding, request for proposals or some other process that satisfies the principles underlying competitive procurement.

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The Oregon Public Contracting Code succinctly states the principles unde competitive procurement. They are to:

- "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[;. . .]
- Promote efficient use of state and local government resources, maximizing the economic investment in public contracting within this state[;and]
- Allow impartial and open competition, protecting both the integrity of the public contracting process and the competitive nature of public procurement."

ORS 279

ORS 279A.015. Unsurprisingly, these principles are recurring themes throughout Oregon's Public Contracting Code and can provide valuable guidance for the local public contracting agency when preparing and/or administering its own code.

As with most laws, exceptions followed the rule. In the case of public contracting, professional services contracts were among the first recognized exceptions based on the rationale that a professional's qualifications are of greater importance than the cost of the services. This and various other exceptions are now incorporated into the Public Contracting Code (and are discussed in detail below). In addition, the Public Contracting Code also provides the opportunity for a public body to exempt particular public contracts or classes of public contracts from the competitive process under certain circumstances.

SOURCE OF LAW

ORS 279

OREGON PUBLIC CONTRACTING CODE As noted above, the primary source for Oregon's public contracting law is the Oregon Public Contracting Code codified in ORS Chapters 279, 279A, 279B, and 279C. State and local contracting agencies must comply with the requirements of the Code in their public contracting.

ORS Chapter 279A sets out the general provisions for the entire Code, including many of the terms and their definitions, describing the types of contracts and entities subject to the Code, and addressing 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. Lastly, this chapter establishes several 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

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exemptions), electronic procurement, 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. This chapter also addresses the procurement of architectural, engineering and land surveying services, from which a local contracting agency can opt out through rulemaking. Lastly, this chapter contains provisions pertaining to public works contracts, covering the prevailing wage laws, hours of labor, etc.

The Public Contracting Code refers to the entity procuring the contract as the "contracting agency." The contracting agency may be the public entity acting through its governing body, or acting through a city manager, county administrator, or a department head to whom the governing body has delegated or permitted delegation of authority. The discussion below uses the term "contracting agency" to refer to either the governing body or the person with delegated authority under the local code.

OAR 137
ORS 279
Attorney General's proposed rules for public contracting

ATTORNEY GENERAL'S MODEL RULES The administrative rules adopted by the Attorney General in OAR Chapter 137 are variously referred to as the Model Rules or Attorney General's Public Contracting Rules. A public body subject to the Public Contracting Code may opt out of the Model Rules established in OAR Chapter 137 and adopt its own rules of procedure for public contracts under ORS 279A.065(5). Even if not opting out, public bodies also have rulemaking authority to address matters not addressed in the statutes or Model Rules.

In order to opt out, the public body must adopt its own public contracting code (or "local rules") that specifically states that the Model Rules do not or only partially apply to it and that prescribe the rules of procedure that it will use instead. ORS 279A.065(5). Thereafter, the statute requires the public body to review its own code each time the legislature makes legislative changes to the Public Contracting Code and each time the Attorney General makes changes to the Model Rules to ensure compliance. *Id.*[5]

OAR 137-046
OAR 137-047

OAR 839-025

The administrative rules adopted under this chapter are contained in OAR Chapter 137 Division 46 and apply to all public contracting conducted under the Public Contracting Code. OAR Chapter 137 Division 47 contains the administrative rules implementing ORS Chapter 279B. The administrative rules adopted under this chapter are contained in two divisions—Division 48, which

5 Note that when the 2003 legislative changes to the Public Contracting Code became effective on March 1, 2005, all previously existing local public contracting rules and exemptions were repealed and the contracting agency became subject to the Model Rules adopted by the Attorney General, unless the local agency adopted its own new rules. Existing contracts continued to remain in effect and the application of the former statutes and rules may continue to be important to administering those pre-existing contracts.

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describes procedures for procurement of architectural, engineering and land surveying services, and Division 49, which governs the procurement of construction contracts. The rules addressing public works are adopted and enforced by the Bureau of Labor and Industries (BOLI) and are found at OAR Chapter 839 Division 25.

LOCAL PUBLIC CONTRACTING CODE AND CHARTER Lastly, the local public contracting code (if the public body has opted to adopt one) will apply to public contracting as well. The Oregon Constitution and local charters may also be a source of law in public contracting, but usually with respect to a few limited issues, such as debt limits (debt limits are discussed in further detail below). Local charters may contain other applicable provisions and should always be consulted.

WHO IS SUBJECT TO PUBLIC CONTRACTING LAW?

The Public Contracting Code applies to all "public bodies authorized by law to conduct a procurement." ORS 279A.010(1)(b). A public body is any state government body, local government body and special government body, or any interstate intergovernmental entity formed by any state government body, local government body, or special government body. ORS 174.108(3) and 174.109.

A local government body refers to all cities, counties and local service districts and all of their administrative subdivisions. ORS 174.116(1)(a). It may also include an entity created by a local government body whose purpose is to give advice to the local government, unless the ordinance or resolution creating the entity "indicates that the entity is not a governmental entity or the entity is not subject to any substantial control by local government." ORS 174.116(1)(b).

A special government body is an intergovernmental body formed by two or more public bodies, or any entity formed by a special government body whose purpose is to give advice to the special government body, unless the ordinance or resolution creating the entity "indicates that the entity is not a governmental entity or the entity is not subject to any substantial control by the special government body." ORS 174.117. The term "special government body" also covers certain public corporations, school districts, charter schools, etc.

Because of the broad applicability of the Public Contracting Code, whether a particular procurement is a public contract subject to the Public Contracting Code will depend less on who the entity is procuring it and more on the type procurement itself.

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WHAT IS A PUBLIC CONTRACT?

IDENTIFYING A PUBLIC CONTRACT Thus, it is important to know what is and what is not a public contract. ORS 279A.010(1)(z) defines a public contract as follows:

> [The] sale or other disposal, or a purchase, lease, rental or other acquisition of personal property, services, including personal services, public improvements, public works, minor alterations, or ordinary repair or maintenance necessary to preserve a public improvement.

Thus, a public contract is the purchase of office supplies, equipment, construction services, paving, consultant services, software, web-based services, cleaning services, and so on.

ORS 279A.025 describes in detail when the Contracting Code does not apply. ORS 279A.025(2) through 279A.025(4) describe contracts and contracting activities that are not subject to the Public Contracting Code. Some of the more common or important exceptions to keep in mind are:

- Contracts between contracting agencies;
- 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).

Note, too, that by extension of the definition of a "public body," 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 the exclusion likely does not apply. The first exception in the list above is consistent with this conclusion.

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There are many more contracts excluded from the definition of a public contract under ORS 279A.025 which is always a good starting place when in doubt as to the applicability of the Public Contracting Code.

PERSONAL SERVICES CONTRACTS

A local contracting agency has authority to "designate certain service contracts or classes of service contracts as personal services contracts." ORS

279A.055(2). Generally, these are contracts for professional-type services. 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.

Architectural, engineering and land-surveying services contracts are treated a little differently and must be procured through the qualifications based selection (QBS) process outlined in ORS 279C.110 for certain projects over $900,000 for which the local agency receives State Highway Funds or a state grant or loan, or if the local agency has not adopted its own public contracting code. *See* ORS 279C.110(2). Otherwise, these contracts can be procured as a personal services contract under the local code if designated as such.

ORS 279

GOODS AND SERVICES CONTRACTS

Contracts for goods and services are governed by ORS Chapter 279B. The contract may be for goods, services, or both. Goods are supplies, equipment, materials, and personal property. ORS 279A.010(1)(i). Supplies, equipment, materials and personal property include any tangible, intangible and intellectual property, rights, and licenses. *Id.* Services are all other services not designated as personal services under ORS 279A.055 or under a local code. ORS 279A.010(1)(kk). Generally, these types of services are non-professional services.

Because a public improvement contract does not include contracts for emergency work, minor alterations, or ordinary repair or maintenance necessary to preserve a public improvement, these contracts will fall under Chapter 279B as goods and services contracts, although the hours of labor provisions of ORS Chapter 279C will apply and the prevailing wage provisions of Chapter 279C may apply if the project is a "public work."

PUBLIC IMPROVEMENT CONTRACTS

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Public improvement contracts are governed by ORS Chapter 279C. The contracts are for the "construction, reconstruction or major renovation or property by or for a contracting agency." ORS 279A.010(1)(cc). Howeve contract is not a public improvement contract if:

- No funds of the contracting agency are directly or indirectly used, except for participation incidental or related primarily to project design and inspection; or

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ORS 279c

- The work is emergency work; or

- The work is minor alteration, or ordinary repair or maintenance necessary to preserve the public improvement.

Id. The exclusion in (a) above means that projects for which labor is donated, such as by volunteers or volunteer neighborhood organizations, etc., are not public improvement contracts (nor are they "public works" for purposes of the prevailing wage laws.

LIMITS ON AUTHORITY TO CONTRACT

AUTHORIZED BY LAW To be able to enter into a public contract, the public body, agency, or person seeking to enter into the contract must be "authorized by law." The initial source of this authority will be found in the local charter or enabling statutes in the case of statutorily created entities. If the source of the authority is the charter, the charter will contain a provision giving the public body authority to enter into public contracts, often along with some requirements or limitations, such as in conformance with state public contracting laws. In either case, the Public Contracting Code further defines that authority and specifies that the public body's "local contract review board" is the entity authorized to contract under the Code and implement the Code provisions through rulemaking.

A public body's "local contract review board" is the governing body, unless the public body designates an alternative "[public] body, board or commission." ORS 279A.060. The local contract review board may then delegate some, most, but not all of its authority through rulemaking. ORS 279A.075(1). Thus, the city council or board of commissioners may delegate some or all authority to the city manager or county administrator and/or to department heads, and so on. How much delegation is appropriate will depend on the size of the public body and the contracting limits adopted by the public body.

On a final note, unless the person or entity who entered into a public contract has the actual (express or implied) or apparent authority to enter into a contract on behalf of the public body, the contract will be void. *State v. Des Chutes Land Co.,* 64 Or 167, 175 (1913); *Wiggins v. Barrett & Associates, Inc.,* 295 Or 6 (1983). Even if the contracting agent had apparent authority, the contract w enforced only under narrow circumstances. *Wiggins,* 295 Or at 683; *see al Weyerhauser Co. v. Klamath County, Or.,* 151 F3d 996 (9th Cir 1998). If the contracting agent exceeds their authority, the public body will not be held liable, but the employee or officer who exceeded their authority can be held liable. *Hanson v. Mosser,* 247 Or 1 (1967), *overruled in part on other grounds, Smith v. Cooper,* 256 Or 485 (1970).

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GOVERNMENTAL V. PROPRIETARY CONTRACTS The traditional governmental versus proprietary function dichotomy comes into play in public contracting with respect to the length of time a contract may run. In most cases involving contracts for goods and services and public improvement contracts, the

government will be acting in a proprietary, or business capacity. Conversely, if the contract is created through the contracting agency's governmental powers, such as a contract between an elected officer and appointed officer of the public body, the contract may not run beyond the length of the elected officer's term of office absent statutory authority to the contrary. *See, Shady Cove Water District v. Jackson County et al.,* 218 Or App 292 (2008); *Brunick v. Clatsop County*, 204 Or App 326 (2006); *Hughes v. State of Oregon,* 314 Or 1 (1992); *Johnson et al. v. Pendleton et al.,* 131 Or 46 (1929) (city government may bind future government in proprietary contract but not governmental obligation). This means that a governing body's contract with a chief administrator is not binding on a new governing body. The local charter will need to be consulted to determine when a new governing body is seated.

BUDGET APPROPRIATIONS AND DEBT LIMITS A contracting agency has no authority to spend money unless the funds are available and authorized to be spent for the purpose of the contract. Therefore, the funds contemplated to be spent under a public contract must be appropriated or otherwise authorized to be spent under the agency's budget. Note that it is unlawful for a public official to spend unappropriated funds under ORS 294.100 and can be held personally liable to reimburse the public agency.

The Oregon Constitution limits the amount of debt that a county may have, but not cities. However, a local charter may contain debt limits. A contract that exposes the contracting agency's general tax revenues will be subject to the debt limits. *See, DeFazio v. Washington Public Power Supply System,* 296 Or 550 (1984).

C. CONTRACT REVIEW BOARD AND LOCAL CONTRACTING CODE

CONTRACT REVIEW BOARD

As noted above, ORS 279A.060 states that if a governing body of a local contracting agency takes no action to provide otherwise, "the governing bo the local contract review board of that local contracting agency."

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LOCAL CONTRACTING CODE

LOC A-Z Index: Resources on Sample Ordinances and Rules

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 public body will need to evaluate its own form of government, administration and public

Issues to consider when adopting a contracting code include:

- Delegation of authority

- Rulemaking authority
- Defining and exempting personal service contracts
- Other exemptions, and
- Disposal of surplus property

Note that the acquisition and disposal of real property is not governed by the Contracting Code. There are no statutory provisions governing the purchase of real property. However, ORS Chapter 271 and Chapter 221 will apply.

D. ORS CHAPTER 279A (OAR CHAPTER 137 DIVISION 46)

OVERVIEW

ORS 279A
OAR 137-046

ORS Chapter 279A is applicable to all three chapters of the Public Contracting Code. The Model Rules adopted under it in Division 46 are likewise applicable to all three chapters.

PERMISSIBLE LIMITATIONS ON COMPETITION FOR AFFIRMATIVE ACTION, MINORITIES, WOMEN AND EMERGING SMALL BUSINESSES; DISABLED VETERANS

Notwithstanding 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 for any other public contract estimated to cost $50,000 or less, to pursue that goal, policy or program. ORS 279A.100(3). ORS 279A.100(1) defines an affirmative actio goal, policy or program as one that is "designed to ensure equal opportunit employment and business for persons otherwise disadvantaged by reason race, color, religion, sex, national origin, age or physical or mental disabilit policy to give a preference in awarding public contracts to disabled veterans."[6]

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ORS 200

Separately, the legislature allows a contracting agency to favor business enterprises certified as disadvantaged, minority, women or emerging small business enterprises under ORS 200.055 or business enterprises owned or controlled by a disabled veteran in three ways:

6 Although this provision is written in permissive language, it is worth noting that ORS 200.090 states that "[p]ublic agencies shall aggressively pursue a policy of providing opportunities for available contracts to emerging small businesses and shall cooperate with the Advocate for Minority, Women and Emerging Small Businesses to determine the best means by which to make such opportunities available."

- By requiring a contractor to subcontract with 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 certified disadvantaged, minority, women or emerging small business enterprises that are located or draw their workforce from areas classified as economically distressed by the 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).

CONTRACT PREFERENCES

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. OAR 137-046-0300 (Commentary). Effective June 7, 2011, except for construction contracts, cities are allowed, but not required, to give a 10 percent price advantage to Oregon-produced goods and services. ORS 279A.128.

ORS 279b
ORS 279c

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 w be given to the bidder in the state in which the bidder resides. ORS 279A.120(2). The Department of Administrative Services publishes a list o states that give such preferences and the amount of the preference that th local contracting agency can refer to without liability. ORS 279A.120(4).

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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. OAR 137-046-0300.

PREFERENCES FOR LOCAL GOODS AND SERVICES Apart from the statutory preference for goods and services manufactured and produced in Oregon under ORS 279A.120, local preferences are not expressly permitted under the Contracting Code. Local preferences likely cannot be approved as an exemption under 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 contract award is not required to be based on the lowest bid and factors other than cost can be considered, such

as in an RFP, it may be possible to favor local goods or services, but such favoritism would not be consistent with the policies articulated in ORS 279A.015.

However, when using a less formal contracting procedure, such as the intermediate procurement process under ORS 279B and the competitive quote process under ORS 279C, nothing in the Code prevents the contracting agency from contacting only local contractors. Whether doing so amounts to applying a local preference has not been tested in the Oregon courts. There are many legal arguments to be made against doing so, such as preemption, U.S. Constitution Commerce Clause, to name a few. Therefore, if considering local preferences, the local contracting agency should proceed with caution.

PREFERENCES FOR RECYCLED GOODS The 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 percent if a written determination is made by the contracting agency. ORS 279A.125. Thus, unless the findings in (1) to (4) can be made, the contracting agency must award a higher priced contract that includes recycled goods instead of a lower priced contract that does not.

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 o reused when discarded." Therefore, a local contracting agency should adop rules under ORS 279B.025 to meet this obligation to give preference to recycled goods. Sample rules are attached at Appendix D.

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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 Code. Reference should be made to the statutes and rules for each type of cooperative procurement for the specific conditions.

JOINT COOPERATIVE PROCUREMENT ORS279A.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. A joint cooperative procurement cannot be a permissive cooperative procurement.

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 contra or price agreements under the terms, conditions and prices of the original contract. A permissive cooperative procurement can be used to establish contacts for goods and services (including personal 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.

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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 does not have to, but may specifically identify contracting agencies permitted to participate. If not identified, it 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 and a contracting agency desiring to enter into a contract or price agreement under the 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 contacts for goods and services (including personal services), but not public improvements.

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 (the "administering 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 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 administering agency is not involved.

FEDERAL PURCHASING PROGRAMS

Local contracting agencies may enter into a contract 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. ORS 279A.180.

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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.

E. ORS CHAPTER 279B (OAR CHAPTER 137 DIVISION 47)

OVERVIEW

ORS Chapter 279B and OAR Chapter 137 Division 47 govern the procurement of public contracts that are not public improvement contracts. This leaves a broad range of items, commodities, equipment, supplies and services that are covered.

There are two primary methods for procuring a contract for goods and services—the competitive sealed bid or invitation to bid (ITB) and competitive sealed proposal or request for proposal (RFP)—and either are permitted. There are no statutory guidelines or preferences as to either method and the choice is the local contracting agency's to make.

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 problem and requesting a solution. An RFP will be awarded based on the level of technical ability shown as well as cost.

The Code and the Model Rules also provide for a variety of alternative contracting methods. This provides the Code with a built in flexibility not available prior to 2005. In addition, a local contract review board may adopt its own contracting methods, as "special procurements" under ORS 279B.085, setting different dollar thresholds for the variety of different methods available.

COMPETITIVE SEALED BID—ITB

ORS 279b
OAR 137-047

ORS 279B.055 and OAR 137-047-0255 provide a detailed checklist for developing the solicitation documents for an ITB. The Model Rule does not duplicate what is in the statute, so a contracting agency 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 solicited in the first phase, and the competitive sealed bids are solicited in the second phase from those who submitted eligible bids in the first phase. OAR 137-047-0257 provides a framework for this process.

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The ITB must include all requirements on which 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). Following the most recent amendments to the Model Rules, OAR 137-047-0255 now 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.

Of course the solicitation documents must include a description of the procurement. The procurement description requirement in ORS 279B.055(2)(c) was amended by the 2009 Legislature to describe in more detail exactly what the description should include: "In the description, 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 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." (2009 Legislature, HB 2867, Section 5).

Public notice of an ITB is required. ORS 279B.055(4). 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). The notice of an ITB must be published at least 7 days before the solicitation closing date.

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. OAR 137-047-0300(1). Lastly, the notice must be posted at the "principal business office" of the contracting agency. OAR 137-047-0300(4).

A notice of intent to award a public contract procured through the ITB process must be given at least 7 days prior to award, although a shorter period may be used if circumstances warrant a shorter time.

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, l are public records subject to disclosure, although trade secrets and inform submitted in confidence may be withheld from disclosure in accordance wi ORS 192.501 and 192.502 of the Public Records Law. ORS 279B.055(5)(b)&(c).[7]

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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. ORS 279B.055(6). The contract must be awarded to the lowest "responsible" bidder whose bid "substantially complies" with the requirements and criteria of the ITB. ORS 279B.055(10). "Responsibility" is defined in ORS 279B.110 and OAR 137-047-0640(1)(c)(F). If the bidder is not responsible, the contracting agency must reject the bid and issue a written determination of non-responsibility. OAR 137-047-0500.

Negotiations are not permitted, although a contracting agency may seek clarification of a bid. OAR 137-047-0600(2). Note that "clarification" does not supplement, change, correct or otherwise alter what is already there. *See, Matter of On-Line Gaming Services Contract,* 279 NJ Super 566 (1995).

Sometimes mistakes in a bid are discovered before the contract is awarded and sometimes a mistake may be waived or corrected, or bid 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. Errors in judgment cannot be corrected. OAR 137-047-

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7 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.

0470. Decisions pertaining to mistakes must be given in writing. ORS 279B.055(7). 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.[8]

COMPETITIVE SEALED PROPOSAL—RFP

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. ORS 279B.060(6)(b). 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 fin offer process. OAR 137-047-0263 contains the procedures for multistep proposals.

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ORS 279b

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 must follow both when drafting a solicitation document.

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 contract) and can identify any terms and conditions that could be negotiated. ORS 279B.060(2)(h).

The RFP must include a description of the procurement. The 2009 Legislature amended the procurement description requirement in a similar manner as it did for ITBs to require the contracting agency to “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. (2009 Legislature, HB 2867, Section 6).

Public notice of an RFP is required. ORS 279B.060(4). The notice is given in the same manner as the notice of an ITB and must be published at least 7 days before the solicitation closing date, sent to contractors who have expressed an

8 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.

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. OAR 137-047-0300.

A notice of intent to award a public contract procured through the RFP process must also be given at least 7 days prior to award, although a shorter period is permitted if justified under the circumstances.

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 Public Records Law. ORS 279B.060(5)(a)&(b).[9]

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The contract must be awarded to the "responsible" proposer whose propos 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 .125; and (3) the outcome of negotiations, if any, authorized by the RFP. ORS 279B.060(10). "Responsibility" is defined in ORS 279B.110 and OAR 137-047-0640(1)(c)(F).[10] As with bidders, if the proposer is not responsible, the contracting agency must reject the proposal and issue a written determination of non-responsibility. OAR 137-047-500.

Finally, the 2009 Legislature made one more additional change to ORS 279B.060, which now requires the contracting agency 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. (2009 Legislature, HB 2867, Section 6). The modified rule in OAR 137-047-0310 clarifies that this is not so much a pre-contract to a contract, but applies when the proposer offers terms for negotiation and they are agreed upon by the contracting agency.

ALTERNATIVE METHODS

The Code and Model Rules provide for a variety of alternative contracting methods. In addition, a local contract review board may adopt its own exemptions, as "special procurements" under ORS 279B.085, setting different dollar thresholds for the variety of different methods available. The following alternative methods are provided by ORS Chapter 279B and the local code may contain the same or a variation of these methods.

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9 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.
10 See footnote 11 regarding 2009 Legislative changes to ORS 279B.110.

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ORS 279b

SMALL PROCUREMENTS Small procurements are defined by ORS 279B.065 and OAR 137-047-0265 as the procurement of goods or services in the amount of $5,000 or less. These may be awarded "in any manner deemed practical or convenient" including by direct selection. A small procurement contract may be amended, but the cumulative amendments cannot increase the total contract price to greater than $6,000. A contract cannot be artificially divided so as to constitute small procurements.

INTERMEDIATE PROCUREMENTS An intermediate procurement is a contract for goods or services for more than $5,000 but not more than $150,000. The process for intermediate procurements is set out in ORS 279B.070 and OAR 137-047-0270. The Model Rule used to require some form of written solicitation for intermediate procurements $75,000 or over, but that requirement was removed in the 2010 revisions to the Model Rules. As a result, 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 the quotes or proposals received.

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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.

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." ORS 279B.070(4).

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 from only one source." ORS 279B.075(1). The determination must be made by the local contract review board, or person delegated authority to do so under the local code. Neither the 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." ORS 279B.075(1) (emphasis added).

The written determination must include findings that address: (a) that the efficient utilization of existing goods requires the acquisition of compatible goods or services; (b) that the goods or services required for the exchange of software or date with other public or private agencies are available from only one source; (c) that the goods or services are for use in a pilot or experimental project; or (d) other findings that support the conclusion that the goods or services are available from only one source. ORS 279B.075(2).

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.

EMERGENCY PROCUREMENTS A public contract for goods or services may be awarded without competition if an emergency exists, except that an emergency contract for construction services must be awarded following "reasonable and appropriate competition" except in a case of "extreme necessity." ORS 279B.080. 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. Note that neither the statute nor rule 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. OAR 137-047-0280 (Commentary).

OAR 137-047

ORS 279b

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An emergency is defined in ORS 279A.101(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, the unforeseeability may not be so clear in less obvious emergency situations. Therefore, the contracting agency should take care to adequately document the circumstances that could not have reasonably been foreseen.

SPECIAL PROCUREMENTS

Special procurements are basically exemptions from the statutorily defined ITB, RFP, Intermediate and Small Procurement source selection methods 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." ORS 279B.085. A class special procurement would permit a series of contracts for specified goods or services to be entered without using the prescribed contracting process. 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. 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
- Is unlikely 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.

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ORS 279B.085(4). 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 judicial review, which will be held on the record established by the local contract review board. (Review is to the circuit court by writ of review pursuant to ORS Chapter 34).

Lastly, public notice of the approval of a special procurement is required. The notice must follow the requirements for ITB notice under ORS 279B.055(4), which generally require publication in a local newspaper at least once, as well as mailing and posting. OAR 137-047-0300.

FEASIBILITY DETERMINATION FOR SERVICE CONTRACTS OVER $250,000

Prior to beginning a procurement or entering into a service contact with an estimated price over $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. (Note that this provision will apply to any contract entered into after January 1, 2010, even if the procurement process began before then.)

As noted, this change affects 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 populations of 15,000 or less
- Counties with populations of 30,000 or less
- Special districts (ORS 198.010), diking districts, and soil and water conservation districts
- Port of Portland
- Procurements for client services by state agencies

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ORS 279b

ORS 279B.036. If this new provision applies, and the 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
- 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).

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." ORS 279B.036(1)(a). 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. *Id.*

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 6 months after the date o contract execution
- Policy goals, avoiding conflicts of interest, or ensuring unbiased findings
- Urgent or temporary need for services when delay would "frustrate purpose for obtaining services.

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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. ORS 279B.033(2)(a). Thus, if the cost 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. ORS 279B.033(2)(b). If the contracting agency chooses this latter course, the statutes sets forth some record keeping requirements that must be followed. *Id.*

The cost comparison analysis and feasibility determinations along with the supporting records are public records subject to disclosure. ORS 279B.033(3) and 279B.036(2). In addition, the decision under this process is exempt from the judicial review process of ORS 279B and will be overturned only if it is "clearly erroneous, arbitrary, capricious or contrary to law." ORS 279B.145. Review would be by writ of review to the circuit court under ORS Chapter 34.

The Department of Administrative Services has prepared forms and other tools for state agency use under these new provisions that can be easily adopted to local contracting agency use. Contact the Department of Administrative Services for additional tools.

PRICE AGREEMENTS

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. Price agreements are specifically authorized under ORS 279B.140 and defined in ORS

ORS 279a

ORS 279b

279A.010(1)(v). Price agreements for goods and services under ORS Chapter 279B are not subject to ORS 72.050, which governs contracts for goods generally, meaning that the contractor may not revoke the price agreement ORS 279B.140(1).

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CONTRACT SPECIFICATIONS

ORS 279B.210 permits contracting agencies to consult with outside experts, consultants and contractors to develop “clear, precise and accurate” contract specifications. Care must be taken not to give a material competitive advantage to those potential contractors assisting in specification preparation, but incidental advantages are permitted. ORS 279B.210.

PREQUALIFICATION AND DEBARMENT

Prequalification refers to a contracting agency’s ability to determine a prospective contractor’s eligibility to submit an offer prior to the procurement process. A contracting agency may require prospective contractors to prequalify under ORS 279B.120 and .125. Prequalification enables the agency to apply criteria that reflect the standards of responsibility under which prospective contactors are measured in terms of their abilities 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 be revoked once an ITB or RFP is issued under ORS 279B.120(3), the contracting agency can still make a determination of nonresponsibility under ORS 279B.110.

A contracting agency may debar prospective contractors from consideration for award of the agency’s contracts for the reasons listed in ORS 279B.130(2) (generally related to criminal conduct), after providing the prospective contractor with notice and a reasonable opportunity to be heard. A debarment decision may be appealed to the local contract review board.

CONTRACTOR RESPONSIBILITY

ORS 279b

The standards for contractor responsibility are set out in ORS 279B.110. Contracts to which this section applies cannot be awarded to contractors who do not meet the standards of responsibility. Note that disqualification and debarment are not the same, although if a contractor has been debarred, the contractor will not meet the standards of responsibility. In addition, regardless of whether the contracting agency is operating under the Model Rules, any bid or proposal must be rejected if the contractor does not meet the standards of

responsibility. There is no parallel requirement to reject offers solicited using alternative methods if responsibility is not a criterion listed in the solicitation documents.

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To meet the standards of responsibility, the contractor must:

- Have available appropriate financial, material, equipment, facility and personnel resources and expertise, or ability to obtain them, to meet all contractual responsibilities;
- Have completed previous contracts of a similar nature with a satisfactory record of performance.[11]
- Have a satisfactory record of integrity. The contracting agency may evaluate the contractor's business ethics and criminal convictions of offenses related to procurement or performance of a public contract.
- Be legally qualified to contract with the contracting agency.
- Have supplied all necessary information requested by the contracting agency to make the responsibility determination.
- Have not been debarred by the contracting agency.

If a non-responsibility determination is made under subsection (2) or (3) above, the contracting agency must make the determination in writing. ORS 279B.110(2)(b)(&(c). Information submitted by a contractor in confidence for purposes of making a responsibility determination is not subject to disclosure under the Public Records Law. ORS 279B.110(3).

A contracting agency may adopt rules or solicitation document provisions ensuring the confidentiality of information submitted for purposes of determining responsibility, in which case the information would not be subject to disclosure under the Public Records Law. ORS 279B.110(3).

CANCELLATION, REJECTION, DELAY

Any solicitation may be canceled, suspended or delayed, or all offers may be rejected when the local contract review board or contracting agency with authority determines that it is "in the best interests of the contracting agency." ORS 279B.100(1). 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 reason. *Id.* The reasons must be documented and placed in the solicitation file. There is no

11 Previously, this provision simply required a "satisfactory record of performance." Now, the record of performance must be relative to similar types of contracts and the contracting agency can evaluate a proposer or bidder's integrity to determine whether there are any previous criminal convictions for offenses relating to obtaining or performing a contract. 2009 Legislature, HB 2867, Section 7.

liability to the contracting agency for canceling, suspending, delaying a solicitation or rejecting any bid or proposal. *Id.*

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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).

OAR 137-047

OAR 137-047-0650 sets out the criteria that must be met in order for a contracting agency to reject all offers. These are, in the alternative:

- "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 Offerors 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;
- Causes other than legitimate market forces threaten the integrity of the competitive process. These causes may include, without limitation, 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 Procurement or solicitation in accordance with OAR 137-047-0660; or

OAR 137-047

- Any other circumstance indicating that Awarding the Contract would not be in the public interest."

Lastly, when a contracting agency cancels a procurement (which can be done for any reason in the best interests of the agency), written notice of the cancellation must be given. If the cancellation is made prior to opening, the notice must be given to potential contractors in the same manner as notice of the procurement was given. OAR 1137-047-0660 (2). If cancellation is made after opening, the contracting agency must simply give written notice to all potential contractors who submitted offers. OAR 137-047-0660(3). OAR 137-047-0670 provides that if the solicitation is canceled prior to opening, the contracting agency should seek to return all submitted offers, but if the solicitation is canceled after opening, it must keep all bids submitted in response to an ITB, and may return proposals submitted in response to an RFP in accordance with ORS 279B.060(5)(c). If all offers are rejected in an ITB or

RFP solicitation, the contracting must keep all bids and proposals. OAR 13 047-0670(3).

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CONTRACT AMENDMENTS

ORS Chapter 279B does not address amendments to public contracts for goods and services. However, if the local code has not adopted the provisions pertaining to contract amendments, then 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 approval; or (2) renegotiate terms and conditions if it is advantageous to the contracting agency, subject to several limitations in subsection (2) of the rule. OAR 137-047-0800. Small and intermediate procurements may be amended so long as the total increase in the contract price does not exceed $6,000 for small procurements and 25% of the original contract price for intermediate procurements.

CONTRACT TERMINATION

A contracting agency can terminate a public contract for goods and services for convenience (also known as termination in the public interest) only if the contract contains a clause permitting that kind of termination.[12] The other kind of termination is when the contracting agency terminates the contract due to the contractor's breach of or default under the contract.

It is important to carefully follow the termination provisions, whether termination for convenience or for breach. If the contracting agency fails to follow the procedures properly, the improper termination for convenience can be considered a breach by the contracting agency itself and make the contracting agency liable to the contractor for monetary damages; or an improper termination for breach can be determined by a court to be a termination for convenience, also opening the contracting agency to monetary damages liability.

F. INTRODUCTION TO CHAPTER 279C

ORS 279c

ORS Chapter 279C contains all of the rest of the provisions pertaining to procurement of services in the design and construction field for or by a contracting agency. Architectural, engineering, land survey and construction related services are covered under ORS Chapter 279C, unless the local code provides for a different process; and the source selection provisions for procurement of construction services for the construction done by or for a

12 In contrast, the Contracting Code specifically provides for termination of public improvement contracts for convenience in ORS Chapter 279C (see Section VII(H)(15)).

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contracting agency, whether or not the construction is for a public improvei are covered under Chapter 279C. Lastly, Chapter 279C contains a detailec of contract conditions that must be in every public improvement contract ai the Prevailing Wage laws.

ORS CHAPTER 279C (OAR 137 – 48)—ARCHITECTURAL, ENGINEERING, LAND SURVEYING AND RELATED SERVICES

ORS 279c

The ORS Chapter 279C "qualification based selection" (QBS) process governs the procurement of architect, engineering, photogrammetric mapping, transportation planning, and land surveying services when the estimated cost is over $100,000. A contracting agency must follow 279C if:

- The local contracting agency receives moneys from the State Highway Fund under ORS 366.762 or 366.800 or a grant or loan from the state that will be used to pay for any portion of the design and construction of the project;
- The total amount of any grants, loans or moneys from the State Highway Fund and from the state for the project exceeds 10 percent of the value of the project; and
- The value of the project exceeds $900,000.

ORS 279C.110(2). Note that only if those three conditions are met, must the contracting agency follow the QBS process set out in ORS 279C.

QBS is a process under which the contractor is selected on the basis of qualifications alone; the consideration of price for the services cannot be considered. However, once the contractor is chosen on the basis of qualifications, the contracting agency may discuss and negotiate price. *See* ORS 279C.110.

ORS 279c

Although services related to architect, engineering, and land surveying are addressed in ORS Chapter 279C, the local contracting agency determines the procurement process for those services, whether it be by the agency's own procedures established under ORS 279C.105 (which can be the agency's personal services contract procurement provisions), QBS, or a variety of other methods suggested in ORS 279C.120(1)(c).

The discussion that follows will apply only if the contracting agency is procuring a contract for A&E or related services under ORS Chapter 279C (and is not a state agency).

CONSULTANT LIST

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OAR 137-048

OAR 137-048-0120 requires a contracting agency to maintain a list of consultants who are interested in providing A&E or related services. The rule permits consultants to annually 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. OAR 137-048-0120(1).

Contracting agencies must keep a record of all A&E and related services contracts covering the preceding 10 year period, which record can include information regarding each consultant's performance under the contract. OAR 137-048-0120(2)&(3). These records are public records subject to disclosure under the public records law. *Id.*

SELECTION PROCEDURES; PUBLIC RECORDS

OAR 137-048

OAR 137-048-0130 generally sets out the various permitted selection procedures. If the local contracting agency is required to follow ORS Chapter 279C for A&E services under ORS 279C.110(2), the contract must be procured using Direct Appointment, Formal Selection or Informal Selection. OAR 137-048-0130(1). If the contracting agency is not subject to Chapter 279C under ORS 279C.110(2), then some additional procurement procedures may be followed that take price into account. OAR 137-048-0130(2).

ORS 279C.107 and OAR 137-047-0130(5) describe when proposals submitted under the processes outlined in OAR 137 Division 48 are not subject to disclosure under the public records laws. Generally, opened proposals are not subject to disclosure during negotiation or before the notice of intent to award a contract is issued. ORS 279C.107(1). Thereafter, the contracting agency can withhold from disclosure trade secrets and information submitted in confidence. ORS 279C.107(2). If the procurement is canceled after proposals are received, the contracting agency may return proposals, so long as it keeps a list of the proposals returned. *Id.* The list then becomes a public record subject to disclosure.

DIRECT APPOINTMENT PROCEDURE 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 $50,000, or if the contract is for services that "have been substantially described, planned or otherwise previously studied" in an earlier contract with the same consultant for the same project and the contracting agency used a formal procurement process for the earlier contract. OAR 137-048-0200. Note that the not to exceed amount was previously $25,000 and changed effective January 1, 2010, to $50,000.

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 $150,000. The

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Informal Selection Procedure requires a written request for proposals that must be provided to at least 5 prospective consultants. OAR 137-048-0210(2). The rule specifies the contents of the request for proposal and how to determine the consultants to whom the request will be given. After receipt of proposals, negotiations must proceed serially with the three highest ranked proposers until the contracting agency reaches agreement with a proposer; if agreement is not reached upon the conclusion of negotiations with the third highest ranked proposer, the contracting agency may then terminate the solicitation. OAR 137-048-0210(3)&(4). In addition, if it becomes clear that the contract price will exceed $150,000, the contracting agency must terminate the procurement and use the Formal Selection Procedure unless it makes written findings that contracting with the winning proposer under the Informal Selection Process will: "(a) Promote efficient use of public funds and resources and result in substantial cost savings to Contracting Agency; and (b) Protect the integrity of the Public Contracting process and the competitive nature of the Procurement by not encouraging favoritism or substantially diminishing competition in the award of the Contract." OAR 137-048-0210(5).

FORMAL SELECTION PROCEDURE OAR 137-048-0220 sets out the Formal Selection Procedure. This procedure requires advertising notice of the procurement in a manner similar to advertising public contracts for goods and services.

As with Informal Selection Procedure negotiations, negotiations must proceed serially with the highest ranked proposers. However, if agreement is not reached upon the conclusion of negotiations with any proposer, the contracting agency may then terminate the solicitation. OAR 137-048-0220(4)(d).

OAR 137-048

TIES, PROTESTS, CANCELLATION If a tie occurs between proposers selected based on qualifications alone, OAR 137-048-0230(1) allows the 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, honesty and good faith" in the contracting agency. If the tie occurs between proposers selected based on qualifications and price, the contracting agency must follow the local preferences procedures in OAR 137-046-0300 to determine the winning contractor. OAR 137-048-0230(2).

Solicitation and award protests are governed by OAR 137-048-0240. The Model Rules establishes a 7 day deadline for submission of solicitation document protests prior to closing. Contract award protests must be submitted within 7 days after the date of the selection notice. In either case, the contracting agency may provide for a longer period in the solicitation document.

Lastly, 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. OAR 137-048-0250.

G. ORS CHAPTER 279C (OAR 137 – 49)—PUBLIC IMPROVEMENT CONTRACTS

OVERVIEW

ORS Chapter 279C and OAR Chapter 137 Division 49 govern the procurement of public improvement contracts which are more commonly known as construction contracts. These contracts are for the "construction, reconstruction or major renovation on real property by or for a contracting agency." ORS 279A.010(1)(cc). However, the contract is not a public improvement contract if:

- No funds of the contracting agency are directly or indirectly used, except for participation incidental or related primarily to project design and inspection; or
- The work is emergency work; or
- The work is minor alteration, or ordinary repair or maintenance necessary to preserve the public improvement.

Id. The exclusion in (a) above means that projects for which all labor is donated, such as by volunteers or volunteer neighborhood organizations, etc., are not public improvement contracts (nor are they "public works" for purposes of the prevailing wage laws).

The underlying policy in ORS Chapter 279C is to construct public improvements at the least cost to the contracting agency. ORS 279C.305. Thus, there is one primary method for procuring a public improvement contract—the competitive sealed bid (also known as invitation to bid (ITB)) pursuant to which the contract is awarded to the bidder with the lowest price. ORS 279C.300. If a contracting agency does not want to competitively bid a public improvement contract, an exception must apply, or the contracting agency must adopt and exemption. As with public contracts for goods and services, the exceptions provide for a variety of alternative contracting methods.

In addition, the ITB process provided for in ORS will not apply on contracts using federal funds because federal procurement rules will apply—although the federal rules do also seek to procure a contract at the least cost to the contracting agency.

Lastly, if the affirmative action provisions ORS 279A.100 apply, the ITB process will not apply due to the preferences that must be given.

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PUBLIC IMPROVEMENTS CONSTRUCTED BY CONTRACTING AGENCY; REPORTING

ORS 279c

The statutes do not prohibit a contracting agency from constructing public improvements using its own personnel and equipment, but there are a few restrictions. Before proceeding in-house, the contracting agency must make sure that it is prepared to keep and preserve "a full, true and accurate account of the costs of performing the work." ORS 279C.305(3)(b). For projects estimated to cost more than $125,000, the contracting agency must also prepare "adequate plans and specifications" with the estimated unit cost of the work. ORS 279C.305(3).

In addition, a contracting agency cannot construct a public improvement in-house unless it has adopted and applied "a cost accounting system that substantially complies with the model cost accounting guidelines developed by the Oregon Department of Administrative Services." ORS 279C.310. A simple check with finance director should determine whether your agency qualifies.

Annually (not less than 30 days prior to adoption of the budget), contracting agencies must prepare a list of "every public improvement known to the contracting agency that the contracting agency plans to fund in the budget period" and send this list to the Bureau of Labor and Industries (BOLI). ORS 279C.305(2). The list must identify which projects will be constructed with a private contractor or in-house. If the project is to be constructed in-house and is estimated to cost more than $125,000, the contracting agency must also include a written determination showing that the decision to use its own personnel and equipment reflects the agency's "every effort to construct public improvements at the least cost to the contracting agency." *Id.*

Note that these provisions will apply to all contracts for the resurfacing of roads at a depth of 2 or more inches and at an estimated cost of more than $125,000, even if procured as a 279B contract. These provisions do not apply when the public improvement is to be used for the distribution or transmission of electric power. ORS 279C.305(5).

PUBLIC IMPROVEMENT CONTRACT OVERSIGHT SERVICES

The 2009 Legislature added a new provision to ORS Chapter 279C, now codified at ORS 279C.307, that prohibits a contracting agency from entering into a personal services contract for the oversight of a public improvement contracts (administration, management, monitoring, inspection, etc.) with a contractor who is a contractor or affiliate of the contractor under the public improvement contract to be overseen. The service also cannot be procured through the public improvement contract itself. There are exceptions for construction manager/general contractor and design-build contracts as defined in the Model Rules. (2009 Legislature, HB 2867, Section 11).

SOURCE SELECTION METHODS

Although the ITB is the primary source selection (or procurement) method for procuring a public improvement contract, ORS Chapter 279C describes other permissible methods and when they may be used.

COMPETITIVE BIDDING (ITB) As noted above, procuring a public improvement contract through the competitive bidding process is the standard procurement method for public improvement contracts because it is designed to result in a contract with the lowest responsible bidder. This Subsection discusses some of the statutory provisions that are unique to the ITB process in the public contracting realm. Subsections F, G, and H describe statutory provisions applicable to all procurement methods.

OAR 137-049

The evaluation of submitted bids must be made in accordance with the evaluation process described in the solicitation documents. Recall that an ITB is awarded to the lowest responsible bidder based on price. The price can be provided as a "lump sum" or in a "unit price" format. The total bid price can be altered if the contracting agency has elected to include "additive or deductive alternates." These are elements of the work that can be included or not, at the contracting agency's discretion, so long as the contracting agency has included provisions in the solicitation documents providing as such. How to calculate the lump sum or unit price is set out in OAR 137-049-0380.

OAR 137-049-0200(1)(b) describes the basic elements of the bid evaluation process that should be described in the solicitation documents and permits the inclusion of various "special evaluation factors" that may be considered in determining the actual cost. 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." OAR 137-049-0200(1)(b)(C)(i). Examples of special evaluation factors include conversion costs, transportation costs, cash discounts, and depreciation allowances.

Contracting agencies have broad discretion to determine lowest responsible bidder, except that decisions will be reversed for fraud and abuse of discretion. OAR 137-049-390 describes the process for evaluating the bids. This must always include an evaluation of responsibility.

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 order to solicit value engineering and other options to attempt to bring the contract within the contracting agency's cost estimate." ORS 279C.340. However, in order to do so, the contracting agency must follow the Model Rules or its own rules prescribing a negotiation process.

OAR 137-049

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."[13] 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.

All bids are public records available for inspection after having been opened. ORS 279C.365(4). Note, however, that if the contracting agency proceeds with negotiation under ORS 279C.340, the records of the negotiation are not subject to disclosure until after the negotiated contract has been awarded or the negotiations are terminated.

Notice of intent to award a public improvement contract procured through the ITB process is required under ORS 279C.375.

COMPETITIVE PROPOSALS (RFP) The competitive proposal process (RFP) 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 RPF process worked, including ultimate costs and how the outcome compared to the findings providing for the exemption. ORS 279C.355. 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 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 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. OAR 137-049-0650(3)(a)(B). Negotiations can also occur during the competitive range process and the Model Rules provide a process in OAR 137-049-0650(6).

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13 "Value engineering" is defined in OAR 137-049-0430(2)(d) as "the identification of alternative methods, materials or systems which provide for comparable function at reduced initial or life-time cost."

The same rules regarding notice of intent to award a public improvement contract procured through the ITB process is required for a public improvement contract procured through the RFP process under ORS 279C.375.

Proposals, including negotiation records, are not subject to disclosure as public records until after notice of intent to award is issued. ORS 279C.410.

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COMPETITIVE QUOTES—INTERMEDIATE PROCUREMENTS A third procurement method for public improvement contracts permitted by statute 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 $100,000. 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. OAR 137-049-0160.

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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. OAR 137-049-0160(3). More than 3 quotes are not required, but if less than 3 are obtained, the contracting agency must keep a written record of why it could only obtain 3 quotes. OAR 137-049-0160(4).

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. ORS 279C.414. 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. OAR 137-049-0150(5).

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 (ORS 279C.335), a contracting agency can nevertheless require a competitive quote or similar process for those contracts as well.

OTHER COMMON ALTERNATIVE CONTRACTING METHODS REQUIRING EXEMPTION The Model Rules discuss some of the more common types of alternative contracting methods used other than the RFP process or competitive quote process. These include design-build, energy savings performance contracts (ESPC), and construction manager/general contractor (CM/GC). As noted below in subsection E(1), ESPC contracts are statutorily exempted, so will not require the contracting agency to adopt a separate

exemption. However, in order to use the remaining methods, an exemption is required.

ESPC An energy savings performance contract (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. OAR 137-049-0610(6). 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.

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 Model Rule warns that design-build contracts have technical complexities that are not readily apparent and should be used only with the assistance of knowledgeable staff or consultants. OAR 137-049-0670(1).

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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.

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OAR 137-049-0670(1). 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. OAR 137-049-0610(2) describes a CM/GC contract as follows:

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. OAR 137-049-0690(1). The skills needed to manage this type of contract extend from design and 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.

ADVANTAGES AND DISADVANTAGES OF ALTERNATIVE PROCUREMENT METHODS As discussed above, the traditional and historically preferred procurement method for public improvement contracts has been the ITB process. Through this process, the contracting agency traditionally ends up with two contracts—one with the architect and one with the construction contractor. The alternative contracting methods permitted in the Code permit more information than price alone to form the basis for the contract award decision and can be used to reduce the procurement process to one contract. This section evaluates the perceived and real pros and cons to these two approaches.

ADVANTAGES OF ALTERNATIVE METHODS Proponents of alternative methods believe that the project will be completed sooner because the contractor is selected prior to the completion of the design work. The contractor can add its experience to the design team and identify problems and crafts solutions when cost estimates are being reached and/or before getting to work when such problems can result in delays and change work orders. In addition, there may be cost savings in the packaging approach such as in design-build or CM/GC. Of course, when price is not the only selection criteria, there is more flexibility in choosing the contractor and the contracting agency can tailor the criteria to any unique project requirements.

DISADVANTAGES OF ALTERNATIVE METHODS The subjective nature of the selection process used in alternative contracting methods can lead to a perception of favoritism, which can lead to more protests and fewer interested offerors. Because the selective nature favors a contractor's experience, references, and track record, newer less experienced contactors may find it difficult to secure contracts solicited through alternative methods. Both of these effects may thus end up creating less competition—although this is inherent in any selection process that is not solely based on price. Lastly, the process itself may take longer and cost more due to time spent in interviews, evaluating subjective criteria, negotiations, and handling protests, thus leading to no sooner of a project start date or completion date.

Of course, procuring a contract through an alternative method may not result in the lowest price, although the advantages of value may outweigh the higher price. This may lead to public perception of wasteful use of public money if not handled carefully.

EXCEPTIONS AND THE EXEMPTION PROCESS

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EXCEPTIONS ORS 279C.335 contains the few exceptions to the competitive bidding procurement process requirement for public improvement contracts. The exceptions are:

- Contracts made with qualified nonprofit agencies providing employment opportunities for individuals with disabilities under ORS 279.835 to 279.855.[14]
- 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.
- Intermediate procurements under ORS 279C.412.
- Contracts for repair, maintenance, improvement or protection of property obtained by the Department of Veterans' Affairs under ORS 407.135 and 407.145 (1).
- Energy savings performance contracts entered into in accordance with rules of procedure adopted under ORS 279A.065.

Thus, public improvement contracts with a value of less than $5,000 can be entered into directly. Also, there is no exception (or statutory exemption) for emergencies because emergency public improvement contracts are considered and procured as public contracts for goods and services under ORS Chapter 279B.

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THE EXEMPTION PROCESS 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.[15] Notice, a public hearing, and written findings are required. ORS 279C.335.

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14 The Oregon Department of Administrative Services is charged with establishing the price of all products manufactured and services offered to public agencies by qualified nonprofit agencies for individuals with disabilities. Public improvement contracts between a public agency and a qualified nonprofit are exempt from the competitive procurement provisions of ORS Chapter 279C.

15 Recall that for public contracts for goods and services, exemptions are referred to as special procurements.

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
- The awarding of the public improvement contract(s) will likely result in substantial cost savings to the contracting agency.

Model Rules

The Model Rules provide additional guidance when addressing cost savings, favoritism and competition. OAR 137-049-0630. In addition, the Model Rules suggest, and it is recommended that the contracting agency provide a detailed description of the alternative contracting method that will be used in lieu of competitive bidding. OAR 137-049-0630(5). Information beyond the procurement method described in the findings will not be binding on the contracting agency in any subsequent contract. ORS 279C.335(6).

If the exemption is for a class of contracts, the defining characteristics of the class must be clearly identified. ORS 279C.335(3). 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." *Id.* 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.

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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 5 days after the public hearing date. ORS 279C.335(5).

A challenge to an exemption under these provisions is made directly to circuit court via the writ of review process. ORS 279C.350(3).

PREQUALIFICATION, ELIGIBILITY AND RESPONSIBILITY

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PREQUALIFICATION[16] A contracting agency may require prospective contractors to prequalify under ORS 279C.430. There are two types of prequalification—mandatory and permissive. OAR 137-049-0220. Under mandatory prequalification, the contracting agency can limit distribution of a solicitation to those contractors who have prequalified. Under permissive prequalification, distribution cannot be so limited.

If a contractor is prequalified by either ODOT or the Department of Administrative Services (DAS), the contractor is rebuttably presumed to be qualified to perform similar work for a local contracting agency and, for mandatory prequalification, can submit proof of qualification with those agencies in lieu of completing a prequalification application. ORS 279C.435; OAR 137-049-0220(2).

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. Unless the local contract review board has delegated this authority, an ordinance or resolution of the board will be required. 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 contracts through the contracting agency's policies and own application forms.

The standards for determining prequalification are the same as determining responsibility and are found in ORS 279C.375(3)(b).

DISQUALIFICATION[17] A contracting agency may disqualify a contractor who has previously been prequalified under ORS 279C.440. The disqualification cannot last more than 3 years. The contracting agency must provide written notice and opportunity for the contractor to have a hearing to respond to the disqualification. See OAR 137-049-0370(2) for the required contents of the notice. The decision to disqualify must be in writing, personally served or se by certified mail, state the reasons for the disqualification, and advise the contractor of their rights to appeal the decision under ORS 279C.445 and 279C.450.

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The grounds for disqualification are a little different than the grounds for prequalification/responsibility due to the amendments to the responsibility criteria made by the 2009 Legislature. The grounds for disqualification due to responsibility issues are limited to:

16 See Section V(I) above regarding purposes of prequalification.
17 Disqualification is referred to as "debarment" for public contracts for goods and services.

- 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 Construction Contractors Board to be so serious as to justify disqualification. A violation may include but is not limited to a failure to perform 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 to be a basis for disqualification.
- The person does not carry workers' compensation or unemployment insurance as required by statute.

ORS 279C.440(2). Recall that it is also possible to disqualify a contractor under ORS 200.065 and 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. OAR 137-049-0370(1)(b) sets out the various disqualifying circumstances under these provisions. The same notice, hearing and appeal rights apply to disqualification under these provisions.

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In lieu of going through the disqualification process itself, a contracting agency can also submit a request to the Construction Contractors Board to disqualify a contractor. ORS 279C.440(1)(b).

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ELIGIBILITY Oregon law requires contractors to have a valid certification of registration issued by the 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. *See* ORS 279C.365(1)(k).

Non-resident education service districts are ineligible to enter into public improvement contracts in Oregon. ORS 279C.325.

However, if the contract is federally funded, different rules may apply and ineligibility in Oregon may not mean ineligibility under federal law.

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See OAR 137-049-0230.

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 local contracting agency can adopt its own 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) and were amended by the 2009 Legislature to include some additional standards, shown in bold below. (2009 Legislature, HB 2867, Sections 9 & 9a).

To meet the standards of responsibility, a contractor must now 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.

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- 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.

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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, contracting agencies will need to check the Construction Contractors Board list of contractors who are qualified to enter into public improvement contracts. *See* ORS 279C.375(3)(c). 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, discre to determine responsibility. *See Hanson v. Mosser,* 247 Or 1, 9-10 (1967) *overruled in part on other grounds, Smith v. Cooper,* 256 Or 485 (1970). T a court will not overturn a responsibility determination unless the contracti ıg agency acted fraudulently or grossly abused its discretion.

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H. OFFER, PERFORMANCE, AND PAYMENT SECURITY; WARRANTIES

OFFER 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. ORS 279C.365(5) & (6). For all other public improvement contracts, the contracting agency may require offer security.

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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. OAR 137-049-290(3).

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.

PERFORMANCE AND PAYMENT SECURITY 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 security that is usually also required to be provided in the full amount of the contract price to guarantee payment of material and labor suppliers, including subcontractors, under the contract.

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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 contracts for highways, bridges and other transportation projects with an estimated value of more than $50,000. ORS 279C.380(1). The contracting agency may waive the performance security requirement under ORS 279C.380(1)(a). The contracting agency may waive both security requirements in the event of an emergency under ORS 279C.380(4). The security must be in the form of bonds that comply with the requirements of ORS 279C.380(3).

A contracting agency may otherwise require, or not, performance and/or payment security for all other classes of public improvement contracts. Performance and payment security requirements should be clearly called (the solicitation documents.

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Note, however, that when a payment bond is required by statute, if the contracting agency fails to require the contractor to provide the bond, the public body and the officers who authorized the contract are *jointly liable* for payment for the labor and materials used in performing the contract and for workmens' compensation claims, unemployment claims, and tax claims.

WARRANTIES Although not required by the Code or the Model Rules, most public improvement contracts require the contractor to provide a warranty bond warranting the work and passing through any warranties on materials or equipment for a period of time after completion and acceptance.

PUBLIC IMPROVEMENT CONTRACTING PROCEDURES

This section discusses common issues related to public improvement contracting procedures. This section does not provide a step by step process of the public improvement contract procurement process as the process will likely

be handled by knowledgeable staff and/or legal counsel and is too lengthy a topic to address in these materials.

ADVERTISEMENT The procurement of all public improvement contracts must be advertised. ORS 279C.360(1). 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. *Id.* 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.

A local contract review board can exempt certain contracts or classes of contract from the advertisement requirements in accordance with the procedures under ORS 279C.335. A procurement process that does not use a written solicitation document (for small procurements) likely does not need to be advertised under the terms of the statute or the Model Rules.[18]

SOLICITATION DOCUMENT CONTENTS ORS 279C.365 sets out the required contents for bids and proposals. OAR 137-049-0200 extends application of ORS 279C.365 to *all* solicitation documents for public improvement contracts. The contents include general information, including closing and offer opening dates, and a designation for or description of the public improvement, the evaluation process describing how the contracting agency will evaluate an score offers, and all contract provisions required by the Contracting Code.

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The statutory requirements are as follows:

- 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 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, 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;

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18 In adopting the small procurement process, the contract review board should address advertising requirements and make findings as to why exempting the process form advertisement meets the requirements for exemptions in ORS 279C.335.

19 Previously, the solicitation document had to include "a description of the public improvement project." The 2009 Legislature added "designation for or description of" to allow a contracting agency to refer to the project by name rather than including a full description that might be contained in more detail elsewhere in the solicitation documents. (2009 Legislature, HB 2953).

- The name and 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;

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- A statement that, if the contract is for a public works project subject to the state prevailing rates of wage under ORS 279C.800 to 279C.870, the federal prevailing rates of wage under the Davis-Bacon Act (40 U.S.C. 3141 et seq.) or both the state and federal 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 ORS 279C.838 or 279C.840 or 40 U.S.C. 3141 et seq.;
- A statement that each bid must identify whether the bidder is a resident bidder, as defined in ORS 279A.120;
- A statement that the contracting agency may reject a bid that does not comply with prescribed public contracting procedures and requirements, including the requirement to demonstrate the bidder's responsibility under ORS 279C.375 (3)(b),[20] 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 under ORS 468A.720; and
- A statement that the contracting agency may not receive or consid bid for a public improvement contract unless the bidder is licensed the Construction Contractors Board or the State Landscape Contractors Board.

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PRE-OFFER CONFERENCES The Model Rules permit the contracting agency to hold mandatory or optional pre-offer conferences prior to closing. OAR 137-049-0240. 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. *Id.*

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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. 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

20 The statement allowing rejection of any bid where the bidder fails to demonstrate responsibility under ORS 279C.375(3)(b) was added by the 2009 Legislature. (2009 Legislature, HB 2953).

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. ORS 279C.365(3). Unless the contracting agency has opted out of the Model Rules, the longer list in OAR 137-049-0280 will apply.

Except as provided in ORS 279C.365 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.[21]

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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. ORS 279C.390(2).

Prior to closing, an offer may be modified or withdrawn in accordance with OAR 137-049-0320. An offer may also be withdrawn prior to closing in accordance with OAR 137-049-0320.

ADDENDA, CLARIFICATION AND CONTRACT SPEC PROTESTS Changes to the solicitation documents are made by written addenda. The Model Rules rec changes to be in writing and provided in accordance with OAR 137-049-02 Addenda should be issued at least 72 hours prior to closing to give prospe offerors an opportunity to review the addenda and make any changes to a 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.

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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

21 See Section V(B) above regarding the confidentiality exemption.

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.

AVOIDING 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 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 solicitations documents. This easily happens when documents from a prior solicitation are used for the next. Next, if the clause or 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.

CONTRACT SPECIFICATIONS/CONDITIONS The following list of required contract specifications and conditions are drawn from Chapter 279C. Refer to Chapter 279A and Section IV above for additional specifications that may b included, such as with respect to recyclable and used goods, minority, wor or emerging small businesses.

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BRAND NAME A public improvement contract cannot expressly or implicitly include any brand name or manufacturer specification, unless the contracting agency obtains an exemption under ORS 279C.345(2). The exemption may be approved by the contract review board if any of the following written findings are made:

- 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 substantial cost savings to the contracting agency;
- There is only one manufacturer or seller of the product of the quality required; or
- Efficient utilization of existing equipment or supplies requires the acquisition of compatible equipment or supplies.

ORS 279C.345(2). The findings will need to address any applicable factors listed in ORS 279C.330. A challenge to an exemption under these provisions is made directly to circuit court via writ of review. ORS 279C.350(3).

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It is permissible, however, to identify products by brand names so long as "approved equal" or "equivalent" is included in the solicitation documents. OAR 137-049-0870. A local contracting agency could also adopt a local rule stating that when a brand name is inadvertently (or impliedly) used, the words "or approved equal" are implied.

Notwithstanding the limit on specifying a product by brand name, a contracting agency is free to decide what products to select for use and can include those in its standard contract specifications, so long as there is a rational or reasonable basis for the selection. *See Advanced Drainage Sys., Inc. v. City of Portland,* 214 Or App 534 (2007).

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 any unreasonable delay caused by the contracting agency. If the contract includes such a clause, ORS 279C.315 provides that it is void and unenforceable. This provision does not, however, limit any clause setting a reasonable amount of damages that might be paid in such circumstances (liquidated damages).

ASSIGNMENT OR TRANSFER RESTRICTED OAR 137-049-0200(2) 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. Thus, this provision will automatically apply unless the contracting agency has opted out of this Model Rule. Even if the agency has not opted out and would like to rely on this provision, it is always a good idea to include it in the contract documents.

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GREEN ENERGY TECHNOLOGY 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. ORS 279C.527. 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(3). 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. ORS 279C.427(4).

OAR 330-135
ORS 279c
OAR 137-049

If the contract is subject to ORS 279C.527, additional rules and specifications adopted by the State Department of Energy will apply. ORS 279C.528. *See* OAR Division 330 Chapter 135 for DOE rules.

REQUIRED CONTRACT CONDITIONS Numerous other required contract conditions are enumerated in ORS Chapter 279C. These are listed below. Note that these conditions must also be included in all solicitation documents under OAR 137-049-0200(1)(c).

- 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)). This provision allows "the proper officer" representing the contracting agency to pa unpaid vendors' or subcontractors' claims for labor or services and reimbursed by the contracting agency;

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- Contractor and first-tier subcontractor liability for late payment on P 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). These are required to be attached or referenced by incorporating the website location into the solicitation documents. Public agencies are required to include a requirement in every public works contract and subcontract that contractors pay the higher of the applicable state or federal prevailing wage to workers on public works projects subject to both state and federal prevailing wage laws;
- BOLI Public Works bond (ORS 279C.830(2)). A public works bond is required if the contract is a public works contract, unless exempt under ORS 279C.810;
- Retainage (ORS 279C.550 to 279C.570);
- Prompt payment policy, progress payments, rate of interest (ORS 279C.570). OAR 137-049-0830 provides that progress payments are to be requested and made monthly and, importantly, do not constitute acceptance of the work by the contracting agency. The contracting agency is required to promptly pay all payments due under ORS 279C.570. OAR 137-049-0840 provides further guidance on promp payments and when interest is due;

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- Contractor's relations with subcontractors (ORS 279C.580);
- Notice of claim for action on payment bond(ORS 279C.605)[22];
- 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. *See* OAR 137-049-0800.

FIRST TIER SUBCONTRACTOR DISCLOSURE & 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.

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22 Note that the 2009 Legislature increased the number of days in which a person filing notice of claim on a payment bond has to file the claim from 120 days to 180 days. (2009 Legislature, SB 50A).

OAR 137-049
ORS 279c

See ORS 279C.370; OAR 137-049-0360(2). The first-tier subcontractor disclosure is submitted with the bid or within 2 hours after closing. OAR 137-049-0360(4). A bid that does not include the required disclosure is considered nonresponsive and must be rejected under ORS 279C.370(3). The disclosures become public records after bid opening along with the remaining bid documents.

A contractor may substitute a first-tier subcontractor only in accordance with ORS 279C.585 The statute and the Model Rule in OAR 137-049-0360(7) make 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.

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. OAR 137-049-0350 provides that "a minor informality is 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." OAR 137-049-0350(2)(a). Examples of minor informalities include an offeror's failure to: (a) return the correct number of signed offers or other documents as required by the solicitation documents; (b) sign in the correct place so long as a signature appears elsewhere indicating the offeror's intent to be bound by the offer; or (c) 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. *Id.* A clerical error is another type of minor informality that the contracting agency can allow to be corrected.

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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 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 are 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. OAR 137-049-0350(2)(d).

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. OAR 137-049-0350(3).

Mistakes discovered after the contract is awarded cannot be corrected, or the contract rescinded, except by mutual agreement of the contractor and the contracting agency, or as contracting law may otherwise provide.

CANCELLATION/REJECTION OF OFFERS As with public contracts for goods and services, a public improvement contract procurement may be canceled at any time for any reason the contracting agency determines is in the public interest. OAR 137-049-0270(1). 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 agency's needs. OAR 137-049-0270 (Commentary).

OAR 137-049

If the procurement is canceled prior to closing, notice is required to be provided in the same manner as the solicitation was noticed. OAR 137-049-0270(2). There is no parallel rule for rejection of all offers prior to closing, unless rejection is made on the grounds in OAR 137-049-0270. If the procurement is cancelled prior to 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. OAR 137-049-0270(3).

Any or all offers may be rejected for a variety of reasons. OAR 137-049-0440 describes when an offer or all offers may be rejected. Any offer may be rejected if it "may impair the integrity of the Procurement process" or if rejecting the offer is in the public interest. OAR 137-049-0440(1)(a). 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. OAR 137-049-0440(1)(b). Note that 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. Note, too, that no written notice of rejection under these grounds is required and a contracting agency can simply include such offers with the remaining losing offers.

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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). OAR 137-049-0440(1)(c). 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; or
- Any other circumstance indicating that Awarding the Contract would not be in the public interest. OAR 137-049-0440(5).

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CONTRACT AWARD Written notice of intent to award a public improvement contract is required under the Model Rules, regardless of the procurement method used. OAR 137-049-0450. Because notice of intent to award is statutorily required only for ITBs and RFPs, 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 7 days before the contract is to be awarded. The contracting agency can provide less notice, but only if 7 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 7 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.

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

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 applicable legal requirements.

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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.

OAR 137-049
ORS 279c

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. OAR 137-049-0910(2). Local rules can limit who in the contracting agency is authorized to approve change orders and setting any dollar limits.

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-.570, ORS 701.420 and 701.430, and OAR 137-049-0820. The retainage statutes and rules do not apply when federal funds are used. ORS 701.440.

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 contracting agency's charter requires otherwise. ORS 279C.555. 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.

ORS 279C.845(7); OAR 137-049-0820(6). The retainage is released within 14 days after the contractor files the certified statements.

Typically, the form of retainage has been in the form of funds withheld as permitted by *former* ORS 279C.560. However, the 2009 Legislature amended this section which now provides that the contracting agency must accept the bonds described in ORS 279C.560(1) unless the contracting agency 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." ORS 279C.560(1). The instruments the contracting agency must now accept are:

- Bonds, securities or other instruments specified in ORS 29C.560
- A surety bond

OAR 137-049

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 comp insured by the FDIC. ORS 279C.560(6).

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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. ORS 279C.570(7). However, the contracting agency is not obligated to consider reducing or eliminating retainage unless requested by the contractor. ORS 279C.570(7). 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.

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. ORS 279C.570(7).

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 Code and Model Rules. OAR 137-049-0820(5).

PAYMENTS & 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. ORS

279C.570(2). 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. OAR 137-049-0840(2)&(3). The statute and administrative rule provide for an interest rate equal to 3 times the discount rate on 90-day commercial paper in effect on the date the payment is due, but cap it at 30%. *Id.;* ORS 279C.570.

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. OAR 137-049-0840(4).

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FINAL INSPECTION At the completion of the work, the contractor must notify contracting agency that the work is complete so that the contracting agency undertake a final inspection. ORS 279C.570; OAR 137-049-0850. 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. OAR 137-049-0850(2).

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. ORS 279C.655-.670; OAR 137-049-0900. 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. ORS 279C.655.

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. *Id.*; OAR 137-049-0900(1).

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. ORS 279C.665; OAR 137-049(3).

If the parties mutually agree to terminate the contract under the circumstances listed in OAR 137-049-0900(2)(a), the contractor will be entitled to the amount of compensation described in OAR 137-049-0900(2)(b). *See also* ORS 279C.660.

In no event will termination under these provisions relieve the contractor or its surety of liability for any claims arising out of the work previously performed. OAR 137-049-0900(4).

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.

PUBLIC WORKS CONTRACTS

As previously discussed, a public works contract is a construction contract (not always a public improvement contract, but sometimes a public contract under 279B if it is for maintenance, repair, or emergency work on a public improvement) valued at over $50,000 to which prevailing wages will apply These contracts include, but are *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;

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- A project for the construction, reconstruction, major renovation or painting of a privately owned road, highway, building, structure or improvement of any type that uses funds of a private entity and $750,000 or more of funds of a public agency; or

- A project for the construction of a privately owned road, highway, building, structure or improvement of any type that uses funds of a private entity and in which 25 percent or more of the square footage of the completed project will be occupied or used by a public agency.

[but do] not include:

- The reconstruction or renovation of privately owned property that is leased by a public agency; or

- The renovation of publicly owned real property that is more than 75 years old by a private nonprofit entity 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 percent of the total cost of the renovation; and

- 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.

ORS 279c

ORS 279C.800(6). Note the exclusion above for reconstruction or 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.

Note, too, that the $50,000 limit 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. *See* OAR 839-025-0004(25). 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 that the exemption applies to some of the contract.

OAR 839-025

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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.

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. The contracting agency must provide information regarding the payment of prevailing wages with the contract specifications. ORS 279C.830(1). When federal funds are involved in a public works contract, the contracting agency must provide information that also identifies which rates are higher.

Inclusion of the following information will meet this obligation:

- The prevailing state rate of wage, as required by ORS 279C.830(1)(a): (i) physically contained within or attached to hard copies of procurement Specifications; (ii) included by a statement incorporating the applicable wage rate publication into the Specifications by reference, in compliance with OAR 839-025-0020; or, (iii) 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.

OAR 839-025
ORS 279c
OAR 137-049

- 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 subsection 3(a) of this rule apply. See BOLI rules at OAR 839-025-0020 and 0035.

OAR 839-025

OAR 137-049-0860(3). The applicable prevailing wage rates are those that are in effect at the time the contacting agency first advertises the solicitation for the contract.

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The contracting agency or contractor may request a determination from E regarding the extent to which prevailing wage rate requirements will apply public improvement contract under ORS 279C.817. This is particularly us the project involves funding from mixed private and public sources.

REQUIRED CONTRACT CONDITIONS Public works contracts are governed by the provisions in ORS 279C.800 to 279C.870. These statutes require the following conditions to be included in all public works contracts:

- Contracting Agency authority to pay certain unpaid claims and charge such amounts to Contractors, as set forth in ORS 279C.515(1).
- Maximum hours of labor and overtime, as set forth in ORS 279C.520(1).
- Employer notice to employees of hours and days that employees may be required to work, as set forth in ORS 279C.520(2).
- Contractor required payments for certain services related to sickness or injury, as set forth in ORS 279C.530.
- Requirement for payment of prevailing rate of wage, as set forth in ORS 279C.830(1). OAR 137-049-0860(2).

BOLI NOTICE OF AWARD & 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.

Prior to the 2007 legislature changes, the contractor was required to pay a per-project fee to BOLI under ORS 279C.825. The contracting agency is now required to pay that fee to BOLI. The fee is used to cover certain BOLI administrative expenses.

The 2009 Legislature amended the amount of the fee provided in ORS 279C.825(1)(b). (2009 Legislature, SB 51). That fee is now 0.1% of the contract price, but cannot exceed $7,500 or be less than $250. In addition, the fee used to be payable when the public agency entered into the contract. The fee is now payable when the contracting agency provides notice to BOLI that it has awarded a public works contract under ORS 279C.835. ORS 279C.825(2) (2009 Legislature, SB 53). 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. OAR 839-025-0210.

Prevailing Wage Rate Law Handbook

BOLI WEBSITE BOLI has a very informative and helpful website and publishes a Prevailing Wage Rate Law Handbook. An excerpt from that Handbook entitled Public Agency Responsibilities, is located at Appendix C to these materials, which sets out in more detail a public agencies prevailing wage contracting responsibilities. The Handbook otherwise covers numerous other topics and serves as a handy reference.

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CONTRACTORS' RECORDS

The Model Rule imposes recordkeeping obligations on contractors and subcontractors under OAR 137-049-0880. These provisions will apply to all public improvement contracts, regardless of the procurement method or form of contract used. The rules require records to be kept in accordance with generally accepted accounting principles (GAAP) and provide that the contracting agency shall have access to the records and an opportunity to inspect, copy and audit them at any reasonable time and place. The contractor is obligated to keep the records for at least 3 years from the date of final payment, or from the conclusion of any dispute or litigation related to the contract, whichever is later.

I. MISCELLANY

IDENTITY THEFT PROTECTION ACT

Oregon has adopted its own version of the identity theft prevention provisions contained in FACTA in ORS 646A.600 to 646A.628. These provisions require any person, including public bodies, that maintains data that includes a consumer's personal financial information to implement reasonable safeguards to protect the security of that information. A public body will be considered to have complied with some of the requirement for implementing safeguards if it "[s]elects service providers capable of maintaining appropriate safeguards, and requires those safeguards by contract; * * *" ORS 646A.622(2)(d)(A)(v).

ORS 646a

Thus, when procuring a public contract, a contracting agency will need to include a contractor's ability to protect the security of personal financial information in the selection criteria and incorporate contract provisions requiring

contractors who obtain personal financial information to implement appropriate safeguards to protect it in conformance with the statutory requirements.

FIRST AMENDMENT RETALIATION CLAIMS IN PUBLIC CONTRACTING

ORS 279c

As discussed above, ORS 279C.375 requires a contracting agency to award a public improvement contract to the "lowest responsible bidder." Notwithstanding ORS 279C.375, ORS 279C.395 permits a the contracting agency to rejec bid "not in compliance with all prescribed public bidding procedures and requirements."

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In the public contracting world, a retaliation claim under the First Amendm the U.S. Constitution is a claim alleging that a contract was denied (or bid rejected) in retaliation for the bidder's exercise of its First Amendment rights on matters of public concern.

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Thank you to

- Diana Moffat, Executive Director, Local Government Personal Institute (LGPI); Labor Relations Consultant; Attorney

for updating this chapter in the Fall of 2010.

CHAPTER 10 – PERSONNEL ADMINISTRATION / LABOR RELATIONS

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A. INTRODUCTION

Public personnel administration has been defined as "the process of acquiring and developing skilled employees and of creating organizational conditions which encourage them to put forth their best efforts."[1] While cities are subject to a number of legal restrictions and mandates in dealing with personnel matters, they should not lose sight of the positive values of an effective system of personnel administration and the benefits it brings for both the employing governmental unit and employees.

Public employment policies evolved out of the reform movement of the late 19th century, which saw the enactment of "civil service" protections for federal employees. The concept later extended to state and local governments. The operating principle of the civil service movement is commitment to the "merit system" concept for public employment, which requires that selection, placement and separation of government employees be based on their job-related abilities and performance rather than political considerations or other non-merit factors such as race, color, marital status, religion, sex, national origin, political affiliation, age, disability, sexual orientation or union affiliation.

Modern theory stresses "positive personnel administration," suggesting that personnel policies and programs should not only ensure fairness and equity in public employment. They should also seek to enhance career development opportunities and job satisfaction through employee training, employee benefit programs and participative management strategies.

B. BASIC FUNCTIONS OF PERSONNEL ADMINISTRATION

A personnel system includes a number of basic functions which provide the processes and guidelines for dealing with the full scale of activities involved in the employment of individuals. A city system is based on the organization's philosophy regarding the employment relationship and consideration of various legal requirements.

WORKFORCE PLANNING

Workforce planning relates to both short-term and long-range staffing needs as determined by the organization's goals and objectives. Changes need to be incorporated into the structure, program purposes and budget. A city must

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[1]Felix A. Nigro and Lloyd G. Nigro, The New Public Personnel Administration (Itasca, Illinois: F.E. Peacock Publishers, Inc., 1976), p. 28.

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package and adjust the full range of skills needed for future programs as the mix of programs shift.

RECRUITMENT, SELECTION AND PLACEMENT

This involves determining the most effective manner of attracting sufficient numbers of qualified candidates to compete for job openings, screening of those applicants and selection of the most qualified individual for the available position. It is essential that this process not discriminate against protected classes of employees, 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. 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.

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.

CLASSIFICATION PLAN DEVELOPMENT AND ADMINISTRATION

A classification plan provides the basic structure of the internal relationship of positions within the organization. Through position analysis and job evaluation, jobs are grouped according to similarity of duties and responsibilities, levels of difficulty and required qualifications. Position descriptions should outline assigned essential and auxiliary job functions and mandatory and desirable qualification requirements such as, experience, training, certifications/licenses and special skills. Position descriptions must also outline the physical demands of the position. The position descriptions serve as the foundation for a variety of other personnel functions including compensation, recruitment, training, performance appraisal, and reorganization. Position descriptions also serve as the foundation piece when working with employees who have become disabled or when addressing reasonable accommodations with qualified applicants.

SALARY AND BENEFITS ADMINISTRATION

In order to attract, retain, and motivate qualified employees, organizations 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 that jurisdictions 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.

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

It is important to understand that if the city offers some of these voluntary benefits, there may be legal obligations associated with them, such as payment for accrued and unused vacation at the time of termination and continuation of health benefits to terminated and retired employees.

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.

PERFORMANCE APPRAISAL

Performance appraisal programs should assess employee performance of assigned duties and responsibilities against agreed upon performance objectives. The criteria or standards used to appraise performance need to be job-related and nondiscriminatory. You can use appraisals for both management decision making and employee motivation and development. Some examples include decisions regarding merit increases, promotions, training needs, layoffs, demotions, transfers, disciplinary action, denial of salary increases and terminations. Those conducting performance appraisals also need training on the program to ensure consistency between different raters as well as how to set realistic, measurable goals and in conducting the appraisal interview.

PERSONNEL POLICIES

Personnel policies and procedures outline the rules and processes involved in all areas of personnel administration. The policies and procedures help to ensure that employees are treated in an equitable and consistent manner and in compliance with legal requirements. Personnel policies and procedure

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require almost annual review and updating to reflect new legislation and organizational changes.

TRAINING AND CAREER DEVELOPMENT

Training is a systematic way to solve the problem of skill obsolescence. Career development assists employees in planning future career advancement within the agency. These activities are good investments in an organization's future. They help employees reach maximum self-development and the organization to achieve its objectives. Training and career development should be related to agency goals and integrated into workforce planning efforts. Training programs should:

- Systematically identify employee training needs
- Consider long-range workforce needs
- Evaluate training activities

RECORD KEEPING

Accurate and up-to-date records are essential to a personnel program both for use by management and for compliance with legal requirements including various reporting requirements. Maintenance and release of employee related information needs to be in conformance with public information/ records laws, HIPAA, confidentiality concerns, and civil rights requirements.

C. FEDERAL, STATE AND LOCAL LAWS GOVERNING EMPLOYMENT PRACTICES

Oregon Bureau of Labor and Industry Website

Federal, state and local laws exist which restrict options in dealing with employees and potential employees. These laws reach virtually every facet of the employment relationship.

COMPENSATION

Limitations in the area of compensation are placed on the organization by laws dealing with such matters as minimum wages, overtime, form of payment, equal pay, maximum time between payments, allowable deductions from compensation, and final payment of wages.

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BENEFITS

The organization is subject to various legal requirements pertaining to such employee benefits as retirement, health insurance, life insurance,

unemployment insurance, workers' compensation insurance, break periods, meal periods, and leaves of absence.

EMPLOYMENT PRACTICES

Laws also place conditions on many employment practices. These conditions pertain to how to recruit and select new hires; reinstate former employees; promote, transfer, and assign employees; train employees; conduct or require medical exams of employees and applicants; terminate employees; hire and employ minors; and accommodate disabilities of applicants and employees.

COLLECTIVE BARGAINING

The collective bargaining process as well as what subjects must be bargained are regulated by state law.

ADMINISTRATIVE MATTERS

There are laws which specify conditions and standards for keeping personnel records, for posting or otherwise giving notice to employees about various employment related matters, for maintaining the confidentiality of employee information, etc.

WORKPLACE SAFETY

These laws and regulations contain 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.

D. LABOR RELATIONS AT THE LOCAL GOVERNMENT LEVEL

ORS 243
Oregon Employment Relations Board Website

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’s exclusive representative.

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The legislative policy statement embodied in the state's collective bargainir statute provides:

> 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.

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.

EXCLUSIVE EMPLOYEE REPRESENTATIVE

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 by a petition filed with the Employment Relations Board or through an election held by the Employment Relations Board.

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 will ultimately be resolved by the Employment Relations Board 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.

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 Employment Relations Board 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, 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.

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 Employment Relations Board define the conditions that must be satisfied before a bargaining unit is allowed to strike.

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: (a) subjects determined to be non-mandatory by the Employment Relations Board prior to June 6, 1995; (b) subjects the Employment Relations Board determines to have a greater impact on City management's prerogative than on employee wages, hours, or other terms and conditions of employment; (c) subjects that have an insubstantial or de minimis effect on public employee wages, hours, and other conditions of employment; and (d) some staffing levels and safety issues; (e) 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 Employment Relations Board for resolution.

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.

The Employment Relations Board has the authority to order an employer, employee group or labor organization to stop committing an unfair labor practice and to penalize parties found guilty of such acts.

UNION SECURITY

Oregon law provides an option for fair share agreements where members of the bargaining unit are obligated to hold membership in the union or make in-lieu-of-dues payments to the union. However, under such arrangements, the non-association rights of employees based on bona fide religious tenets or teachings must be protected.

EFFECT OF COLLECTIVE BARGAINING LAWS ON LOCAL CHARTERS AND ORDINANCES

ORS 243

Any provisions of charters and ordinances of local governments that were in existence on October 5, 1973, and not in conflict with the rights and duties established in ORS 243.650 through 243.782 and other collective bargaining laws may remain in full force and effect after the Employment Relations Board has determined that no conflict exists. If provisions of local charters and ordinances are found to conflict with these laws, the statutory provisions must prevail.

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Thank you to

- Lynn McNamara, Executive Director, CityCounty Insurance Services (CIS)
- Mark Rauch, Esq., General Counsel, CityCounty Insurance Services (CIS)

for updating this chapter in the Fall of 2010.

Names listed in alphabetical order.

CHAPTER 11 – RISK MANAGEMENT AND INSURANCE

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This chapter will address two related issues, risk management and insura
Risk can be "managed" in one of several ways, or in some cases, in some combination of these:

- 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, by 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 (the "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 a pooling arrangement where insurance premiums or pool contributions are made in exchange for the insurance company or pool agreeing to pay future losses or claims, if any. Larger entities with sufficient resources to set aside actuarially sound loss reserves, may elect to "self-insure" these exposures to risk up to some level, say $500,000 per claim, and carry excess insurance to cover claims that exceed the self-insured amount.

A. INSURANCE VERSUS POOLING

CityCounty Insurance Services (CIS)

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 to 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 League of Oregon Cities and Association of Oregon Counties agreed to form a trust, known as CityCounty Insurance Services, or "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 CityCounty Insurance Services.

CityCounty Insurance Services Website

B. 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 (CityCounty Insurance Services) you have a designated Risk Management Consultant to assist with risk management. As part of its coverage, CIS also provides its members with "pre-loss" legal assistance (especially useful in employment matters) and other resources, including risk management incentive funds.

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.

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Oregon state law requires all public entities great than 11 employees to have safety committee. Public entities with 10 or few employees can elect to have safety meetings in lieu of a safety committee. Safety committee members must be trained in their responsibilities including performing quarterly inspections on

all facilities. Elected officials and management should provide staff with clear safety expectations and hold staff accountable when safety rules are not adhered to.

C. 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.

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. (ORS 656.031)

INMATE WORKERS

Cities may also elect to have inmates performing authorized employment (including workers performing court-ordered community service work) covered for workers' compensation. (Note, the term "inmate" in this context "includes a person who performs community service pursuant toORS 137.128, whether or not the person is incarcerated." ORS 656.041(1)(b).) Again, the city would l required to maintain a roster of such inmates or community service workers (ORS 656.041 (4))

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CONTRACTORS

It is important that any contractor doing business with the city provide evidence of compliance with the statutes requiring 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 either 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.

D. 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 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.

E. 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.

WHO SHOULD BE COVERED?

Covered parties in a liability policy should include the city and its officers, employees, agents, and volunteers.

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; and
- 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.

INTERGOVERNMENTAL ENTITIES

Intergovernmental agreements 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.” ORS 190.010. 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”. ORS 190.010(5). When such an entity is created the liability exposures associated with that entity must be considered. If the agreement does not address the issue of liability, then each participating entity is “jointly and severally” responsible for any debts, liabilities, and obligations of the intergovernmental entity. This means 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. ORS 190.080(4). 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.

AMOUNTS OF COVERAGE

As discussed in the preceding chapter, 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 ADA (Americans with Disabilities Act) 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 provide those limits to all participating members, with higher limits also available.

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F. 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 an important liability exposure. 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. Coverage for physical damage to automobiles is a separate coverage.

Whether the city uses its own fleet or reimburses employees for the use of their own automobiles on city business, it's important to manage the risk associated with these drivers. Developing a safe driving policy, providing driver training, and checking and monitoring the driving records of employees whose jobs include travel are ways to accomplish this objective.

G. CONTRACTUAL LIABILITY

There is not a coverage for damages awarded against a city for breach of contract. Instead CIS covers certain "indemnity" obligations that are assumed by contract. For example, a city might enter into a contract to lease a building from a private party ("Lessor"). Lessor would likely want a provision (an "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.

Let's 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 city had done to the building. The liability claim arose out of the 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 the City, and the 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" to include 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 or its employees. It does not apply to claims arising out of the sole negligen of the other party.

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H. FIDELITY AND FAITHFUL PERFORMANCE BON

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 (a $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."

I. RISK MANAGEMENT BEST PRACTICES

Cities should consider and, where possible, implement the following risk management best practices.

- Appoint a Risk Management Coordinator who is trained on risk management techniques;
- Have a current Employee Handbook that has been approved by an employment attorney. Provide regular training on hiring practices, harassment training, and employment laws;
- Implement a city-wide Safety Manual and assign safety responsibilities;
- Implement a Fleet Program in which driver's license records are checked and employees trained in defensive driving;
- Review all ordinances, resolutions, and policies on a regular basis;
- Have an Emergency Plan and practice the plan annually;
- Have a legal and insurance review of all contracts before they're signed;
- Use a local insurance agent to provide insurance, risk management, and loss control advice;
- Maintain an up-to-date schedule of all properties and vehicles;
- Implement internal financial controls;
- Carefully consider all possible unexpected outcomes in new activities; and
- Don't go it alone. LOC, CIS, your local agent and others are happy to provide advice on how to manage the risks associated with managing a city.

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Thank you to

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Names listed in alphabetical order.

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A. THE OREGON LAND USE SYSTEM

In 1973, the Oregon Legislature adopted SB 100, Oregon's pioneering, statewide land use planning program. That bill, now codified in ORS Chapter 197, created the Land Conservation and Development Commission ("LCDC"), which was directed to adopt the Statewide Planning Goals. Local governments were then required to adopt comprehensive land use plans and implementing regulations in compliance with the Goals. Once LCDC determined that a local plan and regulations were in compliance, it issued an order "acknowledging" that plan. Almost all local governments achieved LCDC acknowledgment by the mid-eighties. After acknowledgment, the local plan becomes the sole land use regulation for the jurisdiction in most instances. The 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. The chief applicable statutory and regulatory authorities are found at:

ORS AND OAR

LCD Website
LUBA Website
Oregon Statewide Planning Goals
ORS 197
ORS 227
ORS 195
ORS 268
ORS 222
ORS 092
OAR 660
OAR 661

- **ORS CHAPTER 197** Establishes LCDC and the Department of Land Conservation and Development ("DLCD"), assigns comprehensive planning responsibilities, requires compliance with the goals, addresses needed housing and urban growth boundary ("UGB") expansion, establishes local procedural requirements, contains post-acknowledgement procedures, and establishes the jurisdiction of the Land Use Board of Appeals ("LUBA").
- **ORS CHAPTER 227** Governs city planning requirements, many of which have analogs in the county statute.
- **ORS CHAPTER 195** Sets forth local government coordination and urban reserve requirements.
- **ORS CHAPTER 268** Governs the planning and other authority of Metro, the Portland area regional government.
- **ORS CHAPTER 222** Governs annexations and boundary changes.
- **ORS CHAPTER 92** Governs partition and subdivision of land.
- **OAR CHAPTER 660** LCDC's Administrative Rules.
- **OAR CHAPTER 661** LUBA's Rules of Procedure.

B. LOCAL LAND USE REGULATORY SYSTEM

Local land use regulations are typically contained in two documents:

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THE COMPREHENSIVE PLAN

The Comprehensive Plan is a local government's chief land use document. Comprehensive Plans establish the policy framework for the local land use program. Comprehensive Plan policies are typically not directly applicable to individual applications, but this can vary from jurisdiction to jurisdiction. LUBA has held, however, that a local government may only apply its Comprehensive Plan as a regulatory document if such intent is clearly expressed by the language of the Plan.

THE ZONING/DEVELOPMENT CODE

The typical local development code contains more specific regulations designed to implement the broad Comprehensive Plan policies. Such codes are the "nuts and bolts" document: They set forth the criteria or standards that each application must meet in order to be approved. These codes are required by law to comply with the Comprehensive Plan. ORS 197.175. The components of a typical code include:

- **ZONING:** The zoning portion of the development code (in some jurisdictions, the Zoning Code is a separate document) sets forth the zoning districts of the local jurisdiction (e.g., residential, commercial, industrial, etc.) The zoning districts typically list the allowed uses in the zone, the minimum lot sizes (if any), minimum density (if any), and siting requirements, such as height limits, lot coverage, setbacks, and floor area ratios. Uses are typically divided into "permitted uses" and "conditional uses." Permitted uses are generally allowed outright subject to no or limited review procedures, while "conditional uses" are uses that may be approved, denied, or approved with conditions because of their potential negative impacts on the permitted uses in the zone. In 2011, solar photovoltaic and solar thermal energy systems were exempted from land use restrictions and fees, with some limitations. ORS 227.505.

- **PERMITTING PROCEDURES:** The typical code breaks the permitting process into three or four categories, based upon the level of review: "Ministerial" (Type I) decisions, "minor" (Type II) decisions, "major" (type III decisions), and "legislative/rezone" (Type IV) decisions. Type I decisions are typically made without any notice or opportunity to comment or appeal. These types of decisions are (or are supposed to be) limited to nondiscretionary permits subject to objective criteria. The next level up, Type II, are generally staff decisions, but are subject to notice and the opportunity to appeal to a hearing. Type III decisions automatically go to a hearings officer or hearing body for approval. Type IV decisions are those that require a legislative or

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quasi-judicial change to the zoning requirements or standards befor the permit is approved.

Note: The question of whether a local government action is a "land use decision" subject to notice and at least the opportunity for a hearing is a perennially recurring and difficult issue. Deserving of an entire chapter itself, the question is tough to boil down to a rule, but basically a "land use decision" is:

- A decision that applies the local land use regulations; or
- Significantly impacts use of land; and'
- Involves at least an iota of discretion; and
- Is in some written form.

Many property owners will want to rush through a seemingly simple land use question without providing basic notice. This can come back to haunt them later, because the appeal period in some cases is never tolled.

- **DEVELOPMENT STANDARDS:** The development standards typically contain the basic infrastructure requirements, e.g., street and sidewalk, sewer and water connections, required landscaping, and similar requirements. Due to changes in law effective June 1, 2012, cities must also adopt standards for clustered mailbox that conform to the standards established by the Oregon Structural Specialty Code, to ensure compliance with the Americans with Disabilities Act requirements. ORS 227.455.

C. TYPES OF LAND USE DECISIONS

- **"LEGISLATIVE" DECISIONS** Are decisions where a governing body enacts policies or standards which are generally applicable to all persons or property or large classes of persons or property. Amendments to the policies of the Comprehensive Plan or the standards and criteria of the Zoning Code are typically legislative decisions. When a governing body makes a legislative decision, it is sitting in its role as the policy-making body for the local government.
- **"QUASI-JUDICIAL" DECISIONS** Are decisions where a governing body is applying adopted policies or standards to specific persons or property. Approvals or denials of specific land use permits are typically quasi-judicial decisions. As the name implies, when a governing body makes a quasi-judicial decision, it is sitting in the role of a judge and is adjudicating individual rights.

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D. LEGISLATIVE LAND USE DECISIONS

NATURE AND SCOPE OF LEGISLATIVE DECISION

When a governing body makes a legislative land use decision, it is deciding whether or not a proposed amendment to the Comprehensive Plan or Zoning Code is in the best interest of the local government as a matter of public policy. Legislative decisions typically affect large areas and are not focused on small, localized segments of property or the community. Because a governing body is the elected policy-making body of the local government, the governing body's policy judgment is given great deference by the courts.

A governing body's legislative discretion is, however, constrained by state and local laws, such as:

- **THE GOALS:** A post acknowledgment amendment to a Comprehensive Plan or implementing regulation must be in compliance with any applicable Statewide Planning Goal.
- **STATE LAW:** ORS 227.173(1) requires all land use decisions to be based on legislatively adopted standards and criteria. While such criteria may be discretionary, LUBA and the courts have reversed criteria that are arbitrary or so vague that they do not provide an applicant with a reasonable idea of what the applicant needs to do to obtain an approval.
- **THE COMPREHENSIVE PLAN:** Many Comprehensive Plans contain approval criteria or a review process for amendments to the Plan. Amendments to zoning regulations must comply with Comprehensive Plan policies.
- **LOCAL CHARTER AND CODE REQUIREMENTS:** 1998 Ballot Measure 56 amended ORS 227.186(2) to require all legislative land use decisions to be enacted by ordinance. Legislative land use decisions must therefore be made pursuant to each city's local enactment process.

PROCEDURAL REQUIREMENTS FOR LEGISLATIVE DECISIONS

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. In most local governments, proposed legislative amendments are first referred to a planning commission

for public hearing and recommendation before coming to the governing bo
for public hearing and adoption.

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- **NOTICE** Notice of a legislative hearing is typically provided by publication in a newspaper of general circulation in the community. Local codes may contain additional requirements.

- **BALLOT MEASURE 56** (ORS 215.503/227.186) requires notice to property owners not less than 20 and not more than 40 days in advance of the first hearing on a legislative change that limits or prohibits previously allowed land uses.

- ORS 197.610 requires notice of a legislative decision to be mailed to DLCD at least 45 days in advance of the first evidentiary hearing on adoption, unless the local government determines that the Goals do not apply (which will almost never be the case). In either event, notice of adoption must be mailed to DLCD not later than five working days following adoption. Failure to do so is jurisdictional, which means the decision comes back to the local government to re-do with the appropriate notice.

- **CITIZEN INVOLVEMENT** Statewide Land Use Planning Goal 1 requires every local government to adopt and implement a citizen involvement program. 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.

- **HEARING PROCEDURE** There is no state-prescribed procedure for legislative hearings. Most codes provide for general testimony; others call first for testimony in favor, followed by testimony in opposition. After the close of testimony, the legislative amendment is adopted, adopted with amendments, or rejected pursuant to the ordinance or resolution adoption procedures of the local government charter or code.

E. QUASI-JUDICIAL LAND USE DECISIONS

NATURE AND SCOPE OF QUASI-JUDICIAL DECISIONS

When a governing body makes a quasi-judicial decision, it is deciding whether the evidence and testimony in the record proves or fails to prove that the application complies with the applicable criteria for approval. The scope of a quasi-judicial decision is much more limited, and a governing body's discretion is more constrained, both procedurally and substantively. Typically, quasi-judicial decisions affect only a single or limited number of

properties. Quasi-judicial decisions apply, rather than create, policy. In thes circumstances, the Council is acting as a judge rather than setting policy fo the city.

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THE APPLICABLE STANDARDS AND 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 regulations. ORS 215.416 and 227.173. 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. 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. These criteria, however, can be and are frequently very subjective.

- **WHICH CRITERIA?** ORS 227.178(3) and 215.427(3) require that an application be judged by the criteria in effect at the time the application is filed. In other words, the governing body cannot delay a decision on an application in order to rush through a legislative amendment to the criteria and then retroactively apply the new criteria to the pending application.

- **INTERPRETATION OF CRITERIA:** In Clark v. Jackson County, 313 Or 508 (1992), the Oregon Supreme Court stated that 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." The 1993 Legislature incorporated the Clark standard into the LUBA review statute. ORS 197.829.

- In *Church v. Grant County*, 187 Or App 518, 69 P3d 759 (2003), however, the Court of Appeals appeared to limit its line of cases that concluded that *Clark* and the *Clark* codification statute (ORS 197.829) required affirmance of a local governing body's interpretation if not "clearly wrong." Instead, the court of appeals concluded 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)" (the "*PGE* test"). 187 Or App at 524. Under the *PGE* Test, courts look first to the text and context of the provision. If the text and context is ambiguous, the courts next look to legislative history.

- More recently, the Court of Appeals has indicated that LUBA and the courts should defer to a city's interpretation of its own code if that interpretation is "plausible." *Siporen v. City of Medford*, 231 Or App

585, 598-99, 220 P3d 427 (2009). This issue seems to be in flux a may be developing further

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THE EVIDENCE IN THE RECORD

The decision as to whether an application complies with the applicable criteria has to be based on the evidence and testimony "in the record." Evidence is considered to be "in 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. 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.

- **BURDEN OF PROOF:** The applicant has the burden of proof to demonstrate compliance with the applicable criteria. The "burden of proof" is the obligation to establish compliance by evidence to a particular degree. The typical evidentiary burdens are "beyond a reasonable doubt," "clear and convincing," and proof by a "preponderance of the evidence." The latter is the burden in most codes. In other words, if the city council believes that the evidence is 50-50 with regard to compliance with a particular criterion, then it must deny the application because the applicant has failed to carry the burden of proving his or her case to the council.

- **SUBSTANTIAL EVIDENCE:** A decision to approve or deny must be based on "substantial evidence in the whole record." 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. "Substantial" evidence is evidence a reasonable person would rely on in reaching a decision. City of Portland v. Bureau of Labor and Ind., 298 Or 104, 119, 690 P2d 475 (1984). 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. Younger v. City of Portland, 305 Or 346, 360, 752 P2d 262 (1988). "In order to determine whether evidence is 'substantial' it must be considered in the context of conflicting evidence in the record." The local hearings body is empowered to make the choice between different reasonable conclusions to be drawn from the evidence in the whole record.

PROCEDURAL REQUIREMENTS

ORS 197
ORS 195
ORS 763
ORS 215
ORS 416
ORS 227

The quasi-judicial decision-making process is controlled by both state law and local code and can differ substantially among local governments. See

ORS 197.195, 197.763, 215.416, and 227.160 to 227.185. The general ru is, however, that parties to a quasi-judicial decision are entitled to be treat 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 make and to a written decision. *Fasano v.* Washington *County*, 264 Or 574 (1973), ORS 227.173(2).

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- **THE RIGHT TO PRESENT AND REBUT EVIDENCE** The standard practice in most local governments is for the applicant to begin the public testimony, followed by testimony in support of the application. Testimony in opposition is then taken, enabling opponents to respond to the evidence in support and to present additional evidence. The applicant is then given the opportunity for rebuttal, which is limited to responding to the evidence and testimony in opposition.

- **LOCAL HEARINGS** Most local government codes provide for at least one hearing before a lower body (generally the planning commission or a hearings officer) before the application may be appealed to the governing body. Depending on the local government, an appeal to the governing body may be heard:

- **DE NOVO** A "de novo" hearing generally means that the parties may submit new evidence and testimony before the governing body, although some local governments limit the arguments to those stated in the notice of appeal.

- **ON THE RECORD** An "on the record" hearing 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. No new issues or evidence may be presented at the governing body hearing. The purpose of limiting evidence and testimony is to encourage issues to be fully presented and resolved at the lower level.

- **IMPARTIAL TRIBUNAL** The requirement for the governing body to be impartial is one of the most important distinctions between legislative and quasi-judicial decisions. A legislative decision is essentially a political decision and people are entitled and should be encouraged to call, send letters, or otherwise attempt to influence a governing body's decision. Further, a governing body is expected and entitled to exercise its political judgment in making such decisions. In contrast, a quasi-judicial decision is a legal judgment on a specific case which affects individual rights. The parties to such a case are entitled to a fair, equal, and unbiased consideration and decision.

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- **EX PARTE CONTACT** An "ex parte" contact is contact with a governing body regarding a land use application outside of the pub hearing process. Ex parte contacts are discouraged in quasi-judicia decisions because they can result in undue influence and because all parties do not have the opportunity to hear and respond to such comments. If a member of a governing body has an ex parte contact (and sometimes they cannot be avoided), then the member must disclose and describe the content of that contact prior to opening the public hearing so that all parties may respond. ORS 227.180. Failure to disclose an ex parte contact taints the fairness of the hearing and can result in reversal or remand of the governing body's decision.

- Communication with local government staff regarding an application outside the hearing process is not an ex parte contact. *Richards-Kreitzberg v. Marion County*, 31 Or LUBA 540, 541-542 (1996). This is true even if the City is the applicant.

- A site visit by the governing body is not technically an ex-parte contact, but will be treated like one if not disclosed because a decision based on a site visit is otherwise impermissibly based on evidence outside of the record. 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).

- Contacts that occur prior to the filing of an application are not ex parte contacts. *Richards-Kreitzberg*, 31 Or LUBA at 541.

- **BIAS** A member of a governing body should not participate in a decision if he or she has an actual bias regarding the application. "Actual bias" means prejudice or prejudgment of the facts to such a degree that he or she is incapable of rendering an objective decision on the merits of the case. *1000 Friends of Oregon v. Wasco County Court*, 304 Or 76, 742 P2d 39 (1987).

- The courts have been very reluctant to overturn a local government decision based upon an allegation of bias. The reasons are essentially two: First, elected officials are not judges and are expected to exercise some political judgment – within the bounds of the law. Second, while you can easily replace a judge, disqualifying city councilors or county commissioners can create quorum and minimum vote problems, making it difficult for the governing body to even make a decision. *Eastgate Theatre v. Bd. of County Comm'rs*, 37 Or App 745, 754, 588 P2d 640 (1978).

- It is not bias for a city council to decide the city's own applications. *Pend-Air Citizen's Committee v. City of Pendleton*, 29 Or LUBA 362 (1995).

- 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. For the reasons stated above, it is probably better to err on the side of participation. It is useful, however, for the council to have a discussion about bias issues to determine some ground rules for participation. 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.

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- **CONFLICTS OF INTEREST** Prior to participating in any decision, a member of the planning commission or governing body must declare any potential or actual conflicts of interest pursuant to ORS Chapter 244 (Government Standards and Practices).

- A "potential conflict of interest" exists if the land use decision could result in a personal financial gain or loss to the councilor, any member of his or her household, or any business with which they or a household member is associated. A potential conflict does not include financial impacts arising out of membership in an occupation or class which is a prerequisite to holding office, or an action which would affect to the same degree a class such as an industry, occupation, or other group to which the councilor belongs. A councilor 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. ORS 244.120(2). If the land use decision is discussed over the course of several meetings, the councilor must declare the conflict each time the matter comes up.

- An "actual conflict of interest" exists if the land use decision would result in a personal financial gain or loss to the councilor, any member of his or her household, or any business with which they or a household member is associated. A councilor 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. Exception: If the participation of the councilor is necessary to meet a requirement of a minimum number of votes to take official action, the councilor may vote, but may not participate in the discussion. ORS 244.120(2)(b)(B).

- Failure to comply with ORS Chapter 244 can result in an investigation and hearing by the Oregon Ethics Commission ("OEC"). If it finds a violation, the OEC can levy a fine of up to $5000. It also can affect the validity of the land use decision.

- Note: The statutory requirement to declare conflicts applies to both legislative and quasi-judicial decisions.

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- To the extent a member of a governing body has questions regarc conflicts of interest, the OEC can provide advice. You should consult with your city attorney if you have any concerns about conflicts of interest.

- **ORS 197.763 (THE "RAISE IT OR WAIVE IT" LAW)** Since 1989, the State Legislature has regulated local quasi-judicial land use hearing procedures pursuant to ORS 197.763. This statute is referred to as the "raise it or waive it" law 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." In return for this protection, the legislature adopted a number of procedural requirements designed to ensure that parties have an adequate opportunity to raise issues at the local level.

- ORS 197.763 may or may not apply to a hearing before the governing body. If the hearing is "de novo" before the governing body, ORS 197.763 applies. If the hearing is "on the record," however, ORS 197.763 may not apply. See *Murphey Citizens Advisory Committee v. Josephine County*, 25 Or LUBA 312 (1993). ORS 197.763 issues that are likely to come up at a hearing include:

- **NOTICE** ORS 197.763(3) requires that written notice be sent 20 days in advance of the hearing. The notice must explain the nature of the application, list the applicable criteria, and describe the procedures to be used at the hearing. A violation of the notice requirements can result in a remand if it prejudices a "substantial right."

- **LUBA/TAKINGS WARNING** At the beginning of each quasi-judicial hearing, the chair 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.

- ORS 197.796 requires an applicant alleging that a condition of approval unconstitutionally "takes" their property to raise that argument at the local level. ORS 197.796(3)(b) now requires a statement that "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."

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- **CONTINUANCE/OPEN RECORD** Under ORS 197.763(6), 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. 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.

- **FINAL REBUTTAL** Unless waived by the applicant, the applicant is entitled to submit final written arguments after the record is closed to all other parties. ORS 197.763(6)(e). This extension is exempt from the 120/150-Day Rules.

- **WRITTEN DECISION** The governing body's final decision must be expressed in writing. This decision, typically referred to as the "Findings of Fact, Conclusions of Law and Order" must set forth the relevant criteria, state the evidence on which the governing body relies, and explain 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. It is important to remember that the decision does not become final until the written order is adopted; during the interim between preliminary decision and adoption of the final order, you should continue to avoid ex parte contacts.

- Often, the winning side will request an opportunity to draft the findings. LUBA has concluded that this does not violate any state law and may save staff resources. 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.

120/150-DAY RULES

ORS 215.427, 215.429, 227.178, and 227.129 require local governments to make a final decision on a land use application, including resolution of all local appeals, within 120 days (cities/counties for territory within an urban growth boundary) or 150 days (counties outside of an urban growth boundary) of the filing of a complete application. 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. If the applicant prevails on the writ, the court can make the local government pay the applicant's attorney fees.

> Note: An applicant is entitled to a compelled approval unless the local government can demonstrate that approval would violate a

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substantive provision of the local Comprehensive Plan and zoning regulations. Many applicants mistakenly assume that if the local government violates the rule that they are entitled to automatic approval.

F. APPEAL OF GOVERNING BODY DECISIONS

PROCEDURE AND PROCESS

With several limited exceptions, a legislative or quasi-judicial decision of the governing body, where proper notice was given, may be appealed by filing a Notice of Intent to Appeal ("NITA") with LUBA within 21 days of the date of the decision. ORS 197.805 to 197.895. LUBA is a three-member administrative hearings body appointed by the governor. ORS 197.810. 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. LUBA's procedure is very similar to filing a brief and arguing a case before the Court of Appeals or Supreme Court.

LUBA is statutorily required to make a final decision within 77 days of the filing of the record. ORS 197.830(14). (The local government has 21 days from the filing of the NITA to file the record).

EFFECT OF LUBA'S DECISION

LUBA can affirm, reverse, or remand the governing body's decision. 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. When LUBA remands a case, the governing body must reconsider its decision based on LUBA's order.

- **REMAND DEADLINE:** ORS 227.181 requires a city to respond to a LUBA remand within 90 days of a request from the applicant for a decision.
- **ATTORNEY FEES:** Attorney fees are difficult to obtain at LUBA, but can be awarded if the losing party fails to present a position that is well founded in law or factually supported. ORS 197.830(15)(b). LUBA can also award attorney fees to a prevailing party on a takings claim. ORS 197.796(5). This rarely occurs.

JUDICIAL REVIEW

LUBA's decision may be appealed within 21 days to the Court of Appeals, and the Court of Appeals decision can be appealed to the Supreme Court.

ORS 197.850. Review at the Court of Appeals is also expedited: Except in limited circumstances, the Court must hold oral argument within 49 days o the transmittal of the record. ORS 197.850(7). ORS 197.850(10) requires the court to make a decision "with the greatest possible expediency" and n later than 91 days from the date after oral argument. ORS 197.855(1). ORAP 4.60 to 4.74, which govern appeals from LUBA, require the record to be transmitted within seven days of filing of the appeal, require the petition for review to be filed within 21 days of filing, and require the response to be filed within 21 days after the filing of the opening brief. As with a standard civil case arising from circuit, the Supreme Court has discretion as to whether to grant review of a Court of Appeals land use decision. Historically, the Supreme Court has granted review in only a handful of cases. A decision by the Supreme Court is final, unless the decision involves an issue of federal law (such as a due process or 5th Amendment takings claim), in which case a party could file a petition for review in the United States Supreme Court. This is a very rare occurrence.

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G. MISCELLANEOUS CONCEPTS AND ISSUES

URBAN GROWTH BOUNDARIES

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. Metro establishes the Metro UGB for cities within its jurisdiction. Within the Metro UGB, each city then establishes an urban services boundary within which the particular city commits to annex and serve the territory.

- **AMENDING THE UGB** ORS 197.295 to 197.314, 197.475 to 197.490, and Goal 14 apply to amendments to the UGB. Generally, the statutes require a review of the 20-year land supply, and require either adjustments to the UGB or to land use regulations to accommodate the need. Once a need is identified, the factors of Goal 14 and ORS 197.298 are applied to determine the appropriate area for expansion. Generally, non-resource land is preferred over resource (forest or farm) land. Urban Growth Boundary amendments over 100 acres (Metro) or 50 acres (cities over 2,500 in population) must be submitted to LCDC under the period review process. Appeal of LCDC's decision goes to the Court of Appeals.

- **URBAN RESERVES** 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. ORS 195.145. The urban reserve area reflects a 30- to 50-year land need beyond the current UGB. Rules for identification and designation of urban reserves are very similar to those for the UGB. Once designated, an

urban reserve becomes the first priority territory for expansion of the UGB when such need is determined. ORS 197.298(1)(a).

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"TAKINGS"

The 5th amendment to the U.S. Constitution and Article I Section 18 of the Oregon Constitution prohibit the taking of private property for public use without due process and just compensation. While grossly oversimplifying a complex area of the law, there are basically four kinds of takings:

- **EMINENT DOMAIN** A government may take private land for public use by filing a condemnation action. A governing body's determination of "public use" is given great deference in this context. Generally, the chief argument at trial, if it gets that far, is the amount of compensation.

- **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." 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).

- **PHYSICAL INVASIONS** A regulation is a "physical invasion" – and thus an unconstitutional "taking" regardless of how it impacts the value of the property – if it requires the owner to permit a third party to occupy his or her premises.

- **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. Related to a physical invasion, an exaction is constitutional if the local government demonstrates that it complies with the test established in *Dolan v. City of Tigard*, 512 US 374, 114 S Ct 2309, 129 L Ed 2d 304 (1994):

    - 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.

  The 1999 Legislature enacted ORS 197.796 to provide for a method of challenging conditions of approval that may be unconstitutional exactions. An applicant for a land use decision must bring a case

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within 180 days after the final decision either at LUBA or circuit cour In order to do so, the applicant must have raised the issue at the local level and exhausted all local appeals. The local government has the obligation to state at the beginning of a hearing that failure to raise an issue with regard to a condition precludes appeal, and must state the condition with sufficient specificity to enable the applicant to contest the decision before the final local hearing is closed.

H. CONCLUSION

This chapter is a necessarily cursory overview of a complex area of the law. Please consult your city attorney if you have further questions.

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Thank you to

- Sean Kelly, Attorney, Ackley, Melendy & Kelly, LLP
- Dave Ris, Esq., City Attorney, City of Gresham

for updating this chapter in the Fall of 2010.

Names listed in alphabetical order.

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A. CRIMINAL JUSTICE

INTRODUCTION

The criminal justice system exists as a formal way of dealing with those who violate the law. The extent to which cities are involved in the criminal justice system varies according to the size of the city and the extent to which it wants to be involved. The four major components are: police, prosecution, courts, and corrections. Closely related to these components are crime prevention and post release rehabilitation programs. An overview of the enforcement process and its terms is provided to assist councilors understand the overall system.

POLICE

The role of local law enforcement officers encompasses a wide range of responsibilities. Some of the functions commonly associated with modern police forces are crime control and prevention, preservation of the peace, regulation of conduct other than criminal activity (such as licensing and inspection), traffic supervision, human relations, and provision of general assistance to the community. In response to the increasing demands for effective performance of such diverse duties, the need for instruction to local police officers has become increasingly apparent to all who are interested in improving the daily performance of city business.

ORS 181

Police officer training is governed by state law under ORS 181.610 to 181.712, which require, in part, that all newly hired police officers complete a basic course of instruction. City police departments must send recruits to the Oregon Police Academy at Salem for their basic training. The 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 structure field training program. Some city police departments also maintain their own instruction programs, and a number of community colleges and four-year educational institutions in Oregon offer law enforcement courses.

The time and resources expended on police activities varies with the size and social and economic characteristics of the city. The history of criminal activity and police practices also plays a role in the framework for police services. In some small communities, 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. 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.

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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. 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

Oregon cities are not legally required to provide law enforcement services, and some cities do not. However, when a city decides to provide police services, state and federal constitutional requirements relating to the rights of individuals become applicable. City "home rule powers" are subject to state preemption of local choices and the State of Oregon frequently directs certain details of local law enforcement. Oregon statutes prescribe certain duties and authorities of police officers, set up general requirements such as certification standards, and determine to which court a person who commits a criminal offense may be cited..

MUNICIPAL COURTS

Most Oregon city charters establish municipal courts, but some court procedures are controlled by state law. There is no state requirement that a municipal judge be full-time, that judicial duties be her or his sole area of responsibility, that the position be elective, or even that the person holding such a position have any formal legal education or be a member of the Oregon State Bar. But some cities, by charter or council policy, do set such requirements. Some small cities combine the functions of municipal court judge with those of city recorder.

Citizens are directly affected by services provided in a municipal court. The court is often where the policies and standards adopted by the Council are ultimately enforced. Many people appear in court each year. Each community, through its governing body, adopts ordinances or laws which reflect the standards for conduct by its citizens. Cities may choose to have a municipal court to enforce local ordinances consistent with community standards.

Oregon Constitution, Article VII, Section 1

AUTHORITY FOR MUNICIPAL COURT The Oregon Constitution, Article VII, Section 1, (original), states: "Municipal Courts may be created to administer the regulations of incorporated towns, and cities." Most cities authorize the creation of the municipal court in its city charter. The charter establishes the municipal judge as the judicial officer of the city and establishes the jurisdiction of the court over all crimes and offenses contained in the ordinances and charter committed within the city and on all property owned or controlled by the city.

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The city charter typically requires that court be held within the city. Regular hours for conducting court business are established by the judge or the Council. The defendant's first appearance (arraignment) is scheduled for the defendant's entry of a plea (guilty, not guilty, no contest). Jury trials are generally scheduled for more serious offenses. Trials to the judge are held for most violations such as parking, traffic, and infractions. Special court appearances are scheduled as necessary to accommodate defendants who have been lodged in the local correctional facility.

PARTICIPANTS IN MUNICIPAL COURT As noted above, the municipal judge is the "judicial officer" of the city. Though charters may differ, usually the municipal judge is appointed by and serves at the pleasure of the council. Some charters, such as Salem, provide that the judge be elected. The charter describes the authority of the judge, and the responsibilities can be further defined in an agreement between the judge and the council. The duties usually include presiding over court appearances and reviewing correspondence from attorneys and defendants regarding specific cases. When the municipal judge is unavailable, either because of illness or absence from the city or because of a conflict of interest in a case, a pro tem judge acts in the judge's place.

The city attorney or city prosecutor represents the city in the prosecution of ordinance violations. It is the prosecutor's responsibility to appear for the city in criminal trials and other criminal matters, such as hearings regarding the release of a defendant from corrections. The city can contract with the district attorney's office or a private attorney for prosecution of ordinance violations.

The defense attorney represents defendants charged with a crime in municipal court. If a defendant in a criminal matter cannot afford an attorney, the court is required to provide an attorney. Local attorneys frequently serve as court-appointed attorneys. They are attorneys who have indicated a willingness to provide their services and are appointed by the municipal judge or by contract at a rate approved by the Council.

The court bailiff may be present at arraignments to announce the opening of the court session and to direct defendants as they enter and leave the courtroom. Typically, the court clerk serves as bailiff, though many cities have volunteers perform this duty after taking an oath of office.

ORS 471
ORS 801

In addition to jurisdiction over violations of city ordinances, municipal courts have jurisdiction over violations of state statutes within the city when the statutes specifically provide such jurisdiction (State Liquor Control Act, ORS chapter 471; Oregon Vehicle Code, ORS chapters 801 to 822). Cities sometimes adopt other state laws by reference, which then permits them to enforce such laws as municipal offenses. Felonies cannot be handled by municipal courts.

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A circuit court has concurrent jurisdiction with municipal courts over violations of city charters or ordinances when the city is located entirely, in part, in the court's jurisdiction. A few cities, under permissive legislatio have transferred their municipal court functions to circuit courts. Some cities have, by intergovernmental agreement, relinquished the municipal court function to the justice court.

There are several factors to consider before transferring jurisdiction of the municipal court. Some of the more important ones are:

- How far is the circuit or justice court from the city considering transfer? Distance could mean time and money for violators and city police officers as well as inconvenience for the city.
- How important is local control? The city loses authority to appoint the judge and to determine court hours. In addition, enforcement of local priorities such as parking or animal control may not receive the attention they would in a municipal court.
- Can the city continue to maintain the court financially? The city should balance the cost with the loss of fine revenue, since the distribution of fines is determined according to the court hearing the case as well as the agency employing the citing officer.
- Does the city contract with the county for jail services? If the jail is in the county seat, it may be more convenient to try cases there, instead of transporting prisoners.

A civil infraction or civil penalty procedure can provide an alternative to court procedures to deal with ordinance violations. Such a procedure is adopted by ordinance following a determination of which offenses the city wants to, and may legally, "decriminalize" and reclassify as "civil infractions." Civil infraction procedures are used to reduce court case loads by attempting to settle disputes over such matters as sidewalk repair regulations, nuisances, and animal control in a non-criminal context. A civil process may be more expeditious and, in contrast to a criminal process, reduce the burden-of-proof standards required of a government or a complaining party.

PROSECUTION

ORS 221

Since the jurisdiction of the municipal court is limited to misdemeanor crimes, traffic offenses, and violations of municipal ordinances most municipal courts are not courts of record. If a municipal court is not a court of record defendants have an automatic right of appeal to circuit court.

Other criminal prosecutions are the responsibility of the District Attorney's Office. Some municipalities have agreements with the District Attorney's

Office whereby all crimes, traffic offenses, and municipal ordinance violations are handled.

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CORRECTIONS

Corrections in Oregon consist of state and local components that provide both institutional and community supervision. In general, the state Department of Corrections is considered to be responsible for convicted felony offenders, and local programs deal with convicted misdemeanants. In addition, many prisoners are lodged in local facilities awaiting trial, sentencing, or transfer to another facility. Cities are responsible for corrections facilities and programs for persons prosecuted in municipal court.

ORS 169

Cities have several options in providing jail services. They may operate: no facility; a local correctional facility (to hold prisoners for more than 36 hours); a local lockup (to hold prisoners for up to 36 hours, or 96 hours counting weekends and holidays); or a temporary hold (to hold prisoners for up to four hours). (ORS 169.005) They may contract with another jurisdiction for longer-term incarceration, contract for all services, or participate in the operation of a joint regional correctional facility.

Contracting for all jail services is widespread. In most cases a county provides the jail facility and its services to the cities. A wide variety of formal and informal arrangements exist for financing local jail operations, based on different local conditions and on negotiations.

ORS 169

City responsibilities in corrections are considerably lighter than those of counties and the state, but they were increased by the Oregon Jail Standards Act. The legislation sets mandatory standards that apply to local jail facilities whether they are local correctional facilities, lockups, or holds. The standards include 24 hour supervision, three meals a day, medical procedures, and other requirements. (ORS 169.076 to 169.078) The Attorney General may bring action against a city or county for failure to meet these standards.

Both the professional norms of the corrections field and the practical problems of financing adequate correctional facilities have led cities, as well as counties and the state, to explore alternatives to incarceration. In addition to the traditional alternative of probation, cities are involved in diversion programs (especially for DUII), early release programs, and similar efforts to relieve jail overcrowding and to enhance the possibility of rehabilitation.

A diversion agreement is a prosecutorial tool that is typically utilized wherein the defendant is required to complete a series of tasks such as

pay restitution or a fine, perform community service or attend classes in exchange for having the offense removed from their criminal record.

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CRIMINAL JUSTICE PROCESS

City codes set standards for citizens that define the "livability" of each city. Cities have created offenses for noise levels, animal control, liquor control, nuisance, litter, and other community problems. Cities also can have city laws against theft, resisting arrest, assault, and weapons offenses that parallel state criminal statutes. A municipal court is the forum for the less severe violations of community standards. A misdemeanor is an offense for which a defendant can be sentenced to a maximum of one year in jail. An infraction (now more commonly referred to as a violation) is an offense for which no jail sentence can be imposed. The municipal court monitors all citations processed through the court. The court must track and report to the state court administrator's office the level of each type of citation. Presumptive fine amounts for felonies, misdemeanors, and violations other than parking infractions are governed by state statute. Additionally, the first $60 of each fine, or total fine amount if the fine is less than $60, must be remitted to the state. ORS 153.633(1).

For more information on the impacts of recent court fines legislation on municipal courts, please read this League of Oregon Cities report.

Citations prepared by police officers are usually reviewed by the city prosecutor before they are filed in court. If an offense is charged properly and there is sufficient evidence to support the charge, the citation is prosecuted. If more evidence is needed, the citation can be returned to the Police Department for further investigation. Crime victims have a right to be kept informed of the progress of the case they are the victim in and have a right to be present at sentencing. (ORS Chapter 147)

Once a case goes to court, the prosecutor appears on motions and at trial to the court or jury in misdemeanor cases. When defendants retain attorneys to defend them on infractions, the city prosecutor generally appears on behalf of the city. The city prosecutor assists police officers to get ready for an infraction trial to the court without attorneys where police prosecute the cases.

The constitution requires that the city appoint and pay for attorneys to represent indigents who are charged with a misdemeanor. This is due to the fact that conviction can result in the incarceration of the defendant. When the city makes the offense a violation, the city is no longer required to pay for indigent defense because no jail sentence may be imposed.

B. FIRE PREVENTION AND SUPPRESSION

FIRE PROTECTION PROGRAMS

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Most city fire departments are part of the city government structure. In large cities they are staffed by full-time professionals. Smaller cities usually use volunteer firefighters, and medium-sized cities often use a combination of full-time and volunteer personnel. Many city residents in Oregon receive their fire protection from Rural Fire Protection Districts (RFPDs).

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 rural fire protection districts under contract also are widespread. The reverse is found in several areas: rural fire districts 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 mergers and consolidations among fire districts and to receive fire protection from merged or consolidated districts. ORS 198.885 to 198.915.

ORS 198

A state Board on Public Safety Standards and Training, appointed by the Governor, 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.

Many other city functions are involved in providing efficient fire department operation: fire hydrants must be installed in the proper locations; zoning ordinances should set maximum dwelling heights; buildings should be inspected for conformance with fire safety regulations; width and layout of streets should be planned for easy fire equipment access.

FIRE PREVENTION REGULATIONS

The legislature has enacted state fire safety standards, created the office of State Fire Marshal, and provided for a system of state-local responsibility for fire protection. In addition, various national organizations have developed standards of good practice that are suitable for adoption and enforcement by local governments.

Statutes and the administrative rules established by the State Fire Marshal specify standards on subjects such as storage and use of explosives, fire protection equipment, protection of buildings, handling of liquid petroleum gas, transportation and storage of flammable and combustible materials,

ORS 476
ORS 479
ORS 480

etc. ORS chapters 476, 479 and 480. The State Fire Marshal can certify a city as an exempt jurisdiction, allowing the city to modify state fire and safety regulations. In each city, an official is an assistant to the State Fire Marshal for purposes of enforcing state regulations and issuing certain permits, e.g., fireworks. This is normally the city fire marshal, or, if there is no city fire marshal, the chief of the fire department.

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Regulations have limited value unless there are programs to stimulate fire prevention efforts. Much of the effectiveness of fire prevention depends on public education and information programs. Fire prevention presentations by local fire department personnel at elementary schools are one means of educating the public on fire safety measures. Information programs include voluntary inspections of residential property and mandatory inspection of other types of development.

C. EMERGENCY MEDICAL SERVICES

Emergency medical services (EMS) were originally established to transport seriously ill or injured persons to a hospital as quickly as possible, and hospitals were the most common providers of the service. Since the 1960s, the function of EMS has evolved into a coordinated system for bringing medical care to patients at the site of the incident and until transport to a hospital can be accomplished.

ORS 682
ORS 820

In Oregon, the provision of emergency medical service is governed by ORS chapter 682 and 820, which includes requirements for ambulance vehicle certification, insurance, ambulance equipment and supplies, licensing of ambulance services, and emergency medical technician certification.

The law requires counties to develop and adopt plans for the coordination of ambulance services, including establishment of ambulance service areas, another example of a mandated program in the public safety area. The planning process requires the county to "consult with and seek advice from" cities and other public and private ambulance service providers who have specifically informed the county of their interest in being consulted. In the absence of a county plan, cities and others may continue to provide ambulance services and, in some circumstances, a new ambulance service provider may enter the market. In adopting the plan, the county may not grant preference to existing ambulance service providers solely because they're already providing the service. Ambulance service regulation is declared exempt from federal antitrust laws. Once a plan is adopted, however, cities must abide by it and cannot alter ambulance service in a manner inconsistent with the county plan.

While EMT response to emergencies is the most visible component of an EMS system, there are many other important elements, including

communications, transportation, facilities, critical care units, public safety agencies, consumer participation, access to care, patient records, public information and education, review and evaluation, disaster planning, and mutual-aid agreements.

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Oregon cities receive ambulance service from independently owned private companies or from a publicly-owned ambulance service, or both. Service may be for-profit, nonprofit, or subsidized; and staff may be paid or volunteer. In some cities, EMS is provided by local fire departments, and transportation to the hospital is provided by private ambulance service. Cities usually regulate private service through business licensing or franchise provisions, or both, in city ordinances. A few cities contract with private companies and regulate the service through contract specifications.

A city has the authority to adopt an ordinance regulating ambulances but must comply with the county plan and the county determines the issue of compliance. City regulation of private ambulance service typically incorporates state standards, such as: license standards for drivers, attendants, and attendant drivers; requirements for equipment and number of attendants; amount of liability insurance companies must carry; posting of bond to the city; and posting of rates and charges. Some cities also regulate the fees private companies charge for ambulance service.

Some cities operate their own public ambulance services instead of authorizing and regulating private services. Municipal ambulance service also may be provided by the fire department. Cities may establish boards to oversee operation of the service. Some of these boards are purely advisory, while others have management powers over city-owned services. Whether or not a city maintains a public ambulance service, it usually continues to regulate private ambulance services that operate inside the city.

D. EMERGENCY TELEPHONE SYSTEMS

ORS 401

Oregon law provides for creation and implementation of emergency telephone systems in ORS 401.710 through ORS 401.790. The law provides for a statewide system of access to emergency services through a statewide telephone number, 9-1-1. A "public or private safety agency" includes any unit of state or local government, a special purpose district or private firm that provides or has authority to provide fire fighting, police, ambulance or emergency medical services.

To establish 9-1-1 systems, groups of public safety agencies formed a "local jurisdiction" and agreed in writing to jointly plan an emergency telephone system. The plan had to be approved by all agencies in the local jurisdiction. The state Office of Emergency Management Division also approved all plans and, on request, assisted local jurisdictions in planning

9-1-1 systems. Levels of service provided by 9-1-1 service area offices vary, but each service area must comply with the minimum standards set forth in ORS 401.720.

To aid in financing 9-1-1 systems, cities and counties receive a portion of the revenue produced from a state tax charged to all telephone service subscribers, and local governments are prohibited from imposing separate taxes on the service. Some cities have adopted ordinances prohibiting the use of automatic telephone dialing services and alarm systems to directly access 9-1-1. Other local regulations prohibit harassing and false reporting using the 9-1-1 system.

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E. DRUG HOUSES AND OTHER SAFETY NUISANCES

ORS 453

ORS chapter 453 provides for the regulation of hazardous substances. This chapter also prohibits the occupancy of property used as an illegal drug manufacturing site. "Property" is defined as a house or an apartment, unit, room or shop within a building, boat, trailer, motor vehicle, or even a "booth or garden." When property is not fit for occupancy due to its use as a drug lab, the property must be decontaminated and reinspected, and the Health Division must approve reuse before the property may again be rented or sold. Under rules adopted by the Health Division it is illegal for an owner to sell or rent property in violation of this procedure. The legislation imposes a number of requirements on local jurisdictions:

- As a local code enforcement agency, cities are required to make available to the public (and to supply to the affected property owners) a list of decontamination contractors approved by the Health Division;
- The Health Division may contract with local agencies for inspection of decontamination work and for evaluation of decontamination contractors;
- Cities and counties are free to regulate or prohibit use or occupancy of property, but local actions must be consistent with this legislation and Health Division rules; and
- The city is empowered to bring nuisance abatement proceedings against a property owner who allows property to be used after it has been determined to be not fit for use.

The city may use this law to take action against applicable property owners; short of this, the city's role is a passive one of cooperation with the Health Division in helping to enforce this legislation.

ABATEMENT OF PROSTITUTION, GAMBLING, AND DRUG NUISANCES

ORS 105

ORS chapter 105 provides for the abatement of places of gambling and lotteries, prostitution, or controlled substance activities. Under this chapter, places of prostitution, places of gambling or illegal lotteries, and places where unauthorized delivery, manufacture, or possession of drugs occurs are all declared to be a nuisance. Almost anyone, including the attorney general, city attorney, or a private citizen, can file an abatement action in circuit court. The costs of the suit, including attorney fees, become a lien on the property. The law is not intended to limit the power of a city or county to further restrict these nuisance activities, but the ordinance must be consistent with this law. The city may use the law to take abatement action against qualifying properties and their owners. The city is not limited by this law, and is free to determine other uses of property to be a nuisance or to further regulate property subject to this legislation.

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F. BUSINESS REGULATION

Oregon cities and counties license business for both regulatory and revenue purposes. This section addresses regulatory licensing programs. Licensing for revenue purposes is discussed in Chapter 6.

SCOPE OF REGULATORY LICENSING

Regulatory licensing programs are directed toward a variety of community objectives. Many cities and counties 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.

Cities and counties also may adopt and implement special regulations for the conduct of specific types of businesses. Some of the businesses traditionally regulated by local governments are:

- **SECONDHAND STORES AND RELATED OPERATIONS:** Regulations generally are directed at detecting stolen merchandise through required record keeping.
- **AMUSEMENTS (TRAVELING SHOWS, POOL HALLS):** Regulations usually address public safety and nuisance concerns by setting hours of operation, providing for inspection of premises and similar matters.
- **TAXI SERVICE:** Local regulation of rates and service levels.

- **Large Outdoor Gatherings:** Regulations are aimed at sanitation and public safety.
- **Business And Fire Alarm Systems:** Regulations address installation and maintenance practices in an effort to reduce false alarms.
- **Rental Housing:** Regulations address compliance with fire, health and safety regulations to ensure habitable living conditions for the community.

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EXEMPTIONS

The state Legislature has preempted local government authority to regulate certain types of businesses, including pari-mutuel betting, liquor, and insurance 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.

FEES

Cities and counties customarily impose fees that must be paid by business firms subject to city regulation. Fee structures for regulatory purposes usually take the form of a flat rate established for each specific type of business. Since the authority to regulate derives from the city's police power, the amount of the fee must be reasonable and not so high as to be considered a prohibition on the activity. In general, the fee must be based on the cost of regulating the activity, including the cost of application processing, investigation, inspection, and other enforcement activities.

FRANCHISES

Closely related to regulatory licensing is the franchising of certain private services. However, while regulatory licenses are usually granted for short periods of time (usually one year), franchises may extend as long as 20 years, although franchise agreements may include provisions for renegotiation for specified purposes at shorter intervals. Another difference is that, while regulatory licensing is an exercise of the local government's general police power, a franchise usually has the status of a contract that is binding on both parties. The procedures and consequences of terminating a franchise before its expiration would be quite different from those involved in revoking a license. For example, early termination can potentially lead to breach of contract claim.

City "home rule powers" and state law authorizes cities to grant franchises to public utilities such as gas and electric providers (ORS 221.420), vehicles for hire (ORS 221.495), telecommunication providers (ORS 221.550) and solid waste collection (ORS 458A.085). Cities are also authorized by federal law to franchise cable television providers. The franchises consist of provisions that govern how the franchisee is to operate within the boundary of the community and generally include the payment of franchise fees. In lieu of franchises, some cities have elected to establish regulatory system using the police power to govern operations within the city including the payment of fees.

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A city cannot regulate matters that are under the exclusive regulatory authority of the Public Utility Commission. Historically, while state law gives authority to do so, most communities have not regulated the rates gas and electric utilities charge their customers.

Most communities have established franchise fees as compensation for the special use of the public right of way (PROW). The PROW includes the space on, above and under city streets, alleys, and sidewalks. Utilities make special use of the PROW by placing their equipment (e.g. power lines) above or under the right of way. This use differs from ordinary use of the PROW for travel.

ORS 221

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. If the community wishes to charge a franchise fee for electric or natural gas providers, there are no state or federal limitations on the amount of the franchise fee.

There are limits on certain franchise fees. State law limits the fee for certain telecommunications companies to seven percent of a defined base. At the federal level, the Telecommunications Act of 1996 requires that compensation from telecommunications providers be on a competitively neutral basis. 47 USC 253; ORS 221.515(1). Finally, federal law limits cable television franchise fees to five percent of gross revenues. 47 USC 542.

GAMBLING

ORS 167

The State of Oregon, in the criminal code, prohibits "gambling" throughout the state. State law defines gambling as a contest of chance where someone else may receive something of value in the event of a certain outcome. ORS 167.117. 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.

Of particular interest to municipalities is the exemption of "social games" from the definition of gambling. A social game is defined as a game in a private home, club, or place of public accommodation where there is no "house" who acts as the bank or the odds maker or receives any direct income from the operation of the game.

Municipalities may by ordinance authorize the playing of social games in private businesses, clubs, or places of public accommodation. This is a general grant of authority to municipalities to define what regulations they deem to be appropriate for their local communities.

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G. ANIMAL CONTROL

LOC A-Z Index: Resources on Regulating Animals

Animal control is one of government's oldest activities. It was originally a rural function that was established to protect livestock from marauding dogs, and that aspect is still important. However, dog control is now both an urban and a rural problem, and city officials report that it occupies a large share of their attention. In addition to dog control, many cities regulate the keeping of livestock, poultry, pigeons, and bees.

There are two ways control can be exercised over dogs within cities: A petition by 20 or more electors of any incorporated city that does not already have an established dog licensing program is enough to place the question of whether dogs should be allowed to run at large within that city on the ballot. However, most cities will prefer to adopt their own rules and procedures by ordinance. ORS 609 sets out general rules for animal control. However, the statutes regarding impoundment, disposition of menacing or biting dogs, public nuisance dogs, dangerous dogs and licenses, fees and tags for dogs, and disposition of dogs harming livestock are not binding on cities. The statutes are clear that the provisions of ORS 609.030 to 609.110 and 609.135 to 609.190 do not limit cities in their development of their own regulations.

ORS 609

Similarly, the cities are expressly granted the ability to adopt ordinances prohibiting the keeping of wildlife and exotic animals within the city. See ORS 609.205.

A comprehensive animal control program includes the following components:

- An ordinance that sets forth the city's dog and other animal regulations, including impoundment procedures;

- An animal shelter, often provided through a contract with the local Humane Society;[23]
- A continuing education program;
- An enforcement program; and
- A sterilization program to reduce the number of unwanted animals.

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In addition to prohibiting dogs from running at large, cities often regulate the location where animals may be kept, the amount of land required to house them, sanitation, noise, communicable diseases, cruelty, and removal of carcasses. Most cities prohibit the keeping of swine, and many cities either prohibit or restrict bee keeping. Several cities have special regulations for wild and exotic animals, as well as for potentially dangerous animals such as pit bulls. These regulations are usually found in separate titles devoted to animals, but they can also be found in zoning and development codes, public health chapters, or in safety and welfare chapters of municipal codes. Such regulations are usually enforced by citation into municipal court; however, certain activities, such as keeping a dangerous dog, can be declared a public nuisance and the city could seek injunction of the nuisance in circuit court.

ORS 167

ORS 167.310 – 167.351 are the state criminal provisions regarding animals. The following offenses have been made crimes by the state legislature:

- Research and animal interference;
- Animal Abuse and Aggravated Animal Abuse;
- Animal neglect;
- Sexual assault of an animal;
- Interference with or assault on a law enforcement animal;
- Animal abandonment;
- Trading in non-ambulatory livestock;

ORS 433

23 Be aware that if your city either runs or contracts with a shelter that must destroy dogs or cats on occasion, the method allowed by law is lethal injection of sodium pentobarbital or other substance approved by the Oregon State Veterinary Medical Examining Board. If the animal to be destroyed poses an imminent threat to human or animal life making injection of sodium pentobarbital inappropriate, a reasonable and appropriate alternate method may be used; however the method used may be subject to review by the Oregon State Veterinary Medical Examining Board.

- Interference with assistance, search and rescue and therapy animals;
- Involvement in animal fighting such as dogfighting and fighting birds; and
- Interference with livestock or livestock production.

Additional state provisions on animals include, among others, ORS 433.340 to 433.390, which pertain to rabies control. State law requires all dogs to be inoculated against rabies, and many local dog control ordinances require proof of rabies inoculation before a license may be issued.

Cities frequently work with counties, under ORS Chapter 190 intergovernmental agreements, for dog licensing or control, or both. In at least one-third of Oregon counties, the county administers the dog licensing program on behalf of the cities, and in a few cases, cities administer licensing programs on behalf of the county. Cities and counties also share facilities such as dog pounds, disposal facilities, and spay/neuter clinics.

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Although cat regulations are less common than dog control programs, they have been adopted by some Oregon cities. Cat programs may contain one or more of the following provisions: licensing, impoundment procedures, sterilization, noise control, certification collar requirement, limitations on the number of cats per household, rabies and disease control, prohibition of running at large, owner liability, and regulation of kennels.

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Thank you to

- Leonard J. Goodwin, Assistant Public Works Director, City of Springfield
- William Scheiderich, Assistant City Attorney, Cities of Beaverton and Durham

for updating this chapter in the Fall of 2010.

Names listed in alphabetical order.

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Citizens depend upon a number of services provided either by local government or private entities (either profit making, cooperative or non-profit), commonly known as “utilities.” The term has a number of different modifiers such as public, investor-owned, and municipal, each with its own legal implications. These utility services generally are physically connected to occupied structures and generally occupy public rights of way between distribution centers and the service address, except for wireless telecommunications utilities.

The state, counties, cities and special districts provide other essential services including emergency response, drinking water, transportation, and sewer- and storm drainage. These services can also be delivered by intergovernmental agreements under ORS Chapter 190, a topic covered elsewhere in this handbook.

Utilities provided by private companies typically involve a city license, revenue tax or franchise (a legal contract) to use public right of way to distribute those services. These include solid waste collection, recycling and disposal; gas, electric and steam energy; and telecommunications in all forms (telephone, cable television and internet access.) Some cities provide their own telecommunications services, and some have electric energy supplied by municipal utilities, people’s utility districts and electrical cooperatives. Solid waste disposal is sometimes managed by a county or regional government. A few cities own or operate disposal sites and there are many private sites. The Portland area Metro regional government manages solid waste disposal for all cities and counties within its boundary.

This chapter is divided into two parts: the first briefly describes the various utility systems. The second deals with the practical implications of providing these services. It includes a discussion of public facility funding mechanisms, (SDCs, reimbursement districts, special assessments), capital improvement programming, contract and force account construction, and a range of environmentally related issues.

A. PUBLIC FACILITIES USUALLY PROVIDED BY CITIES

TRANSPORTATION SYSTEMS

Motor vehicles provide the principal means of moving people and products within a city. The street system permits this movement and provides access to property. Sidewalks adjacent to roadways permit pedestrian movement. In many areas design standards require special lanes for bicycle use. Public right of way typically includes the area from the centerline of a street to the farthest or “back” edges of the abutting sidewalk. Multi-use facilities for pedestrian and bicycle use, constructed outside of public rights of way, can create a funding issue. Oregon Constitution Article IX, Section 3a limits the

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use of State Highway Trust Fund revenue (fuel taxes and vehicle related fees and charges) to improvements within right of way. In *Oregon Telecommunications Association v. ODOT,* 341 Or 418, 144 P3d 935 (2006), the Supreme Court applied this provision to local fuel taxes as well. Public right of way is also the pathway for transit systems except in a few cases of transit systems that are not confined to streets. Portland's MAX is the prime example.

State and local engineering- and zoning code standards typically require lighting, trees and other plantings and signage in street design. Streets are a major source of impervious surface which tends to alter natural water run-off patterns and thus require significant storm drainage facilities. Street rights of way are also the location of nearly many other public works and utility facilities.

OAR 660-012-0000
ORS 197

Planning for location and development of a street system is a complex process which merges both transportation planning and Oregon land use law. Goal 12 of the state Land Use goals, the Transportation Planning Rule (see OAR 660-012-0000, et seq., and ORS 197.250) regulates transportation planning by all local governments Land use planning is beyond the scope of this chapter, but transportation infrastructure has a dramatic effect on the ability of land to support development, and the interrelationship between the two planning regimes is important

Beyond the relationship with land uses, transportation planning must take into account the multiple purposes served by rights of way.[24] Streets in most Oregon cities are one of three service types or "functional classes": arterials, which are mainly for through traffic[25]; collectors, which connect internal traffic to arterials; and local access streets, which serve traffic to and from adjacent properties.

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. Dedicated right-of-way then allows extension of utilities such as water, power, telecommunications and sewer/storm drainage facilities to the property line. Street construction is funded either by the city or (for most local streets) by the property developer; when the city accepts the construction work as complete it assumes the obligation to maintain the street. Dedication and improvements to collector and arterial street rights of way serving private development may be required only to the extent that requiring such

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24 Transportation planning and land use planning are closely interrelated. The complexities of that interrelationship are beyond the scope of this article and the reader should refer to Chapter xx, on land use planning. This interrelationship is becoming more complex as many focus on the transportation system as a significant generator of greenhouse gases, and , therefore, a system to be managed for the reduction or elimination of adverse human impacts on climate.

25 The Federal Highway Administration subdivides the arterial functional class into major and minor arterials. Major arterials are typically limited access facilities.

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dedication is roughly proportional to the impact of the private development on the transportation system, see the US Supreme Court decision in *Dolan v. City of Tigard.*

Wastewater Collection and Treatment

Sanitary sewers receive liquid waste from homes, businesses, and industries. Storm sewers receive storm water from streets, building roofs, and other impervious surfaces. In all but three cities (Astoria, Corvallis, & Portland) sanitary sewers are separate from storm water drainage systems, and cross connections are prohibited.

There are two components to a wastewater system. The first is a private collection and conveyance system which connects wastewater piping inside a structure to the public collection system. Between the interior piping and the public system is a “lateral” pipe which is usually privately owned and maintained but can be part of the public system, as when it serves multiple structures and lies within a public easement. The point of demarcation between the public system and private facilities determines who is responsible for maintenance and repair. The second component is a treatment facility which removes waste from the liquid effluent stream and treats the remaining water either for return to the river system or for other disposal or reuse.

The cost of wastewater collection system construction and maintenance depends in part on the street system as the sewers typically underlie public streets. Public utility easements may be difficult and costly to maintain unless there are adequate access ways or alleyways to enable scheduled cleaning, maintenance, repair and reconstruction. Oregon subdivision law no longer requires a dedication of public utility easements along the sides of newly created lots, and many property owners will be unaware that public sewer or water systems may underlie a portion of the lot that the owner desires to improve with a driveway, deck, storage building and so forth.

One environmental problem for wastewater collection systems in western Oregon is infiltration of groundwater into the collection system. In wet weather, when the water table is higher than the elevation of the wastewater pipes, ground water can flow into the pipes at the joints or at penetrations by roots and other causes.

Wastewater Treatment

Wastewater must be cleaned to meet water quality standards established by state and federal environmental laws before discharge into public waters. The standards are in the form of a discharge permit from federal and state agencies, e.g., an “NPDES” permit. Virtually all Oregon cities treat wastewater at a centralized “publicly owned treatment works” or “POTW,” also known as a water pollution control facility or “WPCF”. There may be an

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issue with siting some or all of such a facility outside of the city's urban growth boundary.

STORM WATER

Safe Drinking Water Act

Clean Water Act

Property development tends to divert and add rainwater that once percolated into the ground to the natural surface runoff. Efforts to prevent flooding on developed land require storm sewer lines to replace the natural drainage system and to carry a greater quantity of water. Federal and state provisions of the Clean Water Act and Safe Drinking Water Act make cities responsible for assuring that the quality of that runoff meets a number of regulatory standards.

The public drainage system starts at the edge of the street where the storm water is directed into either catch basins or vegetated swales or similar treatment facilities. From there, water enters a system of pipes and open drainage ways where it flows to an appropriate body of water to return to the natural environment.

WATER SERVICE

Municipal water is supplied from either surface- or in-ground sources and is stored in either surface-, above-ground or in-ground reservoirs. Sources include a river, stream or lake, either with or without a reservoir in which the withdrawn water is stored before delivery to the citizen, or underground wells. Diversions from stream flows and withdrawals from below ground require a water right either granted by the State Water Resources Department or claimed as pre-existing in 1909 when the first statutes regulating withdrawal of water were enacted. For many of the latter situations, the withdrawal actually occurs under an unadjudicated water right claim filed on or before December 31, 1992. Many of those claims will remain unadjudicated for a number of years because of the complexity of dealing with the multiple claims on a particular river or body of water. In many cases, the claims assert rights to quantities that are far above what the source can supply. In-ground storage and retrieval of water taken from surface sources, aka "Aquifer Storage and Recovery" ("ASR") also requires state agency approval.

B. PRIVATE PROVIDERS OF PUBLIC UTILITIES

A franchise is a contract, commonly granted by ordinance, between a city and a publicly- or privately owned utility provider to allow use of public right-of-way to distribute the utility. It includes various terms and conditions such as (typically for private utilities) payment of compensation for that use. Oregon law explicitly provides for such compensation whether in the form of a "franchise fee" or an excise tax, depending on the utility. Federal and state law allow for franchise terms and conditions that relate to the city's management of public right of way and so long, as in the case of

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telecommunications companies, as the city's requirements do not constitut a barrier to entry or limit competition among providers. Federal and state la allow cities to charge private utilities for permits to excavate and to block traffic, among other things, in addition to charging compensation for use of right of way. Those laws allow cities to tax the revenues of utility providers in addition to compensation for right of way, and utility providers are also subject to city zoning regulations. Right of way licenses or permits are a lesser form of contract and are often granted by administrative, not legislative action. A franchise or license may provide that the grantee or licensee is subject to all of the general laws of the jurisdiction as amended from time to time or may provide that specific terms of the franchise are controlling.

Solid Waste Collection and Disposal

Most Oregon cities license or franchise private companies to collect garbage and other solid waste from residences and commercial buildings and transport it to an approved site where recyclable content is sorted out and the remainder sent to a sanitary landfill or incinerator. A city has a clear and historic role in the approval of franchises. These franchises tend to be exclusive, at least in practical effect, to avoid duplication of service and excess truck traffic and to meet a city's typical requirement that the franchised hauler offer service to everyone who wants it within a defined service area. State and regional (Metro) government has jurisdiction over the amount of waste that must be recycled by the haulers and the location of disposal sites. Federal law restricts cities' abilities to require solid waste franchises for persons who haul source-separated, fully recyclable "waste" such as some forms of construction- or demolition debris. City franchises typically limit the rates charged by franchised haulers to their customers in exchange for allowing the hauler both a unique service area and a certain rate of return, similar to the state's role in regulating other private utility providers. A few cities have municipal collection systems, and some have contracts under which a private company collects the waste and the city is responsible for billing and fee collection. Disposal sites are often owned by the city or by the surrounding county, with contract operations provided by a private company. Disposal sites must in turn meet the requirements of state and federal law as to runoff and discharges that affect water and air quality.

Gas and Electric Power Distribution

Private gas and electric companies provide this utility in most cities except for some served by city- owned electric utilities, peoples' utility districts, or electric cooperatives. Cities have typical control over the use of public right of way for these facilities, including requirements, for example, that electric lines be place underground in certain locations or that they be relocated underground in a street widening project. Oregon Public Utility Commission Administrative Rules (PUC OAR) set out considerable detail as to the rates

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the private utilities may charge and the extent to which a city may cause these utilities to limit use of above-ground facilities and to relocate them underground at the utility's expense. PUC OAR limits the percentage of these providers' revenues that may be charged as a franchise fee; the OAR also allows an alternate formula for the franchise fee for when an electric utility is re-organized into separate generation, transmission, and local distribution entities that would significantly alter the revenue on which cities have traditionally calculated the franchise fee. (These OARS anticipated a large-scale restructuring of the electric industry that has not come to be in Oregon and other states).

Local consumer-owned utilities (municipals, people's utility districts and electric cooperatives) are regulated locally, not by the PUC. Oregon's electric restructuring law in 1999 was to bring competition to the electricity industry, and the PUC has entertained petitions pursuant to ORS 758.410 for exclusive territory assignments for electric investor owned utilities, utility districts and cooperatives. For a municipal electrical provider, growth can result in conflict between municipal charter provisions granting the municipal utility exclusive service rights in the city, on the one hand, and the PUC's territorial allocations.[26]

Most cities franchise the use of public right of way to distribute natural gas. There is very limited competition for natural gas distribution in Oregon. Cities have the same rights and powers with respect to gas distributors that they do with respect to electrical providers. The Oregon legislature attempted to induce competition in this industry but with no apparent results to date.

TELECOMMUNICATIONS SERVICES

The interplay of federal and state law on local regulation of private providers of telecommunications (telephone, television, data, internet access) requires separate consideration given the type of service(s) provided. A city administrator should note that rapid technological change has resulted in convergence of several once-discrete forms of telecommunications that may soon all be delivered through an internet enabled "platform" wherein between bits of digital information will deliver any one or all of those services in the same form using the same cable (copper, fiber optic or hybrid). The so-called "last mile" connection to the actual consumer, whether it be by wire from the right of way or by radio waves from a tower that may be in right of way or may not, may be the only visible difference. The currently known forms of service and delivery are set out below.

26 See *Emerald People's Utility District v. Springfield Utility Board*.

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WIRELINE SERVICE

Almost all cities franchise the delivery of voice communications by local wireline[27] telephone service facilities within city boundaries. Franchise arrangements are similar to those for electric utilities, and the PUC has similarly allocated exclusive territories to telecom utilities pursuant to ORS 759.510. Unlike electrical and gas providers, there is a significant amount of competition that has developed since the federal Telecommunications Act of 1996. The PUC under ORS 759.020 may grant certificates to "competitive access providers" who are not required to serve as a "carrier of last resort" to provide service throughout a designated territory. These competitive providers[28] make telephone service available to customers either by installing their own facilities ("overbuilding") or, more commonly, by leasing network elements from the telecommunication utility[29] Those providers who lease network elements are commonly called "resellers" and also include companies that offer only long distance, or interexchange service, when one dials a specific series of digits from the local dial tone to connect to their network elements. Federal and state law prohibit local regulation of telephone service but do not generally prohibit local regulation of those providers' use public rights of way.

WIRELESS SERVICES

Wireless- or radio telephone is commonly known as cellular telephone service. These services use radio frequency waves to connect an instrument to a cellular tower site and to "hand off" the signal to the next tower, and land lines "haul back" signals from the tower antennas to the wireline network. In virtually every case, these services then use network elements of the POTS to transmit voice from the receiving cell tower to a cell tower nearest the call destination. From that tower, the message is transmitted to the receiving instrument using radio frequency waves. Under federal law, cities have no regulatory authority of the provision of cellular service but of course can regulate the siting and appearance of the antenna towers, including antennas placed on street lights or other fixtures within public right of way.

TELEVISION SERVICES

Broadcast over-air television service is regulated exclusively by the Federal Communications Commission. Most households receive television signals either by cable TV providers or by direct broadcast satellite providers.

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27 Wireline service is sometimes known as "plain old telephone service "POTS".
28 Commonly called a competitive local exchange carrier, or "CLEC."
29 Commonly called the incumbent local exchange carrier, or "ILEC."

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Cable TV providers deliver service using copper, fiber optic or hybrid cables frequently installed in rights of way, either aerial or underground. Pay per view and other menu driven selection processes use the cable both to transmit programming to the home or business and to receive instructions from the subscriber.

Direct broadcast satellite television service is delivered directly from earth orbit satellites to antennae located on the subscriber's home or business. This service does not, at present allow for two way communication via satellite. For that reason, subscribers must have wireline telephone service (which uses public rights of way) for return signals from the receiver to the company distributing the television signals.

Cities have no regulatory authority over direct broadcast satellites but for limited land use control of very large receiver "dish" antennas. Federal law expressly prohibits the taxation of direct broadcast satellite services by local governments[30]. By contrast, cities do have some authority over cable TV providers. There is authority to regulate rates for the minimum "basic" analog cable service[31] and to regulate the provider's use of public rights of way. Cities may also regulate the quality of the provider's customer service such as the resources provided to respond to service complaints. These regulations must be competitively neutral and must not have the effect of prohibiting the provision of service. Cities are entitled to receive fair compensation for competitively neutral access to public rights of way, typically set (in a franchise) as a percentage of the provider's gross revenue.

ADVANCED TELECOMMUNICATIONS SERVICES

We have described the various forms of telecommunications service as separate and distinct offerings by, in many cases, separate and distinct providers. That paradigm, upon which most of the current regulatory models are based, is rapidly disappearing as the telecommunications industry continues to move rapidly to what are commonly described as internet-enabled, of IP-enabled, communications models.

A brief description of the change in technology may prove useful. The earliest days of telephone service used a circuit switch model. For each communication connection a physical circuit could be traced from the originator to the recipient. If that physical connection was disrupted, the communication ended. Telephone companies built massive switches in central office locations in every locality to provide hard wired connections for an ever expending number of communications. When cable TV began to supplant over the air broadcasting, a variation of this same model was

30 P.L. No. 104-104, 110 Stat. 56 (1996).
31 Only a small fraction of subscribers avail themselves of this service.

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followed. The signal would be broadcast from a single point, over wires and cables that traced a hard circuit directly from the broadcast facility to the individual television set.

The internet as a communication tool required a different approach as it became virtually impossible to assure that every connection between two communicating computers existed. This resulted in the development of what is called the internet protocol (or “IP”). Under this protocol, units of information transmission are rigidly defined as packets, with a header marking the beginning of a packet, a footer marking the end of a packet, and a regulated number of bits of information contained between the header and the footer. With this information, packets could be assembled at the beginning and sent over different routes, all arriving at the recipient from these varying routes and assembled at that point in the correct order, based on information in the packet header and footer, and then delivered to the receiving instrument, either a commuter or a telephone or a television receiver.

The content of the packet is irrelevant to the transmission mechanism. It can be part of a voice transmission, a video, or simply computer data. It is merely a series of bits to be assembled. This phenomenon is known as convergence as the content is completely independent of the delivery mechanism, and the older regulatory models simply make no sense in the IP environment. That means that the bits passing through wires and cables in the public rights of way cannot be distinguished, and thus, cannot be regulated as cable TV versus telephone versus data signals.

The federal regulatory mechanism has failed to keep pace with this change. While simple transmission of data, such as in an internet connection, is unregulated at the federal level and may not be taxed at the federal state or local level,[32] telephone service may still be taxed even if provided by internet based or enabled technology. Still unclear is the status of IP enabled television is only now being deployed as providers extend fiber optic cable, which is generally required to provide the bandwidth for television signal data.

Cities may still demand fair and reasonable compensation for the placement of facilities in their public rights of way. For that reason, right of way management and its demands on revenues become a critical concern for the local government official.

32 An exception to the tax moratorium in the Internet Tax Freedom Act exists for some cities, like Eugene, which had a mechanism in place before the 1998 effective date of the prohibition.

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C. MANAGING PUBLIC FACILITIES

RIGHT OF WAY MANAGEMENT

Street construction, maintenance and control of street right-of-way use within a city is a city responsibility except for state highways and county roads inside city limits.[33] In some cases, cities have allowed the creation of private streets in planned unit developments. These private streets are usually limited to the equivalent of a local street in the city's land use plan but may be partially exempt from city design and construction standards. In these circumstances a property owner's association is typically responsible for operations and maintenance. If the association becomes defunct the homeowners typically look to the city to assume the burden. Cities retain control of parking and utility installation along state highways that use local street rights of way. There may be shared responsibility and/or agreement for development and management. Standards for traffic control devices are set by the state and are compatible with national standards. Under certain circumstances, cities may place and utilize bicycle-specific traffic signals to regulate bicycle traffic and reduce conflict. ORS 811.260. Designation of a truck route is within the authority of the city with certain exceptions, which require the consent of the road authority. ORS 810.040. In most cases, traffic speeds are set by the state (See ORS 810.180), but a city may seek adjustment of a posted speed through the state Speed Control Board and may establish a temporary speed limit lower than the state established limit pursuant to ORS 810.180(8) or an emergency speed limit for not more than 120 days under ORS 810.180(9). However, cities are permitted to reduce speed limits to five miles per hour below the statutory limit (from 25 to 20 miles per hour) on specific types of roadways in order to encourage use by pedestrians and bicyclists. ORS 810.180(10). Granting of access (curb cuts) on state highways is controlled by Oregon Department of Transportation (ODOT)[34], in consultation with local government.[35]

ORS 810

ODOT Website

If a street brought inside a city by annexation is on the county or state road system, the identity of the road authority having jurisdiction over the road does not change, unless the city formally agrees to a transfer of jurisdiction. Either the city or the existing road authority (County or State) may initiate the transfer of jurisdiction. In the case of a county road, the city may condition its acceptance of the county road on the county's agreement to make specific

ORS 373

33 The identity of the road authority, that public body having jurisdiction for decision making with respect to the road, is not necessarily the political jurisdiction in which the road or street is located. See ORS 810.010. See section x, infra, for a discussion of public financing techniques
34 See OAR 734-051-0010, et seq.
35 SB 1024, approved in the FY 2010 Session, makes significant changes in the authority of ODOT, including a provision which eliminates the requirement for an access permit for a public approach (street intersection). ODOT is also required to develop objectives standards for the grant of approach permits. The ramifications of this change are not fully known at this time

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improvements to repair or upgrade the road to city standards. ORS 373.27 Upon annexation, local access roads[36] automatically come within the city's control for maintenance and preservation. For a state highway, the transfer of jurisdiction is accomplished by an intergovernmental agreement setting for the transfer and any conditions attached thereto.

The League has worked with both the Association of Oregon Counties and ODOT to establish guidelines for local-local and local-state jurisdictional transfer of roads. Those guidelines are available through the League.[37]

Cities typically control access to their rights of way for purposes other than movement of people or goods in commerce either through franchises[38] granted to specific users of the rights of way or, more recently by codifying right of way management rules in their municipal code, where they clearly apply to all those licensed or franchised to use the rights of way. As between rights of way and public utility easements, ability to manage activity in the public utility easement is more likely to be limited by the terms of the easement, while management of access to rights of way is generally plenary except in circumstances where state authority has preempted city home rule powers.

Management of access to rights of way by code offers both increased flexibility to a city as well as increased uniformity of management requirements. Franchises tend to be for extended periods[39] and can be modified only by mutual agreement. This can prove problematic for the city which faces a need to update its rules for use of the rights of way in the face of a number of franchises of varying terms, with varying levels of differing right of way management provisions. The areas typically covered in managing use of rights of way include both methods of working in the right of way and location of facilities.

Cities can, and do, restrict the work techniques used, in the interest of protecting the public investment in the infrastructure. Open cutting of a street may be limited, or even prohibited, in certain cases. Specific methods of restoration may be required to insure the integrity of the repair when a street is opened. Money guarantees to assure adequacy of the restoration and penalties for the failure to follow prescribed techniques are common.

Many cities restrict aerial placement of facilities, particularly in new development where there is no pre-existing aerial "plant." Many cities place wastewater and piped storm drainage infrastructure within the travelling area

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36 A local access road is one that connects a property to a county road. The county is not obliged to maintain a local access road.
37 See, A Handbook for Making Jurisdictional Transfers, ODOT, 2002 (new edition now under review).
38 In most cases these franchises are non-exclusive. However, there are a number of solid waste collection franchises that are exclusive.
39 Under ORS 221.460 a municipal franchise can be for as many as 20 years.

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of rights of way and may require private utilities to attempt to avoid placing their facilities there. Preference for placement in PUEs, behind the sidewalk, under the sidewalk, or near curbside, out of the typical wheel track of vehicles are all possible, and some cities specify an order of preference among these areas.

Franchises typically provide for compensation payable to the City for use of the public rights of way. In addition, cities are entitled to recover compensation for use of the public facilities that they hold and operate in trust for the citizens. Although recently challenged, generally unsuccessfully, in the courts by telecommunications providers, the challenges to this “rent” based model continue on both the legislative and administrative fronts, and there is a trend to divorce the receipt of revenue from the management of the rights of way. This can take the form of a fee for ROW use (e.g., $X per lineal foot) or a tax on the privilege of conducting business within the jurisdiction enacted by ordinance. If this revenue approach is coupled with codification of the requirements for use of the rights of way, the need for a franchise is eliminated and access to the rights of way can be granted by license.

The risks involved if facilities located within rights of way are damaged make records of the location of facilities particularly important when excavations are made. Under ORS 757.557 operators of underground utilities must be subscribers of the Oregon Utility Notification Center which provides locational information for those proposing to dig in the rights of way. This program provides data on underground facilities before excavation in a street right-of-way and covers all utilities, provides a central phone number to "call before you dig" and preconstruction marking of the location of underground facilities. There are industry standards for separation of various types of facilities from each other, both horizontally and vertically, and it can become a complicated process to support new development without due care to assure that facilities in the rights of way are placed so as to minimize those conflicts.

WASTEWATER MANAGEMENT

Department of Environmental Quality

“Primary” wastewater treatment is not sufficient under state law and each city must provide at least secondary treatment. Tertiary treatment is required where the quality of the receiving body of water is subject to restrictions on the quantity of pollutants that may be discharged. A waste discharge permit must be obtained from the Department of Environmental Quality (DEQ) to build or operate a sewage treatment plant. Those permits contain total maximum daily load (TMDL) limits on the discharge from the treatment facility. Additional treatment and management measures may also be required if wastewater discharges may have an impact on federally listed threatened or endangered species.

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Many of Oregon's rivers and streams fail to meet existing water quality standards for a number of constituents (i.e. bacteria, temperature, mercury and other pollutants of concern). Under the Clean Water Act, DEQ establishes total maximum dissolved loads (TMDL) for these constituents, the maximum capacity of the water body to receive certain pollutants. Once the TMDL is established municipal waste water dischargers must adjust their discharges to comply with the TMDL. City wastewater treatment plants are licensed or permitted by state/federal authorities. If the city's discharge violates the water quality standards contained in the permit, the city is subject to third party lawsuits, city officials may be prosecuted and the city is subject to substantial fines.

The processing of sewage leaves sludge residue at the treatment plant, which must be removed to maintain operational capacity. The sludge may be used for beneficial purposes such as a substitute for fertilizer or it may be disposed of as a waste material.[40] Most cities make use of the sludge for beneficial purposes and thereby recycle a resource and avoid the costs and problems of disposal in landfills.

Although Oregon has had high standards of water quality for many years, continued growth and water quality goals mean that many cities need to expand and improve their sewage treatments plants. They also may need to establish more rigorous operating methods to obtain the best results from existing treatment plants. Some industrial operations need to control, or remove in a pretreatment process, the kinds of pollutants that might upset or adversely affect treatment plant operation.

STORMWATER MANAGEMENT

The costs of some parts of the drainage system can be treated as part of the cost of streets. Other parts may be financed from wastewater user revenue if permitted by the ordinance establishing the wastewater user fee. Some cities have enacted separate drainage user fees for conveyance and detention (quantity and quality control).

Early efforts to manage stormwater focused on the elimination or reduction of risks of flooding. Any development which creates additional impervious surface reduces the amount of permeable ground surface area in which water can percolate down to an aquifer and thus contributes to flooding risk. Earlier approaches involved conveying storm runoff into a pipe system as soon as possible and then underground to an appropriate body of water for discharge (the "receiving stream").

40 There are two classes of residue which may be applied to land. Class B cannot be applied to land in food production, while class A can be applied to food producing land.

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Under this approach, if flooding in a particular area cannot be controlled by drainage structures, it is customary to restrict development within the area. On a federal level this involves the Federal Emergency Management Agency ("FEMA") which establishes floodways and flood plains based on an event termed the "100 year storm"). This is a storm event which statistically has a one percent chance of occurring in any particular year. Restricting new development does not necessarily prevent development, but merely sets standards to reduce the risk of flood loss. A city's adoption of FEMA flood control standards not only make owners of existing buildings eligible for flood insurance provided by FEMA, but also reduce flood insurance premiums of all property owners. Owners of existing buildings are then eligible for flood insurance under a federal program.

There has been much reexamination of storm water disposal methods in recent years in an attempt to reduce dependence on storm sewers. One method encourages site design to retain more rainwater on site and infiltrate into the ground or flow to receiving streams in a more orderly fashion. Each of these approaches allows for passive treatment of the water, as well as regulating the rate of run-off. Part of the reason for the interest in this approach is recognition that storm water often causes erosion and can contain unacceptable amounts of polluting material. While on-site water management is just now receiving significant attention, it appears to be another example of how city adopted standards help direct private development to benefit all citizens of the community.

A second approach, emerging in some areas, is to conclude that all increase in stormwater runoff from a development should be retained on site and allowed to infiltrate into the ground. This approach presents significant challenges to development because of the difficulty of accomplishing the goal. It is not universally accepted as appropriate, or even achievable. This approach often requires use of privately provided and patented cartridges and filters to free up the use of the surface but those facilities require regular and sometimes expensive maintenance.

The 1991 Clean Water Act also requires communities over the population of 50,000 to obtain a permit from the DEQ regulating the community's stormwater discharge. The discharges are regulated through a series of best management practices. DEQ has authority to determine if any smaller community in Oregon must obtain a permit.

Nationally, the Environmental Protection Agency has developed standards for separating storm and sanitary sewer systems to reduce the possibility that flows will overwhelm wastewater treatment facilities, resulting in a discharge of untreated sewage. Local communities are under significant mandates to build separated sewer facilities. Communities that do not separate the systems must treat all of the effluent in the wastewater stream,

a task that results in substantially increased cost, because of the size of the treatment facility that is required.

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WATER SUPPLY MANAGEMENT

In order to supply water, cities must obtain and develop water rights from the state of Oregon. As a western state, Oregon's water right's law is governed by the prior appropriations doctrine:1) those who develop water first have superior rights than those who develop water later; and 2) one must use the water right or it is forfeited. The unique needs of cities with respect to planning and growth have made municipal water rights much more flexible than other rights and they may be held undeveloped or partially developed for long periods of time. Municipalities also must develop Water Management and Conservation Plans which justify the municipality's plan for fully developing their water system and committing the municipality to conservation measures. New and higher standards of water quality in the 1974 Federal Safe Drinking Water Act and the 1991 Clean Water Act have increased the level of water treatment for many supplies, although some small cities may be able to substitute an acceptable groundwater supply for surface water sources that are more easily polluted.

Only a small amount of the water supplied by domestic systems is used for human consumption, but the entire supply must meet the same standard, partly because it is not easy to monitor the use of water outlets and partly because constructing separate systems of water supply for different uses is more expensive than treating all water for the highest use. The quantity of water to be provided by the system must allow for fire protection needs for the most intensive uses allowed in the zoning district.

Extension of a water supply system to serve new areas or to provide for a large additional user can create a need for considerable additional investment. As an alternative to revenue from user charges, these costs may be charged to benefitted property owners using some of the financing methods described below.

MANAGING SOLID WASTE

Most cities do not directly manage the collection, hauling and disposal of solid waste. Most frequently, a private hauling company collects waste and hauls it to a landfill operated either privately or by the county or regional government.

Solid waste hauling is commonly done under a city franchise for a described area. State law requires cities to honor county franchises in place as to areas annexed to the city. 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. In a small

number of cities a licensing system exists where any number of haulers ca be licensed and compete for customers.

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Cities do have direct involvement in assuring that their residents have an opportunity to recycle, as required by the Opportunity to Recycle Act, ORS chapter 459A, which directed the Environmental Quality Commission to adopt rules regarding waste disposal and recycling. The Act and rules establish the following goals in managing solid waste:

- Reduce amount of waste generated;
- Reuse material for the purpose for which it was originally intended;
- Recycle material that cannot be reused;
- Recover energy from solid waste that cannot be reused or recycled; and
- Dispose of waste through land fill.

The Act established a statutory obligation for cities, counties, landfill operators, and garbage collectors to recover recyclable waste when the cost to collect and recycle the material is equal to or less than the cost to collect and dispose the same material. The parties must 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. ORS 459A.010.

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. The law prohibits disposal of lead-acid batteries in mixed municipal solid waste and requires battery retailers to accept used batteries as trade-ins. Used lead-acid batteries are now subject to state environmental regulation. A recent concern is recovering unused pharmaceuticals, a significant risk to water quality because if flushed into the toilet they are typically not eliminated by any known wastewater treatment practices.

PLANNING FOR CAPITAL IMPROVEMENTS

Considering the high costs and long-term effects of investment in sewer, water, street, and other facilities, cities find it beneficial to relate infrastructure needs and policies for their financing to comprehensive long-range land use plans and comprehensive financial plans.

A capital improvement plan identifies needed future capital investments (streets, sewers, water supply, fire stations, etc.), their relative priorities, and methods of financing them within the framework of projected revenues and expenditures for all purposes. The need to allocate scarce resources among all city functions and to carefully phase and coordinate investments for public

facilities requires consideration of long-range capital needs on a formal or a informal basis.

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Capital project planning often begins with the development of a long range master plan which identifies the needs for build out of the existing urban growth area.[41] Typically all urban facilities must be located on land within an urban growth boundary. Exceptions do exist. ORS 215.213 and 215.283 allow for the placement of certain utility facilities on land designated for exclusive farm use. The standards for allowing siting on EFU land are set out in ORS 215.273.

Typically these plans cover 20 years or more. They are not typically updated annually but should be revisited with some regularity, particularly in a growing community. In a mature community the review may be less frequent. These facilities plans will contain cost estimates and usually are the basis for the city's public facilities and services plan (PFSP), a component of the city's comprehensive general plan. The PFSP documents compliance with land use planning goals. It must contain all significant infrastructure requirements for each of the key urban services to be provided. The master plan, or master facilities plan, can be the basis for a (separate) Systems Development Charge capital improvement plan. The next phase of the capital improvement planning process shows projects in the near term (five or six years is typical). Those near term projects can be detailed and costed based upon more detailed information and included in an overall Capital Improvement Program ("CIP"). While the master facilities plan typically lays out only generally estimates of when a project will be required, the typical CIP attempts greater certainty about both the time when a project will be required, and the source of funding to be used.

The CIP is often accompanied by a Capital Financing Plan which assesses the revenue streams available to the jurisdiction and determines how they are to be applied to the projects in the CIP. Frequently the Capital Financing Plan takes a longer view that the CIP, since longer term financial planning may be prudent for a city considering use of debt for capital purposes.

The final phase of the capital improvement process is the annual (or biennial) capital budget, which typically derives from the first year of the CIP (with appropriate adjustments for changed conditions and unexcited developments). The Capital Budget is the only part of the process that formally appropriates money to a specific project.

Capital programming should be coordinated with the annual list of improvement projects the city must prepare and file with the state, as discussed

41 Under Oregon land use law it is inappropriate to plan for urban facilities that would serve an area beyond the existing urban growth boundary.

below. Capital programming also must be coordinated with the public facil plan required under LCDC Goal 11 for cities of more than 2,500 populatio

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Capital improvement plans should tie into land use planning documents outlining significant capital facilities needs (such as a Public Facilities and Services Plan or a Transportation System Plan) and list of capital improvements that may be funded through SDCs.

D. FINANCING PUBLIC FACILITIES

SPECIAL CONSIDERATIONS BECAUSE OF BALLOT MEASURE 5

City taxes for operations, maintenance and construction of facilities, including these utility facilities are somewhat limited by Oregon Constitution, Article XI, section 11(b), fka Ballot Measure 5 of 1990. This provision limits the amount that local governments can raise from *ad valorem* property taxes and fees that are an incidence of property ownership and that exceed the cost of providing the service. The general governmental limit for taxes is $10 for each $1,000 of assessed valuation. This limit is exclusive of any voter authorized levies to fund debt service on general obligation (full faith and credit) bonds. Sewer and water facilities are usually funded by user fees, exempt from Measure 5 limit, on the theory that they are imposed on the user of the utility service, not necessarily the property owner and thus not a charge incurred as an incidence of property ownership. Cities have also successfully implemented Transportation Utility Fees, sometimes referred to as Street User Fees on the residents or property owners who use the system, again based on use, not the incidence of ownership. The fees are user-based and primarily used for road maintenance. Guidelines and sample city models for the fees are available through the League.

PRINCIPAL REVENUE SOURCES

The major sources of revenue to finance construction, operations and maintenance of public facilities include:

- **PROPERTY TAX REVENUES** are used either to finance current construction and maintenance or to retire bond issues that have been used to pay for public improvement construction. Use of property tax or other unrestricted revenues is within the discretion of the city's governing body. Property tax revenues can fund operations and maintenance of public facilities as well as construction. Use of these unrestricted revenues to fund the payment of debt service on bonds is also within the discretion of the governing body, but the City cannot pledge its full faith and credit to pay debt obligations without a vote. An infrequently used variation of general obligation bonding, the

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Limited Tax General Obligation (LTGO) bond, does not require a vote, because it does not pledge the city's full faith and credit beyond the existing level of revenue authority.

- Debt authority of an urban renewal district is a variation on the use of property tax revenues for capital financing. An urban renewal district (URD) may use tax increment financing whereby the amount of property tax revenue available from properties within the URD is frozen as of the creation of the district. Revenue from taxes levied against the properties within the district that is attributable to an increase in assessed value is allocated to the URD and is used to retire bonds issued to pay for public facilities related to the urban renewal project, even revenue otherwise allocated to other taxing entities. When the bonds are paid, the URD terminates and each overlapping tax entity then receives revenue from the full increase in value since inception of the URD. Property taxes used in tax increment financing are within the taxing limits of Ballot Measure 5.

- **USER FEES**, such as monthly water, drainage or sewer service charges, may be used to pay current operations and maintenance costs or to fund capital construction. These revenues may either be used for direct capital financing or pledged to service debt issued under the Uniform Revenue Bonding Act. Most cities operate under the assumption that there is at least a moral obligation to use those revenues only for the specific system from which they were derived. In the absence of specific code or charter language or bond covenants there is, however, no legal obligation.

- **CONNECTION CHARGES** cover a portion of the city's cost to extend water, storm drainage or sewer facilities to serve a particular property (generally a one-time payment). These fees replicate what would have been charged under a local improvement district if created and are sometimes referred to as "in lieu of assessment" fees. They are distinguished from the actual cost of the construction of the private line or system which connects a property to the public system.

- **SYSTEMS DEVELOPMENT CHARGES** (SDC) on development account for the impact that development has in terms of requiring the city to construct additional infrastructure capacity to be able to serve growth. Unlike planning fees, building permits fees or charges for facilities required to serve the particular development SDCs are designed to assess owners of new construction for the extra capacity required in citywide facilities to accommodate the new growth. Their adoption and use is governed by detailed statutory provisions in ORS 223.297, *et seq. which are discussed below.*

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- **SPECIAL ASSESSMENTS** are apportioned on the basis of relative benefit. This is usually a charge for constructing new facilities to serve particular properties; or to expand facilities to increase the capacity of the infrastructure to benefit specific properties. They are determined through the process of creating a Local Improvement District (LID) which is discussed below. In some limited cases, an Economic Improvement District, which is a form of LID limited to certain types of work may be an appropriate vehicle, but not for the types of projects discussed in this chapter. Economic Improvement Districts are defined and discussed in ORS 223.112 through 223.161.

- **SUBDIVIDER OR DEVELOPER FINANCING** is at the expense of the subdivider or developer of facilities as needed to serve a developing area. Particularly where a city is without the capacity to fund infrastructure construction at the time a developer wishes, the developer may agree to assume that cost, even though the city could not, consistent with *Dolan* and other case law exact the payment for the infrastructure.

- **REIMBURSEMENT DISTRICTS** provide a developer who has voluntarily agreed to construct infrastructure above and beyond his proportionally impact a method for recovering some portion of the expense. Like an LID, they are created in advance to encompass properties benefitted by new or expanded infrastructure. The cost of the new infrastructure is apportioned to these benefitted properties on some objective basis, as determined by the city. Unlike an LID, the amount is not assessed against the property but is due when, or if, the property develops beyond its then current use. This critical distinction means that the city is not obliged to offer an opportunity to remonstrate, nor is it obliged to cancel the project if a set percentage of owners indicate opposition (as is typically provided by the 1920's vintage charter common to Oregon cities). Generally these districts have a limited life, meaning that the original developer will have some risk of not fully recovering their investment if future development does not happen within that time limit.

- **OTHER LOCAL REVENUE STREAMS FROM FEES OR TAXES IMPOSED LOCALLY**. After Ballot Measure 5, Oregon Constitution, Article XI, section 11(b), cities have increasingly turned to local fees and taxes other than property taxes as a method of raising revenue for municipal operations. These can be used for operations, maintenance and capital construction for utility type facilities, as well. In many cases, revenue from these and taxes can be considered unrestricted revenue and use for any system. However, local fuel taxes are subject to the same restrictions as are state fuel taxes. That restriction does not, however, apply to fees such as

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transportation and street utility fees, which are not based on use of fuel or registration or licensing of vehicles or drivers.

- **STATE SHARED REVENUES** include revenues from taxes on liquor and tobacco products and are unrestricted as to use by the city. Allocations from the State Highway Trust Fund must be used within the restrictions in Article IX, section 3a of the Oregon Constitution.

Many of these revenue sources may be used as security for payment of debt service on bonds used to fund construction of public facilities. As a practical matter, however, those revenue sources which are unpredictable or volatile (such as SDCs, among others) are discounted by the financial community and not accepted as security for debt issuance, even though they may actually be used to pay debt service once the debt is issued.

PROCEDURES FOR FINANCING IMPROVEMENTS

LOC Publication: Debt Issuance Manual

As noted, there are a wide variety of methods for financing public improvements. Some, such as sale of bonds, are beyond the scope of this chapter. For a full discussion of debt financing, see chapter 8 – *Financial Management and Budgeting*, and the Debt Issuance Manual published by the LOC. Some methods are particular to financing the sort of public improvements we include within the term utilities. These include Local Improvements Districts (LID), Reimbursement Districts and System Development Charges. Those we will discuss in more depth.

For these purposes, we distinguish two types of public improvements. The term "public improvement" refers to a project that furthers the public's health, safety, or welfare, and are local or general. A "local improvement" primarily benefits the abutting property owners. A "general improvement" primarily enhances or benefits the overall community environment, not a specific neighborhood. Many projects benefit both the general community as well as nearby property, and the cost of constructing an improvement allocated to either is both a political and an engineering question.

USING LOCAL IMPROVEMENT DISTRICTS

SPECIAL ASSESSMENT A special assessment is an amount charged to local property owners as a proportionate share of constructing a local improvement. A special assessment is like a tax on property in that it can be levied only against land and is not a personal liability of the property owner. For Measure 5 purposes it is an incurred charge for which the fee is no greater than the service provided, thus excluding it from property tax limit. The amount of the assessment is based upon benefit received rather than the assessed value of the property. The amount by which a property benefits and thus the amount of the assessment is decided by the city council as part of the local improvement process.

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PROCESS FOR LOCAL IMPROVEMENT DISTRICTS The procedures for forming local improvement districts and levying special assessments may be contained in a local improvement ordinance. Each city's ordinance may be different but the process used must guarantee the minimum protections provided by state law. ORS chapter 223.387, *et seq.* An improvement project may be proposed by a citizen, a neighborhood group, staff, or by a councilor. After preliminary staff work is complete the council holds a public hearing on whether the project should be constructed and whether it should be financed in part by special assessments. At the first public hearing, included property owners are notified of the scope of the project and of the engineer's estimate of how much the improvement will cost. The actual decision that is made by the council at this point is whether the improvement should be constructed, if so, whether it should be financed by special assessments and, if so, upon what basis the total assessable cost[42] will be allocated to the benefitting properties. At this point there is no lien on any property, but the resolution forming the LID is recorded to afford notice of the assessment to come. That being said, once the Council initiates a project and creates the district the right to remonstrate is gone unless the LID is challenged in court, and assessments will follow when the improvements are complete. The district is formed by passage of an ordinance or a resolution, and the construction contract is awarded according to statutes governing public works.

BENEFIT There are many standards that can be used by the council to determine whether a benefit has been conferred upon the property subject to an assessment. Expert opinion that the improvement will raise a property's value is not necessary. The council may examine whether the property's current uses will broaden or increased by the construction of the improvement, in the near or long term; whether the construction will improve accessibility, safety, or convenience; whether construction will make available alternative modes of transit to employees and customers of the property; and, so forth. This list is not intended to be all-inclusive, and the council has broad discretion to determine what constitutes a benefit to the property.

In allocating the cost among the various benefitted property owners, the frontage foot and square footage methods are the most common. In the frontage foot method, the total frontage along the project is calculated and each property is assessed a proportionate amount (non-assessable property is included so that benefitted owners do not end up paying more than their share). The square footage method uses the same sort of calculation but

42 In some cases, not all of the project cost is assessable to the benefitted owners. For example, the portion of a project that is in an intersection would not benefit the property owners, but would be an area of general benefit to the community; the cost of that part of the project is borne by the city and not assessed. Some jurisdictions, as a matter of policy choose not to assess properties owners for parts of a project. For example, in a street project the jurisdiction may, as a matter of policy, assume all of the cost of the street surface and only assess for curbs, sidewalks, etc.

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using the total square footage of each parcel. These may be the most common methods but there are no specific limits on the method of calculation, and cities are free to use any method which reasonably apportions the cost.

Typically city code or charter provisions on special assessments provide a method for persons to object to or "remonstrate" against a proposed project. The property owner may object to constructing any improvement or to the formula for distributing the cost of the improvement, either in person or in writing. The council considers all remonstrances and other objections at a public hearing. City codes or charters often require that a project not proceed if a certain number or proportion of owners file remonstrances.[43]

Many cities condition property development on the owner's agreement to not remonstrate against one or more LIDs which may affect the property. Such agreements typically are recorded and run with the land. These agreements have been held effective as a bar to remonstrating later against inclusion in the LID when the City considers forming it but do not limit or affect the owners' ability to speak in opposition to the improvement at any public hearing or protest the construction cost or assessment method.[44]

A special assessment can be levied against a property only with due process, namely, adequate public notice of the project and the amount of the proposed assessment and a right to appear to discuss or object. The assessment hearing comes after the work is complete. The council then determines whether the amount of the assessment for each property is consistent with the assessment formula adopted at formation. Determining the amount of the assessment to be allocated to each property is a quasi-judicial decision. The council levies the assessment by ordinance. The City constructs the project using its own fund sources and then recovers that expenditure through the assessments.

At the assessment hearing the council will consider any adjustments between the engineer's estimate of the cost of the project and the actual construction cost. The affected property owners may address the council concerning the amount of their assessments. Once the council enacts an ordinance or resolution levying the assessments, the property owners may apply for bi-annual installment payments of same under the Bancrofting Bonding Act. The city may use the revenue stream created by the assessment payments to support debt service, and issue assessment bonds to recover the project cost. These bonds are not subject to a vote because

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43 Unlike LIDs, EIDs have a specific statutory provision which bars a city from moving forward if it receives remonstrances from owners of property upon which more than 33 percent of the total amount of assessments would be levied.

44 It is perhaps not surprising that many subsequent owners have various stories about how they were assured by someone involved in the purchase and sale of the property that the improvement agreement either has no effect, or that there is little or no probability that the improvement will ever occur.

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they do not pledge the full faith and credit of the city, nor is the debt service included in calculating the amount of property tax the city may levy outside of the Measure 5 limitation. Property owners do not make their payments are subject to foreclosure proceedings if initiated by the council.

JUDICIAL REVIEW The final levy of an assessment is subject to judicial review by writ of review, ORS 34.010 *et seq*. Courts generally defer to the judgment of the city council in LID decisions. The court's primary role is to determine whether the council conformed to state and local laws for the establishment of an LID and the levying of an assessment. Failure to follow those laws may make the assessments void or voidable. If the council failed to afford an affected property owner due process or acted arbitrarily or abusively, the assessments are subject to court review and remedies.

BANCROFTING Bancrofting refers to the method of financing special assessments by installment payments. Property owners have this option on all assessments over $25. The property owners are charged interest on the principal amount owed. The name "Bancroft" refers to the Oregon State Senator who sponsored the legislation in the early 1930's. Developers can also finance their system development charges owed to the city through Bancrofting. In either case the lien to secure repayment of the assessments or the SDC is superior to any mortgage lien on the property.

FINANCING IMPROVEMENTS The city finances the construction of public improvements by issuing promissory notes called "warrants", which provide money in the short term to build the improvements. The city then sells bonds to investors, who are repaid over a longer term by the city. The city uses the payments by individual property owners plus any interest accumulated in the Bancroft fund to retire the bonds. If there are insufficient funds to pay the bonds from the payments received from property owners, the city may levy a special tax on all property in the city. Many technical requirements under state and federal law apply to the issuance of warrants and the sale of publicly backed bonds. The council authorizes warrants to be issued when the ordinance levying assessments and authorizing the project to be constructed is adopted. The council also authorizes when bonds will be sold to finance the debt. The annual debt service must be adopted as part of the city's annual budget.

FUNDING CAPITAL IMPROVEMENTS WITH SDCS

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SDCs are imposed under the statutory scheme in ORS 223.297 *et seq.* The underlying theory is that new development which creates the need for additional infrastructure capacity should pay the cost of designing and constructing that infrastructure. The task in creating an SDC is to determine the amount of infrastructure capacity that may be required to accommodate future planned growth, the cost of providing that capacity (which may include some existing capacity as well as capacity yet to be built), and a method for allocating that cost to specific developments as they occur. They may be

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imposed either to accumulate the funds needed to fund construction of additional capacity to accommodate growth (an improvement fee), or to recover the cost of existing available capacity that will be used by growth (a reimbursement fee). Both of these fees may be imposed if the jurisdiction can demonstrate that the fees are not each collecting for the same units of capacity.

SDCs may be imposed only for specific infrastructure systems: transportation, wastewater collection and treatment, storm water collection and management, water supply and parks. These are treated as completely separate systems and funds collected for one may not be utilized for any other system.

For an improvement fee the determination of needed capacity is documented in a methodology which sets out the measure or measures of capacity (*e.g.,* trip ends in the case of transportation), how or why those units of measurement are appropriate, and how much of that capacity is used by any particular development. Although at present most SDC methodologies rely on a single measure of capacity, nothing limits the use of multiple capacity measures. In many sewer SDC methodologies there are numerous distinct capacity measures for wastewater treatment. Some cities have also explored separate capacity measures for flood control and water quality in establishing storm water management SDCs, and others are exploring multiple capacity measures for Transportation SDCs as a way of addressing climate change or other constraints to continued construction of roadways.

Use of multiple capacity measures makes it important that the capital facilities master plan for that infrastructure system conceptualizes projects with respect to the various measures of capacity. Those facilities plans should provide the basis for assessing capacity needs of each project under each capacity measure to be employed.

For a reimbursement fee the methodology likewise determines the appropriate measures of capacity, the amount of capacity that exists, and the value of same. That is frequently done by calculating the total value of the existing system and dividing that by the number of units of capacity in the system. The unit value of capacity can form the basis for a fee, assuming the methodology demonstrates that there is, in fact, capacity available in the existing infrastructure system

SDCs can be imposed either citywide or within specific geographical areas. Area specific SDCs may be overlays over a citywide SDC if the city can demonstrate, through its methodology, that there is no overlap between the additional capacity that is required in the area specific charge and in the general charge.

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One should distinguish between the various steps involved in creating an SDC. The development of the methodology, in simplistic terms, creates a

mechanism to evaluate a project list and output a maximum permissible rate for each unit of additional capacity. There are specific statutory constraints on development of a methodology, including specific notice requirements. It should be separately adopted from each other element as each has its own specific requirements for adoption and amendment. Notice of adoption or amendment of a methodology must be 90 days in advance to "interested parties" who have indicated their desire to be so noticed and a copy of the proposed methodology must be publicly available at least 60 days in advance. An ordinance or resolution adopting an improvement fee methodology must allow for credits to a developer who constructs a "qualified public improvement" – basically an offsite improvement or oversizing of an improvement beyond the improvement required for the development.

Certain increases in infrastructure cost do not require an amendment to the methodology. A mechanism for automatic adjustment based on a CPI or construction cost index are allowed if specified in the methodology or in the adopting ordinance or resolution.

The capital project list is likewise an independent element, not the same as the infrastructure master plan for the system involved, nor the equivalent of a city capital improvement program, although the same project may appear in each of those three planning documents. The list must specifically identify what portion, if any, of each project is attributable to meeting the needs of growth and thus eligible for funding by Improvement SDCs. That proportion should be identified in the facilities master plan or the project List.

A city may amend this project list at any time. If the amendment includes adding an improvement that results in an SDC increase, the city must give at least 30 days notice to the interested parties list. A written request within seven days of the date of proposed adoption requires a public hearing on the proposed change.

The final step is the resolution adopting the SDC. This is the time to consider policy implications of SDCs and to make changes reflecting policy objectives. A city may not enact an SDC greater than the methodology allows but may enact lesser rates. Waivers of SDC for particular uses such as non-profits require that the city "repay" the SDC fund from other revenue sources.

USE OF SDC REVENUES Improvement SDC revenues may only be used for the cost of capital facilities that increase system capacity (and only to the extent of that increase in capacity) or for the cost of the methodology study or for audits or reports on SDC expenditures. Reimbursement fees may be more broadly used for any capital construction or preservation of infrastructure in the system involved, as well as for the administrative functions.

CONSTRUCTION OF CAPITAL IMPROVEMENTS

Cities almost universally manage public works maintenance with city employees and equipment. To construct public improvements, most cities contract with private firms while others use their own forces. Public contracting for capital improvements is governed by ORS 279C. There are specific limits on use of city employees for capital improvements as well as detailed processes to determine which approach to take. Those topics are covered in Chapter 9 on public contracting.

ENVIRONMENTAL ISSUES

In the 1970's and 1980's, Congress enacted a number of laws as to the generation, disposal, and cleanup of hazardous wastes. The Resource Conservation and Recovery Act (RCRA) imposes obligations on the city in the generation of wastes. The Clean Water Act (CWA) regulates wastewater plant operations. The Superfund law (CERCLA) imposes liability for the cleanup of hazardous waste sites on transporters and generators of waste and on the owners of property where the wastes were released into the environment. Oregon statutes parallel federal law: a city must meet standards for monitoring and clean-up of potentially leaking underground storage tanks (LUST).

ORS 465

ORS 465.200 TO 465.455 is the state "Superfund" law and sets out a procedure for the Department of Environmental Quality (DEQ) to inventory statewide those facilities with documented releases of hazardous substances into the environment. This law establishes both a "list" and an "inventory" of facilities with confirmed releases, using parallel but separate procedures. The "list" is to comprise those facilities with confirmed releases of hazardous substances. The "inventory" is to comprise those facilities with confirmed releases *and* for which DEQ has determined that additional investigation, removal, remedial action, or other controls are necessary for protection of the environment. The statute sets out the procedures to place a facility on the "list" or "inventory;" in both cases, the owner of the facility must have 45 days to "comment" on the decision before it becomes final. The decision is final, and is not appealable. A procedure is established, however, to enable a facility to be removed from the "list" or "inventory". Both the "list" and the "inventory" are informational only. DEQ is not obligated to take removal or remedial action just because a facility is listed. DEQ may take action regardless of whether a facility is on the "list" or "inventory". The Environmental Quality Commission must define "confirmed release" by rule and establish criteria for removing a facility from the "list" or "inventory".

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Another state environmental law affecting cities is the Toxics Use Reduction and Hazardous Waste Reduction Act, also in ORS Chapter 465. This law directs the Environmental Quality Commission to develop a program for the reduction of toxic wastes and hazardous substances from the state. DEQ is

to provide technical assistance to large generators of toxic wastes. Large users and regulated entities must complete a toxic use reduction plan and file annual progress reports. Local governments are subject to some provisions of the act depending upon the nature of their activities and the volume of wastes generated.

DEQ Air Quality Information

THE CITY ROLE IN AIR QUALITY CONTROL The Oregon Clean Air Act Implementation Plan establishes rules for control of indirect sources of air contaminants such as parking facilities, airports, recreational facilities, highways, and roads.

When DEQ or a regional authority determines a need to control parking and traffic circulation to attain or maintain air quality in a certain area, the city with jurisdiction in that area may be required to develop and implement parking and traffic circulation plans.

DEQ also may require cities in "non-attainment" areas to develop plans for control of specific air contaminants from direct sources. The plans include measures to provide for attainment and maintenance of air quality standards and administrative procedures to implement each control measure. The plans may be incorporated with the air quality planning required in statewide planning Goal 6.

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Thank you to

- Paul C. Elsner, Partner, Beery, Elsner & Hammond, LLP

for updating this chapter in the Fall of 2010.

CHAPTER 15 – BUILDING REGULATIONS

A. STATE-LOCAL BUILDING CODE REGULATIONS 15-2
B. EXAMPLE ORDINANCE 15-4

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A. STATE-LOCAL BUILDING CODE REGULATIONS

Oregon Building Codes online

Building regulation in Oregon involves an unusual city/county/state relationship with the following features:

The “State Building Code” is made up of four (4) separate “specialty” codes, each devoted to a single element of a building, i.e., electrical, mechanical, plumbing and structural. In addition, there is a separate specialty code devoted to residential structures. Each specialty code is revised periodically and then adopted by administrative rule by the state Building Codes Division (BCD) of the state’s Department of Consumer and Business Services.

The State Building Code is primarily “preemptive”, meaning it is the only set of regulations that can be enforced in the state for new construction activities, including major remodels or improvements to existing buildings. HUD standards regulate construction of manufactured housing although the state regulates construction of manufactured and mobile home parks and installation of mobile homes and alterations made to manufactured housing.

Each city may elect to administer and enforce the State Building Code; if it does, it has to agree to do so for a four-year term and the Council must also appoint someone to act as the building official. If a city elects to assume administration and enforcement of a building inspection program, the city then must (subject to some limited exceptions) enforce the entire State Building Code and, in addition, rules on manufactured home parks and installation, mobile home parks, park and camp programs, tourist facilities, manufactured dwelling alterations and boiler regulation.

If a city opts not to, the county can step in and do the enforcement and administration. If neither the city nor county provide State Building Code enforcement inspection, the state enforces the State Building Code through the state’s BCD. Cities can also elect to have another city do their building code administration, inspection and enforcement using an intergovernmental agreement.

If a city elects to enforce the State Building Code, it must also adopt an ordinance which then adopts by reference the various specialty codes it plans on enforcing and making sure the ordinance is up-to-date each time a specialty code is revised by the state. A draft ordinance doing this is included at the end of this chapter.

Local jurisdictions offering building inspection and administration are required to develop and use four-year operating plans which must be approved in advance by the BCD.

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Notwithstanding the preemptive nature of the State Building Code, there are areas not covered by the State Building Code (but which may impact it) that cities are specifically allowed to deal with separately, including matters affecting the city's administration of the State Building Code (including appeals of local decisions), fees and penalties a city may wish to impose in its Building Code enforcement program, stop work orders and regulations for the abatement of dangerous buildings and nuisances and relocation of buildings.

Even though a city has the ability to impose penalties for violation of the State Building Code, state law requires that the penalty be a civil (not criminal) penalty, that the city give the violator notice of the amount, that the penalty can be challenged and how to challenge the penalty.

A city or county may have a regulation that is different from the State Building Code only if it is specifically authorized by the BCD Administrator. Needless to say, those authorizations do not happen often nor is there much of a demand for it.

Anyone doing inspections of buildings for compliance with any of the "specialty" codes of the State Building Code must be certified and licensed by the state to do so. Inspectors can be licensed for multiple specialties. The various specialty boards adopt (by administrative rule) minimum and continuing education requirements for licensure.

Cities that are responsible for State Building Code administration and enforcement must make sure that they provide "timely inspections and plan reviews." If someone believes a city is not doing so, they can file a written demand with the city and the city then has five (5) days to do the inspection or review. If they then fail to, the city is then subject to being sued.

The State Building Code includes items that are called "fire and life safety standards" but those standards are not exhaustive. The State Fire Marshall adopts the Oregon Fire Code every few years under the State Fire Code.

The state also requires a contractor obtaining a permit to do work on a residential structure be registered with the Construction Contractors Board. The purpose of this registration is to ensure that the contractor is insured and bonded, thereby providing a degree of consumer protection. A city or county cannot issue a residential building permit to an unregistered contractor. Furthermore, a city having administrative and enforcement responsibility must also ensure that persons doing work on a structure be properly licensed to do the particular work (i.e., electrical, mechanical, plumbing, etc.) as required by state law.

Building regulation is closely tied to land development controls. When a building project is submitted for a building permit, a check should be made to make sure the building would not be out of compliance with land use and other development regulations. A city or county enforcing building regulations should therefore integrate this review and follow it up with compliance inspection.

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If a city is not enforcing the building regulations, the county or state enforcement office will seek a land use clearance from the city before the building permit is issued. The city may not be able to depend on building code enforcement to achieve land development code enforcement.

B. EXAMPLE ORDINANCE

ORDINANCE NO. ___

CITY OF _____, OREGON

AN ORDINANCE AMENDING _____ MUNICIPAL CODE CHAPTER __.__ (BUILDING CODES) ADOPTING REVISED SPECIALTY CODES FOR ____ AND ADDING THE NEW ENERGY EFFICIENCY SPECIALTY CODE.

WHEREAS, the City of _____ has assumed the duties associated with administration and enforcement of a comprehensive municipal building inspection program consistent with the requirement imposed by the terms of ORS 455.148;

WHEREAS, the State Building Code (as defined in ORS 455.010) is applicable and uniform throughout Oregon and the City is required, as part of its assumption of duties noted above, to adopt the specialty codes comprising the State Building Code as those codes are adopted for enforcement by the Building Codes Division of the Oregon Department of Consumer and Business Services;

WHEREAS, the Oregon Building Codes Division has via Administrative Rule adopted new and/or amended codes and standards which are to be applied by the City as part of its duties noted above and said codes and standards are effective as of July 1, ____, but the Division has, by rule, allowed municipalities to have until September 30, ____ to apply them in all instances;

WHEREAS, the City wishes to continue its enforcement and administrative duties relative to the State Building Code and must therefore amend its Municipal Code to reflect the changes in building regulations;

NOW, THEREFORE, BASED ON THE FOREGOING THE CITY OF _____ ORDAINS AS FOLLOWS:

Section 1. The current provisions of Section __.__.010 of the _____ Municipal Code are hereby repealed and replaced by new language to read as follows:

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__.__.010. Various specialty codes and standards adopted. The following specialty codes, rules and standards are adopted and shall be enforced by the City of _____.

- **Structural Code.** The Oregon Structural Specialty Code, as adopted by OAR 918-460-0010 through 918-460-0015 (____) as well as the fire and life safety provisions thereof as adopted by OAR 837-040-0140 (____).
- **Mechanical Code.** The Oregon Mechanical Specialty Code, as adopted by OAR 918-440-0040 (____) and the fire and life safety provisions thereof as adopted by OAR 837-040-0140 (____).
- **Plumbing Code.** The Oregon Plumbing Specialty Code, as adopted by OAR 918-750-0110 (____).
- **Electrical Code.** The Oregon Electrical Specialty Code, as adopted by OAR 918-305-0100 (_____).
- **Residential Specialty Code.** The Oregon Residential Specialty Code as adopted by OAR 918-480-005 (____).
- **Manufactured Dwelling Parks Rules.** The manufactured park and mobile home park rules adopted by OAR 918-600-0010 (____).
- **Manufactured Home Installation Rules.** The manufactured dwelling rules adopted by OAR 918-500-0000 through 918-500-0500 and OAR 918-520-00l0 through 918-520-0020(____).

Energy Efficiency Code. The Oregon Energy Efficiency Code as adopted by OAR 918-460-0500 (____).

Section 2. The terms of this ordinance shall take effect immediately inasmuch as the newly revised state codes relating to Energy Efficiency, Fire, Mechanical and Structural matters are enforceable beginning July 1, 20__.

First Council Approval: _____, 20__

Second Council Approval and Adoption: _____, 20__

Approved by Mayor: _____, 20__

_____

Mayor

Attest:_____

City Recorder

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Thank you to

- Tom O'Connor, Executive Director, Oregon Municipal Electric Utilities (OMEU)

for updating this chapter in the Fall of 2010.

CHAPTER 16 – ENERGY

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B. OVERVIEW OF ELECTRICITY INDUSTRY RESTRUCTURING IN OREGON 16-2
C. RIGHTS OF WAY AND FRANCHISE FEE ISSUES 16-3
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A. ENERGY

The Northwest has faced new energy challenges over the past two decades. Deregulation and competition have brought fundamental changes to the purchase and delivery of electricity services, and to the structure of traditionally vertically-integrated utilities. At the same time, rapidly expanding renewable energy sources and measures to address climate change are fundamentally altering the composition of Oregon's energy system. These changes are presenting unique challenges and opportunities.

ROLE OF THE BONNEVILLE POWER ADMINISTRATION

Created in 1937, the Bonneville Power Administration (BPA), is one of five federal power marketing agencies in the U.S., and plays a large role in both electricity generation and transmission in the region. About half of the power used in the Northwest comes from BPA. Under longstanding federal law, BPA sells output of the federal Columbia River Hydropower System at cost to non-for-profit public power utilities in the Northwest. The agency's grid also provides about 75 percent of the region's transmission capacity. BPA is also responsible for a number of public purposes, such as energy efficiency programs and fish and wildlife recovery which are paid for by its public power wholesale customer utilities. BPA's hydropower from the Federal Columbia River Power System has provided Northwest citizens and businesses with low-cost electricity for decades. Strategies for retaining the benefits of the federal system will be necessary as further restructuring takes place and other parts of the country attempt to gain access to the region's power.

B. OVERVIEW OF ELECTRICITY INDUSTRY RESTRUCTURING IN OREGON

LOC A-Z Index: Resources on Electric Industry Restructuring

In 1999, Oregon legislators passed Senate Bill 1149, a bill to restructure the electricity industry. Some refer to restructuring of the electricity utility industry as deregulation. While the poles and wires will remain regulated, the generation component of electricity will no longer be regulated. Oregon's restructuring law has allowed commercial and industrial customers of investor-owned utilities (Portland General Electric and PacifiCorp), to purchase their power from alternative energy suppliers. The ability to purchase power from an energy supplier other than Portland General Electric (PGE) or PacifiCorp is referred to as direct access.

Consumer-owned electric utilities (municipal utilities, people's utility districts and electric cooperatives) retain local authority to determine if, how, and wh electric restructuring will occur within their service territories.

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In addition to direct access, a key component of Oregon's restructuring law has been public purpose funding. When direct access is offered, a public

purpose charge equal to three percent of the gross revenues of PGE and PacifiCorp has been collected from all retail electricity consumers within their service territories. The Energy Trust of Oregon determines how the funds will be allocated for the purposes of cost-effective energy conservation, development of renewable resources, and low-income weatherization. Consumer-owned utilities (COUs) do not assess a public purpose charge since they have not deregulated or gone to direct access. Consumer-owned utilities provide energy efficiency and conservation programs for their customers using a combination of local and BPA programs. COUs pay for the BPA programs as part of their power sales contracts with BPA.

Cities, along with other large and small non-residential consumers served by investor-owned utilities, now have options regarding the pricing of their energy usage. For example, if a city wants to choose an energy provider other than PGE or PacifiCorp, they have the ability to do so for the city accounts such as city hall, the water plant, or street lights. They also have various pricing options such as annual, quarterly, monthly, and daily pricing.

Most cities, however, do not have the resources necessary to evaluate the various options. If a city does not make a choice in accordance with the time frames outlined by the utilities, the pricing will default to an annual rate. The annual rate will be the cost-of-service rate, the rate that at this time most closely reflects a regulated rate option. Periodically, the city has the opportunity to reevaluate the various options.

C. RIGHTS OF WAY AND FRANCHISE FEE ISSUES

LOC A-Z Index:
Resources on Franchise Agreements

Oregon cities collect franchise fees (or privilege taxes where there is no franchise agreement in place) from power and telecommunications utilities. The fees from electric utilities make up the highest percentage of revenues from all franchise fees/privilege taxes, and they are at risk in a deregulated electricity industry. First, as utility customers choose new power suppliers, utility revenues (the basis for franchise fees) will be reduced, and consequently, city franchise fee revenues will be reduced. Second, if utility services such as billing and metering are spun off to new companies, utility revenues will be further reduced, and city franchise fee dollars will shrink again. New approaches for collecting city franchise fees may be necessary as electric restructuring is implemented in Oregon.

City franchise fees, privilege taxes, and in-lieu of tax payments made by municipal electric utilities are protected. When direct access is offered by a utility, cities may impose a privilege tax on the distribution utility for use of local, public rights of way. The privilege tax will be based on volume of kilowatt hours delivered, instead of a utility's gross revenues. This new methodology is called the volumetric approach. It is designed to avoid a substantial loss of franchise fee revenues.

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The volumetric approach is intended to allow cities to collect the same revenue as provided by the gross revenues calculation. The rates may vary by customer class to avoid cost shifts to any one type of customer. A cap on volumetric rates, by class, is established to be equivalent to a five percent cap on gross revenues. Cities with current rates less than five percent are allowed to raise volumetric rates to produce revenues equal to the amount that would have been collected under a five percent gross revenues approach. ORS 221.655.

ORS 221

For in-lieu payments made by municipal electric utilities, volumetric charges can be set when direct access is offered so that charges established for different customer classes bear the same approximate relationship to payments made under the current gross revenues approach. ORS 225.270.

ORS 225

Cities need to periodically evaluate whether or not it is beneficial to move to an alternative mechanism for calculating franchise fee revenues. General considerations include: determining if a large business, industry, or governmental entity such as a school either chooses a new energy provider; or establishes their own electrical generation system. If a large enough entity either chooses a new service provider or generates its own electricity, the city could lose franchise fee revenues because they would no longer be captured through the utility's gross revenues. The volumetric approach is designed to keep cities whole so there is no loss in franchise fee revenue.

If there is no movement on the part of a large industry or governmental entity, a city is better off staying with a gross revenues calculation for franchise fees. For assistance with a comparison of the gross revenues vs. volumetric calculation contact your PGE or PacifiCorp local government representative.

SUCCEEDING WITHIN A RESTRUCTURED ELECTRIC UTILITY MARKET

This new environment requires cities to be proactive in making choices that best fit their communities. Cities must be able to evaluate their options, including the potential solicitations they will receive from energy marketers. Implementation of electric restructuring in Oregon is a long-term process that is still developing.

In addition to guidelines for calculating franchise fees with a volumetric methodology, the League also has sample franchise agreements and other recommendations for franchise agreements under a restructured utility market, available to cities.

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There are tools and incentives available through the Oregon Department of Energy, the Northwest Energy Efficiency Alliance, local utilities, and the Energy Trust of Oregon that can assist cities with better managing their

energy usage and cutting costs. The League has additional information available on these options.

D. CURRENT CITY ROLES

Cities are responsible for key decisions that control a substantial portion of the energy consumed in the state. Cities can also provide leadership for residents and businesses in making wise energy choices. Major roles for cities include:

- **Consumers** of energy in their own buildings, facilities, and motor vehicle fleets;
- **Planners** of efficient energy utilization through the comprehensive planning process;
- **Regulators, administrators, and enforcers** of land use regulations, building codes that affect energy use and stewards of rights of way;
- **Developers** of renewable energy production facilities; and
- **Operators** of municipal electric utilities.

CITIES AS ENERGY CONSUMERS

Cities spend significant sums of money each year for energy to operate buildings and facilities and to provide basic services such as water, sewage treatment, and streetlights. In an effort to control energy expenditures, many cities have begun to pursue internal energy management opportunities. After information on energy use and cost patterns is collected and analyzed with the assistance of a bill-monitoring system and auditing program, potential operation and maintenance changes and capital outlays for efficiency improvements and renewable resource opportunities are assessed. Investments in insulation, and more efficient windows, lights and motors, for example, can save energy and dollars. Using renewable resources, such as methane at the wastewater treatment facility or solar water heating at the fire station, can also reduce energy expenditures over the long term. Often, an individual staff member or staff team is given responsibility for coordinating city's internal energy management program.

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CITIES AS PLANNERS

Cities can influence energy consumption patterns through the comprehensive planning process. For example, land use can be designed to minimize the need to travel; travel circulation can be planned and the use of public transportation can be encouraged to achieve energy conservation goals; and subdivision and zoning standards can be developed to increase opportunities for building sites with good solar access.

CITIES AS REGULATORS, ADMINISTRATORS, AND ENFORCERS

Another avenue open to cities in the energy field is through energy-related local regulatory and enforcement activities such as land use regulations and building codes.

Two kinds of land use regulation that can promote energy conservation are the protection of solar access and renewable energy facility siting standards. Many cities in Oregon have passed ordinances to protect access to the sun as new houses are built, and some also have passed regulations that protect solar devices installed on existing structures. Relatively simple adjustments in subdivision standards may result in an increase in the number of building sites with good solar access.

It is also within the purview of local government to promulgate siting standards for the location of renewable energy facilities in their jurisdictions. Generally, energy facility siting takes place in rural locations, but siting within city limits also is possible.

As discussed earlier, cities are given the option of administering the state building code, which includes chapters on energy conservation. Strictly enforcing ever more efficient building codes can go a long way towards reducing energy use.

As discussed earlier in relation to Oregon's changing electricity industry, a key role for cities is serving as stewards of city rights of way. Oregon cities collect franchise fees (or privilege taxes where there is no franchise agreement in place) from power and telecommunications utilities. The fees from electric utilities make up the highest percentage of revenues from all franchise fees/privilege taxes. Franchise fees and privilege taxes are compensation for use of local public rights of way. They are a rental fee. If a utility had to acquire access to property from private land owners, property by property, its acquisition costs would be tremendous. Utilities benefit from a city's acquisition of rights of way and through franchise fees and privilege taxes, pay some return to the community.

Fees from electric utilities generally have been capped at five percent by state law. Fees up to three and a half percent have been allowed as an operating expense of the utility, and are not itemized or billed separately. Fees above three and a half percent, up to a total of five percent, have been charged to users of the utility within the city, and are separately stated on customer bills. Sample franchise fee agreements and a list of recommendations for franchise agreements under a restructured electric utility market are available from the League.

CITIES AS RENEWABLE RESOURCE DEVELOPERS

Cities can become developers of renewable energy projects. Such projects are undertaken for various reasons, including cutting the operating cost of local government buildings or facilities and generating power for off-site use.

Possible projects include solar or geothermal water or space heating for city-owned buildings, use of methane production at a landfill or wastewater treatment plant, and electricity generation from hydraulic sources or as an additional product of a heat generating operation (cogeneration). Other less common electricity generation sources that a city might sponsor or develop include geothermal, wind, biomass, and solar.

MUNICIPAL UTILITIES

Eleven cities in Oregon currently operate municipal electric utilities. These utilities are formed and operated by the city. Municipal utilities are accountable to citizens through statutory requirements for public bodies such as open meetings. They make payments in lieu of taxes to the city.

Most municipal utilities purchase their wholesale electric power from the Bonneville Power Administration (BPA). As noted earlier, because municipal utilities are publicly-owned and non-profit, they are afforded first right to the output of the federal Columbia River Hydropower System under cost-based rates. Several provide part of their power with their own hydroelectric generation facilities. As part of cooperative efforts with BPA, municipal utilities are acquiring conservation resources. Programs to weatherize existing residences and businesses, to encourage the construction of new energy efficient housing, to increase energy efficiency in businesses and industries, and to reduce demand for energy at peak hours are offered.

As discussed earlier with regard to Oregon's electric restructuring law, consumer-owned electric utilities (municipal utilities, people's utility districts and electric cooperatives) retain local authority to determine if, how, and w electric restructuring will occur within their service territories.

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Municipal utilities, along with other public power and cooperative utilities, h recently signed new twenty year contracts with BPA which take effect September, 2012. Under these contracts, the Columbia River Power System is fully allocated to northwest public power utilities at the lowest preference rate. Public power utilities must then purchase additional power at market prices to serve new load growth in their communities. This places upward pressure on rates as communities grow. State Renewable Portfolio Standard requirements to purchase renewable resources also increase costs. This makes energy efficiency a valuable tool for customers to mitigate these increases.

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This chapter was updated by the League of Oregon Cities in the Fall of 2010.

CHAPTER 17 – OTHER CITY PROGRAMS

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A. PARKS AND RECREATION

PARKS AS AN URBAN FACILITY

Cities have authority by statute and charter to acquire, develop, maintain and regulate 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 and the characteristics of the area. Many small cities have no municipally owned parks and recreational facilities or maintain only a small park area. Most medium and large cities provide for a variety of recreational needs through a park and recreation system managed by professional personnel. In a few cities, public recreational facilities and programs are provided by a park and recreation district encompassing the city and surrounding areas. In general, city park facilities fill the need for open space and room for outdoor activities.

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 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. Some departments, particularly in large 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 or the park department on planning, developing and operating park and recreational systems and programs.

CITY-SCHOOL DISTRICT COOPERATION

Some facilities (playgrounds, athletic fields, swimming pools, gymnasiums, auditoriums) are appropriate for development by either cities or school districts. Since efficiencies are possible through cooperative agreements, cities and school districts sometimes opt for joint or adjacent ownership of facilities. For example, in some communities, swimming pools are constructed and operated through agreement

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between the city and the school district in order to intensify pool use and improve the level of service received from the investment. Agreements may involve consolidated ownership of the facilities, joint administrative 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 fields when they are not being used for school programs.

PLANNING FOR PARKS

As the amount of housing increases, the number and size of parks also should 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.

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, and development policies can help establish new park sites as land is subdivided or planned developments are constructed.

Cities along the Willamette River are participants in a special state-mandated program. The legislature directed that a natural, scenic, historical and recreational greenway be developed and maintained along the Willamette River. The Department of Transportation developed a Greenway Plan that was approved by the Land Conservation and Development Commission. Much of the Greenway program 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.

PARK AND RECREATION FINANCE

In Oregon, the acquisition, development, operation and maintenance of parks and recreational programs are financed through the usual local government sources: general fund revenue, bonds, serial levies, and user fees. Among special sources are state grants, such as Willamette Greenway matching grants; federal grants such as those available from the Heritage Conservation and Recreation System (through the State Parks Division); and Community Development Block Grants from the Department of Housing and Urban Development. Funds from federal and state grants are declining and grant funds are not normally available for

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operation and maintenance. The state constitution was amended in 1980 to repeal previous authority to use revenue collected from highway users for park purposes.

LOC A-Z Index:
Resources on SDCs

Many cities have also adopted system development charges (SDCs) for the acquisition and development of new park facilities. These charges are assessed against new development in the community to help pay for additional park facilities necessitated by growth.

B. LIBRARIES

ORGANIZATION OF LIBRARY SERVICE

ORS 198
ORS 357
ORS 451

A library district may be established as provided in ORS 198.705 to 198.955 and 357.216 to 357.286. Any Oregon city, county, school district, community college district or library district may establish, equip and maintain a public library; may contract with other agencies to provide library services; or may enter into an agreement with the other agencies for joint operation of a public library system or specific library services. It is also possible to establish a library system as a county service district under ORS chapter 451, thus limiting the financing of library facilities and service to an area of the county considered to be especially benefitted. County service districts may include cities if the city council consents.

PUBLIC LIBRARY SYSTEMS AND PROGRAMS - Library services are available throughout the state, although organization of the systems vary greatly. According to 2009 data, There are presently 24 library districts in Oregon — 19 special library districts and five county library service districts. All 24 districts are funded through voter-approved permanent tax rates. Some libraries are funded primarily by municipalities. Some county governments provide full library services and are responsible for their administration and finance countywide, and may provide branch systems and book-mobiles in addition to the main facility.

Some library systems are funded by a combination of city, county, and special district funding. In those cases, functions may be shared among the county and local library systems (e.g., joint circulation programs), but city libraries within a county are administratively and financially separate, except for the joint activities.

LIBRARY ADMINISTRATION - Before 1975, when the legislature substantially revised statutes dealing with public library systems, several libraries were administered by locally appointed library boards. A few cities still have such a policy-making structure, but most libraries now have department status and are under the supervision of a city or county governing body or administrator. Appointed library boards may still play an important role in the development and administration of library

programs, but their functions in many cities and counties are now principally advisory.

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FINANCING LIBRARIES

LOCAL Most funding for the continuing operation of local libraries is provided form the general fund of a city or county, or from a special library levy approved by voters specifically for library functions. Fines, library card fees, donations, and miscellaneous revenues including those from gift or coffee shops located in the library, augment these basic local sources.

STATE Until the late 1970s, little state aid was available to local libraries. The first major state aid came in 1977 when the legislature provided $300,000 from the state general fund for grants administered by the State Library. The money was distributed on a per capita basis, with a maintenance of effort provision that conditioned eligibility on maintaining library expenditures at a level not less than the least amount provided in the two prior fiscal years. In 1985, the law was amended to provide that at least 20 percent of the money granted by the state would be distributed in the area (in actual square miles) served by the local library. The other 80 percent would continue to be distributed on the basis of population. State funding for public library service is appropriated on an annual basis for the development and improvement of children's services.

ADDITIONAL INFORMATION

Oregon State Library Website
Oregon Library Association Website

For more information regarding Oregon public library services, visit the Oregon State Library website or contact the Oregon Library Association.

C. HUMAN SERVICES

Major service programs such as public health, mental health, public assistance, employment, vocational rehabilitation, and children's services are carried out almost entirely by state and county governments in Oregon.

Cities are involved to some extent in social service provision through police departments, libraries, programs for the elderly, and park and recreation programs. Cities are involved in human service programs in three general ways: 1) direct provision of services and programs; 2) cooperation with and financial support of programs of other public or non-profit agencies; and 3) provision of referral services for persons seeking information or assistance.

DIRECT SERVICE

Services most often provided directly by cities include youth and senior citizen centers and mediation in discrimination complaints. Other direct service activities include such programs as the Portland Police Bureau's emergency "Sunshine Division" relief program, and the City of Bend "Dial-A-Ride" bus service for senior and disabled citizens.

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Activities in the field of human rights are promoted and assisted by some cities which have commissions on the rights of women, minorities, aging citizens, youth and the disabled. Members of the commissions are most often selected on the basis of a demonstrated interest in or knowledge of the problems of discrimination that are of particular concern to the commission with the passage of the Americans with Disabilities Act.

COOPERATIVE PROGRAMS

In cooperation with other agencies, cities may participate in area-wide human services planning as members of councils of government. They also contribute financial support for community nonprofit agencies, including alcohol and drug rehabilitation centers, emergency food and housing, child and family abuse shelters, legal assistance, crisis and family counseling centers, and senior citizen transportation.

Many cities have participated directly or indirectly in employment training programs through the Job Training Partnership Act (JTPA). Oregon's JTPA program is coordinated by the Business Resources Division of the State Executive Department, which reviews local plans to prepare economically disadvantaged and long-term unemployed people for productive participation in the labor force. Private industry councils, organized by local elected officials and business leaders in each of Oregon's eight service delivery areas, oversee local expenditures and are responsible for local job training results.

Many cities also participate directly or indirectly in services to children and families through the Commission for Children and Families. Local Commissions for Children and Families promote wellness for the children and families in the county or local region, and develop policy and oversight of a local comprehensive plan. Types of services, either contracted for or provided directly by the commissions, differ from county to county depending on the locally identified community needs.

REFERRAL SERVICES

Many cities are served by a large number of public, non-profit and private agencies providing a vast array of human services. Adequate sources of current information about these agencies are critical to enable potential

service recipients to identify the programs that are available and appropriate and for which they are eligible. Some cities operate special referral services to assist persons in need, and the referral function is performed routinely as a part of the daily activities of city police and other departments.

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HUMAN SERVICE FINANCING

Many cities provide services for senior citizens, including transportation and nutrition programs and senior centers. Other programs include day care centers, programs for the disabled, Little League, halfway houses, community centers, and after school or summer programs.

Cities also respond to human needs by making financial arrangements that take into account the special needs of particular population groups; for example, special rates for water, sewer, and electric utility services for senior citizens and low-income persons. Several cities also allow these groups to defer payment of special assessments, and some require franchised services such as taxi and garbage collection firms to provide lower rates to such groups as seniors and disabled persons.