



LEAGUE
of Oregon
CITIES

2018-19
**ELECTED
ESSENTIALS**



ELECTED ESSENTIALS – Agenda

- 7:30 a.m. Registration & Continental Breakfast**
- 8:15 a.m. Welcome and Introductions..... Tab 1**
- 8:30 a.m. Council Responsibilities..... Tab 2**
- 9:15 a.m. Ethics..... Tab 3**
- 10:30 a.m. Morning Break**
- 10:45 a.m. Public Meetings..... Tab 4**
- 11:45 a.m. Public Records..... Tab 5**
- 12:30 p.m. Lunch**
- 1:15 p.m. Achieving & Maintaining High-Functioning Governing Bodies**
- 2:45 p.m. Afternoon Break**
- 3:00 p.m. Region Chosen Session #1 - *supplemental materials not included in binder***
- 3:45 p.m. Region Chosen Session #2 - *supplemental materials not included in binder***
- 3:45 p.m. Panel Discussion**
 - Understanding Home Rule & State Preemption..... Tab 6**

The League would like to remind members that if they have a quorum traveling to or attending the Training, they should avoid conducting city business during travel and the event. The purpose of the training is for members to learn rather than discuss things as a governing body. Oregon law allows a quorum to attend a Training so as they are not discussing city business. Councils should also be mindful of the perception of city business being done outside of regular, publicly-noticed meetings.

2019 LOC BOARD OF DIRECTORS

OFFICERS



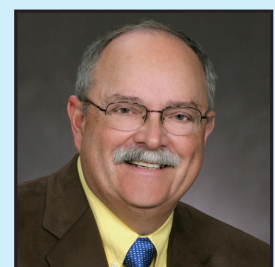
Greg Evans
PRESIDENT
Councilor, Eugene



Jake Boone
VICE PRESIDENT
Councilor, Cottage Grove



Keith Mays
TREASURER
Mayor, Sherwood



Timm Slater
IMMED. PAST PRESIDENT
Councilor, North Bend

DIRECTORS



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Mayor, Lebanon



Tanea Browning
Councilor,
Central Point



Steve Callaway
Mayor, Hillsboro



Paul Chalmers
Councilor, Pendleton



Scott Derickson
City Manager, Woodburn



Dave Drotzmann
Mayor, Hermiston



Drew Farmer
Councilor, Coos Bay



Amanda Fritz
Commissioner, Portland



Christine Lundberg
Mayor, Springfield



Michael Sykes
City Manager,
Scappoose



Steve Uffelman
Mayor, Prineville



Christy Wurster
City Manager, Silverton

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We're Here to Help!
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Helping Cities Succeed



Our Services

ADVOCACY


- **Legislative advocacy** – tracking and representing the interests of cities at the state and federal levels.
- **Legal advocacy** – to ensure municipal perspectives are considered in state and federal court cases impacting Oregon’s local governments.

TRAINING

- **LOC-TV** – short online training videos, available free, 24/7.
- **LOC Annual Conference** – the largest municipal gathering each year, bringing city officials together from around the state to network and learn about emerging issues from leading experts.
- **League Training** – for elected and appointed officials on a broad range of municipal topics.
- **Elected Essentials** – free, one-day trainings offered around the state for elected officials in odd-numbered years.

COMMUNICATIONS

- **Information and News** – delivered through the quarterly *Local Focus* magazine and weekly electronic *LOC Bulletin*.
- **Social Media** – follow the League:

 @LeagueofOregonCities

 @OregonCities

Legislative Advocacy

www.orcities.org/legislative

2019 Priorities:

1. Mental Health Investment
2. Revenue Reform/Cost Containment
 - Property Tax Reform
 - PERS Reform
3. Housing/Homelessness Improvement
4. Infrastructure and Resilience Investment
5. Broadband Investment and Right-of-Way Authority
6. Preservation of Third Party Building Inspection



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Helping Cities Succeed



Our Services

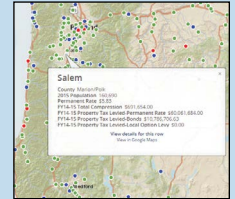
MEMBER SERVICES

- **CIS (Citycounty Insurance Services)** – group insurance program providing risk management, employee benefits as well as property, liability and workers' compensation coverage.
- **Local Government Personnel Institute (LGPI)** – human resources and labor relations assistance for cities.
- **Small Cities Support Network** – networking, information sharing and training for cities with less than 7,500 population.

LOC-Data

data.orcities.org

- Analyze data collected through LOC research
- Create charts & graphs to help tell your city's story
- Display key information using maps



INFORMATION & RESEARCH

- **LOC-Data** – open data portal with access to research data and custom reports.
- **City Handbook** – electronic reference for the most common challenges and questions on city operation, policy and governance.
- **Municipal Research, Reports and Surveys** – focusing on current issues and trends affecting local government.
- **Guidebooks** – comprehensive explanation and how-to manual on one particular area of municipal law.
- **Models** – sample ordinances or policies for cities to use as guideposts when they develop their own ordinances or policies.
- **White Papers** – equivalent to a legal memorandum wherein complicated legal issues are dissected and explained.
- **FAQs** – short, easy-to-read resources that answer frequently asked questions posed to the League by member cities.
- **City Directory** – contact information, charters and population data.
- **A-Z Index** – includes sample ordinances, policies, guides, reports and more.

LEGAL & TECHNICAL ASSISTANCE

- Respond to inquiries about municipal matters ranging from city operations to policy development.
- Participate as *amicus curiae* when matters related to home rule and municipal sovereignty are before the judiciary.

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COUNCIL RESPONSIBILITIES

UNDERSTANDING YOUR ROLE AND OBLIGATIONS



FORMS OF LOCAL GOVERNMENT IN OREGON

- **Council – Manager.**
 - Majority of Oregon cities.
 - 55% of cities nationwide utilize this form of government.
 - Most popular in the Southeast and Pacific coast areas.
 - **Strong Mayor.**
 - Beaverton, Oregon.
 - 34% of cities nationwide utilize this form of government.
 - Most popular in the Mid-Atlantic and Midwest.
 - **Commission.**
 - Portland, Oregon.
 - Only 1% of the country utilizes.
 - Oldest form of local government in the country.
-

COUNCIL – MANAGER FORM OF GOVERNMENT

- Council.
- Mayor.
- City Manager/Administrator/Recorder.
- Citizens.



COUNCIL'S ROLE

- **Legislative body.**
 - Adopt the budget.
 - Adopt local laws and regulations.
- **Power is centralized.**
 - Act as a body, not as individuals.
- **City's policy makers – the visionaries.**
 - Plan for your city's future.
 - Establish strategic comprehensive plans to build the city your citizens want.
- **Limited hiring authority**
 - Hire a city manager/administrator/recorder.
 - Depending on city charter, may also hire:
 - City Attorney.
 - Municipal Judge.
 - Police Chief.

MAYOR'S ROLE

- **Public face of the community.**
 - Represents the city at community events or government functions
 - Spokesperson for the council.
- **Presiding officer of the council.**
 - Presiding officer during council meetings.
 - Sets the agenda for council meetings.
 - Appoints citizens to committees and workgroups.
 - Signs ordinances and resolutions on behalf of the council.
- **Chief facilitator between the city manager and the city council.**
- *Role may shift depending on the city charter.*



MANAGER/ADMINISTRATOR'S ROLE

- **Chief Executive Officer of the City.**
 - Prepares the budget (or oversees preparation by the budget officer) for the city council's consideration.
 - Recruits, hires, supervises and terminates city employees.
 - Responsible for ensuring the city council's vision and strategic plans are brought to fruition.
- **Chief Advisor to the City Council.**
 - Provides the council with objective information about local operations.
 - Provides reasoned analysis and assessments of the benefits and consequences of city council actions.
 - Makes policy recommendations for the council to consider.

CITIZENS' ROLE

- **Participation.**
 - Providing public comment during council hearings and meetings.
 - Serving on city boards and commissions.
 - Participating in visioning and strategic planning sessions.
 - Voting for elected officials, initiatives and referrals.
- **Attendance.**
 - Attending public meetings.
 - Attending one-on-one sessions with elected officials.



QUESTIONS?



ETHICS AWARENESS

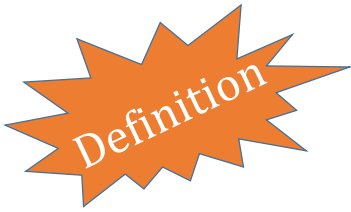
UNDERSTANDING YOUR LEGAL OBLIGATIONS



OREGON GOVERNMENT ETHICS LAW

All public officials in Oregon must comply with the Oregon Government Ethics Law.

Are you a public official?



“PUBLIC OFFICIAL”

“[A]ny person * * * serving the State of Oregon or any of its **political subdivisions** or any other public body, as an **elected** official, **appointed** official, **employee** or agent, **irrespective of whether the person is compensated** for the service.”

WHO ADMINISTERS THE ETHICS LAW?

Oregon Government Ethics Commission:

- Review and Investigation
 - Resolution
 - Advice
 - http://www.oregon.gov/OGEC/Pages/advisory_opinions.aspx
-

WHAT DOES THE ETHICS LAW COVER?

1. Prohibited Use of Office
 2. Conflicts of Interest
 3. Gifts
 4. Nepotism
 5. Outside Employment
 6. Subsequent Employment
 7. Statement of Economic Interest
 8. *Lobbying*
 9. *Executive Sessions*
-

PROHIBITED USE OF OFFICE

PROHIBITED USE OF OFFICE THE “BUT FOR” PROHIBITION

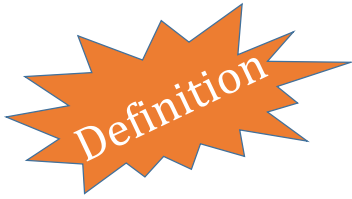
Public officials cannot use their public positions for:

- Financial Gain or Avoidance
 - Promise of Future Employment
 - Use of Confidential Information Gained Through Public Office
 - Representation Before the Governing Body for Fee
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FINANCIAL GAIN OR AVOIDANCE

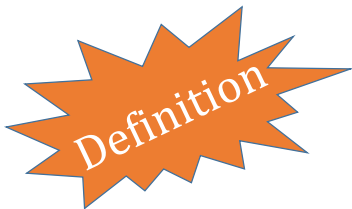
- Public Officials are prohibited from using or attempting to use their official position or office to:
 - Obtain financial gain, or
 - Avoid financial detriment.
- For themselves, a relative or a household member

No matter how minimal



“RELATIVE”

- Spouse;
 - Child or child-in-law;
 - Parents and stepparents
 - Siblings and stepsiblings;
 - Same members of the official’s in-laws (spouse’s child, spouse’s parent, spouse’s sibling);
 - Anyone for whom the public official has a legal support obligation;
 - Anyone receiving benefits of the public official’s public employment; and/or
 - Anyone from whom the public official received a benefit of employment.
-

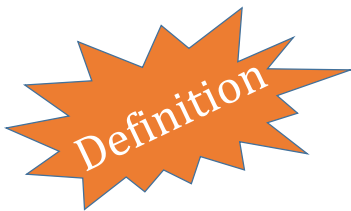


MEMBER OF THE HOUSEHOLD

Any person who resides with the public official or candidate.

EXCEPTIONS – WHAT IS *NOT* FINANCIAL GAIN

- Official compensation package
 - **Honoraria** related to the public official's position with a max value of \$50
 - Reimbursement of approved expenses
 - Unsolicited awards for professional achievement
 - Certain **Gifts**
 - Contributions to a legal expense trust fund.
-



HONORARIA

- Payment or something of economic value given in exchange for services upon which custom or propriety prevents the setting of a price.
 - Services include: speeches or other services rendered in connection with an event.
-

FINANCIAL GAIN HYPOTHETICAL #1

A volunteer firefighter borrows the fire department's power washer to clean the exterior of his private residence.

Can the firefighter use the department's power washer?

FINANCIAL GAIN HYPOTHETICAL #2

A staff member installs Microsoft Word on her personal computer using a bulk license purchased by the city used for city-owned devices.

Can the employee install Microsoft on her personal computer using the city's license?

FINANCIAL GAIN HYPOTHETICAL #3

City police officers provide law enforcement support services for a large private events that saw thousands of attendees. The event sponsor, a private company, provides the officers with a T-shirt valued at \$18.00, a fanny pack valued at \$20.00 and a sports bag valued at \$50.00

Can the officers accept the t-shirt, fanny pack & sports bag?

FINANCIAL GAIN HYPOTHETICAL #4

A mayor joins the League in Washington D.C. for meetings with Oregon's two U.S. Senators to discuss federal legislation that may harm Oregon municipalities. The city pays for the Mayor's airplane ticket on an airline that the Mayor receives airline miles.

Can the mayor keep the earned airline miles for later personal use?

PROMISE OF FUTURE EMPLOYMENT

A public official may not solicit or receive, either directly or indirectly, and a person may not offer or give to any public official any pledge or promise of future employment, based on any understanding that the vote, official action or judgment of the public official would be influenced by the pledge or promise.

USE OF CONFIDENTIAL INFORMATION GAINED THROUGH PUBLIC OFFICE

- A public official may not attempt to further his or her personal gain through the use of confidential information gained in the course of or by reason of holding his or her position or the activities of the public official.
 - This includes any attempt after the public official ceases to be a public official.
-

CONFIDENTIAL INFORMATION HYPOTHETICAL

A former city engineer uses public information gained while employed by the city to submit a bid in response to the city's request for proposals.

Did the engineer violate the ethics rules by using the public information in her bid proposal?

REPRESENTING A CLIENT BEFORE A GOVERNING BODY FOR A FEE

A person may not attempt to represent or represent a client for a fee before the governing body of the public body of which the person was a member.

REPRESENTING A CLIENT FOR A FEE HYPOTHETICAL #1

A member of the city council, who is an architect, has a developer as a client who has a proposed subdivision to be approved by the city council.

May the councilor appear in front of the city council acting as an architect on his client developer's behalf?

CONFLICTS OF INTEREST

WHAT IS A CONFLICT OF INTEREST?

Participation in an official action that *would or could* result in a financial benefit to the public official, a relative or a business in which either are associated.

- Potential conflict: when the action taken by the public official *could* have a financial impact on that official, relative or business.
 - Actual conflict: when the action taken by the public official *would* have a financial impact on that official, relative or business.
-

POTENTIAL VERSUS ACTUAL

Potential Conflicts of Interest

The public official must announce or disclose the conflict

Actual Conflicts of Interest

The public official must announce or disclose the conflict and recuse themselves

HOW TO DISCLOSE A CONFLICT AS AN ELECTED OFFICIAL

- Publicly announce the nature of the conflict.
 - The notice must be recorded in the official records of the public body.
 - An announcement of the conflict must be made at each meeting or on each occasion the issue is discussed or debated.
-

HOW TO DISCLOSE A CONFLICT AS A PUBLIC EMPLOYEE

- Provide written notice to the person who appointed or employed them.
 - Must describe the nature of the conflict and request that the appointing authority/employer dispose of the matter.
 - **Notice must be provided each subsequent time the conflict arises.**
 - Appointing authority/employer must:
 - Assign someone else to the task, or
 - Instruct the employee on how to proceed with the matter.
-

EXEMPTIONS FROM DISCLOSURE

- The conflict arises from a membership or interest held in a particular business, industry, occupation, or other class that was a prerequisite for holding the public position.
 - The financial impact of the official action would impact the public official, relative of business to the same degree as other members of an identifiable group or class.*
 - The conflict arises from a position or member in a nonprofit section 501(c) corporation.
-

RULE OF NECESSITY



RARE

- An actual conflict of interest exists but the public official's vote is necessary to meet the minimum number of votes required for official action.
 - The public official may vote out of necessity.
 - Does not apply when there are insufficient votes because of a member's absence.
 - **Only applies when a quorum is lacking solely because the member must refrain due to the conflict.**
 - Must still disclose and refrain from any discussion on the matter.
-

CONFLICT OF INTEREST HYPOTHETICAL #1

A city is considering enacting a short-term vacation rental ordinance. Two members of the council own short-term vacation rentals inside the city limits.

Do the Councilors have a conflict of interest regarding the proposed ordinance?

CONFLICT OF INTEREST HYPOTHETICAL #2

A city does not have a fire department. There is a volunteer fire district that covers the city's jurisdiction. Each year the city provides each volunteer firefighter who serves the district a \$50 annual stipend. One of the city councilor's spouse is a volunteer firefighter who receives the \$50 stipend.

Does the Councilor have a conflict of interest in participating in and voting on the city's proposed and adopted budget each year?

GIFTS

WHAT IS A GIFT?

“[S]omething of economic value given to a public official, a candidate or a relative or member of the household of the public official or candidate:

- Without valuable consideration of equivalent value, including the full or partial forgiveness of indebtedness, which is not extended to others on the same terms and conditions; **or**
 - For valuable consideration less than that required from others who are not public officials or candidates.”
-

WHAT IS NOT A GIFT?

- Something **received from relatives or household members**
 - Reasonable expenses **paid by certain entities** if:
 - The entity is a governmental entity, Native American tribe, membership organization to which the governing body pays dues, or a 501(c)(3) non-profit; or
 - The public official is participating in a convention, fact-finding mission/trip, or meeting where he or she is scheduled to speak, participate in a panel discussion or represent his or her governmental unit.
 - **Reasonable food, travel or lodging expenses** for the public official, relative, household member or staff while the public official is representing his or her governmental unit on:
 - An **officially sanctioned** fact-finding mission or trade-promotion; or
 - In officially designated negotiations, or economic development activities, approved in advanced.
-



OFFICIALLY SANCTIONED

- Written approval by a local public body or by a person authorized by the public body to provide that approval.
 - For cities:
 - Written notice from a supervisor or the city council is sufficient to constitute an officially sanctioned activity
 - The chief administrator of a city may officially sanction events for themselves.
-

WHAT IS NOT A GIFT?

- **Admission, food and beverages** for the public official, relative, household member or staff while accompanying the public official at a reception, **meal or meeting held by an organization where the public official represents his or her governmental body.**
 - **Food, beverage and entertainment that is incidental** to the main purpose of the event.
 - **Food or beverage consumed** by the public official acting in an **official capacity in association with a financial transaction or business agreement** with another government agency, public body or private entity, including review, approval or execution of documents or closing a borrowing or investment transaction.
-

WHAT IS NOT A GIFT?

- An **unsolicited token or award** of appreciation in the form of a plaque, trophy, desk or wall item or similar with a resale value of **under \$25.**
 - Anything of economic value offered, solicited or received as part of the **usual and customary practice** of the recipient's private business or the recipient's employment or position as a volunteer with a private business, corporation, or other legal entity operated for economic value.
 - The item must bear no relation to the official business and must be historical or established long standing traditions or practices for those not in public office.
-

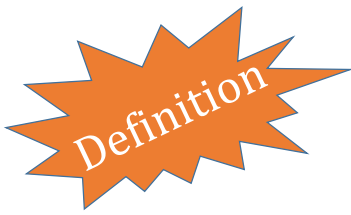
WHAT IS NOT A GIFT?

- **Informational material** related to the performance of official duties.
 - Waiver or discount of registration expenses or materials provided at a **continuing education event** that the public official may attend to satisfy a **professional licensing requirement**.
 - Legal defense trust fund contributions
 - Campaign contributions.
-

LIMITATIONS ON GIFTS

A public official, relative or household member may not:

- Solicit or receive any gift;
 - With a value exceeding \$50;
 - From any single source ;
 - Reasonably known to have a **legislative or administrative interest**.
-



LEGISLATIVE OR ADMINISTRATIVE INTEREST

- “[A]n economic interest, distinct from that of the general public, in:
 - Any matter subject to the decision or vote of the public official acting in the public official’s capacity as a public official; or
 - Any matter that would be subject to the decision or vote of a candidate who, if elected, would be acting in the capacity of a public official.
-

GIFT HYPOTHETICAL #1

A salesperson from a software company offers to take the city’s IT manager out to lunch. The IT manager has purchasing authority.

May the IT manager accept the offer for lunch?

GIFT HYPOTHETICAL #2

A city manager attends a work-related conference paid for by the city. When the city manager checks out of the hotel, she is offered a coupon for two nights of free lodging. The city manager is in charge of her own lodging arrangement.

May the city manager accept and use the coupon?

What if the city has a provision in the city manager's compensation policy allowing employees to use loyalty program benefits for personal use?

GIFT HYPOTHETICAL #3

You are a city staff member and it's your manager's birthday. The two of you have known each other for years and are close friends. You decide to purchase a nice birthday present.

May your manager accept your gift?

WHAT TO ASK YOURSELF BEFORE ACCEPTING A GIFT

- Is it a “gift” within the definition under ORS 244.020?
 - Do any exceptions apply?
 - Does the source have an legislative or administrative interest in my position?
 - Is the value great that \$50?
-

STATEMENT OF ECONOMIC INTEREST

ANNUAL FILING REQUIREMENT

- The SEI must be filed every year by all elected officials, the city manager (or principal administrator), municipal judges and planning commission members.
 - This is not an exclusive list! See ORS 244.050.
 - Completed online.
 - April 15 deadline.
-

WHAT DOES THE SEI DISCLOSE?

- Business interests;
 - Sources of income;
 - Ownership interests in real property other than the principal residence;
 - Honoraria received in excess of \$15 in value;
 - Name of lobbyists associated with business interests;
 - Name of entities in which the official received over \$50 to participate in conventions fact-finding missions, trips, negotiations, economic development activities or other meetings;
 - Entities or individuals with a legislative or administrative interest.
-

WHAT ARE THE PENALTIES FOR NOT TIMELY FILING SEI?

- Late filing fee of \$10 **for each** of the first 14 days after April 15th.
 - Late filing fee of \$50 **for each day** after the first 14 days until the maximum penalty of \$5,000 is reached.
-

RESOURCES

- Oregon Government Ethics Commission
 - Website: www.oregon.gov/OGEC
 - Email: ogec.mail@oregon.gov
 - Phone: 503-378-5105
 - “A Guide for Public Officials”
http://www.oregon.gov/OGEC/Pages/forms_publications.aspx.
 - Your City Attorney.
 - The League of Oregon Cities.
-

QUESTIONS?



PUBLIC MEETINGS

DUTIES OF PUBLIC OFFICIALS



WHAT IS A MEETING?

- A public meeting is the convening of any governing body for which a quorum is required to make or deliberate toward a decision on any matter, or to gather information.
 - Decisions must be made in public, secret ballots are prohibited.
 - Quorum requirements may vary among governing bodies.
-

WHAT ARE THE LEGAL REQUIREMENTS?

- Notice.
 - Within the Public Body’s jurisdiction.
 - Accessible location.
 - Minutes.
-

TRI-COUNTY METROPOLITAN TRANSPORTATION DISTRICT OF OREGON V. AMALGAMATED TRANSIT UNION LOCAL

- **Brand New Decision – Published February 15th.**
 - The Oregon Supreme Court did two things with this opinion.
 - A quorum applies to **ANY organized body**, even if the body hasn’t established its own quorum.
 - The Public Meetings Law applies to “some decision-making of a governing body that does not occur in a ‘meeting’”
 - **Solidifies that Serial Meetings are NOT Permitted.**
-

EXECUTIVE SESSION

Any meeting or part of a meeting of a city public body which is closed to certain persons for deliberation on certain matters.



REASONS TO HOLD AN EXECUTIVE SESSION

To consider the initial employment of a public officer, employee or staff member, but not to fill a vacancy in an elected office, or on public committees, commissions or advisory groups.



REASONS TO HOLD AN EXECUTIVE SESSION



To consider dismissal or discipline of, or to hear complaints or charges brought against a public officer, employee, staff member or individual agent, unless the person requests an open hearing.

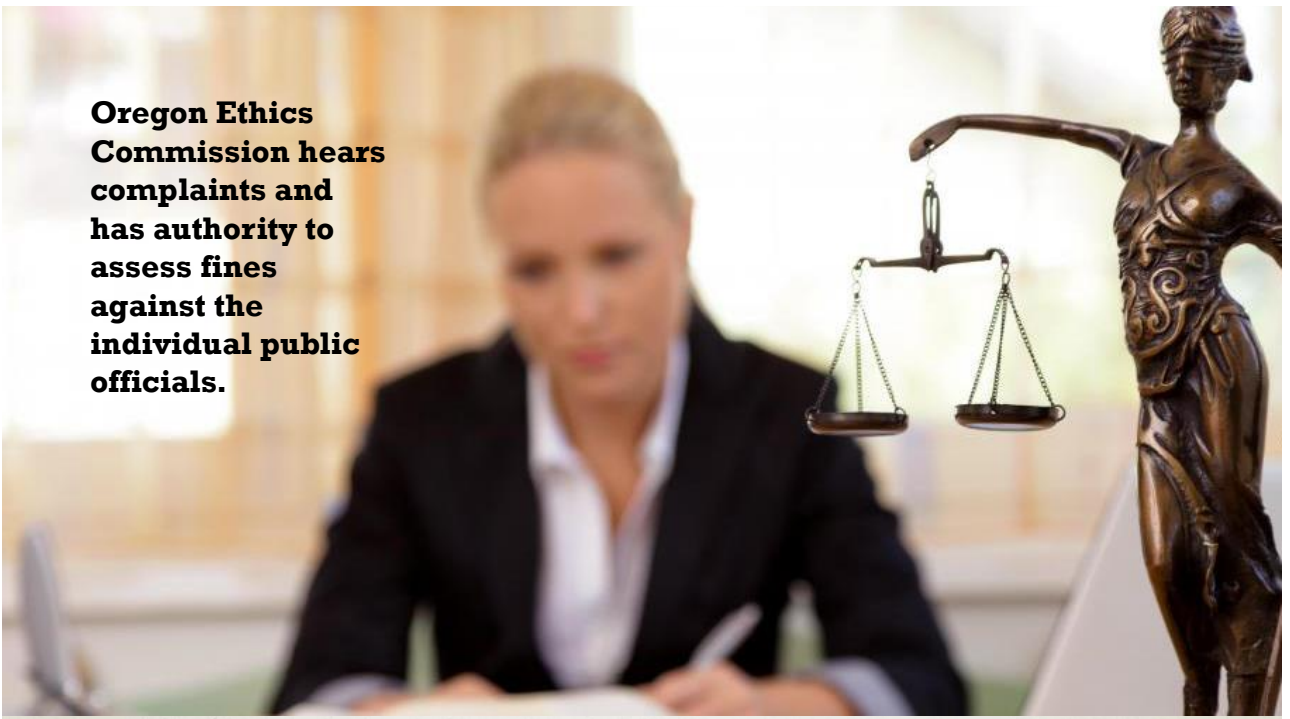
REASONS TO HOLD AN EXECUTIVE SESSION

- To conduct **labor negotiations** or discuss **labor negotiations** with negotiator.
 - To discuss **real estate transactions** with negotiator.
 - To review **security programs** related to the security of utilities, telecommunications or data transmissions.
-

REASONS TO HOLD AN EXECUTIVE SESSION

- To consider **records exempt from public inspection.**
 - To consult with your attorney regarding “**current litigation or litigation likely to be filed.**”
 - To conduct **employee evaluations** - if the employee does not request an open hearing.
 - To conduct **trade negotiations** where the governing body is competing with governing bodies in other states.
-

Oregon Ethics Commission hears complaints and has authority to assess fines against the individual public officials.



HOW SHOULD PUBLIC PARTICIPATION BE HANDLED?

- Oregon's Public Meetings Law requires public attendance, not public participation
 - Exceptions: land use and budget hearings.
 - City Charters
 - City Ordinances
 - Council or Committee Rules of Procedures
-

CONSTITUTIONAL PROTECTIONS



- First Amendment to the U.S. Constitution
 - Ensures that “debate on public issues should be uninhibited, robust, and wide open.”
 - “Citizens have an enormous first amendment interest in directing speech about public issues to those who govern their city.”
 - Article I, Section 8 of the Oregon Constitution
 - Content-based restrictions on speech are not permitted.
-

TIME, PLACE & MANNER RESTRICTIONS



- City councils and commissions can adopt rules that:
 - Dictate the time during a meeting when the public can comment.
 - Establish the particular location in a meeting where the public can address the council.
 - Limit the topic the public can speak to during their speech.
 - Regulate the amount of time each speaker is allowed to talk.
 - Inform the public of these rules.
-

REMOVING DISRUPTIVE PEOPLE

- Actual disruption required.

“Actual disruption means actual disruption. It does not mean constructive disruption, technical disruption, virtual disruption, nunc pro tunc disruption, or imaginary disruption.”
 - Offensive conduct that does not disrupt must be allowed.
 - Who is designated in your city to remove disruptive persons?
-

ARRESTING DISRUPTIVE PEOPLE

DISORDERLY CONDUCT STATUTES

Prohibits persons from:

- Engaging in violent or threatening behavior;
- Making unreasonable noise; or
- Disturbing lawful assemblies.

COURT DECISIONS

No constitutional free speech violation if the arrest was for disorderly conduct *“had as its objective the prevention of some harm within its power to prevent or whether its objective was to prevent protected speech.”*



SUSPENDING DISRUPTIVE PERSONS FROM FUTURE PUBLIC MEETINGS

- Oregon Federal District Court = cities cannot *“prospectively exclude individuals from future public meetings merely because they have been disruptive in the past.”*
 - U.S. 9th Circuit Court of Appeals = *“imposing a complete ban”* on a person’s entry into a government building *“clearly exceeds the bounds of reasonableness”* under the First Amendment.
 - Threat to public safety **MAY** be an exception to these rules.
-

RESOURCES

- [Oregon Attorney General's Public Meetings Manual](#);
 - [League's FAQ on Notice Requirements for Public Meetings](#);
 - [League's Guide to Executive Sessions](#);
 - [League's Legal Guide to Handling Disruptive People in Public Meetings](#); and
 - [League's Model Rules of Procedure for Council Meetings](#).
-

QUESTIONS?



PUBLIC RECORDS

DUTIES OF PUBLIC OFFICIALS



PURPOSE OF THE PUBLIC RECORDS LAW

- Informed citizenry – What is the government up to?
 - *“Democracy requires accountability, and accountability requires transparency.”*
 - Knowing our history – How did our government get us here?
-

RETENTION



WHAT IS A PUBLIC RECORD?

- A public record is any information that:
 - Is prepared, owned, used or retained by the city;
 - Relates to any activity, transaction or function of the city;
and
 - Is necessary to satisfy the fiscal, legal, administrative or historical policies, requirements or needs of the city.

WHAT IS NOT A PUBLIC RECORD?

- Examples include:
 - Extra copies of a document, preserved only for convenience of reference;
 - A stack of publications;
 - Messages on voice mail or on other telephone message storage and retrieval systems;
 - Spoken communication that is not recorded.
-

CITY'S OBLIGATION TO RETAIN ITS RECORDS?

Each city is required to maintain all of its public records, or accurate copies thereof, in accordance with the retention schedule established by the State Archivist.

[OAR 166-200-0200 through 166-200-0405](#)

TAMPERING WITH OR DESTROYING PUBLIC RECORDS

It is a crime to destroy, mutilate, conceal, remove, make a false entry in, or falsely alter any public record.



RECORDS CUSTODIAN

Each city is required to designate a records officer to coordinate its records management program and to serve as a liaison with the State Archivist.



STATE ARCHIVIST - THERE TO HELP

Oregon Secretary of State - Archives Division

800 Summer St. NE
Salem OR 97310
503-373-0701
Fax 503-378-4118

sos.oregon.gov

DISCLOSURE



WHAT IS A PUBLIC RECORD?

A public record is any writing that:

- Contains information relating to the conduct of the city's business;
 - Which is prepared, owned, used or retained by the city;
 - Regardless of the writing's physical form or characteristics.
-

WHAT IS NOT A PUBLIC RECORD?

- A public record does **not** include any writing that:
 - Does not relate to the conduct of the city's business; and
 - That is contained on a privately owned computer.
-

RIGHT TO INSPECT

Every person has a **RIGHT** to inspect any public record of the city, except as expressed provided by 192.338, 192.345 and 192.355.

RECORDS EXEMPT UNDER ORS 192.345

- Records are conditionally exempt – exempt unless the public interest requires disclosure in a particular incident.
 - 40 Potential Exemptions – Not all are applicable to cities.
 - “The policy underlying the conditional exemption statutes is that disclosure decisions should be based on balancing those public interests that favor disclosure of governmental records against those public interests that favor governmental confidentiality, with the presumption always being in favor of disclosure.”
-

345 EXEMPT RECORDS – PENDING LITIGATION

Recordings pertaining to litigation to which the public body is a party if the complaint has been filed or the public body shows that such litigation is reasonably likely to occur.



345 EXEMPT RECORDS – TRADE SECRETS



Formulas, plans, patterns, processes, tools, mechanisms, compounds, procedures, production data, or compilations of information which:

- Is not patented;
 - Known only to certain individuals;
 - Used in business that has actual or potential commercial value; and
 - Gives the user an opportunity to obtain a business advantage.
-

345 EXEMPT RECORDS – INVESTIGATORY INFORMATION FOR CRIMINAL LAW PURPOSES

Records and information compiled in connection with a criminal investigation are generally exempt from disclosure so that disclosure doesn't interfere with law enforcement proceedings.

- This is **not** applicable to records of arrests or reports of crime.
- Only sometimes applicable to investigative records not connected with pending or contemplated records.



345 EXEMPT RECORDS – TEST QUESTIONS AND KEYS FOR EXAMINATIONS



Test questions, scoring keys, and other data used to administer a licensing examination, employment examination or academic examination before the examination is given *if the examination will be used again*.

345 EXEMPT RECORDS – BUSINESS RECORDS & REAL ESTATE APPRAISALS

- Business records which are required to be submitted to a governmental body for use in setting fees/assessments or for establishing production quotas, are exempt from disclosure if disclosure would permit identification of the business.
 - This includes the amount of the fees or assessments.
 - Information relating to the appraisal of real estate prior to its acquisition is exempt from disclosure.
 - Even after the real estate is acquired, the exemption may still apply if the appraisal is relevant to later appraisals of similarly situated properties.
-

345 EXEMPT RECORDS – EMPLOYEE NAMES & SIGNATURES FOR LABOR REPRESENTATION



The names and signatures of employees who sign authorization cards or petitions for the purpose of requesting representation or decertification elections.

345 EXEMPTION RECORDS – DISCIPLINE

Personnel disciplinary actions, including the materials and documents supporting the discipline, are exempt from disclosure.

Applicable only to completed disciplinary actions when a sanction is imposed. Not applicable if employee resigns during investigation.

345 EXEMPT RECORDS – PUBLIC SAFETY PLANS

Cities do not have to release specific operational plans connected with an anticipated threat to the safety of individuals or the public, if the disclosure of the plans would endanger a person's life or physical safety or jeopardize a law enforcement activity.



345 EXEMPT RECORDS – SECURITY MEASURES

Records or information that would reveal or otherwise identify security measures, or weaknesses or potential weaknesses in security measures that protect people, buildings, property, or information are exempt from disclosure.



345 EXEMPT RECORDS – FINANCIAL TRANSFER RECORDS

Information provided to, obtained by or used by a public body to authorize, originate, receive or authenticate a transfer of funds is exempt from disclosure.

- Credit card numbers
- Payment card expiration dates
- Passwords
- Financial institution account numbers
- Financial institution routing numbers

\$

345 EXEMPT RECORDS – PERSONAL INFORMATION OF PUBLIC SAFETY & CODE ENFORCEMENT OFFICERS

A public safety officer may request a public agency refrain from disclosing his or her home address and/or home telephone number.

- Corrections officers;
 - Emergency medical dispatchers;
 - Parole officers;
 - Probation officers;
 - Police officers;
 - Certified reserve officers;
 - Telecommunicators; and
 - Fire service professionals
 - Code enforcement officers
-

345 EXEMPT RECORDS – ONGOING PUBLIC AUDIT

Any document or other information related to a public body's audit that is in the custody of an auditor until the auditor issues a final audit report or abandons the audit.

- The auditor must operate under nationally recognized governing auditing standards.
 - This exemption does not prohibit the disclosure of a draft audit report that is provided to the public body for a response to the auditor's findings.
-



345 EXEMPT RECORDS – POLICE BODY CAMS

Audio or video recordings from a law enforcement officer's body camera. The body camera footage of a police officer is subject to the following:

- Recordings sealed by court order may not be released;
 - Requests for disclosure must identify the approximate date and time of the incident related to the request and be reasonably tailored to include only that material for which public interest requires disclosure; and
 - Video recordings that are disclosed must first be edited in a manner as to render the faces of all persons within the recording unidentifiable.
-

RECORDS EXEMPT UNDER ORS 192.355

- ORS 192.355 does not contain the condition that records be withheld “unless the public interest requires” like ORS 192.345 does.
 - BUT, each exemption expressly requires a particularized weighing of the public interest in disclosure.
 - 42 Potential Exemptions – Not all are applicable to cities.
-

355 EXEMPT RECORDS – INTERNAL ADVISORY COMMUNICATIONS

A public records is exempt from disclosure as an internal advisory communication if it meets all of the following criteria:

- It is a frank communication within a public body or between public bodies;
 - It is of an advisory nature preliminary to any final agency action;
 - It covers other than purely factual materials; and
 - In the particular instance, the public interest in encouraging frank communications clearly outweighs the public interest in disclosure.
-

355 EXEMPT RECORDS – PERSONAL PRIVACY

Information of a personal nature is exempt from disclosure if disclosure would constitute an unreasonable invasion of privacy. The public interest in disclosing personal information must be shown by clear and convincing evidence by the person requesting the disclosure.



355 EXEMPT RECORDS – EMPLOYEE & VOLUNTEER PERSONAL INFORMATION

The following records and information of public employees and public volunteers is exempt from disclosure:

- Address and telephone numbers;
- Email addresses;
- Driver license numbers;
- Employer-issued identification card numbers;
- Emergency contact information;
- Social Security numbers;
- Dates of birth; and
- Other telephone numbers contained in personnel records.



355 EXEMPT RECORDS – CONFIDENTIAL SUBMISSIONS

Information submitted to a public body in confidence when it was not otherwise required by law to be submitted is exempt from public disclosure if:

- The information should reasonably considered confidential;
- The public body has obliged itself in good faith not to disclose the information; and
- The public interest would suffer by the disclosure.

**TOP
SECRET**

355 EXEMPT RECORDS – FEDERAL LAW PROHIBITION

Public records or information which are prohibited from disclosure under federal law are exempt from disclosure under the Oregon Public Records Law.

- If a city uses this exemption it must be able to point to the specific federal law prohibiting disclosure.



355 EXEMPT RECORDS – STATE LAW PROHIBITION

Public records or information which are prohibited from disclosure under federal law are exempt from disclosure under a Oregon state law.





355 EXEMPT RECORDS – TLT RECORDS

Records submitted to a city for it to determine the amount of transient lodging tax to be paid is exempt from disclosure if the information permits identification of the entity having to pay the tax.

BUT

A city must disclose, upon request, the identify of any entity that is delinquent over 60 das in payment of the required TLT. This disclosure is to include the period for which the tax is delinquent and the actual/estimated amount of delinquency.

355 EXEMPT RECORDS – EMAIL ADDRESSES

Email addresses in possession or custody of the state or a local government.

- This does **not** apply to email addresses assigned by a public body to its employees for use by the employees in the ordinary course of their employment.



VOLUNTARY DISCLOSURE BY THE CITY

- Cities can generally choose to disclose records that are considered conditionally exempt.
 - The Attorney General has determined that under certain circumstances, a city is allowed to release a record to one person, and not the rest of the public.
 - “[W]here limited disclosure of a public record does not thwart the policy supporting the exemption, the public body does not thereby waive its prerogative not to disclose the record to others.”
-

DEADLINES FOR RESPONDING TO PUBLIC RECORDS REQUESTS

- Cities have 5 days to acknowledge receipt of a public records request.
 - Cities have 10 days from the date required to acknowledge receipt to fulfill the request or provide a written estimation of how long it will take to fulfill the request.
-

CHALLENGES TO DENIED REQUESTS FOR PUBLIC RECORDS

- If the city or an **appointed city official** denies a request for public records, an appeal may be filed with the county's district attorney.
 - If an elected official for the city denies a request for public records, an appeal may be filed with:
 - Marion County Circuit Court; or
 - The Circuit Court wherein the elected official is located.
-

RESOURCES

- [The Oregon Attorney General's Public Records Manual](#);
 - [The Oregon Secretary of State's Retention Schedule for Cities](#);
 - The League of Oregon Cities' Policy Manual on the Use, Retention, Ownership, Disclosure of Public Records; and
 - [The League of Oregon Cities' FAQ on Assessing Fees for the Production of Public Records](#);
-

QUESTIONS?





LEAGUE OF OREGON CITIES

WHITE PAPER

The Origins, Evolution and Future of Municipal Home Rule in Oregon

JUNE 2017





**The Origins, Evolution and Future of
Municipal Home Rule in Oregon**

I. Introduction

Where do city governments derive their power? What authority does a city possess to operate a police force or collect franchise fees from an electric utility? For cities in Oregon, the answers to those questions have changed over time. Today, municipal corporations derive their legal authority from home rule charters. This paper examines the origin of the “home rule” doctrine in Oregon, how that doctrine has changed over time, and the current legal fight over the meaning of Oregon’s home rule provisions.

II. Origins of Home Rule in Oregon

In the nineteenth and early twentieth centuries, courts and legal scholars took the view that municipal corporations derived all power from the state government. Indeed, the federal constitution does not explicitly recognize units of local government as distinct political entities, nor does it expressly confer any power on local governments. Drawing on that lack of textual recognition, the Supreme Court of the United States concluded that cities are “convenient agencies” of their respective states and, therefore, the states can abolish or reorganize cities at any time.¹ And, because cities were treated as creatures of the state, courts took the view that cities also lacked inherent powers and possessed only those powers delegated to them by state law. That principle is known as “Dillon’s Rule.”² Until the early twentieth century, therefore, state legislatures had to affirmatively grant cities the authority to carry out their municipal functions. The local population could not simply vote to enact a new policy to address a local problem at the local level, but had to seek the approval of the state legislature. Further, if there was any doubt whether the state had conferred power on a city, the doubt would be resolved against the city. Dillon’s Rule dominated legal scholarship and jurisprudence in the nineteenth

¹ See *Hunter v. City of Pittsburgh*, 207 US 161, 178-79 (1907). That does not mean that local governments lack other legal protections vis-à-vis state government, most notably through state constitutional law.

It should be noted that some scholars reject the analysis of *Hunter* and argue that the federal constitution does indeed offer substantive protections for cities qua cities. They typically find that protection in the Tenth Amendment, which reserves all power not otherwise granted to the federal government to the states “or to the people.” See Jake Sullivan, *The Tenth Amendment and Local Government*, 112 YALE LJ, 1935 (2003) (arguing that the Tenth Amendment can support federal constitutional protections for local government); see also David J. Barron, *A Localist Critique of the New Federalism*, 51 DUKE LJ 377 (2001) (setting out federalism versus localism); Jay S. Bybee, *The Tenth Amendment Among the Shadows: On Reading the Constitution in Plato’s Cave*, 23 HARV JL & PUB POL’Y 551 (2000) (exploring ways in which to understand the Tenth Amendment in the context of American federalism).

² The eponymous rule is named for Iowa Supreme Court justice, and later federal judge, John F. Dillon. Dillon wrote an influential treatise on municipal law in which he argued that cities lacked inherent lawmaking powers and derived all power from the states. See 1 John F. Dillon, *THE LAW OF MUNICIPAL CORPORATIONS*, § 9(b), at 93 (2d ed 1873).

and early twentieth centuries. The Oregon Supreme Court adopted the Dillon's Rule theory of local-state relations in 1882.³

Thus, in nineteenth-century Oregon, only the Legislative Assembly had the power to incorporate new cities and to establish and amend city charters.⁴ If a group of citizens wanted to incorporate a city, the Legislature had to pass special legislation that both created the city and provided the new city with specified, limited powers.⁵ The populist movements of Gilded Age America, however, led to fundamental changes in city-state relationships across the country, including in Oregon. Beginning in 1901, the Oregon Legislature began to consider constitutional amendments that would redistribute power over local charters to their respective localities.⁶ That effort coincided with the push for an initiative and referendum amendment to the Oregon Constitution.⁷ Eventually, in 1906, consistent with a wave of home rule reform sweeping the nation, the voters of Oregon adopted a constitutional amendment that granted the people the right to draft and amend their own municipal charters, independent of special legislative approval.⁸

³ See *City of Corvallis v. Carlile*, 10 Or 139 (1882).

⁴ Although the Oregon Supreme Court endorsed Dillon's Rule in 1882, some late nineteenth-century Oregon cases took a more expansive view of municipal authority. See Paul A. Diller, *The Partly Fulfilled Promise of Home Rule in Oregon*, 87 OR L REV 939, 943 & nn 20-21 (2008). It is true, however, that only the state legislature had the power to incorporate new cities and amend city charters.

⁵ Some examples of cities created by special legislation include the City of Adams, see Act of Feb. 5, 1903 (SB 76), the City of Ontario, see Act of Feb. 13, 1903 (HB 236), and the City of Stayton, see Act of Feb. 2, 1903 (SB 28).

⁶ At the time, amendments to the Oregon Constitution had to be approved by two successive sessions of the Legislature before being referred to the voters. See Or Const, Art XVII, § 1 (1857). A home rule amendment was proposed during the 1901 legislative session. See Senate Joint Resolution (SJR) 3 (1901). The amendment was again proposed during the 1903 session, but because the two proposals had slight grammatical and syntactical variations, the amendment never made it to the ballot.

⁷ The populist drive in Oregon was largely led by William Simon U'Ren. U'Ren was instrumental in establishing the "Oregon System" of popular democratic participation through initiative and referendum processes, local home rule, and, later, popular election of U.S. Senators. See generally Steven L. Piott, *GIVING VOTERS A VOICE: THE ORIGINS OF THE INITIATIVE AND REFERENDUM IN AMERICA* (1995); Lincoln Steffens, *UPBUILDERS* (1st ed 1905). Interestingly, Oregon was the first state to select its U.S. senators via popular election.

For a comprehensive look at the populist sentiments that led to the ratification of the 17th Amendment in 1913, see Todd J. Zywicki, *Senators and Special Interests: A Public Choice Analysis of the Seventeenth Amendment*, 73 OR L REV 1007 (1994).

⁸ In 1953, the people of Oregon adopted a separate constitutional amendment that guaranteed home rule authority for county governments. See Or Const, Art VI, § 10. Today, nine counties operate under home rule charters. In 1973, the state Legislature passed a law that effectively granted all counties home rule authority, regardless of whether they adopted a home rule charter. See Or Laws 1973, ch 282, § 2, currently codified at ORS 203.035.

Article XI, section 2, of the Oregon Constitution, provides in part:

“The Legislative Assembly shall not enact, amend or repeal any charter or act of incorporation for any municipality, city or town. The legal voters of every city and town are hereby granted power to enact and amend their municipal charter, subject to the Constitution and criminal laws of the state of Oregon[.]”⁹

In the same 1906 election, the people voted to amend the initiative and referendum provision of the Oregon Constitution to reserve those powers “to the qualified voters of each municipality and district as to all local, special and municipal legislation of every character in or for their municipality or district.”¹⁰

Taken together, Article XI, section 2, and Article IV, section 1(5), guarantee each locality the right to draft, amend, and vote on municipal charters and ordinances. Note, however, that those constitutional amendments do not use the term “home rule” and do not specifically confer *substantive* lawmaking authority on cities or their citizens. Rather, the amendments prevent the Legislature from enacting or amending municipal charters and ordinances and free cities from the burden of seeking state approval before enacting substantive policies tailored to the needs of the locality. Thus, in general terms, cities and counties possess substantial lawmaking authority independent of the state. The precise nature of the local-state relationship, however, has evolved over the last 100 years. The following section examines key judicial interpretations of the home rule, initiative, and referendum amendments. The overview highlights the fact that the home rule amendments did not end the debate over local authority versus state oversight—rather, the amendments opened a new chapter in the history of state and local relationships.

III. Evolution of Home Rule

The debate over the scope of local government authority vis-à-vis state authority did not end with the enactment of the home rule amendments. On the contrary, the passage of Article XI, section 2, and Article IV, section 1(5), catalyzed a century-long process of interpreting, refining, reconsidering, and applying those amendments—a process that continues today. As the following overview demonstrates, jurists and attorneys have disagreed over the intent of the framers who crafted the amendments, the understanding of the voters who ratified the amendments, and the proper application of the amendments to struggles between state and local authority. The overview is by no means exhaustive.¹¹ Rather, it highlights some of the key

⁹ Or Const, Art XI, § 2.

¹⁰ Or Const, Art IV, § 1(5).

¹¹ For a truly exhaustive look at home rule in Oregon through the late-1980s, see Orval Etter, *MUNICIPAL HOME RULE ON AND OFF: “UNCONSTITUTIONAL LAW IN OREGON”* (1st ed 1991). Further, a law review article written in

judicial opinions, characters, and philosophies that have contributed to the evolution of the home rule doctrine in Oregon.

A. The First Twenty Years: Local Government Authority Subject to General Laws

In one of the first appellate cases to examine the meaning of the home rule amendments, *Acme Dairy Company v. Astoria*,¹² the Oregon Supreme Court affirmed local government authority in the face of a challenge to an amendment to Astoria’s charter. In 1906, the Astoria city council passed an ordinance that prescribed the method of using the initiative and referendum process to amend the city’s charter. Later that year, the council referred to the voters an amendment to a provision of the city charter that set a limit on special assessments. Following that amendment, the council passed an ordinance to repair a city street. The ordinance also imposed a special assessment on the benefitted property owners, including the plaintiff. The plaintiff argued that the new assessment exceeded the previous limit in the original city charter and the city council lacked authority to refer charter amendments to the voters. The Supreme Court disagreed. Importantly, the court recognized that prior to 1906, all charter amendments were made by the state Legislature through special legislation.¹³ The passage of Article XI, section 2, and Article IV, section 1(5), however, revealed that the voters intended “to vest an incorporated city or town with authority to provide the manner of exercising the initiative and referendum powers as to amendments of a charter[.]”¹⁴ Thus, the Astoria council had the authority to seek charter amendments via referendum.

Two years after *Acme Dairy*, the Supreme Court decided another case that touched on the nature of local government authority. In *Straw v. Harris*,¹⁵ the Oregon Legislature enacted a statute that incorporated the Port of Coos Bay as a new municipality. After the port was formed, the plaintiff challenged the constitutionality of the state law that established the port. Of interest here, the plaintiff argued that the legislative enactment violated Article XI, section 2, because it amounted to a “special law” and because it indirectly amended the municipal charters of the cities within the new port district. The Supreme Court rejected both arguments. First, the court explained the difference between a general and a special law. A general law “is one by which all persons or localities complying with its provisions may be entitled to exercise powers, rights, and privileges conferred.”¹⁶ By contrast, a special law “is one conferring upon certain individuals or

1920 by Portland attorney Richard Montague offers a good picture of home rule doctrine to that point. See Richard Montague, *Law of Municipal Home Rule in Oregon*, 8 CAL L REV 151 (1920).

¹² 49 Or 520 (1907).

¹³ *Id.* at 524.

¹⁴ *Id.* at 525.

¹⁵ 54 Or 424 (1909).

¹⁶ *Id.* at 432.

citizens of a certain locality rights and powers or liabilities not granted or imposed upon others similarly situated[.]”¹⁷ The court stated—with little analysis—that the legislative act creating the port district was a general law.¹⁸

The court then turned to the issue regarding municipal charters. The court acknowledged that the creation of a port district might indirectly affect the liabilities and privileges of the cities within the port district, perhaps in contravention of their respective charters, but explained that such a result was permissible because the local charters were subservient to general state laws. The court explained that the state law did not directly amend the local charters, and in the event of an indirect amendment, the general law “may only affect the charters and ordinances of such cities and towns to the extent that they may be in conflict or inconsistent with the general object and purpose for which the port may be organized.”¹⁹ In other words, a general law may have the indirect effect of amending a local charter, and the local charter must yield to the extent that the charter conflicts with the overall purposes of the general law.

Five years after the court decided *Straw v. Harris*, the court considered a case that significantly changed the judiciary’s view of the home rule amendments. In *Branch v. Albee*,²⁰ the court issued a sweeping opinion and concluded that local charters are not subject to any state civil laws, whether special or general. The case began in 1903 when the Oregon Legislature passed a special law that established a pension system for the city of Portland. Portland later incorporated that pension system into its home rule charter. In 1913, the Legislature created a new pension system for cities with more than 50,000 inhabitants—the only such city being Portland. A Portland police officer sued the city, arguing that the city was obligated to pay his pension under the terms of the 1913 plan, not the 1903 plan in the city’s charter. The Supreme Court disagreed. The court explained that under the constitution, the Legislature may not enact, amend, or repeal any city charter. Further, local charters are only subject to the constitution and *criminal* laws of the state, not civil laws. Thus, the court rejected the special/general civil law distinction that formed the basis of the decision in *Straw v. Harris*. *Branch v. Albee* may well represent the apex of local authority under the home rule amendments. The court, however, would soon cut back on that authority.

The same year it decided *Branch v. Albee*, the court issued a decision in *Kalich v. Knapp*.²¹ *Kalich* involved a dispute between a person injured by a motor vehicle and the driver of the vehicle. Part of the case concerned the speed limit for the road on which the accident occurred.

¹⁷ *Id.*

¹⁸ *Id.* (citing *Farrell v. Port of Columbia*, 50 Or 169 (1907)).

¹⁹ *Id.* at 435.

²⁰ 71 Or 188 (1914).

²¹ 73 Or 558 (1914).

The city of Portland had established certain speed limits under its charter, but a state law arguably preempted those limits by setting statewide speed limits. The court explained that the home rule amendment in Article XI, section 2, prohibited the Legislature from amending or repealing local charter provisions, although the court did not use the same sweeping language as it did in *Branch v. Albee*. The court drew an important distinction, however, between general civil laws of statewide concern and civil laws of local concern—presumably, civil laws of statewide concern could preempt local laws on the same subject.²² In *Kalich*, however, the court concluded that the speed limit of a municipal street was a matter of local concern, and the statewide speed limit law was unconstitutional insofar as it amended Portland’s charter.

B. *Rose v. Port of Portland* and the Rise of General Law Dominance

Just eleven years after the passage of the home rule amendments, the Oregon Supreme Court was well on its way to restricting local authority and making local charters subject to general state laws. In *Rose v. Port of Portland*,²³ the court was asked to decide whether the voters within a port district could amend the port’s charter under the initiative power. The court explained that cities can amend their own charters under Article XI, section 2, but other municipal governments must receive an “enabling act” from the Legislature to do so. Rather than stopping there, the court went on to express its views on city home rule. The court stated that city charters are subject to the constitution, under Article XI, section 2, and the constitution permits the Legislature to pass general laws that affect the whole state. Thus, city charters are subject to general laws of statewide concern. *Rose* marks the establishment of the idea that local home rule is subject to general state law, so long as the general law concerns a statewide interest.

Following *Rose*, the court declared that the home rule issue was “settled.” In *Lovejoy v. Portland*, the court explained that its prior home rule cases stood for the proposition that the Legislature could pass general laws that affected local charters. Later, in *Burton v. Gibbons*,²⁴ the court declared that “it is now settled that, within the limits prescribed by the other provisions of the [Oregon] Constitution and of the [U.S.] Constitution, the power of the Legislature to enact a general law applicable alike to all cities is paramount and supreme over any conflicting charter provision or ordinance of any municipality, city, or town.”²⁵ With that, the court appeared to

²² Subsequent cases highlighted the difficulty in drawing a line between local and statewide concern on subjects that are arguably a matter of *both* local and statewide concern. For example, the court declared that taxation is a matter of local concern, *Pearce v. Roseburg*, 77 Or 195 (1915), but setting utility rates is a matter of general statewide concern, *Woodburn v. Public Service Comm’n*, 82 Or 114 (1916).

²³ 82 Or 541 (1917).

²⁴ 148 Or 370 (1934).

²⁵ *Id.* at 379. Ironically, the law at issue in *Burton v. Gibbons* gave cities the power to authorize refunding bonds, thereby permitting some cities to carry a level of debt beyond the limits in their charters. The League of

fully endorse the theory that local charters were subject to statewide general laws, regardless of whether those general laws advanced a statewide concern.

C. Balancing State and Local Interests: *Heinig v. City of Milwaukie*

Following *Rose*, *Lovejoy*, and *Burton*, the Oregon Supreme Court held to the view that local charters were subject to statewide laws of general applicability for the next 30 years. That view changed in *State ex rel. Heinig v. City of Milwaukie*.²⁶ In *Heinig*, firefighters sued the city of Milwaukie and argued that the city was obligated to establish a civil service commission and a civil service system for firefighters, as prescribed by state law. The Milwaukie charter did not require a civil service commission or system, so the issue was whether the state law required the city to establish a civil service system, notwithstanding contrary charter provisions. In the court's view, the question was not whether the state law was generally applicable to all cities—no one disputed that it was. Rather, the question was whether the state law was generally applicable *and* advanced a statewide concern. If so, then the city had no authority under Article XI, section 2, to establish a contrary charter provision. In resolving that question, the court revived the reasoning of *Branch v. Albee* and rejected the reasoning of *Rose*. Specifically, the court held that “the legislative assembly does not have the authority to enact a law relating to city government *even though* it is of general applicability to all cities in the state unless the subject matter of the enactment is of general concern to the state as a whole, that is to say that it is a matter of more than local concern to each of the municipalities purported to be regulated by the enactment.”²⁷

Following *Heinig*, the test for determining whether a state law improperly intruded into municipal lawmaking authority was whether the state law was generally applicable to all cities, *and* whether the law primarily advanced statewide interests, rather than local interests. As the cases following *Heinig* demonstrate, that balancing test proved difficult to apply in practice, because most laws touch on matters of both statewide and local concern. Thus, the courts were left trying to determine whether state or local interests predominated.

D. La Grande/Astoria

In 1978, the Oregon Supreme Court again addressed the proper interpretation of Article XI, section 2. In *La Grande/Astoria v. PERB*,²⁸ the court rejected *Heinig*'s balancing of state and local interests in favor of a more straightforward test—one that arguably saw a reduction in the scope of local lawmaking authority. In *La Grande/Astoria*, a state law required cities to establish

Oregon Cities joined the case in favor of the state law, even though the law conflicted with city authority over their own debt limits.

²⁶ 231 Or 473 (1962).

²⁷ *Id.* at 479 (emphasis added).

²⁸ 281 Or 137, *adh'd to on recons*, 284 Or 173 (1978).

certain insurance and retirement benefits for their employees—benefits the cities of La Grande and Astoria did not provide. The cities argued that, under *Heinig*, providing insurance and benefits to city employees was primarily a matter of local concern, and thus the Legislature was prohibited from interfering with the local charter provisions regarding employee benefits. When the case reached the Supreme Court, the court disagreed and rejected *Heinig*'s balancing test between statewide and local concern. Instead, in a 4-3 decision authored by Justice Hans Linde, the court declared that the home rule provision of Article XI, section 2, was meant to protect the *structure and form* of local government, not the *policy preferences* of local government. Specifically, the court crafted a two-part test to determine where local authority ended and state authority began:

“When a statute is addressed to a concern of the state with the structure and procedures of local agencies, the statute impinges on the powers reserved by the amendments to the citizens of local communities. Such a state concern must be justified by a need to safeguard the interests of person or entities affected by the procedures of local government.

“Conversely, a general law addressed primarily to substantive social, economic, or other regulatory objectives of the state prevails over contrary policies preferred by some local governments if it is clearly intended to do so, unless the law is shown to be irreconcilable with the community’s freedom to choose its own political form. In that case, such a state law must yield in those particulars necessary to preserve that freedom of local organization.”²⁹

The majority drew an important distinction between acts of the Legislature and acts of a city. Because the dispute in *La Grande/Astoria* involved an act of the Legislature, the proper question was what powers and restrictions applied to the Legislature. Under the home rule amendments, the Legislature was prohibited from enacting or amending a city charter, but was free to enact contrary substantive policies addressed to social, economic, or regulatory objectives. The *La Grande/Astoria* court’s reading of Article XI, section 2, essentially reduced home rule authority to a city’s power to frame and enact a city charter and decide on a form of city government. Substantive powers under the charter, however, remain subject to legislative preemption so long as the Legislature is addressing a social, economic, or regulatory objective. As the following section demonstrates, the *La Grande/Astoria* decision shifted the core debate in home rule disputes to whether the Legislature meant to preempt a city’s substantive lawmaking authority, not whether the Legislature is *permitted* to do so. The following sections summarize the state of the home rule doctrine today, with a focus on the preemption doctrine.

²⁹ *Id.* at 156.

IV. Home Rule Today

All of Oregon's 241 incorporated cities operate under home rule charters. Although the language varies, those charters broadly confer on each city all powers permissible under state and federal law.³⁰ A home rule charter, however, does not give Oregon cities carte blanche lawmaking authority. Instead, the courts have developed a two-step test to determine whether a city action is a valid exercise of home rule authority. The first step requires an examination of the city's charter, and the second step involves a search for conflicting state or federal law. As the Oregon Supreme Court articulated the test: "[T]he validity of local action depends, first, on whether it is authorized by the local charter or by a statute[, and] second, on whether it contravenes state or federal law."³¹ Assuming that a local action is authorized by a city's charter, the courts will then ask whether the local action is "incompatible" with state law, either because the Legislature intended to preempt local lawmaking authority (*i.e.*, "express preemption") or because state and local law cannot operate concurrently (*i.e.*, "implied preemption").³² The following section examines express and implied preemption in more detail. It bears noting, however, that the courts presume that the Legislature does *not* mean to preempt local authority.³³

V. Preemption

The question whether a local action "contravenes" state or federal law is commonly called "preemption." If state or federal law preempts local action, the local action is invalid. This section briefly describes the preemption doctrine in Oregon and explores the tests used by the courts to determine when state law preempts local criminal and civil laws.³⁴

³⁰ See, e.g., City Charter for the City of Vale, ch II, § 5 ("The City shall have all powers which the Constitution, state statutes, and common law of the United States and of this state expressly or impliedly grant or allow municipalities"); City of Port Orford Charter, ch II, § 4 ("The city shall have all powers which the constitutions, statutes, and common law of the United States and of this state expressly or impliedly grant or allow municipalities"); City of Klamath Falls Revised Charter of 1972, § 4 (same); City of Prineville Charter, ch II, § 4 (same).

³¹ *La Grande/Astoria*, 281 Or at 142.

³² *Id.* at 148.

³³ See *Rogue Valley Sewer Services v. City of Phoenix*, 357 Or 437, 450 (2015).

³⁴ A detailed analysis of federal law preemption is beyond the scope of this paper. In short, under the Supremacy Clause of the U.S. Constitution, federal constitutional guarantees and statutory rights preempt contrary state and local laws. See US Const, Art VI, cl 2; see also *Altria Group, Inc. v. Good*, 555 US 70, 76 (2008) (explaining that state laws that conflict with federal laws are "without effect"). To take two obvious and uncontroversial examples, a city cannot operate a racially segregated municipal transit system or require segregated seating at public restaurants, because doing so violates the Fourteenth Amendment to the United States Constitution.

A. Preemption of Local Criminal Laws

Article XI, section 2, of the Oregon Constitution provides, in part: “The legal voters of every city and town are hereby granted power to enact and amend their municipal charter, subject to the Constitution and *criminal laws* of the State of Oregon[.]” (Emphasis added.) Note that Article XI, section 2, makes local charters subject to state “criminal laws,” rather than “general laws” or “criminal and civil laws.” Does the specific reference to state criminal law mean that local charters are only subject to the constitution and criminal laws, but not state civil laws? One could argue that because the constitutional amendment only identifies state criminal laws, local laws are not subject to state civil laws.³⁵ That argument has never been embraced by the courts. However, due to the specific reference to state criminal law, the courts have determined that state criminal law presumptively preempts local criminal law.

Because Article XI, section 2, specifically mentions state criminal law, the courts take the view that the amendment imposes stricter limits on city lawmaking power in the criminal context than in the civil or regulatory context.³⁶ In fact, the courts presume that municipal legislation that imposes criminal penalties is preempted by state law, and ambiguities are resolved in favor of preemption. To overcome that presumption, a city must show that a local ordinance or charter provision does not criminalize conduct that state law allows, or permit conduct that state law makes a crime.³⁷ For example, state law would preempt a local ordinance that criminalized the use of marijuana within the city, because state law grants users of marijuana immunity from criminal prosecution.³⁸ Most fights over preemption, however, concern local civil and regulatory laws.

B. Preemption of Local Civil Laws

According to the Oregon Supreme Court, the primary purpose of the home rule amendments was “to allow the people of the locality to decide upon the organization of their government and the

See Gayle v. Browder, 352 US 903 (1956) (operating a segregated municipal bus system is unconstitutional); *Turner v. City of Memphis*, 369 US 350 (1962) (striking down local law that required segregation in public restaurants).

³⁵ That argument illustrates the *expressio unius est exclusio alterius* canon of construction (or, “the expression of one thing implies the exclusion of others”). *See Crimson Trace Corp. v. Davis Wright Tremaine, LLP*, 355 Or 476, 497 (2015) (explaining the canon). The *expressio unius* canon of construction is merely an inference, and is generally stronger when the list of items is longer and more specific. *See* Antonin Scalia & Brian A. Garner, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 108 (2012) (so stating). Thus, just because Article XI, section 2, specifically mentions criminal laws does not necessarily mean that local legislation is *not* subject to state civil laws. Indeed, a brief review of the case law refutes that argument. *See, e.g., La Grande/Astoria*, 281 Or at 142.

³⁶ *City of Portland v. Dollarhide*, 300 Or 490, 497 (1986).

³⁷ *Dollarhide*, 300 Or at 501-02.

³⁸ *See Emerald Steel Fabricators, Inc. v. BOLI*, 348 Or 159 (2010).

scope of its powers under its charter without having to obtain statutory authorization from the legislature[.]”³⁹ Because local governments are free to pursue their own policy goals separate from state oversight, local and state laws often address the same subject. For example, a city code and state statutes may both address a wide range of overlapping subjects, including utility regulation, building codes or land use restrictions. But, if the home rule amendments were designed to allow local governments to adopt substantive policies without the need for state authorization, what happens if the state and a local government adopt two competing policies on the same subject? Does the state law replace the city’s policy choice? Does the city’s home rule power shield it from state interference? Like many things in law, the outcome depends on the precise nature of the state and local laws at issue. First, the outcome may depend on whether the state and local laws address substantive policies, procedural processes or the structures of government. Second, the outcome may depend on whether state and local law are in *conflict*. In the preemption analysis, a “conflict” means that state and local law are incompatible, for one of two reasons: (1) the Legislature explicitly stated that it intended to preempt local laws on the subject (often called “express preemption”); or (2) it is impossible to comply with state and local law simultaneously (often called “conflict preemption”). The following sections will examine the preemption analysis in more detail, for three types of civil law: substantive, procedural, and laws that dictate the form of city government.

1. Substantive Civil Laws

Under Article XI, section 2, cities are free to adopt home rule charters and, acting under the authority of those charters, enact their own substantive policies. Sometimes, however, local policy choices are at odds with state policy choices. In that case, the courts will ask whether the local government has the authority to pursue its own policy goals. Assuming a local substantive policy is permissible under the local charter, the courts will then determine whether the local policy is preempted by state law, first by asking whether the state law expressly preempts the local policy choice, and second by examining whether the state law and local policy conflict.

a. Express Preemption

Sometimes, the Legislature enacts a law that specifically prohibits contrary local policy choices on the same subject. When the Legislature does so, it is said to have “expressly preempted” local law. Over time, the Legislature has expressly preempted local policy choices in many different regulatory areas, including the authority to tax cigarettes,⁴⁰ the authority to tax liquor,⁴¹

³⁹ *La Grande/Astoria*, 281 Or at 142.

⁴⁰ ORS 323.030.

⁴¹ ORS 473.190.

the designation of smoke-free workplaces,⁴² pesticide regulations,⁴³ and the regulation of the use of cell phones in motor vehicles.⁴⁴ Every time the Legislature expressly preempts a local policy, Oregon cities lose some of their ability to address local problems in their own way, thereby reducing local autonomy and flexibility. Perhaps for that reason, the courts presume that the Legislature does not mean to preclude local legislative power. Specifically, the courts refuse to determine that the Legislature expressly preempted local law unless “the text, context and legislative history of the statute ‘unambiguously expresses an intention to preclude local governments from regulating’ in the same area that is governed by the statute.”⁴⁵ Thus, ambiguity in the law is resolved in favor of local policy choice.⁴⁶

b. Conflict Preemption

Even when the Legislature does not expressly preempt local policy choices, the courts may find that a local law is impliedly preempted because local law and state law are in “conflict.” Conflict, as that word is used in the context of preemption, does not just mean that the two laws regulate in the same area, or even that local law imposes different standards than does state law. Rather, “conflict” between state and local law means that compliance with both state and local law is impossible. Thus, just because the state has “occupied the field” in a substantive area does not mean that local laws on the same subject conflict with state law.⁴⁷ And, as noted, local laws that impose stricter standards than state law do not necessarily conflict with state law. For example, a former state law provided that the state building code was to be uniform throughout the state and municipalities were not permitted to enact ordinances that conflicted with the state building code.⁴⁸ The state building code mandated single-wall construction, but the city of Troutdale enacted an ordinance that required double-wall building construction. The Oregon Supreme Court determined that Troutdale’s ordinance did not conflict with the state building

⁴² ORS 433.863.

⁴³ ORS 634.057.

⁴⁴ ORS 801.038.

⁴⁵ *Rogue Valley Sewer Services v. City of Phoenix*, 357 Or 437, 450-51 (2015) (quoting *Gunderson LLC v. City of Portland*, 352 Or 648, 663 (2012) (emphasis in *Rogue Valley*)).

⁴⁶ See *Gunderson*, 352 Or at 660 (examining a state law “to determine whether it unambiguously preempts the city from regulating” in a different manner).

⁴⁷ *Thunderbird Mobile Club, LLC v. City of Wilsonville*, 234 Or App 457, 474, *rev den*, 348 Or 524 (2010) (explaining that “the occupation of a field of regulation by the state has no necessary preemptive effect on the civil or administrative laws of a chartered city.”)

⁴⁸ Former ORS 456.775, *renumbered* 455.040 (1987).

code, because compliance with both sets of standards was not impossible.⁴⁹ After all, a person can comply with a stringent set of local rules and a more relaxed set of state rules simultaneously.⁵⁰ State and local law are only incompatible when compliance with both is impossible.

2. *Procedural Civil Laws*

In *La Grande/Astoria*, the Supreme Court appeared to draw a distinction between local substantive law and local procedural law. Regarding the latter category, the court opined that when state law affects “the structure and *procedures* of local agencies,” the law violates the locality’s home rule authority unless the law is “justified by a need to safeguard the interests of persons or entities affected by the procedures of local government.”⁵¹ It is not clear what “interests” justify the state’s intrusion into local procedures, and no appellate case has addressed that issue. It may be that the *La Grande/Astoria* court was simply stating a truism that local procedural laws must always respect the due process rights of local citizens, and state laws can override local laws to ensure compliance with due process. In any event, the passage regarding local procedural laws is probably best viewed as *dictum*, because the local and state laws at issue in *La Grande/Astoria* concerned the substantive policies of providing public employees with a pension.⁵² Until an appellate court confronts the proper resolution of a conflict between state and local procedural laws, the matter is academic.

3. *Structural Law*

In *La Grande/Astoria*, the Oregon Supreme Court also stated that general state laws “addressed primarily to substantive social, economic, or other regulatory objectives of the state” will prevail over contrary local policies, “*unless* the law is shown to be irreconcilable with the local community’s freedom to choose its own political form.”⁵³ In other words, even substantive state laws that would otherwise preempt contrary local laws—either because the Legislature unambiguously intended to preempt contrary local laws or because compliance with state and local law is impossible—have no effect when the state law interferes with a locality’s ability to

⁴⁹ *State ex rel. Haley v. City of Troutdale*, 281 Or 203, 211 (1978) (explaining that state building code did not preempt city from adopting a more stringent building code).

⁵⁰ See *Thunderbird Mobile Club*, 234 Or App at 474 (city ordinance did not conflict with state laws on selling mobile home parks, even though city ordinance imposed more requirements than state law).

⁵¹ *La Grande/Astoria*, 281 Or at 156 (emphasis added).

⁵² “*Dictum*,” when used to describe language in judicial opinions, “commonly refers to a statement that was not necessary to the court’s decision.” *Engweiler v. Persson*, 354 Or 549, 558 (2013) (citing *State ex rel. Huddleston v. Sawyer*, 324 Or 597, 621 n 19 (1997)). Statements that are *dictum* lack precedential effect. *Mastriano v. Board of Parole*, 342 Or 684, 692 n 8 (2007).

⁵³ *La Grande/Astoria*, 281 Or at 156 (emphasis added).

“choose its own political form.” That type of law would best be characterized as a “structural” law, because it affects the structure of local government. Note that the court speaks of laws that are “shown to be irreconcilable” with local structures, not laws that are *meant* to be irreconcilable with the local structures. Thus, a substantive state law that preempts local laws might theoretically violate home rule protections if the state law has the *effect* of interfering with the local political form. As with local procedural laws, no appellate decision has ever held that a state law was irreconcilable with a local community’s freedom to choose its political form.

VI. Recent Home Rule Cases

In the past few years, the Oregon Court of Appeals and Oregon Supreme Court have issued several important decisions on municipal home rule. This section summarizes the facts of those cases, the issues involved, and the court's application of the home rule doctrine.

A. *Thunderbird Mobile Club v. City of Wilsonville*

The issue in *Thunderbird Mobile Club v. City of Wilsonville*⁵⁴ was whether a city could impose more stringent standards on mobile home park operators than those imposed by state law. Under the state Residential Landlord and Tenant Act, the owner of a mobile home park who intends to sell or close the park must fulfill certain prerequisites. The city of Wilsonville went further and adopted an ordinance that imposed additional requirements on mobile home park owners who sought to sell or close a park. For example, the city required owners of mobile home parks who wished to close the park to obtain a “closure permit” from the city, file a closure impact report, and develop a relocation plan for the park residents. The owner of a mobile home park in Wilsonville who wished to sell the park challenged the legality of the city ordinance, arguing that the ordinance was preempted by the state law.

The Oregon Court of Appeals disagreed. To reach that conclusion, the court applied the preemption test outlined above: first, whether the city charter authorized the local action, and second, because the laws at issue were substantive in nature, whether the local action conflicted with state law. The court first explained that the city ordinance was authorized by the city charter and then turned to the question whether the city ordinance conflicted with state law. The court answered in the negative. First, state law did not *expressly* preempt the city ordinance, because the Oregon Legislature did not unambiguously express an intent to preempt all local legislation on the subject. The court also explained that state law did not *impliedly* preempt the city's requirements, because state law and local law were not incompatible. Even though Wilsonville's ordinance imposed more requirements on the mobile home park owner than state law did, complying with both sets of requirements was not impossible, and thus the local law was not preempted.⁵⁵

Thunderbird illustrates an important principle: implied preemption requires truly incompatible sets of requirements. Just because a city chooses to impose greater burdens on a business or

⁵⁴ 234 Or App 457, *rev den*, 348 Or 524 (2010).

⁵⁵ *Thunderbird Mobile Club*, 234 Or App at 474; *see also Springfield Utility Board v. Emerald PUD*, 191 Or App 536, 541-42 (2004), *aff'd*, 339 Or 631 (2005) (“A local ordinance is not incompatible with state law simply because it imposes greater requirements than does the state, nor because the ordinance and the state law deal with different aspects of the same subject.”).

individual than state law imposes, the city’s legislation is not preempted by state law unless complying with both is impossible.

B. *Rogue Valley Sewer Services v. City of Phoenix*

*Rogue Valley Sewer Services v. City of Phoenix*⁵⁶ is slightly more complicated than *Thunderbird Mobile Club*, but the analysis is quite similar. In 2006, the citizens of Phoenix, Oregon, voted to annex the city into the area serviced by Rogue Valley Sewer Services (RVSS). Under state law, RVSS is considered a unit of local government. After the annexation vote, the Phoenix city council passed an ordinance that levied a 5 percent franchise fee on RVSS. Importantly, the ordinance declared that money from the fee would be used to reimburse the city for its costs associated with RVSS—in other words, the fee was not meant to raise revenue but to cover administrative costs. RVSS filed a complaint and argued that the city lacked authority to impose the fee. The case eventually made it to the Oregon Supreme Court.

At the Supreme Court, RVSS advanced a few different arguments as to why the city’s franchise fee was unlawful. Two arguments are relevant here: (1) the city could not impose a franchise fee on another unit of government, and (2) the city’s authority to impose the fee was preempted by state law. The court rejected both arguments and held that Phoenix had the authority to impose the fee. The court first explained that although the city was prohibited from *taxing* RVSS, the franchise fee at issue was not a tax because the city was using the money from the fee to reimburse the costs associated with RVSS. The court then turned to the preemption argument. The court first explained that the city’s charter granted it authority to impose the fee. The question, thus, was whether state law preempted that authority. The court determined that state law did not expressly preempt the city’s franchise fee, and that the statutory scheme did not prevent the state law and local ordinance from operating concurrently (*i.e.*, state and local law did not conflict). Even though state law regulated less extensively than the local ordinance, compliance with both sets of requirements was not impossible. Therefore, the franchise fee on RVSS was a permissible exercise of the city’s home rule authority.

C. *Northwest Natural Gas Co. v. City of Gresham*

*Northwest Natural Gas Co. v. City of Gresham*⁵⁷ is a complicated case and involved numerous issues. For the purposes of this paper, it is sufficient to concentrate on the home rule aspects of the case. First, the facts. The city of Gresham adopted a resolution that raised utility “license fees” from five to seven percent of a utility’s gross sales within the city. The increased license fee affected several utilities operating within the city, including both publicly-owned and investor-owned utilities. Importantly, the resolution that raised the license fee stated that the increased revenue would be used to fund police, fire and parks. NW Natural Gas Company,

⁵⁶ 357 Or 437 (2015).

⁵⁷ 359 Or 309 (2016).

Portland General Electric, and the Rockwood People’s Utility District (PUD) all challenged the increased fee. The case eventually reached the Oregon Supreme Court.

The Supreme Court first determined that the ostensible “license fees” were in fact privilege taxes under state law, because the city resolution stated that revenue from the increased fees would be used to fund city services. In that sense, the license fee at issue in this case differs from the fee at issue in *Rogue Valley Sewer Services*, because income from that fee was used to pay for costs associated with the utility. Having determined that Gresham’s fee was in fact a privilege tax, the question then became whether ORS 221.450—which imposes a five percent ceiling on privilege taxes—preempted the city’s ability to impose a seven percent privilege tax on the utilities.⁵⁸

The court determined that the city could impose a 7 percent privilege tax on the investor-owned utilities—NW Natural Gas Company and Portland General Electric—but not on Rockwood PUD. The court explained that state law did not preempt the city from imposing a higher privilege tax on the private utilities, because nothing in the law unambiguously expressed an intention to limit privilege taxes on private utilities to five percent of gross revenue. Second, the state law and local ordinance were not incompatible. In other words, a seven percent privilege tax on private utilities did not conflict with state law.

The court reached a different conclusion, however, about Rockwood PUD. Recall that the court determined that the 7 percent “franchise fee” was in fact a privilege tax. As a general matter, municipalities lack authority to impose taxes on other municipalities (so-called “intergovernmental taxation”). Thus, the city lacked home rule authority to impose a privilege tax greater than the 5 percent tax allowed under state law, and the city’s 7 percent privilege tax on Rockwood PUD was preempted by state law.

VII. Conclusion

Home rule is an important aspect of city governance. Since the passage of the home rule amendments in 1906, cities are free to pursue their own policy objectives without state approval. City powers under the home rule doctrine are not limitless, however, because the state can and

⁵⁸ Specifically, ORS 221.450 provides:

“Except as provided in ORS 221.655, the city council or other governing body of every incorporated city may levy and collect a privilege tax from * * * every electric cooperative, people’s utility district, privately owned public utility, telecommunications carrier as defined in ORS 133.721 or heating company. The privilege tax may be collected only if the entity is operating for a period of 30 days within the city without a franchise from the city and is actually using the streets, alleys or highways, or all of them, in such city for other than travel on such streets or highways. The privilege tax shall be for the use of those public streets, alleys or highways, or all of them, in such city in an amount not exceeding five percent of the gross revenues of the cooperative, utility, district or company currently earned within the boundary of the city.”

does preempt substantive lawmaking authority. The League continues to advocate on behalf of cities to resist the erosion of home rule authority and preserve city autonomy.



GUIDEBOOK

LEAGUE OF OREGON CITIES

**Legal Guide to Oregon's
Statutory Preemptions of
Home Rule**

November 2017



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Overview

This Guide to Oregon’s Statutory Preemption of Home Rule (“guidebook”) is designed to provide city leaders with general information regarding specific examples of how and when municipalities are preempted from taking certain actions or regulating particular conduct. This guidebook will provide cities with examples of statutory preemptions in the following areas:

- Finance and Taxation;
- General Governance and City Services;
- Land Use Development;
- Personnel; and
- Regulatory Authority.

Disclaimer

This guidebook is not intended as a substitute for legal advice. Many of the preemptions highlighted herein are complicated and nuanced; if a city believes an action it wishes to take may be preempted by state law, a conversation with a trusted legal advisor should be had.

Introduction

Under the Oregon Constitution, cities are free to adopt home rule charters. Cities operating under home rule charters possess substantial lawmaking authority independent of the state. However, Oregon cities do not have carte blanche lawmaking authority. As the Oregon Supreme Court articulated, “[T]he validity of local action depends, first, on whether it is authorized by the local charter or by a statute[, and] second, on whether it contravenes state or federal law.”¹ Assuming that a local action is authorized by a city’s charter, the courts will then ask whether the local action is “incompatible” with state law, either because the Legislature intended to preempt local lawmaking authority (i.e., “express preemption”) or because state and local law cannot operate concurrently (i.e., “implied preemption”).²

Federal Preemption

This guidebook provides an overview of state law preemption of municipal home rule. A detailed analysis of federal preemption is beyond the scope of this guidebook.

In brief, under the Supremacy Clause of the United States Constitution, federal constitutional guarantees and statutory rights preempt contrary state and local laws.³ For example, a city cannot operate a racially-segregated municipal transit system or require segregated seating at public restaurants, because doing so violates the Fourteenth Amendment of the U.S. Constitution.⁴ League members seeking additional information on federal law preemption are strongly encouraged to contact their city attorney.

WHAT IS HOME RULE?

Generally speaking, home rule is the right to local self-government. “Home rule cities” are free: to regulate for the protection of the public health, safety, welfare; to license; to tax; and to incur debt without legislative authorization.

To the contrary, “preemption is the use of state law to nullify a municipal ordinance or authority.”¹ If state law preempts local action, the local action is invalid.

For a more detailed discussion on municipal home rule, please see LOC’s online white paper entitled: *The Origins, Evolution and Future of Municipal Home Rule in Oregon* (June 2017), available at <http://www.orcities.org/Portals/17/Library/HomeRuleWhitePaper6-15-17.pdf>.

¹ National League of Cities, *City Rights in an Era of Preemption: A State-by-State Analysis*, (2017), p. 4, available at <http://www.nlc.org/sites/default/files/2017-03/NLC-SML%20Preemption%20Report%202017-pages.pdf>

¹ *La Grande/Astoria v. PERB*, 281 Or 137, 142, adh’d to on recons, 284 Or 173 (1978).

² *La Grande/Astoria*, 281 Or at 148.

³ See US Const, Art VI, cl 3; see also *Altria Group, Inc. v Good*, 555 US 70, 76 (2008) (explaining that state laws that conflict with federal laws are “without effect”).

⁴ See *Gayle v. Browder*, 352 US 903 (1956) (operating a segregated municipal bus system is unconstitutional); *Turner v. City of Memphis*, 369 US 350 (1962) (striking down local law that required segregation in public restaurants).

Express Versus Implied Preemption

A NOTE ABOUT CRIMINAL LAWS

Courts take the view that Article XI, section 2 of the Oregon Constitution imposes stricter limits on city lawmaking power in the criminal context. Courts presume that local legislation that imposes criminal penalties is preempted. Ambiguities are resolved in favor of preemption.

To overcome that preemption, a city must show that the local law does not criminalize conduct that state law allows, or permit conduct that state law prohibits.

In Oregon, express preemption occurs when the Legislature enacts a law that specifically prohibits or limits local policy choices on the same subject. Examples of express preemptions include denying cities the authority to tax tobacco products, tax alcohol, regulate pesticides and regulate the use of cell phones in motor vehicles.

Implied preemption occurs when the Legislature has not expressly preempted local policy authority, yet there exists a conflict between state and local law. Essentially, implied preemption occurs when the ability to comply with both the state and local law in that specific field is impossible. Examples of implied preemptions include the preemption of local laws inconsistent with the Adult and Medical Use of Cannabis Act⁵ and the Oregon Public Meetings Law.⁶

The following summary will provide an overview of Oregon home rule preemption and highlight various areas of preempted city authority.⁷ For convenience, the summary has been divided into four policy areas: (1) finance and taxation; (2) general governance and city services; (3) personnel; and (4) regulatory authority.

Finance and Taxation

Finance and taxation limitations hinder the ability of cities to raise revenue and spend money. These limitations typically prevent taxation all together or imposed maximum tax rates. Within the state of Oregon, cities are preempted from taxing:

- Insurance providers;
- Animal racing;
- Real property transfers;
- Cigarettes;
- Alcoholic beverages;
- Lottery tickets or lottery game retailers;
- Real estate broker business licenses; and

⁵ ORS 475B.020.

⁶ ORS 192.610-192.690.

⁷ A more extensive chart of statutory preemptions is included as Appendix A.

- Federal old age and survivors insurance and Railroad Retirement Act benefits.

In addition to preemption, the Legislature has enacted cap and/or time limitations on the municipal authority to tax:

- Property taxes;⁸
- Sale of marijuana items;⁹
- Local fuel taxes;
- System development charges;
- Lodging taxes;¹⁰ and
- Telecommunications carrier privilege tax;¹¹

Cities must comply to the following financial laws:

- Local budget law;¹²
- Municipal audit law;¹³ and
- Urban renewal law.

General Governance and City Services

Cities are free to choose their form of government. However, cities are subject to statewide sewer and sanitation laws and municipal utility laws. City officials remain subject to the public contracting code,¹⁴ statewide election laws,¹⁵ state ethics laws, and state public records

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 manner. Some state mandates are necessary, because they deal with matters of statewide concern that require uniformity of treatment – for example, public health and safety.

Under Article XI, section 15 of the Oregon Constitution, local governments may not need to comply with “unfunded mandates” - those that require the expenditure of money for a new program or increases the level of service for an existing program until the state appropriates reimbursements for costs incurred. For more information on unfunded mandates, please see LOC’s guide on unfunded mandates: *Understanding Oregon’s Unfunded Mandate Law* (2016), available at <http://www.orcities.org/Portals/17/Library/Unfunded%20Mandate%20Memo%20FINAL.pdf>.

⁸ Further information on property taxes is available in LOC’s report on property tax measures 5 and 50: *Measures 5 & 50: A Primer* (2011) available at <http://www.orcities.org/Portals/17/Library/Measures%205%20and%2050%20A%20Primer%20for%20web%202-14-11cc.pdf>.

⁹ Further information on marijuana is available in LOC’s guidebook on local marijuana regulation: *Local Government Regulation of Marijuana in Oregon* (4th ed December 2016), available at <http://www.orcities.org/Portals/17/Library/2016LocalRegulationofMarijuanainOregon12-09-16.pdf>.

¹⁰ Further information on lodging taxes is available in LOC’s guidebook on local transient lodging taxes: *Legal Guide to Collecting Transient Lodging Tax in Oregon* (April 2017), available at <http://www.orcities.org/Portals/17/Library/Model%20TLT%20Guide%20FINAL%204-13-17.pdf>.

¹¹ Further information on telecommunications and a sample telecommunications ordinance are available in LOC’s Telecommunications Tool Kit (2010), available at <http://www.orcities.org/Portals/17/Premium/20101018100014414.pdf>.

¹² Further information on local budget law is available in the Oregon Department of Revenue’s Local Budgeting Manual (2012), available at http://www.oregon.gov/DOR/forms/FormsPubs/local-budgeting-manual_504-420.pdf.

¹³ An overview of municipal audit law is provided in the September 2014 Local Focus Article: *The Municipal Audit – What the Law Says*, available at <http://www.orcities.org/Portals/17/A-Z/MunicipalAuditSept2014LF.pdf>.

¹⁴ A model policy for public contracting and purchasing is available in LOC’s *Model Policy for Public Contracting & Purchasing* (May 2017), available at <http://www.orcities.org/Portals/17/Library/ModelPurchasingRules5-26-17.pdf>

¹⁵ For further information see LOC’s *FAQ about Restrictions on Political Campaigning by Public Employees* (June 2017), available at <http://www.orcities.org/Portals/17/Library/FAQonPoliticalCampaigningFINAL6-2-17.pdf>

and meetings laws.¹⁶ Additionally, cities are subject to certain notice and hearing requirements when selling city-owned real property and are prohibited from becoming a stockholder of or otherwise assisting a joint company, corporation or association.

Land Use and Development

Oregon maintains a statewide land use planning program which includes a set of statewide planning goals. Cities, along with other local governments, special districts and state agencies are required to comply with these planning goals. Cities are limited in their ability to prohibit certain kinds of housing and may not establish housing sale prices or designate classes of purchasers. For example, cities may not prohibit government assisted housing or place additional approval standards on government assisted housing not otherwise placed on similar unassisted housing.¹⁷ Additionally, cities must approve applications for housing developments located within an urban growth boundary if the development complies with clear and objective standards.¹⁸ Cities are prohibited from establishing housing sale or rental prices for new multifamily structures or requiring affordable housing designations.

Personnel

The state has provided minimal preemption in regards to personnel policies. The Legislature has preempted the adoption of local minimum wage and sick leave requirements. In addition, limitations on city authority include compliance with collective bargaining and labor and employment laws. Cities with populations greater than 100,000 which choose to establish their own retirement plans must still provide PERS or equivalent retirement benefits for police and firefighters. Cities are required to provide accommodations for nursing mothers and are required to apply veterans' preferences during the hiring process.

Regulatory Authority

Local regulatory authority remains the largest area of home rule preemption. The following regulatory functions have been preempted by state legislation:

- Regulation of unmanned aircrafts;
- Regulation of private security services and personnel;
- Regulation of tobacco vending machines;
- Building codes;
- Exemptions of shooting ranges from certain local nuisance and trespass claims;
- Regulation of pesticides; and

¹⁶ Further information on public records and meetings law is available in the *Attorney General's Public Records and Meetings Manual (2014)*, available at <https://www.doj.state.or.us/oregon-department-of-justice/public-records/attorney-generals-public-records-and-meetings-manual-2014/>.

¹⁷ ORS197.312(1).

¹⁸ ORS 227.175, as amended by 2017 HB 2007.

- Regulation of vehicle code offenses.

In addition to complete preemption, limitations and mandates exists regarding the following:

- Firearms;¹⁹
- Abandoned shopping carts;
- Placement and height of radio antennas;
- Telecommunications;²⁰
- Utilities;
- Sewage treatment and disposal systems;
- Solid waste management;
- Building inspection programs;
- Air and water quality;
- Marijuana;²¹
- Alcohol;
- Fireworks;
- Liquid gas receptacles;
- Standards for clustered mailboxes;
- Business licenses for minors; and
- Photo red light cameras.

Conclusion

Though cities are free to pursue their own policy objectives without state approval, preemptive legislation will continue to affect Oregon cities. The League continues to advocate on behalf of all Oregon cities to preserve city autonomy and prevent the unnecessary preemption of local authority.

¹⁹ Further information on the regulation of firearms is available in LOC's guidebook on firearms: *A Guide to Local Government Regulation of Firearms in Oregon* (May 2017), available at <http://www.orcities.org/Portals/17/Library/FirearmRegulationattheLocalLevel5-18-17.pdf>.

²⁰ Further information on telecommunications and a sample telecommunications ordinance are available in LOC's Telecommunications Tool Kit (2010), available at <http://www.orcities.org/Portals/17/Premium/20101018100014414.pdf>.

²¹ Further information on marijuana is available in LOC's guidebook on local marijuana regulation: *Local Government Regulation of Marijuana in Oregon* (4th ed December 2016), available at <http://www.orcities.org/Portals/17/Library/2016LocalRegulationofMarijuanAinOregon12-09-16.pdf>.

Appendix A – Oregon Statutory Preemptions

Preemptions and Limitations on City Home Rule Authority

(Note: This is not a comprehensive list. Exemptions may apply. Where there is a question regarding cities’ authority to act, the League encourages its members to seek the legal opinion of their own city attorney.)

Reference	Preemption of Home Rule	Limitation on Home Rule
<i>Finance and Taxation</i>		
Oregon Const. Art IX, § 9	Taxation of certain federal benefits prohibited	
Oregon Const. Art XI, § 11		Property tax limitations
ORS 221.410		Limitations on city floating indebtedness
ORS 221.515		Maximum rate of privilege tax charged to telecommunications carriers
ORS 223.295		Limitations on city indebtedness
ORS 223.297 to 223.314		Cities must comply with uniform framework for the imposition of system development charges and revenues must be expended on capital improvements
ORS 287A.365 to 287A.380	Cities are subject to statewide laws on the issuance of advance refunding bonds.	
ORS 294.305 to 294.565		Cities must comply with the statewide local budget law
ORS 297.405 to 297.555		Cities are subject to the statewide municipal audit law
ORS Chapters 306 to 312		Property tax laws
ORS 306.815	Cities may not impose a tax or fee on transfer of real property	
ORS 319.950		Cities may not impose a new or increased local fuel tax unless referred to and approved by voters
ORS 320.170 & 2016 Or Laws ch. 59, §4	Cities may not impose a construction excise tax	
ORS 320.305		Percentage of transient lodging tax revenue must be used for tourism-related purposes.
ORS 323.030	The state has the exclusive right to tax tobacco products	
ORS Chapter 457		Urban renewal laws
ORS 461.560	Cities may not impose a tax on the sale of lottery tickets	

Reference	Preemption of Home Rule	Limitation on Home Rule
	or impose an excise tax on lottery game retailers	
<i>Finance and Taxation continued</i>		
ORS 462.100	Preemption of taxation on race meets	
ORS 471.045 and 473.190	The state has the exclusive right to tax alcoholic beverages.	
ORS 475B.345		Local taxes are limited to 3% of the production, processing or sale of recreational marijuana by a retail licensee.
ORS 673.715	Local governments may not regulate refund anticipation loans	
ORS 696.365	Cities may not impose or collect a business license tax from licensed real estate brokers	
ORS 731.840 & 731.841	Preemption of the fields of regulation and imposition of taxes, licenses and fees upon insurers and their insurance producers.	
ORS 801.040	Cities prohibited from enacting or enforcing any rule or regulation in conflict with provisions of the vehicle code relating to abandoned vehicles, vehicle equipment, vehicle size, weight and load, the operation of vehicles and use of roads by persons, animals and vehicles. Cities may not impose requirements and conditions governing towing inconsistent with the vehicle code.	
<i>General Governance and City Services</i>		
Oregon Const. Art. XI, §9		Cities may not become stockholder in; raise money for; or loan its credit to, or in aid of any joint company, corporation or association.
ORS 186.110		Requirement to display the Oregon State and POW/MIA flags with the United States flag upon which or near which it is

Reference	Preemption of Home Rule	Limitation on Home Rule
		customary and suitable to display the United States flag upon or near a public building.
<i>General Governance and City Services continued</i>		
ORS Chapter 192		Application of public records and meetings laws
ORS 221.725		Required procedures when selling city-owned property
ORS Chapter 224		City sewers and sanitation
ORS Chapter 225		Municipal utilities
ORS 244.010		Public officials must comply with the Oregon Ethics Code
ORS Chapters 246 to 260		Application of Oregon election law
ORS Chapters 279A-C		Application of the public contracting code
ORS 346.510 to 346.570		Cities must grant persons who are blind priority to establish and operate vending facilities in public buildings.
ORS 682.062		Coordination of ambulance services by county
<i>Land Use and Development</i>		
ORS 197.250		Compliance with statewide land use and development goals required.
ORS 197.309		Ordinances may not establish housing sale or rental price for new multifamily structures or require designation as affordable housing
ORS 197.312(1)		Cities may not prohibit certain kinds of housing
ORS 197.312(5)		Cities with population 2,500 or greater must allow at least one accessory dwelling unit for each detached single-family home in areas zoned in single-family.
ORS 221.032		A city may not commence annexation proceedings for any part of an area that is pending incorporation
Or Laws 2016, chapter 51, §2 ²²	Cities must vote to annex property into the city when certain conditions are met.	

²² The constitutionality of this provision is currently under appeal in the Oregon Court of Appeals. See *Corvallis v. State of Oregon*, Case No. A164595.

Reference	Preemption of Home Rule	Limitation on Home Rule
	Preempts contrary charter and code provisions.	
ORS 222.750		“Island” annexation restrictions
ORS Chapter 227		City planning and zoning
<i>Land Use and Development continued</i>		
ORS 227.175		Cities must approve applications for housing developments located within the UGB if the development complied with clear and objective standards.
2017 Or laws ch. 745, §1		Cities with population 5,000 or greater must review and make decisions on qualifying affordable housing permit applications within 100 days within UGB.
ORS 329A.440		Cities may not enact or enforce zoning ordinances prohibiting registered or certified family childcare homes located in a residential dwelling in an area zoned for residential or commercial use.
ORS 456.265		Local government authority to sanction property owner withdrawing from a federal housing program
<i>Personnel</i>		
ORS 237.620		Mandatory PERS retirement coverage for police and firefighters
ORS 243.650 to 243.782		Application of statewide collective bargaining provisions
ORS 279C.110		Application of qualified based selection procedures for selecting architectural and engineering consultants
ORS 279C.860		Public works contract specification on prevailing wage rate comparisons
ORS 408.225 to 408.237		Public employers must grant certain preferences in the hiring and promotion of veterans.
ORS Chapters 651 to 663		Application of statewide labor and employment laws
ORS 653.017	Preemption of local minimum wage requirements	

Reference	Preemption of Home Rule	Limitation on Home Rule
ORS 653.077		Requires employers to provide accommodations for the expression of breastmilk
ORS 653.661	Preemption of sick leave requirements	
ORS 659A.320		Restricts use of credit score reports for hiring purposes
<i>Personnel continued</i>		
ORS 731.036		Self-insurance requirements for public bodies
<i>Regulatory Authority</i>		
ORS 98.520		Requirements for city abandoned shopping cart regulation
ORS 166.170		Limitations on local firearms regulation
ORS 167.404	State preemption of vending machines that dispense tobacco or electronic cigarette systems regulation	
ORS 181A.895	Preemption of the regulation and licensing of private security services and personnel	
ORS 221.295		Ordinances regulating placement or height of radio antennas
ORS 221.420		Municipal regulation of utilities
ORS 221.510		Municipal regulation of telecommunications
ORS 227.455	Requirement for cities to adopt standards and specifications for clustered mailboxes that conform to the State of Oregon Structural Specialty Code	
ORS 430.402	Preemption of the adoption and enforcement of local laws concerning various liquor uses and consumption	
ORS Chapter 454		Sewage treatment and disposal system regulations
ORS 455.040	State building code preempts local ordinances	
ORS 455.148		Requirements for cities who assume the administration and enforcement of a building inspection program

Reference	Preemption of Home Rule	Limitation on Home Rule
ORS 455.500		Reach code impacts for city building inspection programs
ORS Chapter 459		Solid waste management regulations
ORS 467.136	Preemption of local ordinances that makes a shooting range a nuisance or trespass	
ORS Chapter 468A		Air quality regulations
<i>Regulatory Authority continued</i>		
ORS Chapter 468B		Water quality regulations
ORS 471.045	Preemption of local ordinances inconsistent with state liquor law	
ORS 475B.020	Preemption of local laws inconsistent with the Adult and Medical Use of Cannabis Act.	
ORS 475B.325 to 475B.345		City regulation of recreational marijuana use
ORS 475B.800		Requirements for local government prohibition of marijuana establishments
ORS 480.160		Local regulation and enforcement of fireworks
ORS 480.445		Local regulation of liquid gas receptacles
ORS 634.057	Preemption of pesticide regulation	
ORS 646A.555		Limits local governments from requiring business licenses for minors except where required for the purposes of protecting the environment or the public health, safety or welfare
ORS 714.310	Preemption of local regulation of customer safety at ATMs or night deposit facilities	
ORS 758.025		Requires public bodies to coordinate with utilities when planning highway projects
ORS 801.038	Preemption of vehicle cell phone use regulation	
ORS 801.040		Local government authority under the Oregon Vehicle Code
ORS 810.040		Designation of truck routes

Reference	Preemption of Home Rule	Limitation on Home Rule
ORS 810.434		Requires public information campaign and report from cities operating photo red light cameras
ORS 825.615	Preemption of authority to regulate the idling of primary engines in commercial vehicles	
ORS 836.600 to 836.630		Local regulation of airports
ORS 837.385	Preemption of unmanned aircraft ownership and operation regulation	