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# Incorporating a City in Oregon

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## INCORPORATING A CITY IN OREGON – A WHITE PAPER

This memorandum provides a brief explanation of the procedures for incorporating a city under Oregon law, and once incorporated, what source of law governs the form and function of city government. The answer to the first question is found under ORS 221.010 to 221.110, which sets out the procedure for incorporating a new city from unincorporated territory. The answer to the second question depends on whether a city has adopted a home rule charter. If there is no home rule charter, state law determines the form and function of city government, unless and until the voters of the city adopt a home rule charter. Both issues are explored below.

### I. Forming a City: Oregon’s state-prescribed method of incorporation

The Oregon Legislature first adopted the Incorporation Act in 1893.<sup>1</sup> Currently codified at ORS 221.010 to 221.110, the Incorporation Act sets out the procedure for incorporating a new city from unincorporated territory.<sup>2</sup> ORS 221.020 grants the citizens of Oregon living in an unincorporated area the right to incorporate a city if certain conditions are met: “The people of an area, no part of which lies in an incorporated city and in which [at least] 150 persons reside, may incorporate a city by approving at an election called and held according to ORS 221.031 to 221.061 a proposition provided by those sections for incorporating the city.” ORS 221.031 to 221.061, in turn, prescribe the procedures for gathering signatures and holding an incorporation election.

For example, ORS 221.035 requires the proponents of incorporation to file an economic feasibility statement with the county clerk along with the completed incorporation petition. If the county clerk determines that the incorporation petition meets statutory requirements, the clerk will order an incorporation election.<sup>3</sup> At that election, the voters will decide whether to incorporate and choose “five city council members for the proposed city[.]”<sup>4</sup> Following the election, the county clerk will proclaim the results of the incorporation election and, if the results favor incorporation, which candidates for city council were elected.<sup>5</sup> Assuming the return favored incorporation, the five new city council members take office within 10 days of the county clerk’s proclamation of the results of the election.

The process for establishing a new city under state law is quite involved, because of this, the League of Oregon Cities published a guide to incorporation to help make sense of the process.<sup>6</sup>

### II. Other Methods of Incorporation

Examining statutory incorporation procedures raises an important question: Can a new city in Oregon be incorporated only under state law? The short answer is likely “yes.” This section will briefly discuss, however, two other means of incorporation; one of which is no longer used in Oregon and one which may or may not be valid.

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<sup>1</sup> See The 1893 Incorporation Act; ORS Chapter 221.

<sup>2</sup> A new city can also be created through the consolidation of existing cities, the consolidation of an existing city and unincorporated territory, or both. See ORS 222.210 to 222.310.

<sup>3</sup> ORS 221.040(3).

<sup>4</sup> ORS 221.050(1).

<sup>5</sup> ORS 221.050(4).

<sup>6</sup> See League of Oregon Cities, *Incorporation Guide: City Incorporation in Oregon* (June 2017), [https://www.orcities.org/download\\_file/1067/0](https://www.orcities.org/download_file/1067/0).

According to a prominent treatise on municipal law, municipal corporations can be created in one of three ways: (1) through a special act of the a legislature; (2) through a general law governing incorporation; or (3) through the adoption of a home rule charter.<sup>7</sup> As the following sections explain, municipal corporations are no longer created through special legislation, at least in Oregon, and it is not entirely clear whether incorporation through adoption of a home rule charter is permissible. It is likely that the only method of incorporation currently permissible is through the general incorporation statute.

### A. *Special Legislation*

From the colonial era through the Gilded Age, cities in the United States were created through special legislation.<sup>8</sup> That is, a territorial or state legislature would create a new municipal corporation (whether city, port, water district, etc.) by enacting a bill that both created the new corporation and acted as the corporation’s charter. If the citizens of the state or territory wanted to incorporate a city, they had to lobby the legislature to do so on their behalf. Many Oregon cities were originally created via special legislation.<sup>9</sup>

For example, the Legislative Assembly of the Oregon Territory incorporated the city of Portland in 1851.<sup>10</sup> This legislation also outlined the structure of Portland’s government<sup>11</sup> and vested the city council with certain powers and duties.<sup>12</sup> Likely because municipal corporations were directly created by state and territorial legislatures, the prevailing legal theory of the time posited that cities and other local governments were simply subordinate departments of the state. Indeed, the United States Supreme Court declared that apart from state constitutional protections, “municipalities have no inherent right of self-government which is beyond the legislative control of the state.”<sup>13</sup>

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<sup>7</sup> Eugene McQuillin, 1 *The Law of Municipal Corporations*, § 3.35 (3d ed 1998) (hereafter “McQuillin”).

<sup>8</sup> McQuillin, § 3.36 (“Originally, in this country, the power to create municipal corporations was always exercised by a special act of the legislature.”).

<sup>9</sup>Examples include the following: the City of Adams (see Act of February 5, 1903 (SB 76)); the City of Ontario (see Act of February 13, 1903 (HB 236)); and the City of Stayton (see Act of February 2, 1903 (SB 28)).

<sup>10</sup> See A Bill to Incorporate the City of Portland In Washington County, HB 29 (Jan 14, 1851), available at <http://efiles.portlandoregon.gov/Record/3672705/>.

<sup>11</sup> For example, the governing body of the new city consisted of “one mayor, one recorder, and five councilmen[.]” *Id.* at § 2.

<sup>12</sup> Section 13 granted the city council the power to “license, or prohibit, shows and exhibitions,” in addition to the power to “levy a tax upon the real estate and personal property, subject to taxation for territorial and county purposes, within the limits of said corporation[.]” *Id.* § 13.

<sup>13</sup> *City of Trenton v. New Jersey*, 262 US 182, 187 (1923). The Court went on to state that “[a] municipality is merely a department of the state, and the state may withhold, grant or withdraw powers and privileges as it sees fit. However great or small its sphere of action, it remains the creature of the state exercising and holding powers and privileges subject to the sovereign will.” *Id.*

See also *Hunter v. City of Pittsburgh*, 207 US 161, 178-79 (1907) (declaring that municipal corporations are mere “convenient agencies” of the state). It should be noted that some scholars reject the Hunter/Trenton doctrine and argue that the federal constitution does indeed offer substantive protections for cities qua cities. They typically find that protection in the Tenth Amendment, which reserves powers to the states “or to the people.” See Jake Sullivan, *The Tenth Amendment and Local Government*, 112 *Yale LJ*, 1935 (2003); see also David J. Barron, *A Localist Critique of the New Federalism*, 51 *Duke LJ* 377 (2001) (setting out a federalism versus localism inquiry); Jay S. Bybee, *The*

Thus, each municipal corporation depended on the state legislature to enact and amend its charter, and municipal corporations enjoyed only those powers and privileges granted by the state.<sup>14</sup>

## **B. *Special Legislation Abolished***

Not surprisingly, the special-legislation model resulted in a patchwork of incongruous legislation and common law that more often reflected political cronyism than reasoned policymaking.<sup>15</sup> Further, special legislation had the effect of placing conditions on local populations without the consent or input of the local municipal authorities or inhabitants. Partly in response to those inequities and coupled with a growing populist political movement, voters in many states began to push for more local control over local affairs.<sup>16</sup> In Oregon, the Legislative Assembly enacted and amended municipal charters until 1906, the year the voters of the state approved the home rule amendments to the Oregon Constitution. First, Article XI, Section 2, abolished the authority of the Legislature to enact or amend municipal charters by special legislation:

“Corporations may be formed under general laws, but shall not be created by the Legislative Assembly by special laws. The Legislative Assembly shall not enact, amend or repeal any charter or act of incorporation for any municipality, city or town. The legal voters of every city and town are hereby granted power to enact and amend their municipal charter, subject to the Constitution and criminal laws of the State of Oregon[.]”

Second, Article IV, Section 1(5) extended initiative and referendum powers “to the qualified voters of each municipality and district as to all local, special and municipal legislation of every character in or for their municipality or district.”<sup>17</sup> Taken together, Article XI, Section 2, and Article IV, Section 1(5), “allow the people of a locality to decide upon the organization of and the scope of its

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*Tenth Amendment Among the Shadows: On Reading the Constitution in Plato’s Cave*, 23 Harv JL & Pub Pol’y 551 (2000) (exploring ways in which to understand the Tenth Amendment in the context of American federalism).

<sup>14</sup> That principle is often called “Dillon’s Rule,” named after Iowa Supreme Court justice, and later federal judge, John F. Dillon. Dillon wrote an influential treatise on municipal law in which he argued that cities lacked inherent lawmaking powers. See 1 John F. Dillon, *The Law of Municipal Corporations*, § 9(b), at 93 (2d ed 1873). In Oregon, the courts neither uniformly nor slavishly followed Dillon’s Rule. In fact, some late-nineteenth century Oregon cases took an expansive view of municipal authority, despite the absence of a constitutional home rule guarantee. See Paul A. Diller, *The Partly Fulfilled Promise of Home Rule in Oregon*, 87 Or L Rev 939, 943 & nn 20-21 (2008). It is true, however, that only the state legislature had the power to incorporate a city and amend a city charter, and the Oregon Supreme Court formally endorsed Dillon’s Rule in 1882. See *City of Corvallis v. Carlile*, 10 Or 139 (1882).

<sup>15</sup> The special legislation model of city-making had another practical consequence: tort liability. Oregon courts took the view that because counties were created by general law, county governments were not liable for defective roads and streets unless a statute conferred a duty on the county. In contrast, the corporate charter of a city placed a duty on the city to maintain its streets in good repair, unless the legislature specifically lifted that duty. See *Templeton v. Linn County*, 22 Or 313, 320 (Bean, J., concurring) (noting the distinction between county and city liability); see also *Horton v. OHSU*, 359 Or 168 188-91 (2016) (describing the difference between city and county liability in the context of the remedy clause, Article I, Section 10, of the Oregon Constitution).

<sup>16</sup> The populist drive in Oregon was largely led by William Simon U’Ren. U’Ren was instrumental in establishing the “Oregon System” of initiative and referendum, local home rule, and the popular election of U.S. senators. See generally Steven L Piott, *GIVING VOTERS A VOICE: THE ORIGINS OF THE INITIATIVE AND REFERENDUM IN AMERICA* (1995); Lincoln Steffens, *UPBUILDERS* (1st ed 1905).

<sup>17</sup> Or Const, Art IV, § 1(5).

powers under its charter without having to obtain statutory authorization from the legislature, as was the case before the amendments.”<sup>18</sup> The people of a municipality no longer had to lobby the state Legislature—and grapple with special interests in Salem—to amend their municipal charter in order to confront local policy issues.

Note that neither Article XI, Section 2, nor Article IV, Section 1(5), use the term “home rule,” and neither confers substantive lawmaking authority on city governments or their citizens. Rather, the amendments prevent the state legislature from enacting or amending municipal charters and free cities from the burden of seeking state approval before amending their charters. What that means, in practice, is that cities possess substantial lawmaking authority independent of the state. The contours of home rule authority and the precise relationship between city and state government have evolved over the last 100 years, primarily through judicial interpretation of the home rule, initiative, and referendum amendments.<sup>19</sup> For purposes of this memorandum, however, it is sufficient to recognize that, since 1906, the state Legislature no longer has the authority to incorporate a new municipality or amend a municipal charter through the passage of special legislation.

### **C. General Laws of Incorporation**

Since 1906, new cities in Oregon have been incorporated pursuant to state law, either under the Incorporation Act of 1893 or the modern method of incorporation codified at ORS 221.010 to 221.110. These are general acts of the legislature, meaning they have general applicability across the entire state. Therefore, they do not violate Article XI, Section 2, of the Oregon Constitution, which prohibits the legislature from enacting or amending municipal charters via special law, applicable only to one municipality or one part of the state.<sup>20</sup>

### **D. Adoption of a Home Rule Charter**

As noted above, Article XI, Section 2, of the Oregon Constitution, grants to the “legal voters of every city and town” the “power to enact and amend their municipal charter[.]” It is clear that Article XI, Section 2, prohibits the state legislature from enacting or amending a city’s charter, and it is equally clear that the voters of an existing city, once incorporated, can adopt their own home-rule charter. What is less clear is whether Article XI, Section 2, permits a group of citizens living in an unincorporated area to adopt a home rule charter first, thereby establishing a new city, *instead* of following the incorporation process outlined under state law. The constitutional text offers conflicting clues. On one hand, Article XI, Section 2, states that the “Legislative Assembly shall not enact, amend or repeal any charter or act of incorporation for any municipality, city or town.” That language suggests that only voters can establish a city—presumably, apart from the incorporation procedure under state law. However, Article XI, Section 2, goes on to state that the “legal voters of *every city and town* are hereby granted power to enact and amend their municipal

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<sup>18</sup> *LaGrande/Astoria v. PERB*, 281 Or 137, 142, *adh’d to on recons*, 284 Or 173 (1978).

<sup>19</sup> For a more detailed look at home rule in Oregon, see the League’s publications on home rule, including *The Origins and Evolution of Home Rule in Oregon*, (2017), [https://www.orcities.org/download\\_file/144/0](https://www.orcities.org/download_file/144/0)

<sup>20</sup> The Oregon Supreme Court described a general law as a law “by which all person or localities complying with its provisions may be entitled to exercise powers, rights and privileges conferred.” *Straw v. Harris*, 54 Or 424, 432 (1909). A special law, on the other hand, “is one conferring upon certain individuals or citizens of a certain locality rights and powers or liabilities not granted or imposed upon others similarly situated[.]” *Id.*

charter [.]” That language presupposes that the “voters” empowered to enact a municipal charter already reside in a “city” or “town.”<sup>21</sup>

No Oregon court has addressed the question whether a group of citizens can simply adopt a home-rule charter as a means of incorporation. The better interpretation is likely that the state legislature retains plenary authority over the incorporation process, as expressed in the provisions under ORS 221.010 to ORS 221.110. The right to adopt a home-rule charter, as guaranteed by Article XI, Section 2, then arises *after* the city is duly incorporated. But the matter is not free from doubt.

### **III. The Form and Function of City Government: Statutory Authority versus Home Rule Authority**

The preceding section outlined procedures for establishing a municipal corporation under Oregon law and raised the question whether a group of citizens could enact a home-rule charter apart from statutory procedures. The answer is not clear. This section assumes that all cities in Oregon are incorporated pursuant to state law. What body of law governs the form and function of a city after the city is incorporated? The answer depends on whether the voters of the city adopt their own charter.

#### **A. City Governance Under State Law**

State law not only sets out the procedures for incorporating a new city, it also provides a legal basis for the city to function as a city—that is, the legal authority to adopt ordinances, appoint staff, and raise revenue. Put another way, a new city need not adopt a charter to enact municipal legislation, as state law itself provides cities that authority.<sup>22</sup> If a city so chooses, state law can serve as the city’s “charter” indefinitely. Cities can, however, adopt their own charters under the Oregon Constitution. Doing so enables city government to select from a wide range of policy choices and prescribe a different form of government, enact procedural rules, and pass municipal legislation.

#### **B. City Governance Under a Home Rule Charter**

Rather than relying on state law to prescribe the form and function of its government, a city can adopt a home-rule charter under the Oregon Constitution. As the Oregon Supreme Court recently explained: “Home rule is the authority granted to Oregon’s cities by Article XI, Section 2, and Article IV, Section 1(5), of the Oregon Constitution—adopted by initiative petition in 1906—to

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<sup>21</sup> Article XI, Section 5, of the Oregon Constitution provides: “Acts of the Legislative Assembly, incorporating towns, and cities, shall restrict their powers of taxation, borrowing money, contracting debts, and loaning their credit.” At first blush, Article XI, Section 5, seems to clearly state that the legislature has the authority to incorporate a city. However, Article XI, Section 5, was part of the original Oregon Constitution of 1857. At that time, all cities and towns in Oregon were incorporated through special legislation. Further inquiry reveals that Article XI, Section 5, is less concerned with *who* can incorporate a city than with ensuring municipal corporations did not become so indebted as to make them insolvent. See Charles Henry Carey, ed., *The Oregon Constitution and Proceedings and Debates of the Constitutional Convention of 1857*, 267-70 (1926).

<sup>22</sup> See *Davidson Baking Co. v. Jenkins*, 216 Or 51, 58-59 (1959) (holding that cities incorporated under the general incorporation statutes need not adopt a charter, as these statutes themselves grant incorporated cities the power to enact municipal legislation); *State ex rel. Cutlip v. Common Council of City of North Bend*, 171 Or 329 (1943) (same).

regulate to the extent provided in their charters.”<sup>23</sup> As noted above, Article XI, Section 2 provides, in part:

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

Further, Article IV, Section 1(5) provides, in part:

“The initiative and referendum powers reserved to the people by this Constitution, are hereby further reserved to the legal voters of municipalities and districts. The manner of exercising said powers shall be prescribed by general laws, except that cities and towns may provide for the manner of exercising the initiative and referendum powers as to their municipal legislation.”

Taken together, those constitutional provisions represent a “continuous offer” of “all powers properly belonging to municipal government.”<sup>24</sup> To “accept” that constitutional offer, a city can adopt a home rule charter, whereby the city declares that it possesses all powers that the constitutions, statutes, and common law of the United States and Oregon expressly or impliedly grant to city governments.<sup>25</sup> Once a city has adopted a home rule charter, the city is free to prescribe its own form of government, set rules for how its government operates, and adopt municipal legislation. Thus, for example, a city could choose to have a seven-member council, hire a city manager, assess a privilege tax on public utilities, or adopt a ban on public drinking.

Adopting a home rule charter allows a city to adopt a wide range of municipal legislation, provided that such legislation is not expressly or impliedly preempted by state law. To determine whether municipal legislation is valid, the first question is whether such legislation is authorized by the city’s charter. If so, the second question is whether the municipal legislation in question contravenes state or federal law. To determine whether municipal legislation contravenes state law, the courts will ask “whether the local rule in truth is incompatible with the legislative policy, either because both cannot operate concurrently or because the legislature meant its law to be exclusive.”<sup>26</sup> Not surprisingly, whether state law preempts local law—either expressly or impliedly—is an ongoing area of dispute and is beyond the scope of this memorandum.<sup>27</sup>

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<sup>23</sup> *Rogue Valley Sewer Services v. City of Phoenix*, 357 Or 437, 445 (2015).

<sup>24</sup> See *LaGrande/Astoria*, 281 at 142.

<sup>25</sup> For example, the League’s Model City Charter suggests the following provision: “The city has all powers that the constitutions, statutes and common law of the United States and Oregon expressly or impliedly grant or allow the city, as fully as though this charter specifically enumerated each of those powers.” See League of Oregon Cities, Model Charter for Oregon Cities, Section 2.1 (2018), available at [https://www.orcities.org/download\\_file/605/0](https://www.orcities.org/download_file/605/0).

<sup>26</sup> *LaGrande/Astoria*, 281 Or at 148.

<sup>27</sup> See, e.g., *Thunderbird Mobile Club, LLC v. City of Wilsonville*, 234 Or App 457 (2010); *Gunderson, LLC v. City of Portland*, 352 Or 648 (2012); *Rogue Valley Sewer Services*, 357 Or at 437; *Northwest Natural Gas Co. v. City of Gresham*, 359 Or 309 (2016).

#### **IV. Conclusion**

In sum, Oregon statutory law grants the citizens of Oregon the right to incorporate a city under certain conditions. The law also prescribes the process for incorporating a city and dictates how the new city's government will function. Under the Oregon Constitution, however, cities can adopt their own charters and thereby prescribe their own form of government, procedures procedural rules, and municipal legislation, subject to constitutional and statutory limits.