

— Oregon Municipal Handbook —

CHAPTER 1: NATURE OF CITIES

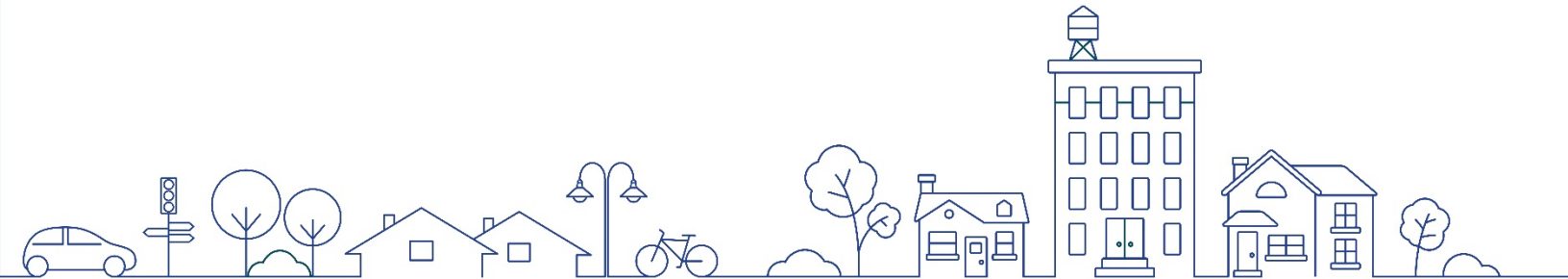


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Chapter 1: Nature of Cities

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

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

This chapter begins in Part I with a brief overview of local governments. In Oregon, local governments come in a wide variety. There are 36 counties, 241 cities, 197 school districts, and at least 7 regional governments.⁸ The most numerous are the 1,000 or so special districts that operate in communities across the state, providing essential services like surface water drainage, fire protection, sanitation, and domestic water supply.⁹ The chapter then turns the focus to cities, addressing (1) the process of forming a city and (2) how to change that form. Part II covers the

¹ THE FEDERALIST NO. 43 (James Madison).

² See Robert H. Thomas, *Sublimating Municipal Home Rule and Separation of Powers in Knick v. Township of Scott*, 47 FORDHAM URB. L.J. 509, 538-40 (2020) (noting the “vertical separation of powers” between federal, state, and local governments and that the “overwhelming” majority of states can be characterized as “Cooley rule” or “home rule” states, where “a locality’s law may be superior to conflicting state law.”).

³ See Brian Galligan, *Comparative Federalism*, in THE OXFORD HANDBOOK OF POLITICAL INSTITUTIONS 263 (Sarah A. Binder et al. eds., 2008).

⁴ Thomas, *supra* at 539.

⁵ Galligan, *supra* at 264.

⁶ *Id.* (noting that U.S. federalism was “a major innovation ... in institutional design [and] popular government.”).

⁷ *Id.*; see also Brian P. Keenan, *Subdivisions, Standing and the Supremacy Clause: Can A Political Subdivision Sue Its Parent State Under Federal Law?*, 103 MICH. L. REV. 1899, 1900 (2005) (noting that municipal governments “offer a miniature version of federalism on the state level, dividing the power of the state and placing many important decisions in the hands of representatives closer to the people.”).

⁸ *Local Government*, OR. BLUE BOOK, <https://sos.oregon.gov/blue-book/Pages/local.aspx> (last accessed May 22, 2020).

⁹ See ORS 198.010.

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

I. UNITS OF LOCAL GOVERNMENT

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

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

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

¹⁰ EUGENE MCQUILLIN, 1 THE LAW OF MUNICIPAL CORPORATIONS § 3:2 (3d ed.).

¹¹ *Id.*; see also US Const, Amend X.

¹² See *Blue v. City of Union*, 159 Or 5, 12-13 (1938).

¹³ MCQUILLIN, 1 THE LAW OF MUNICIPAL CORPORATIONS, § 2:33 (3d ed.).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ For the limited authority of school boards, see ORS 332.072. For that of special districts, see, e.g., ORS 261.305.

¹⁷ See ORS 198.010(6); *Regional Governments*, OREGON BLUE BOOK, <https://sos.oregon.gov/blue-book/Pages/local/other-regional.aspx> (last accessed May 22, 2020).

¹⁸ Or Const, Art XI, § 2.

¹⁹ *Id.*

²⁰ *Id.*

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

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

A. Cities

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

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

²¹ See generally ORS Ch 203, 201, and 198, respectively.

²² See generally ORS Ch 332; see also ORS 294.004(1).

²³ See generally Or Const, Art XI, § 2; see also Or Const, Art IV, § 1(5).

²⁴ See ORS 221.020.

²⁵ See *Brown v. City of Eugene*, 250 Or App 132, 136 (2012).

²⁶ See Or Const, Art. XI, § 2; see generally ORS 221.901 to 221.928.

²⁷ See *Blue v. City of Union*, 159 Or at 12-13 (1938) (noting that “municipal corporations act in a dual capacity and their functions are two-fold: The one, political and governmental, the other private, propriety, corporate.”).

²⁸ MCQUILLIN, 5 THE LAW OF MUNICIPAL CORPORATIONS, §§ 15:17, 15:19 (3d ed.).

²⁹ State *ex rel. Mullins v. Port of Astoria*, 79 Or 1, 17-20 (1916).

³⁰ *Id.*

³¹ See *DeFazio v. Wash. Pub. Power Supply Sys.*, 296 Or 550, 582 (1984).

i. Government Bodies

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

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

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

ii. Corporate Bodies

Not every action a city takes is a use of government power. Many of the day-to-day actions taken by cities are instead corporate functions.⁴⁵ For instance, cities may enter contracts, buy and sell property, employ staff, and even conduct municipal enterprises. In this context, the

³² *Id.* (noting that a city cannot “assert *coercive authority* over persons or property outside its boundaries,” but that this restriction “has little relevance to a city’s contracts [or] consensual transactions.”).

³³ *Port of Astoria*, 79 Or at 18.

³⁴ *DeFazio*, 296 Or at 582.

³⁵ *Port of Astoria*, 79 Or at 17-20.

³⁶ *Id.*

³⁷ *See, e.g.*, SALEM, OR., CODE § 30.001 (2020); *see also* PORTLAND, OR. CODE § 31.40.010 (2020).

³⁸ *See, e.g.*, HERMISTON, OR. CODE §§ 130.01-130.31 (2000 & Supp. 2020).

³⁹ *See, e.g.*, BEND, OR., CHARTER Ch. 5, § 25 (1995).

⁴⁰ *Port of Astoria*, 79 Or at 17-20.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *See Thurber v. McMinnville*, 63 Or 410, 414 (1912), *abrogated on other grounds by State ex rel. Heinig v. Milwaukie*, 231 Or 473 (1962).

⁴⁴ *See Richards et al. v. City of Portland et. al*, 121 Or 340, 345 (1927).

⁴⁵ *See Blue v. City of Union*, 159 Or 5, 12-13 (1938) (noting that “municipal corporations act in a dual capacity and their functions are two-fold: The one, political and governmental, the other private, propriety, corporate.”).

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

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

B. Counties

Like cities, counties are general purpose units with general authority over local matters.⁵⁴ The majority operate as “statutory home rule” counties under ORS Chapter 203.⁵⁵ Unlike cities, only a quarter of counties operate pursuant to home rule charters.⁵⁶ Most counties are governed by a board of commissioners, though some less populated counties are run by county courts.⁵⁷

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

⁴⁶ See *DeFazio v. Wash. Pub. Power Supply Sys.*, 296 Or 550, 582 (1984) (finding “the concept of ‘extramural power’” has little relevance to a city’s contracts or other consensual transactions in goods or services.”).

⁴⁷ *Id.*

⁴⁸ *Id.* (but noting that “exercise of eminent domain outside city limits would be an exercise of extramural power.”).

⁴⁹ See, e.g. *Churchill v. Grants Pass*, 70 Or 283, 288-89 (1914) (holding that a railroad, either “within the boundaries of such municipality or not,” must be for “the general welfare convenience, health, or comfort of its citizens.”).

⁵⁰ MCQUILLIN, 5 THE LAW OF MUNICIPAL CORPORATIONS, §§ 15:17, 15:19 (3d ed.).

⁵¹ See, e.g., *Churchill*, 70 Or at 288.

⁵² *Prineville Railway*, CITY OF PRINEVILLE, <https://www.cityofprineville.com/railway> (last accessed May 22, 2020);

About Us, MINET, <https://www.minetfiber.com/about> (last accessed May 22, 2020).

⁵³ *The Early Years: 1886-1920*, McMinnville Water & Light, <https://www.mc-power.com/about/history/early-years/> (last accessed May 22, 2020).

⁵⁴ See ORS 203.035 (providing that counties govern over all “matters of county concern”).

⁵⁵ See *GTE Northwest Inc. v. Or. Pub. Util. Com’n*, 179 Or App 46, 49 (2002).

⁵⁶ *County Government in Oregon*, OR. BLUE BOOK, <https://sos.oregon.gov/blue-book/Pages/local/counties/about.aspx> (last accessed May 22, 2020).

⁵⁷ *Id.*

⁵⁸ *Oregon Counties*, ASS’N OF OREGON CTYS., <http://oregoncounties.org/counties/oregon-counties/> (see the accompanying interactive graphic) (last accessed May 22, 2020); see also Or Const Art XI, § 2.

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

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

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

C. School Districts

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

⁵⁹ See generally ORS Chapter 202.

⁶⁰ See *Barber v. Johnson*, 86 Or 390, 395 (1917); see also *State ex rel. Stadig v. Deschutes Cty.*, 88 Or 661, 662 (1918).

⁶¹ See ORS 431.405 to 431.550.

⁶² For the Oregon Department of Corrections, see ORS Ch 423; for the Oregon Youth Authority, see ORS Ch 420A; and for the Oregon Department of Veterans’ Affairs, see ORS Ch 406. More so than cities, counties also coordinate with the Oregon Office of Emergency Management through local agencies. See ORS 401.305 (providing that all counties “shall establish an emergency management agency,” while all cities or tribes “may ... establish...” agencies. (emphases added)).

⁶³ *Oregon’s 36 District Attorneys*, OR. BLUE BOOK, <https://sos.oregon.gov/blue-book/Pages/state/executive/district-attorneys.aspx> (last accessed May 22, 2020); see also ORS 8.760.

⁶⁴ See 1000 Friends of Oregon v. Wasco Cty. Court, 304 Or 76, 82 (1987) (noting county is “general-purpose.”).

⁶⁵ See *GTE Northwest Inc. v. Oregon Public Utility Com’n*, 179 Or App 46, 59-62 (2002).

⁶⁶ *Id.* at 62 (upholding a county telecommunications service that operated outside the county’s boundaries because doing so served residents’ interests and because the county did not compel anyone outside its boundaries to use it.).

⁶⁷ MCQUILLIN, 5 THE LAW OF MUNICIPAL CORPORATIONS, §§ 15:17, 15:19 (3d ed.).

⁶⁸ See ORS 332.072.

⁶⁹ Or Const, Art VIII, § 3.

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

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

D. Special Districts

More numerous than school districts are the hundreds of special districts serving communities across the state. These districts are governed generally by ORS Chapter 198 but also by their “principal acts,” which are spread across two dozen or so other ORS chapters.⁷⁶ Special districts include, for instance, a people’s utility district under ORS Chapter 261; a domestic water supply district under ORS Chapter 264; a port district under ORS Chapter 777; and county service districts under ORS Chapter 451.⁷⁷ Other districts relate to mass transit; irrigation; regional air quality control; fire protection; hospitals; sanitation; cemeteries; parks and recreation; special roads and road assessments; highway lighting; health; vector control; water improvement; weather modification; geothermal heating; transportation; chemical control; weed control; emergency communications; diking; and soil and water conservation.

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

⁷⁰ See ORS 330.092 to ORS 330.095.

⁷¹ See ORS 330.080.

⁷² See generally ORS Ch 332.

⁷³ ORS 332.018.

⁷⁴ See ORS 328.213; see also ORS 332.182; see also ORS 332.445.

⁷⁵ ORS 332.072.

⁷⁶ See generally ORS Chapter 198.

⁷⁷ ORS 198.010. Note that county service districts are unique in that they are not wholly independent from the county that operates them. ORS 451.485.

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

Like school districts, special districts are special purpose units of government that are formed for a particular need or service.⁸² Generally, a special district possesses taxing and regulatory power if it acts within its boundaries and within the grant of authority in its principal act or in ORS Chapter 198.⁸³ Unlike school districts, special districts are funded more by local taxes than by state revenue. Special districts also are public corporations and may enter contracts, buy or sell property, and transact other business as long as every action is related to its limited municipal function.⁸⁴

E. Regional Governments

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

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

⁷⁸ See, e.g., ORS 198.748.

⁷⁹ *Id.*

⁸⁰ See, e.g., ORS 261.105

⁸¹ See generally ORS Chapter 198.

⁸² See, e.g., ORS 261.305. The enumerated powers of people’s utility districts, which generally relate to providing and distributing “a supply of water[,] ... waterpower and electric energy, or electric energy generated from any utility.” *Id.*

⁸³ *Id.*

⁸⁴ See, e.g., ORS 261.215 (declaring the corporate status of people’s utility districts and authorizing the use of certain “corporate powers” enumerated in the act.).

⁸⁵ See generally ORS Chapter 268; see also ORS 198.010(6).

⁸⁶ Or Const, Art XI, § 14; OR. METRO CHARTER Ch. 2, § 4 (2015), <https://www.oregonmetro.gov/sites/default/files/2015/01/12/Metro%20Charter%202015.pdf> (last accessed June 9, 2020).

⁸⁷ *Regional Leadership*, METRO, <https://www.oregonmetro.gov/regional-leadership/what-metro> (last accessed June 2, 2020).

⁸⁸ *Regional Governments*, OR. BLUE BOOK, <https://sos.oregon.gov/blue-book/Pages/local/other-regional.aspx> (last accessed May 22, 2020).

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

II. FORMING A CITY

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

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

⁸⁹ OR. CHAPTER OF THE AM. PLAN. ASS’N, REGIONAL PLANNING FOR THE 21ST CENTURY 15-17 (2010), <http://www.oregonapa.org/wp-content/uploads/2015/05/OAPA-Final-Reg-ES-Jan11.pdf> (last accessed June 2, 2020).

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ Or Const, Art XI, § 2, prohibits the state from incorporating cities by special act. The provision also grants “cities” the power to adopt a home rule charter. Arguably, an unincorporated community becomes a city through the process of drafting and adopting a home rule charter; if so, communities could simply adopt a charter and skip the process of becoming a city under state law. For more analysis, see LEAGUE OF OR. CITIES, INCORPORATING A CITY IN OREGON (2019), <https://www.orcities.org/application/files/6815/7904/8842/IncorporationWhitePaperUpdated2-2-19.pdf> (last accessed June 2, 2020).

⁹⁵ ORS 221.020.

⁹⁶ *Id.*, The Incorporation Act does not define the term “incorporated city.” State regulations acknowledge the possibility for communities within the urban growth boundary of a city to incorporate; See OAR 660-014-0010(1).

A. Filing a Proposed Petition

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

The economic feasibility statement requires considerably more work by the community. It details the services and functions of the proposed city, the relationship of those services to existing public services in the area, and the first and third-year budgets of the prospective city that prove “economic feasibility.”¹⁰⁰ Generally, a community’s ability to provide this statement results from a broader feasibility study that addresses the economic characteristics of the area and the tax rate and boundaries of existing taxing districts, among other issues. For information on how to conduct a feasibility study, consult the LOC City Incorporation Guide (2017).¹⁰¹

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

i. Additional Requirements

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

⁹⁷ ORS 221.031.

⁹⁸ See Form SEL 701, <https://sos.oregon.gov/elections/Documents/SEL701.pdf> (last accessed May 22, 2020).

⁹⁹ ORS 221.031(3)(d).

¹⁰⁰ ORS 221.035.

¹⁰¹ LEAGUE OF OR. CITIES, INCORPORATION GUIDE (2017), <https://www.orcities.org/application/files/5515/6116/0245/IncorporationGuideUpdate6-23-17.pdf> (last accessed May 22, 2020).

Petition for Incorporation in a Non-Urbanized Area

A Petition for Incorporation must include:

- Name and residence of no more than 3 persons who are to be the chief petitioners;
- Name of the proposed city;
- Proposed permanent rate limit for operating taxes, expressed in dollars per thousand dollars of assessed value;
- A map indicating the exterior boundaries of the proposed city (not to exceed 14 inches by 17 inches); and
- If the proposed city is to be located in a jurisdiction governed by a local government boundary commission, the Petition must further include the economic feasibility analysis required by ORS 199.476(1).

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

example is areas within an urban growth boundary (UGB), which must comply with the existing city’s local comprehensive plan. That said, planning laws apply to all incorporation petitions, not just those within a UGB; for areas not within a UGB, the petition must comply with statewide planning goals. Finally, if the proposed area falls within the jurisdiction of a local government boundary commission, then other filing requirements exist.

a. Urbanized Areas

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

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

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

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

¹⁰² ORS 221.034(2).

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ ORS 221.034(3).

¹⁰⁷ ORS 221.034(2).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

b. Land Use Regulations

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

c. Local Government Boundary Commissions

A local government boundary commission is a commission with authority to review major or minor boundary changes, including incorporation.¹¹³ Counties are authorized to create these commissions, which technically are state agencies, under ORS Chapter 199.¹¹⁴ In counties where a local boundary commission has jurisdiction, the chief petitioners must include with the initial filing the **economic feasibility analysis** and **estimated tax rate** required under ORS 199.476.¹¹⁵ The information must then be reviewed and approved by the local government boundary commission before the county clerk can authorize the petition for circulation.¹¹⁶

ii. Future Considerations

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

¹¹⁰ OAR 660-014-0010(2)(a).

¹¹¹ OAR 660-014-0010(2)(c). Once incorporated, a city develops its own local comprehensive plan for the area; *See* ORS 197.757.

¹¹² ORS 197.825.

¹¹³ ORS 199.415(11). Incorporation is a “major boundary change,” as is merger, consolidation, and disincorporation.

¹¹⁴ ORS 199.430.

¹¹⁵ ORS 221.031.

¹¹⁶ *Id.*

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

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

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

b. Special Districts

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

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

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

¹¹⁷ LEAGUE OF OREGON CITIES, INCORPORATION GUIDE (2017), <https://www.oregocity.org/application/files/5515/6116/0245/IncorporationGuideUpdate6-23-17.pdf> (last accessed June 15, 2020).

¹¹⁸ ORS 221.760.

¹¹⁹ ORS 222.510.

¹²⁰ *Id.*

¹²¹ ORS 222.520.

¹²² ORS 222.524; ORS 222.460(2).

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

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

c. Budgeting Laws

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

d. Comprehensive Planning

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

ORS Chapters 197 and 227 govern the new city’s land use planning responsibilities. Within four full years of its existence, a new city must prepare, adopt, and gain state approval of a comprehensive plan consistent with the statewide goals adopted by the Oregon Land Conservation and Development Commission (LCDC).¹²⁷ LCDC administrative rules apply the statewide goals to incorporation and require adoption of a comprehensive plan for the new city.¹²⁸ The plan must be coordinated with the county and acknowledged by the LCDC before it is official. The typical plan contains a map indicating preferred land uses, a series of goals and policies defining those uses, and references to the data on which the plan is based.

¹²³ ORS 195.020.

¹²⁴ ORS 195.065.

¹²⁵ ORS 195.085.

¹²⁶ ORS 294.338(1), (10).

¹²⁷ ORS 197.757; ORS 197.251.

¹²⁸ (OAR, Chapter 660, Division 14).

B. Signatures, County Review, and Election

The incorporation process moves quickly following the filing of the proposed petition and the required supporting documents. Upon receiving all of the necessary paperwork, the clerk for the county will immediately file the petition and “authorize the circulation of the petition.”¹²⁹ Petitioners for incorporation then face four additional hurdles: (1) collecting enough signatures; (2) obtaining county approval for the incorporation; (3) winning in the election; and finally (4) withstanding challenges filed against the incorporation, if any.¹³⁰

i. Collecting Signatures

The Incorporation Act requires the petition to be signed by at least 20% of the eligible voters in the area proposed to be incorporated, or only 10% if the area is within a county of more than 300,000 people.¹³¹ At present, there are five such counties: Clackamas, Lane, Marion, Multnomah, and Washington counties.¹³² These signatures must be gathered within six months of filing the proposed petition or else they will not count.¹³³ In addition, the signatures must be collected on a sheet prescribed by the secretary of state and each sheet must be accompanied by a full and correct copy of the petition for incorporation.¹³⁴ Once all of the needed signatures have been collected, the petitioners return to the county to file the petition and signatures with the county court or the county board of commissioners.¹³⁵

ii. County Approval

Upon receiving the petition, the county’s governing body sets a time and place for a hearing on the petition and delivers notice through publications and public places.¹³⁶ This hearing serves two purposes. First, it provides an opportunity for interested parties to appear and present objections to the incorporation or the proposed tax rate. Second, the governing body must determine that all property within the proposed boundaries would be “benefited” by the city.¹³⁷

The standard for determining whether an area would be “benefited” by incorporation is not clearly set by statute.¹³⁸ The Oregon Supreme Court has described the “ambiguity regarding the powers vested in the county” in this hearing.¹³⁹ That said, a few rules are clear. First, the county may, but is not required, to expand the boundaries of the proposed city to include areas it

¹²⁹ ORS 221.031(2).

¹³⁰ See ORS 221.031(4); ORS 221.040; ORS 221.050.

¹³¹ ORS 221.040(1).

¹³² *County Populations*. OR. BLUE BOOK, <https://sos.oregon.gov/blue-book/Pages/local/county-population.aspx> (Last Accessed June 10, 2020).

¹³³ ORS 221.040(1).

¹³⁴ See Form SEL 702 <https://sos.oregon.gov/elections/Documents/SEL702.pdf> (last accessed May 22, 2020); see also ORS 221.031(4).

¹³⁵ ORS 221.040(1).

¹³⁶ *Id.*

¹³⁷ ORS 221.040(2).

¹³⁸ See *McManus v. Skoko*, 255 Or 374, 378 (1970).

¹³⁹ *Id.*

finds would be benefited by the new city.¹⁴⁰ However, the county *must* limit the boundaries of the new city to exclude property owners who would *not* be benefited. Second, the Supreme Court held in *McManus v. Skoko* that the county cannot go so far as to find no property would be benefited by a proposed incorporation, thereby rejecting any possibility of incorporation for the community.¹⁴¹ The *McManus* Court found that the purpose of the hearing is to alter boundaries, not to reject incorporation.¹⁴² Third, any ruling by the county in this hearing is a quasi-judicial decision, not a legislative decision.¹⁴³ As such, the county's governing body is serving as an impartial decision-maker rather than as a political body; the county must make its decision based on evidence, and the petitioners are entitled to certain due process rights in the proceeding.¹⁴⁴

Despite the *McManus* ruling, there remains one way that a county can reject a petition for incorporation. If the proposed area is a rural unincorporated community and a neighboring city objects to the incorporation, then the county has clear grounds to deny the incorporation effort.¹⁴⁵ If it does, then it must clearly acknowledge this as the reason in its findings and the decision may be appealed to the Land Use Board of Appeals (LUBA).¹⁴⁶

Conversely, a county order *approving* the incorporation petition for an election may also be appealed to LUBA. As noted above, this order qualifies as a land use decision and therefore is subject to LUBA appeal.¹⁴⁷ Successful appeals will invalidate the outcome of the election.¹⁴⁸

iii. Election

The county's governing body, upon approving the petition in its original or altered form, must issue an order for an election to be held on the matter of incorporation. The election must be held at least 90 days after the issuance of the order.¹⁴⁹

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

The vote on incorporation carries a unique threshold requirement. To succeed, the vote on incorporation must show that a majority of the votes approve of the idea and that at least 50% of the registered voters in the area participated in the election. But this requirement is waived if

¹⁴⁰ ORS 221.040(2).

¹⁴¹ *McManus*, 255 Or at 378-80.

¹⁴² *Id.*

¹⁴³ See 1000 Friends of Oregon v. Wasco Cty Court, 304 Or 76, 80 (1987) (citing criteria in *Strawberry Hill 4 Wheelers v. Benton Bounty Bd. of Comm.*, 287 Or 591, 593 (1979)).

¹⁴⁴ *Id.*

¹⁴⁵ ORS 221.034(3).

¹⁴⁶ ORS 221.034(5).

¹⁴⁷ *1000 Friends of Oregon*, 304 Or at 78.

¹⁴⁸ *Id.*

¹⁴⁹ ORS 221.040(3).

the vote on incorporation is held in May or November of any year.¹⁵⁰ If the electorate votes for incorporation of the new city, then the date of incorporation is the date of the election and the costs of the election come out of the general fund of the new city. If the electorate votes down the idea, then all expenses of the election are paid out of the general fund of the county.¹⁵¹

The vote on council candidates must result in the election of five council members. Under the Incorporation Act, a city council is a five-person body. To be on the ballot, candidates must file a declaration of candidacy with at least 25 signatures of eligible voters in the area, or else just 10% of the voters in the area if that number is less than 25 people.¹⁵² Of the candidates, the two that receive the highest number of votes will hold office until the second general election following incorporation; the remaining three will hold office until the next general election.¹⁵³

Newly incorporated cities operate, at least initially, pursuant to a government structure under the Incorporation Act.¹⁵⁴ This law governs the city’s politics unless or until the city supersedes it with the creation of a home rule charter. At present, all 241 incorporated cities in Oregon operate under charters enacted under Article XI, Section 3, of the state constitution. More information on how cities can be structured is available in Chapter II.

iv. Challenges

In the event the incorporation of a city is challenged within two years of incorporation, as an improper land use decision or otherwise, state law provides a process for how shared revenue is to be distributed. If the respective court or state agency determines that the incorporation was invalid, moneys that would have otherwise been payable to the city as state shared revenue — such as tax revenue from cigarette, liquor, and marijuana laws and street and highway funds — are instead deposited with the State Treasurer, with the State Treasurer placing these monies in an escrow account. If the new city successfully appeals the decision, then the funds ultimately are

ELECTION OF FIRST CITY COUNCIL

nomination of city council candidates.

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

¹⁵⁰ ORS 221.050(4)-(5).

¹⁵¹ ORS 221.061(2).

¹⁵² ORS 221.050(2).

¹⁵³ ORS 221.090(1).

¹⁵⁴ ORS 221.110.

distributed to the city. If the new city fails to appeal or fails in its appeal, then the city's state shared revenue is instead distributed to all cities throughout the state based on population.¹⁵⁵

Theoretically, another challenge to incorporation might come in the form of a nearby city or special district attempting to annex parts of the area before incorporation can take place. This would not be a direct challenge to incorporation but rather a preemptive one. State law addresses this and forbids any attempts at annexation during the pendency of an incorporation petition. As soon as petitioners complete their initial filing of a prospective petition, no city or district may commence annexation proceedings until the petition is rejected by the county or by voters.¹⁵⁶

III. BOUNDARY CHANGES

Once a city is incorporated, different state laws govern how the nature of a city can be altered through annexation, withdrawal, merger, consolidation, or disincorporation. On these topics, cities may be subject to local laws as well, like an ordinance or a home rule charter. Cities need to be aware of their own laws before attempting any of these processes. The following section is limited to state law requirements and reviews the five boundary changes that a city may undergo. Two of them — annexation and withdrawal — modify a city's existing boundaries and are considered “minor” boundary changes.¹⁵⁷ The remaining three — merger, consolidation, and disincorporation — are “major” boundary changes that dissolve a city (or cities) as part of their respective processes.¹⁵⁸

Note that some of these changes require involvement of a local government boundary commission, if a city is subject to one's jurisdiction. Prior to acting in any of the following ways, a city should confirm whether a commission operates in its area. Also, Metro has jurisdiction over boundary changes within its district.¹⁵⁹

A. Minor Changes: Annexation and Withdrawal

Both annexation and withdrawal modify an existing city's boundaries. Annexation is the process of extending city boundaries. The opposite action, withdrawal, retracts city boundaries by removing territory from the city. These processes are similar in effect, but also different in one fundamental way. A city's power to annex territory is an exercise of extramural authority that flows entirely from state law, not a home rule charter.¹⁶⁰ A city's right of withdrawal,

¹⁵⁵ ORS 221.785.

¹⁵⁶ ORS 221.032.

¹⁵⁷ ORS 199.415(12).

¹⁵⁸ ORS 199.415(11).

¹⁵⁹ ORS 268.347(1).

¹⁶⁰ See *Schmidt v. City of Cornelius*, 211 Or 505, 517 (1957). The LOC maintains that the decision to annex is an expression of intramural authority. As such, local processes of deciding whether to annex territory are not subject to state preemption.

however, is recognized as a matter of intramural authority.¹⁶¹ While Oregon courts have upheld the right of cities to remove property from its boundaries, it is unclear if cities may exercise this right in a manner other than the withdrawal process under state law. For the purposes of this Handbook, the following section is limited to relevant requirements under state law.

i. Annexation

Annexation is the process through which a city extends its boundaries to new territory. Any decision to annex land must comply with a state process because a city has no inherent authority to expand its boundaries.¹⁶² With a few exceptions, ORS Chapter 222 leaves it to each city or the city’s voters to decide whether to annex new territory.¹⁶³ State law instead restricts what territory can be annexed and how. In other words, state law controls (1) the annexation procedure and (2) the type of territory that may be annexed.¹⁶⁴ Finally, many cities require a local election to decide when and where the city will annex new territory.¹⁶⁵ ORS Chapter 222 avoids conflicts with these local laws in all but one provision.¹⁶⁶

a. Territory to be Annexed

By law, only certain territories may be annexed into a city. Two main restrictions apply. First, a city may only annex territory that is “contiguous” to the city.¹⁶⁷ Second, a city may only annex territory if it is “reasonable” to do so.¹⁶⁸ The latter standard originated in case law and is applied on a case-by-case basis, taking into consideration land use laws, the city’s projected growth, and the city’s ability to provide urban services to the area, among other factors.¹⁶⁹

The contiguity requirement is found under ORS Chapter 222, which authorizes a city to annex new territory only if it “is contiguous to the city or separated from it only by a public right of way or a stream, bay, lake, or other body of water.”¹⁷⁰ This requirement does not necessarily mean that *most* of the territory must be contiguous to the city. Taken literally, this provision only requires some connection to the city, either by a narrow strip of land or even an annexed right-of-way running back to it.¹⁷¹ Courts applying the “reasonableness” standard likewise have held on many occasions that so-called “cherry stem” annexations are proper.¹⁷² As one court noted, an

¹⁶¹ *Id.*

¹⁶² *Id.*; see also *City of Corvallis v. State*, 304 Or App 171, 175 (2020) (noting “annexation is an extramural act.”).

¹⁶³ See ORS 222.111(5), which generally requires a city election; see also ORS 222.120, which, in the absence of a city election, grants discretion to the city’s governing body to decide whether to annex a territory or not.

¹⁶⁴ See generally ORS 222.111.

¹⁶⁵ *City of Corvallis*, 304 Or App at 177.

¹⁶⁶ See, e.g., ORS 222.915; ORS 222.750(7).

¹⁶⁷ ORS 222.111(1).

¹⁶⁸ See *Morsman v. City of Madras*, 191 Or App 149, 153-54 (2003).

¹⁶⁹ *Id.*

¹⁷⁰ ORS 222.111(1).

¹⁷¹ See *Dep’t of Land Conservation & Dev. (DLCD) v. City of St. Helens*, 138 Or App 222, 228 (1995).

¹⁷² *Id.*; see also *Morsman*, 191 Or App 149 at 153-54.

irregularly shaped annexation is not “per se unreasonable,” suggesting that other factors weigh more on the reasonableness of annexation than the adjacency of the property to the city.¹⁷³

By and large, the most significant factor for the “reasonableness” of an annexation is whether it complies with land use law.¹⁷⁴ Therefore, a city preparing to annex new territory must be aware of any applicable statewide planning goals or local comprehensive plans.

b. Annexation procedure

For the most part, annexation may be initiated in one of two ways: through a petition by territory residents or through a motion of the city council.¹⁷⁵ The general rule is that whenever a proposal for annexation is raised, a city must submit the proposal to the voters of the territory and the voters of the city.¹⁷⁶ This rule is subject to many exceptions, which are addressed below. However, if no exceptions apply and elections are held in both the city and territory, then these two elections must occur within one year of each other.¹⁷⁷ The votes may happen simultaneously in the same election as long as the proposals appear on the ballot separately.¹⁷⁸

To promote annexation, any proposal may include a special rate of taxation for the new territory that is a ratio of the highest rate of taxation applicable to property within the city.¹⁷⁹ Proposals submitted by petition may include a special rate with a term of up to 10 years; those submitted by the city may have a term of up to 20 years.¹⁸⁰ The special rate may increase from fiscal year to fiscal year pursuant to a proposed schedule, but in no event can it exceed the rate of taxation on which the rate ratio is based.¹⁸¹ If the annexation is approved, then the city cannot tax the annexed territory at any other rate than the special rate for the term that it is in effect.¹⁸²

Not all annexations require elections in both the city and the territory. First, city elections are not required as long as a public hearing is held on the issue and the election is not mandatory under the city’s charter.¹⁸³ Second, a territory election is not required if an adequate number of landowners in the territory consent to annexation.¹⁸⁴ Third, under certain circumstances, neither a city or territory election is required, though the annexation itself might be.¹⁸⁵ In other words,

¹⁷³ *Morsman*, 191 Or App 149 at 153.

¹⁷⁴ *Id.* at 153-54.

¹⁷⁵ ORS 222.111(2).

¹⁷⁶ ORS 222.111(5)

¹⁷⁷ ORS 222.111(6)

¹⁷⁸ ORS 222.111(7).

¹⁷⁹ ORS 222.111(3)

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ ORS 222.120(1).

¹⁸⁴ ORS 222.125; ORS 222.127; and ORS 222.170.

¹⁸⁵ ORS 222.127; ORS 222.750; and ORS 222.855.

some provisions waive all election requirements for annexation and then require cities to take on new territory.¹⁸⁶

1. Annexation without City Elections

Public hearings under ORS 222.120 eliminate the need for a city election on annexation, unless a city charter provision expressly requires otherwise. In lieu of an election, this provision permits a city to hold a public hearing before the council on the matter of annexation. The meeting must be noticed at least once a week for two consecutive weeks and must provide an opportunity for voters in the city to “appear and be heard” on the issue.¹⁸⁷ Once this takes place, the city may declare annexation of a territory on condition that other requirements are satisfied.¹⁸⁸

This exception has limits. First, at least some city charters require that all annexations be put to a vote before city voters.¹⁸⁹ ORS 222.120 avoids preempting these laws by stating that a public hearing is permitted only if an election is not “expressly required...by the city charter.”¹⁹⁰ Second, an election may be unavoidable on the annexation issue — even for cities that do not expressly require one — if a referendum is called following the public hearing. Under ORS 222.120, any ordinance on annexation in lieu of a city election is subject to referendum.¹⁹¹ A successful referendum petition will nullify the effect of the public hearing and put the matter up for an election.¹⁹²

2. Annexation without Territory Elections

Just as public hearings may eliminate the need for a city election, the written consent to annexation by territory landowners may eliminate the need for a territory election. Generally, landowners may consent to annexation either by filing statements of consent with the city or by entering into annexation contracts with the city. ORS Chapter 222 provides multiple

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

(1)

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

(2)

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

(3)

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

(4)

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

(5)

222.750 -- The territory meets the criteria for an “island.”

(6)

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

¹⁸⁶ *Id.*

¹⁸⁷ ORS 222.120(2)

¹⁸⁸ ORS 222.120(4).

¹⁸⁹ *See City of Corvallis v. State*, 304 Or App 171, 177 (2020).

¹⁹⁰ ORS 222.120(1).

¹⁹¹ ORS 222.120(4), (6)

¹⁹² *Id.*

standards of consent that, if met, eliminate the need for an election.

First, a territory election is not necessary under state law if a so-called “triple majority” of territory residents consent to annexation.¹⁹³ The term “triple majority” refers to there being support for annexation among **(1)** more than half of the landowners in the territory **(2)** who also own more than half of the total land in the territory, **(3)** the assessed value of which is more than half of the assessed value of all real property in the territory.¹⁹⁴ Oregon courts have upheld this form of annexation, despite the possibility that the landowners themselves may not be registered as voters or even residing in the territory to be annexed.¹⁹⁵ In *Morsman*, the court found this law does not discriminate against a suspect class, that there is no fundamental right under the U.S. Constitution to vote on annexation, and that the state has an interest in eliminating the burden of an election where it is already clear annexation is favored by many property owners.¹⁹⁶

Second, an election is unnecessary if instead a “double majority” of residents consent to annexation.¹⁹⁷ A “double majority” consists of **(1)** more than half of the registered voters in the territory and **(2)** the owners of more than half of the land, whether or not they are the same individuals.¹⁹⁸ As long as a majority of each class file statements of consent, then an election on annexation need not be held.¹⁹⁹

A statement of consent filed with a city is a public record and only is valid for one year, unless a longer period of time is expressly stated in writing.²⁰⁰ As noted above, consent may also take the form of an **annexation contract**, or an agreement between a city and a landowner that guarantees city services in return for the landowner’s “consent to eventual annexation.”²⁰¹ Unlike statements of consent, annexation contracts must be recorded and are binding on any successors in interest in the property.²⁰²

Significantly, neither one of these processes eliminates the need for the annexing city to hold a city election, or else a public hearing under ORS 221.120 if permitted by local law.²⁰³ As an additional requirement, both the double and triple majority provisions require that landowners file their statements of consent prior to the city election, or else the public hearing if permitted by local law.²⁰⁴ This distinction is important because other landlord consent provisions under ORS Chapter 222 *do* waive the requirement for city elections as well as territory elections.

¹⁹³ See ORS 222.170(1); see also *Morsman v. City of Madras*, 196 Or App 67, 70 (2004).

¹⁹⁴ ORS 222.170(1).

¹⁹⁵ *Morsman v. City of Madras*, 203 Or App 546, 556-563 (2006).

¹⁹⁶ *Id.*

¹⁹⁷ ORS 222.170(2).

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ ORS 222.173.

²⁰¹ ORS 222.115.

²⁰² *Id.*

²⁰³ ORS 222.170(1)-(2).

²⁰⁴ *Id.*

3. Annexation without Any Election

A final category of provisions under ORS Chapter 222 features those that eliminate election requirements for both the city and the territory. Like the public hearing exception above, most of these provisions include a carve-out for ordinances or charters that do require elections on annexation.²⁰⁵ That said, one provision applies regardless of local law.²⁰⁶

Unanimous Landowner Consent

No election is required under state law in the city or in the territory proposed to be annexed if 100% of the landowners in the affected territory consent to annexation and other conditions are met.²⁰⁷ There are two such provisions: ORS 222.125 and ORS 222.127. Purportedly, these laws apply regardless of contrary provisions under local law, such as a charter that requires a local vote on annexation.²⁰⁸

Under ORS 222.125, cities “need not” hold an election in the territory or in their jurisdiction if all of the landowners and at least 50% of the electors in the territory consent to annexation.²⁰⁹ If these conditions are met, cities may declare annexation through a resolution or ordinance, showing the boundaries of the annexed area with an attached legal description.²¹⁰

Under ORS 222.127, no elections are permitted and cities must annex the proposed territory if they receive a petition signed by every landowner in a territory and a number of other conditions are met.²¹¹ This law preempts any local ordinance or charter that requires a city election.²¹² Annexation is required only if the territory is within the city’s urban growth boundary, is or will be subject to the city’s acknowledged comprehensive plan upon annexation, and is compliant with all other local ordinances.²¹³ The territory also must be contiguous.²¹⁴

The state enacted this law in 2016 as SB 1573.²¹⁵ To date, no court has addressed whether this law violates the home rule provisions of the Oregon Constitution.²¹⁶ Arguably, cities or else its voters have a right to select when to extend the city’s boundaries.²¹⁷ The decision to annex, not the annexation itself, might be a matter of local concern that blocks state preemption.²¹⁸ In *City of Corvallis v. State*, the court of appeals avoided ruling on this

²⁰⁵ See ORS 222.915; see also ORS 222.750(7).

²⁰⁶ ORS 222.127.

²⁰⁷ ORS 222.125, ORS 222.127

²⁰⁸ *Id.*

²⁰⁹ ORS 222.125.

²¹⁰ *Id.*

²¹¹ ORS 222.127(2).

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ See *City of Corvallis v. State*, 304 Or App 171, 176 (2020).

²¹⁶ *Id.* at 187 n.9.

²¹⁷ See *Mid-County Future Alts. Comm. v. City of Portland*, 310 Or 152, 163-64 (1990) (stating that “[t]here still is room to argue ... that the borders of a municipal corporation are an integral part of the corporate charter which cannot be altered by the legislature.”).

²¹⁸ *Id.*

question.²¹⁹ The court upheld ORS 222.127 as applied to Corvallis and Philomath because the city charters permit annexation without a local election whenever they are “mandated by state law.”²²⁰ Of course, some city charters do require an election for all annexations, even those mandated by state law.²²¹ The decision in *City of Corvallis v. State* does not resolve the conflict between ORS 222.127 and those charters.

Island Territories

No election is required for the annexation of so-called “island” territories that are entirely surrounded by a city’s boundaries.²²² Under ORS 222.750, a city may annex such a territory after one public hearing upon notice to every landowner in the territory.²²³ However, this provision does not waive the requirement for an election that is required by a city’s charter or ordinance.²²⁴ Moreover, if local law does require a city election, then ORS 222.750 requires that election be open to the residents of the island territory as well as the city.²²⁵

“Island” territories are territories that are (1) completely within the corporate boundaries of a city or (2) completely surrounded by the annexing city and other natural or artificial boundaries, such as other cities, a large body of water, and Interstate 5.²²⁶ Ironically, the provision does not apply to literal islands, i.e., territory that is completely surrounded by water.²²⁷

If a city seeks to annex an “island” territory under ORS 222.750, the city must annex the entire territory.²²⁸ Annexing a portion of the territory is not permitted because the provision authorizes annexation of “*such* territory,” not any part of it.²²⁹

Health Hazard Abatement

Finally, under the Health Hazard Abatement Law, no elections are permitted and a city must annex a territory if the Oregon Health Authority (OHA) finds that a public health danger within the territory can be abated through annexation.²³⁰ Just like ORS 222.750, this law does not apply “if the charter or ordinances of the city conflict with or are inconsistent with” the provision.²³¹ Thus, if local law does require an election on all annexations, this will take precedence.²³²

²¹⁹ *City of Corvallis*, 304 Or App at 181-82.

²²⁰ *Id.* at 182.

²²¹ *Id.* at 177.

²²² ORS 222.750(2); *see also* *Morsman v. City of Madras*, 203 Or App 546, 560 (2006).

²²³ ORS 222.750(2).

²²⁴ ORS 222.750(7).

²²⁵ ORS 222.750(8).

²²⁶ ORS 222.750(2).

²²⁷ ORS 222.750(3).

²²⁸ *See* *Costco Wholesale Corp v. City of Beaverton*, 343 Or 18, 25 (2007).

²²⁹ *Id.*

²³⁰ ORS 222.840 to ORS 222.915.

²³¹ ORS 222.915.

²³² *But see* *Pieper v. Health Division*, 288 Or 551, 557 (1980) (finding that a city charter that did not require city elections when the annexation is “mandated by state law” was not inconsistent with this law). In addition to the city of Corvallis, the city of Klamath Falls was involved in a series of cases regarding its use of this annexation process. *See, e.g.,* *West Side Sanitary Dist. V. Health Div. of Dep’t of Human Res.*, 289 Or 417, 419 n.1 (1980).

This law lists three examples of dangers to public health, but the list is not exclusive: (1) impure or inadequate domestic water, (2) inadequate sewage or garbage disposal, and (3) inadequate drainage of surface water.²³³ The proposed territory must also be “otherwise eligible” for annexation and must be within the urban growth boundary of the city.²³⁴

Annexations under this provision begin in one of three ways. First, the city itself can initiate the proposal by adopting a resolution calling for an OHA investigation into whether a public health danger exists in the proposed territory.²³⁵ Second, the local public health authority — generally the county — can initiate an OHA investigation in the same manner as the city.²³⁶ Third, at least 40% of residents in a territory may petition the local public health authority to initiate the OHA investigation.²³⁷

Next, OHA must hold a public hearing in the affected territory and hear any person who may be impacted by annexation, including city residents.²³⁸ Within 60 days of the hearing, OHA then must issue findings on whether a public health danger exists and provide an opportunity for additional oral or written arguments.²³⁹ Within 30 days of the final additional hearing, if any, the OHA director must file a certified copy of the findings with the city or else issue an order that no public health danger exists.²⁴⁰ At this time, OHA may reduce the boundaries of the territory that has been proposed for annexation.²⁴¹

If a city receives from OHA a certified copy of findings that a public health danger exists, then the city must adopt an ordinance that annexes the territory.²⁴² This ordinance, as well as any final order from OHA, is subject to judicial review.²⁴³

ii. Withdrawal

Withdrawal is the process of detaching territory from a city’s jurisdiction.²⁴⁴ Previously laws referred to this boundary change as “disconnection.”²⁴⁵ Like annexation, this process is a minor boundary change; it retracts the boundaries of a city but otherwise leaves the city intact.²⁴⁶ That said, withdrawal can be a significant land use decision.²⁴⁷ Ultimately, if an area is

²³³ ORS 222.850(5).

²³⁴ ORS 222.850(1).

²³⁵ ORS 222.855.

²³⁶ ORS 222.905(1).

²³⁷ ORS 222.905(2).

²³⁸ ORS 222.875(1).

²³⁹ *Id.*

²⁴⁰ ORS 222.880(1).

²⁴¹ ORS 222.880(3).

²⁴² ORS 222.900(1).

²⁴³ ORS 222.896.

²⁴⁴ ORS 222.460(1).

²⁴⁵ *See Schmidt v. City of Cornelius*, 211 Or 505, 509-10 (1957).

²⁴⁶ ORS 199.415(12).

²⁴⁷ *See Cogan v. City of Beaverton*, 226 Or App 381, 385 (2009).

withdrawn from the city, then from the date of withdrawal it becomes free from assessments and taxes by the city; however, it remains subject to any bonds or indebtedness.²⁴⁸

The withdrawal process under state law is relatively straightforward. As noted above, the Oregon Supreme Court expressly recognizes withdrawal as an exercise of intramural authority by cities; this authority flows from the right to amend a local charter under the home rule provisions of the Oregon Constitution.²⁴⁹ Theoretically, cities therefore have authority to adopt a withdrawal process under local law, though it is unclear what interest the state might have in maintaining a uniform process for withdrawal. This section will focus exclusively on the state’s withdrawal process under ORS 222.460.

Withdrawals may only be proposed by a resolution of a city’s governing body.²⁵⁰ The resolution must state the name of the city and the city’s intent to withdraw, describe the boundaries of the territory to be withdrawn, and include a cadastral map of the area prepared by the county assessor.²⁵¹ No later than 30 days after adopting this resolution, the city must hold a properly noticed public meeting for the purpose of receiving testimony.²⁵² The city may choose to alter the withdrawal proposal based on this hearing.²⁵³ Once the hearing is held, the city must then prepare an order for a second meeting — a final hearing — that must take place no later than 50 days and no earlier than 20 days from the date of the order.²⁵⁴

The order must declare that **written requests** may be submitted prior to the final hearing by registered electors in the territory proposed to be withdrawn from the city.²⁵⁵ If the city receives written requests from 100 of these electors, or at least 15% of these electors, then the city must hold an election on the withdrawal.²⁵⁶ Alternatively, if insufficient requests are filed, then the city is authorized to declare the territory detached from the city without holding an election. If an election is necessary, a majority of the votes cast in the affected territory need to support the proposed withdrawal.²⁵⁷

B. Major Changes: Merger, Consolidation, and Disincorporation

State law provides the processes for merger, consolidation, and disincorporation of cities. In a merger, one or more cities go out of existence and the belonging territory becomes part of an

²⁴⁸ ORS 222.460(10).

²⁴⁹ *Schmidt*, 211 Or at 517 (holding that cities cannot annex territory without a grant of extramural authority but that cities “may exercise their home rule powers and *exclude* territory previously included within their limits.” (emphasis in original)).

²⁵⁰ ORS 222.460(2).

²⁵¹ ORS 222.460(3).

²⁵² ORS 222.460(4).

²⁵³ ORS 222.460(5).

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ ORS 222.460(6)-(8).

²⁵⁷ *Id.*

existing city. In a consolidation, one or more cities — or adjacent unincorporated territories — combine to form a new city. Disincorporation involves just one city terminating its existence.

Unless expressly permitted by state law, local laws have no bearing on these procedures. The power to surrender a city charter is not among the powers granted to cities by the home rule provisions of the Oregon Constitution.²⁵⁸ Accordingly, the power of a city to give up its charter — if it is has this power at all — must flow from extramural authority granted to it by the state.²⁵⁹ While the Oregon Constitution prohibits the state from repealing the charter of any one city, i.e. by special laws, the state may establish any number of processes for repealing a charter under general law.²⁶⁰ These are those processes.

Note that a report of any major boundary change by a city must be filed with the county clerk and assessor within 10 days of the change.²⁶¹

i. Merger

State law permits the merger of a city into an adjoining city upon an election.²⁶² The Oregon Constitution expressly authorizes the state to establish this process, but with the added condition that “a majority of the electors of each of the incorporated cities...” support the merger.²⁶³ To be eligible, the merging cities also must be “adjoining.”²⁶⁴ State law defines “adjoining” as sharing a river as a common boundary or possessing boundaries that are within 1,500 feet from each other at the nearest point.²⁶⁵ State law also requires a written agreement prior to a merger that addresses each city’s unfunded liabilities or surpluses, if any, in the Public Employees Retirement System (PERS).²⁶⁶ Examples of merger include the cities of Empire and Eastside, which merged into Coos Bay on separate occasions, and the city of West Salem, which merged into Salem in 1949.²⁶⁷

For a city to merge into an existing city and surrender its charter, the question of merger must first be raised by a petition. Generally, this petition must comply with state laws governing prospective petitions for local initiatives and referendums.²⁶⁸ However, a city may have its own process for local initiatives and referendums pursuant to Article IV, Section 1 of the Oregon

²⁵⁸ See Or Const, Art XI, § 2, which provides that a city may adopt or amend a charter, but not repeal it.

²⁵⁹ See *McKeon v. City of Portland*, 61 Or 385, 389 (1912) (finding that while voters have “the power to enact or amend the [charter] giving it a legal entity, but they have no power to repeal that instrument.”).

²⁶⁰ *Id.*

²⁶¹ ORS 222.010(1).

²⁶² ORS 222.610; see also Or Const, Art XI, § 2a.

²⁶³ Or Const, Art XI, § 2a

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ ORS 222.045.

²⁶⁷ ANDIE E. JENSEN & THE COOS HISTORICAL & MARITIME MUSEUM, *IMAGES OF AMERICA COOS BAY 14* (Arcadia Publishing, 2012); *West Salem was once its own city*, STATESMAN JOURNAL (March 8, 2014) <https://www.statesmanjournal.com/story/life/2014/03/07/west-salem-was-once-its-own-city/6185953/>.

²⁶⁸ ORS 222.610, ORS 222.620(4).

Constitution.²⁶⁹ Regardless, merger petitions cannot be submitted more than once in a 12-month period and must include a proposed permanent tax rate for the merged city.²⁷⁰ Further, this rate must be the rate that would produce the same amount of tax revenue otherwise produced by the cities if they remained separate.²⁷¹ Any city that has not yet imposed a property tax may propose a permanent rate limit as part of this process, which will be taken into account in determining the rate for the merged city.²⁷² If a petition meets all of these requirements under state or local law, then the city must call an election.²⁷³

For the second city, the one into which the first city is merging, the question of merger may be submitted to its voters in one of two ways. The city may do so on its own resolution, or a second citizen petition may compel the city to put the merger to a vote.²⁷⁴ The petition must meet the same requirements as the first petition above.²⁷⁵

For the most part, merger ballot measures follow the procedures for any other measure under Oregon’s election law.²⁷⁶ There are a few exceptions. First, the statement that is part of each city’s ballot measure must include the proposed permanent tax rate from above, as well as a general description of the city boundaries that would result from the merger.²⁷⁷ Second, the election notice for each city’s measure must include a map of the new city’s boundaries.²⁷⁸ Third, each election must be held “on the next practicable date” permitted for a local election.²⁷⁹ For a city that has not yet approved operating taxes and is proposing a permanent rate limit as part of its merger

Key Differences Between Merger and Consolidation

Merger

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

Consolidation

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

²⁶⁹ ORS 222.620(4)

²⁷⁰ ORS 222.620(5)

²⁷¹ ORS 222.620(3)

²⁷² ORS 222.050(2). This rate must comply with Article XI, Section 11(c)(3) of the Oregon Constitution. *Id.* If the merger ultimately does not take place, then no permanent rate limit will be established in the city, regardless of the outcome of that city’s election. ORS 222.050(7).

²⁷³ ORS 222.620(1).

²⁷⁴ ORS 222.650(1).

²⁷⁵ ORS 222.650(2).

²⁷⁶ ORS 222.620(6), ORS 222.650(6).

²⁷⁷ *Id.*

²⁷⁸ *Id.*

²⁷⁹ ORS 222.620(7); ORS 222.650(7).

measure, the election must be held in May or November.²⁸⁰ The two elections do not need to be held simultaneously; state law provides that “it is sufficient if both are held within a period of one year.”²⁸¹

To be valid, each city’s merger measure requires authorization by “a majority of the electors” of each city.²⁸² For a city that has not yet approved operating taxes and has proposed a permanent rate limit as part of the merger, the merger measure also must be voted on by at least 50% of registered voters eligible to vote in the election.²⁸³ This is sometimes referred to as an “absolute majority” instead of a simple majority.²⁸⁴ Arguably, an absolute majority is required for all mergers because the Oregon Constitution requires support of “a majority of the electors,” not a majority of the electors *voting* on the measure.²⁸⁵

If the merger is approved by a majority of the eligible voters in each affected city, then the two cities will merge 30 days after the date of the last election held on the matter.²⁸⁶ The effect of the merger is that all property, debts and liability, and general jurisdiction of the merging city is transferred to the newly merged city. Any pending suits, actions, or proceedings of the merging city must be “defended or prosecuted to termination” by the merged city.²⁸⁷

ii. Consolidation

In addition to mergers, state law also provides a process for the joining of two or more adjoining cities and adjoining unincorporated areas.²⁸⁸ In contrast to mergers, consolidation results in the incorporation of a new city.²⁸⁹ The cities of Oceanlake, DeLake, and Taft consolidated in 1965 and were incorporated as Lincoln City.²⁹⁰ Past efforts to consolidate the cities of Coos Bay and North Bend have been rejected by voters.²⁹¹

²⁸⁰ ORS 222.050(4).

²⁸¹ ORS 222.610.

²⁸² *Id.*

²⁸³ ORS 222.050(4)(a). Furthermore, as noted above, if the merger measure does not pass in both cities, then no permanent rate is established. ORS 222.050(7).

²⁸⁴ See *Chamberlain v. Myers*, 344 Or 605, 608-9 (2008).

²⁸⁵ Or Const, Art. XI, § 2a. This argument has been raised before in the Oregon Supreme Court. See *School Dist. No. 17 of Sherman Cty. v. Powell*, 203 Or 168, 179 (1955) (decided on other grounds). Likewise, Oregon’s disincorporation statute borrows this language verbatim and this argument has been raised in that context as well. See *De Young v. Brown*, 297 Or App 355, 360 (2019) (rev’ allowed). Oregon’s election law defines “elector” as an “individual qualified to vote.” ORS 254.005.

²⁸⁶ ORS 222.680.

²⁸⁷ ORS 222.700(1).

²⁸⁸ ORS 222.210(1). Consolidation cannot occur with just one city and an unincorporated area. See *Mid-County Future Alts. Comm. v. Portland Metro. Area Local Gov’t Boundary Comm’n*, 300 Or 14, 23 (1985).

²⁸⁹ ORS 222.210.

²⁹⁰ *History of Lincoln City Oregon*, LINCOLN CITY CHAMBER OF COMMERCE (2018), <https://lchamber.com/history.htm#:~:text=Lincoln%20City%20History&text=The%20area%20that%20now%20is,of%20Cutler%20City%20and%20Nelscott>, (last accessed June 15, 2020).

²⁹¹ ANDIE E. JENSEN & THE COOS HISTORICAL & MARITIME MUSEUM, *IMAGES OF AMERICA COOS BAY 14* (Arcadia Publishing, 2012).

Consolidation requires two or more cities to repeal their charters for the charter of the newly incorporated city. Unlike annexation, unincorporated territories do not need to be contiguous to the consolidating cities; the consolidation process permits the incorporation of noncontiguous territory if it is within three miles from “the rest of the territory of the city.”²⁹² Consolidation elections require approval from a majority of voters in **(1)** the most populous city proposed to be consolidated and **(2)** at least one other city or unincorporated area. If two or more cities propose to consolidate, state law also requires a written agreement addressing each city’s unfunded PERS liabilities or surpluses, if any.²⁹³

Like incorporation, the consolidation process begins by filing a prospective petition with the county clerk in which the proposed city lies.²⁹⁴ In the event the proposed city lies in more than one county; the petition is filed with the county clerk of the county in which the largest part of the proposed city lies.²⁹⁵ In addition to the required petition, consolidation necessitates the filing of an economic feasibility statement.²⁹⁶ This economic feasibility statement must contain three things: “(1) a description of the services and functions to be performed or provided by the proposed city; (2) an analysis of the relationship between the services and functions to be provided by the proposed city and other existing or needing governmental services; and (3) a proposed first year line item operating budget and a projected third year line item operating budget for the proposed city that demonstrates the city’s economic feasibility.”²⁹⁷

The prospective petition must also state the proposed city’s permanent rate limit for operating taxes.²⁹⁸ As with mergers, a city that has not imposed a property tax may propose a permanent rate limit as part of the consolidation process; if so, the city’s proposed rate limit must be taken into account in determining the proposed rate limit of the new city.²⁹⁹

Upon receiving the prospective petition and the economic feasibility statement, the county clerk dates and time stamps the petition and authorizes its circulation.³⁰⁰ The clerk also sends a copy of the petition and economic feasibility statement to each of the cities included in the proposed consolidation.³⁰¹

The consolidation process requires this petition to be signed by no less than 10% of the electors of each city and unincorporated areas included in the consolidation.³⁰² All signatures

²⁹² ORS 222.210(2).

²⁹³ *Id.*

²⁹⁴ ORS 222.230(1).

²⁹⁵ *Id.*

²⁹⁶ ORS 222.225.

²⁹⁷ *Id.*

²⁹⁸ ORS 222.030.

²⁹⁹ ORS 222.050(2)-(3). As with mergers, this rate must comply with Article XI, Section 11(c)(3) of the Oregon Constitution, and if the consolidation ultimately does not take place, then no permanent rate limit is established for the city regardless of the election outcome. ORS 222.050(7).

³⁰⁰ ORS 222.230.

³⁰¹ *Id.*

³⁰² ORS 222.220.

must be obtained within one year of filing the prospective petition with the county clerk.³⁰³ The petition must state the name of the proposed new city, the names of every city to be included in the proposed city, and the boundaries of every unincorporated boundary that would be included as well.³⁰⁴ The petition must also include the proposed permanent tax rate limit for the proposed city, which must be the rate that would generate the same amount of tax revenue that the city or cities would otherwise produce in the absence of consolidation.³⁰⁵ Once the signatures are collected, the completed petition may be filed with the city recorder of any city that the petition proposes to consolidate.³⁰⁶

Once the petition is filed, a joint convention is required of the governing bodies of all of the cities proposed for consolidation. The convention must be held at the usual meeting place of the governing body of the city with the largest population, and it must be held within 20 days from when the completed petition is received.³⁰⁷ If the governing bodies find the petition proper and compliant with Oregon's planning goals, then each governing body approves the petition and appoints two residents from its city to be members of a charter commission tasked with drafting the proposed consolidated city's new charter.³⁰⁸ In cases where the proposed consolidation also includes unincorporated areas, the governing body for that county must appoint two additional electors to the charter commission.³⁰⁹ At this stage, if the governing bodies determine that the proposal includes noncontiguous areas separated by a distance of more than three miles, this must be stated and the governing bodies must cancel any further proceedings related to the consolidation proposal.³¹⁰

The charter commission has 60 days from the date of its creation to prepare a charter.³¹¹ During the drafting of the proposed charter, the charter commission may employ attorneys and seek other assistance at the expense of the cities proposed to be incorporated.³¹² Once the charter commission finalizes its proposed charter, the commission's secretary files certified copies of the charter with the governing bodies.³¹³

The consolidation election follows the standard procedure for local measures under Oregon's election law, but with several caveats.³¹⁴ First, the election must be held on the date of the next primary or general election but cannot be earlier than 90 days after the filing date of the proposed city's charter.³¹⁵ The election must be held in May or November if a city that has not

³⁰³ ORS 222.230(2).

³⁰⁴ *Id.*

³⁰⁵ ORS 222.230(3).

³⁰⁶ ORS 222.230(2).

³⁰⁷ ORS 222.230(4).

³⁰⁸ ORS 222.240.

³⁰⁹ *Id.*

³¹⁰ ORS 222.210(2).

³¹¹ ORS 222.240.

³¹² *Id.*

³¹³ ORS 222.250(1).

³¹⁴ ORS 222.265(1).

³¹⁵ ORS 222.250(2).

yet approved operating taxes is proposing a permanent rate limit during consolidation.³¹⁶ Second, the chief elections officer is the clerk of the county in which the largest of the cities proposed to be consolidated resides.³¹⁷ Third, if the proposal includes unincorporated areas, then notice of the election must include a map of the boundaries of each unincorporated area and those of each city.³¹⁸ Fourth, the ballot title must include a general description of the proposed city's boundaries. The statement must use "streets and other generally recognized features" and cannot exceed 150 words.³¹⁹ Fifth, the consolidation measure itself must ask three questions: **(1)** whether the proposed city should be incorporated, **(2)** whether the proposed charter should be adopted, and **(3)** whether the proposed permanent rate for the city should be adopted.³²⁰

Drafting the ballot title is the subject of a second joint convention of the cities.³²¹ Once the governing bodies receive the draft charter, they must meet again to adopt a ballot title for the question of consolidation.³²² The ballot required for consolidation must comply with the requirements of ORS 250.035.³²³ Upon completion of the ballot title, but no later than the 61st day before the date of the election, the clerk of this joint convention must file the ballot title with the county clerk of the county in which the largest of the cities resides.³²⁴ However, if this second joint convention does not result in an agreement upon the date of the election or the adoption of a ballot title, then the county clerk of the county in which the largest of the cities resides must determine the ballot title.³²⁵

To consolidate, the majority of the votes cast in the most populous city and the majority of the votes cast in at least one other city or unincorporated area must favor consolidation. Of course, for a city that has not yet approved operating taxes and has proposed a permanent rate limit as part of the consolidation process, the consolidation measure also must be voted on by at least 50% of registered voters eligible to vote in the election.³²⁶ Upon conclusion of the election, it is the chief election officer's responsibility to canvass separately the votes cast in each city and in each unincorporated area.³²⁷ The chief election's officer shall deliver a certified copy of the abstracts to the governing body of each city, and the governing bodies then meet in a third joint convention to review the abstracts and determine the outcome of the election.³²⁸ If the election results cause more than three miles of noncontiguous area to exist, those portions not contiguous shall not be part of the new consolidated city.³²⁹ Otherwise, if sufficient votes are cast in favor of

³¹⁶ ORS 222.050(4).

³¹⁷ ORS 222.265(2).

³¹⁸ ORS 222.265(3).

³¹⁹ ORS 222.250(4).

³²⁰ ORS 222.250(2).

³²¹ ORS 222.250(1).

³²² *Id.*

³²³ *Id.*

³²⁴ ORS 222.250(5).

³²⁵ ORS 222.250(3).

³²⁶ ORS 222.050(4).

³²⁷ ORS 222.270(1).

³²⁸ ORS 222.270(2).

³²⁹ ORS 222.270(4); *see* ORS 222.210(2).

consolidation, the joint governing bodies issue a proclamation declaring the new consolidated city.³³⁰ The proclamation issued by the governing bodies is to be delivered to the Secretary of State by the officer performing the clerk's duties.³³¹

Should the first election not result in a consolidation, there exists the potential for a second consolidation election.³³² Any city or area may request a second consolidation election if it meets one of the following descriptions:

- (1) A majority of votes cast in the first election in the city or area from which a second vote is being requested was in favor of the consolidation but the city or unincorporated area is not contiguous to any other portion of the consolidated city; or
- (2) A majority of votes cast in the election in the city or unincorporated area is against consolidation but the city or unincorporated area is contiguous to a consolidated city.³³³

If one of these conditions is met, then the petition for a second petition may be filed. The petition must meet the requirements for an initiative petition under state law or else the local laws of the county.³³⁴ The petition must be filed with the clerk of the county in which the city or territory lies no later than 60 days after the date of the first election; if it is filed, then the chief elections officer will call a second election for the area on the next available election date that is no sooner than 60 days after the filing date.³³⁵

Once all elections are finalized, the chief elections officer has 30 days to call a special election in the consolidated city to elect officers.³³⁶ The actual election to determine the city's officers must be held on a date specified in ORS 2221.230 and cannot be sooner than 90 days after the date on which the chief elections officer called for the election.³³⁷

On the 10th day following the date on which officer elections is called, elected officials will take office.³³⁸ The day the elected representatives assume office (absent a different provision in the charter) is the date the newly consolidated city is officially incorporated as a city.³³⁹

A consolidation has many impacts. Upon the city's incorporation, it obtains all of the assets, liabilities, and obligations of the cities it encompassed.³⁴⁰ All of the ordinances in effect

³³⁰ ORS 222.270(3)

³³¹ ORS 222.270(5)

³³² ORS 222.275(1).

³³³ *Id.*

³³⁴ ORS 222.275(3).

³³⁵ ORS 222.275(4).

³³⁶ ORS 222.280(1).

³³⁷ *Id.*

³³⁸ ORS 222.280(2).

³³⁹ ORS 222.280(3).

³⁴⁰ ORS 222.295.

in the original cities, “so far as [they] are not inconsistent with the [new] charter . . . , shall [remain] in effect” and become the consolidated city’s ordinances.³⁴¹ And all complaints and prosecutions for crimes committed or ordinances violated, and any other suit or cause of action, in the original cities become the responsibility of the consolidated city, absent a charter provision to the contrary.³⁴²

iii. Disincorporation

Finally, state law permits cities to disincorporate in certain circumstances.³⁴³ Two main conditions apply. First, cities seeking to disincorporate cannot be liable for any debt or for any other obligation.³⁴⁴ Second, a “majority of the electors of the city [must] authorize” the disincorporation.³⁴⁵ The clause “majority of electors” replicates verbatim the language in Article XI, Section 2a, of the Oregon Constitution.³⁴⁶ As courts have noted, it is unclear if this language requires a simple majority of the votes cast in an election or an “absolute majority” of the city’s *registered* voters.³⁴⁷ If an absolute majority is required, then cities would need at least a 50% turnout of its voters and, among them, a majority that supports disincorporation. Oregon courts have not yet resolved this question.³⁴⁸

To disincorporate, a petition must be filed with the city in accordance with the process for a local initiative or referendum.³⁴⁹ Upon receiving a petition that meets these requirements, the city must call an election on the topic. The election on disincorporation must be held during a November election and, if the disincorporation measure fails, the petitioners must wait two years before a subsequent attempt.³⁵⁰

Disincorporation becomes effective 60 days after it is authorized.³⁵¹ Within 30 days after it is authorized, the city must convey all of its real property and property rights to the county in which it is located. The city’s records must be transferred to the county by day 60.³⁵²

³⁴¹ ORS 222.300(1). Oregon law is silent on how to resolve inconsistencies *among* original cities’ ordinances. For instance, consolidating cities are certain to have ordinances on subjects like traffic, utilities, and business licenses. Duplicate provisions will create ambiguity and some provisions might directly conflict with one another. To avoid complex legal disputes, cities should determine in advance what ordinances will remain in effect and repeal the others upon consolidation.

³⁴² ORS 222.300(2).

³⁴³ ORS 221.610.

³⁴⁴ *Id.*

³⁴⁵ *Id.*

³⁴⁶ *Id.*; *see also* Or Const, Art XI, § 2a.

³⁴⁷ *See De Young v. Brown*, 297 Or App 355, 360 n.3. (2019) (quoting *Chamberlain v. Myers*, 344 Or 605, 609 (2008)).

³⁴⁸ *See School Dist. No. 17 of Sherman Cty. v. Powell*, 203 Or 168, 179 (1955) (decided on other grounds).

³⁴⁹ ORS 221.621(3).

³⁵⁰ ORS 221.621(4).

³⁵¹ ORS 221.650.

³⁵² *Id.*