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This opinion responds to questions from the Department of Consumer and Business Services (DCBS) about municipalities' use of private entities to administer and enforce the building code.

QUESTIONS AND SHORT ANSWERS

QUESTION 1

Does the Oregon Constitution limit the ability of public bodies to hire private entities to administer and enforce governmental power?

SHORT ANSWER

Yes. The nondelegation doctrine provides that public bodies exercising governmental power granted by the legislature must retain sufficient control to guard against the unaccountable exercise of that power.[1]

QUESTION 2

Does the nondelegation doctrine prevent municipalities from hiring private entities to administer and enforce at least some of the duties of a building inspection program?

SHORT ANSWER

No. The nondelegation doctrine does not inherently prohibit the hiring of private entities to perform governmental functions. It does not inherently prohibit municipalities from hiring private entities to perform at least some of the duties of a building inspection program, as long as adequate safeguards exist.

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[1] Because we have been asked this question in the context of a comprehensive statutory scheme enacted by the state legislature, we do not address what standard applies to ordinances enacted by local governments acting solely under home rule.

QUESTION 3

What factors are relevant to the nondelegation analysis when hiring private entities to perform governmental functions?

SHORT ANSWER

The level of decisionmaking reserved to the public body, the oversight exercised by the public body, the degree of self-interest of the private entity, the specificity of standards governing the private entity's conduct, the character of the governmental functions being performed, the ability of the public body to hire and fire the entity, and the extent of review allowed.

QUESTION 4

Does the current statutory scheme permit a municipality to hire a private entity to administer and enforce an entire building inspection program?

SHORT ANSWER

No. The statutory scheme allows a municipality to administer and enforce a building inspection program, and does not expressly or impliedly allow the administration and enforcement to be entirely contracted out.

DISCUSSION

I. Background

The director of DCBS has general supervision over the administration and enforcement of the state building code.[2] The director may allow municipalities to administer and enforce a local building inspection program.[3] When a municipality assumes this role, it must "appoint a person to administer and enforce the program, who shall be known as the building official."[4] The building official "attend[s] to all aspects of code enforcement, including the issuance of all building permits."[5] Building inspection programs also involve the use of specialty inspectors and plan reviewers.[6] Reviewers ensure that any plans comply with the code and local

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[2] ORS 455.100; ORS 455.110(1).

[3] ORS 455.148(1)(a); ORS 455.150(1). As relevant here, "municipality" refers to "a city, county[,] or other unit of local government otherwise authorized by law to administer a building code." ORS 455.010(5).

[4] ORS 455.148(3); ORS 455.150(3). Municipalities are also allowed to combine in the appointment of a single building official. ORS 455.148(3); ORS 455.150(3).

[5] ORS 455.148(3); ORS 455.150(3).

[6] ORS 455.117(3)(a) (referring to building officials, inspectors, and plan reviewers).

regulations;[7] inspectors ensure that the work performed complies with the building code and the approved plans.[8] The building official retains final decisionmaking authority to issue permits,[9] issue certificates of occupancy,[10] and approve inspections.[11] The official also has final decisionmaking authority to allow alternate methods,[12] and to approve modifications and waivers of building code provisions in individual cases.[13]

In practice, some municipalities that administer and enforce inspection programs have contracted with private entities (such as limited liability companies) to provide all program functions. This has led to questions from DCBS broadly as to the constitutional principle constraining such delegations, and then more narrowly as to what the current statutory scheme allows. However, we have not been asked to opine on the constitutionality or validity of any statute or on any specific municipality's building inspection program.

II. Nondelegation Doctrine

The Oregon Court of Appeals has held that the Oregon Constitution prohibits delegating governmental authority to private individuals absent "procedural safeguards to protect against the unaccountable exercise of governmental power."[14] In ***Corvallis Lodge No. 1411 v. OLCC***, the court struck down an administrative rule allowing commercial liquor establishments to determine facts that affected whether private clubs could serve the public.[15] The court explained that delegating this authority to self-interested competitors of the private clubs would force the clubs "to confront that potentially arbitrary and unresponsive exercise of governmental authority."[16] The court emphasized that absent procedural safeguards, the private clubs had no way to make the commercial liquor establishments accountable for this exercise of governmental authority.[17]

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[7] *See Oregon Structural Specialty Code* § 107.3 (2014) (describing examining the submitted documents to determine whether the proposed construction complies with the code).

[8] *See id.* § 202 at 42 (defining "special inspector" by referencing "special inspection," which describes inspecting construction to ensure compliance with the code and the approved plans).

[9] *E.g.*, *id.* § 105.3.1 (reserving to the building official the power to issue a permit).

[10] *E.g.*, *id.* § 111.1 (generally not permitting use or occupancy until the building official has issued a certificate of occupancy).

[11] *E.g.*, *id.* § 110.6 (not allowing work to be done without obtaining the building official's approval).

[12] *Id.* § 104.11.

[13] *Id.* § 104.10.

[14] ***Corvallis Lodge No. 1411 v. OLCC***, 67 Or App 15, 22, 677 P2d 76 (1984).

[15] *Id.* at 20.

[16] *Id.* at 20–21.

[17] *Id.* The court also noted that the focus on procedural safeguards replaced earlier courts' focus on the need for legislative standards. *Id.* at 19. Some ambiguity remains as to how essential legislative standards remain to the analysis. *See, e.g.*, ***City of Damascus v. Brown***, 266 Or App 416, 448–51, 337 P3d 1019 (2014) (applying two separate lines of nondelegation cases, one dealing with legislative standards and the other dealing with procedural safeguards). At a minimum it seems clear that standards are one factor relevant to the analysis. *E.g.*, ***Meyer v. Lord***, 37 Or App 59, 65, 586 P2d 367 (1978) ("The

The court based its decision on a line of cases dealing with constitutional provisions vesting the power to make laws in the legislature.[18] But the court framed those cases as more generally applying to delegating any governmental function—at least where the legislature was the initial source of authority.[19]

A subsequent decision by that court similarly applied this analysis to a delegation of the administrative power to enforce the law. In ***Qwest Corp. v. Public Utility Commission***, the court upheld a commission rule that allowed self-interested owners of utility poles to initially assess sanctions on licensees that used the poles.[20] The court explained that the commission—a public body—ultimately decided whether sanctions could be imposed, and that the pole owner was only initiating, not deciding, the proceeding.[21]

The same analysis applies when a public body hires or appoints a private party to perform governmental functions. In ***Medford Firefighters Assn. v. City of Medford***, the court upheld the use of an arbitrator appointed by the Employment Relations Board to issue a binding decision to resolve a dispute between the city and union over an employment agreement.[22] The court noted that the arbitrator was not permitted to have any personal interest in the outcome, and that any decision was constrained by specific factors laid out by the legislature.[23]

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existence of *standards* is relevant in assessing the validity of delegation, but the existence of *safeguards* for those whose interests may be affected is determinative." (italics in original)).

[18] *See* ***Corvallis Lodge***, 67 Or App at 19–20. Those cases indicate that the relevant provisions are Article III, section 1, Article IV, section 1, and Article I, section 21. ***Foeller v. Housing Authority of Portland***, 198 Or 205, 263–64, 256 P2d 752 (1953).

Article IV, section 1(1), provides,

> The legislative power of the state, except for the initiative and referendum powers reserved to the people, is vested in a Legislative Assembly, consisting of a Senate and a House of Representatives.

Article III, section 1, provides,

> The powers of the Government shall be divided into three separate branches, the Legislative, the Executive, including the administrative, and the Judicial; and no person charged with official duties under one of these branches, shall exercise any of the functions of another, except as in this Constitution expressly provided.

And Article I, section 21, provides, in part, that "nor shall any law be passed, the taking effect of which shall be made to depend upon any authority, except as provided in this Constitution."

[19] *See* ***Corvallis Lodge***, 67 Or App at 19. This analysis applies also to the state legislature's grant of authority to local governments. *See, e.g.*, ***Warren v. Marion County***, 222 Or 307, 313–15, 353 P2d 257 (1960) (applying analysis to building code administered by county government under an earlier statutory scheme).

[20] 205 Or App 370, 381–85, 135 P3d 321 (2006).

[21] *Id.* at 384–85.

[22] 40 Or App 519, 521, 524–27, 595 P2d 1268 (1979).

[23] *Id.* at 526–27 (also noting the availability of judicial review).

The court's decision in ***City of Damascus v. Brown*** further illustrates the concerns with delegations to private parties. There, the court held unconstitutional a statute allowing certain landowners to determine whether their own properties could be withdrawn from the city boundaries.[24] The court emphasized the self-interest of the landowners in the decision to withdraw, and the lack of any meaningful procedural safeguards.[25]

We think the same nondelegation analysis applies whenever a public body contracts with a private entity to perform a governmental function. The cases identify a concern with self-interested actors exercising governmental authority without governmental accountability. That same concern exists whenever for-profit private entities, instead of presumptively disinterested government officials and employees, wield governmental power. Such delegations, absent sufficient safeguards, risk allowing unaccountable private entities to exercise governmental power to maximize their profits at public expense.

The relevant test is whether a public body exercises sufficient control to adequately safeguard against arbitrary and unaccountable exercise of governmental power.[26] This analysis will be case specific and depend on the character of the governmental function at issue.[27] For example, the analysis generally will be stricter when delegating government's coercive power to regulate certain activities, as opposed to delegating government's power to provide public services.

III. Applying the Nondelegation Doctrine

The relevant nondelegation analysis does not prevent a private entity from performing some role in administering and enforcing a statutory scheme. The Court of Appeals has observed that "[a]s a general rule, the delegation of a fact-finding function to private individuals is an acceptable procedure."[28] And as discussed above, that court allowed a state board to appoint a private arbitrator to issue a binding decision to resolve a local government's dispute with a union over the union members' terms of employment.[29]

Key differences exist between the private entities at issue in ***Damascus*** and ***Corvallis Lodge*** and private entities that operate under adequate safeguards. The landowners in ***Damascus*** and the commercial liquor establishments in ***Corvallis Lodge*** were by definition selected to exercise governmental authority *because of* their self-interest: the commercial liquor establishments were selected based on their proximity to a competitor that wished to host an

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[24] 266 Or App at 450–51.

[25] *Id.*

[26] *See* ***Bercot v. Ore. Transportation Comm.***, 31 Or App 449, 453, 570 P2d 1195 (1977) ("'The criterion for determining the validity of a delegation should be the totality of protection against arbitrariness.'" (quoting 1 Davis, *Administrative Law Treatise* §§ 2.00–2.05 (Supp 1970))); 49 Op Atty Gen 254, 265 (2000) (concluding that a public charter school contracting out operations to a for-profit, private entity was required to "maintain a right of control over delegated governmental functions and provide safeguards for those affected by the contractor's actions").

[27] ***Warren***, 222 Or at 314.

[28] ***Corvallis Lodge***, 67 Or App at 20 n 3.

[29] ***Medford Firefighters***, 40 Or App at 524–27.

event, and the private landowners were authorized to make decisions only about their own land. In addition, the liquor establishments and landowners were not subject to any meaningful governmental control or safeguards.

In the building-code context, we see nothing that would inherently prohibit municipalities from hiring private entities to perform at least some functions, as long as adequate safeguards prevent these entities from exercising governmental authority in a self-interested and arbitrary way.

The factors that will generally be relevant to the nondelegation analysis are the level of decisionmaking reserved to the public body,[30] the oversight exercised by the public body, the degree of self-interest of the private entity,[31] the specificity of standards governing the private entity's conduct,[32] the character of the governmental functions being performed,[33] the ability of the public body to hire and fire the entity, and the extent of review allowed.[34]

In the building-code context, the nondelegation analysis will be relatively strict, as the legislature has delegated the coercive power to forbid persons from constructing new buildings or from altering existing buildings. We can best illustrate the types of safeguards relevant to the nondelegation analysis by looking to the current statutory scheme, which allows municipalities to contract with or designate private inspectors and plan reviewers—as distinct from building officials—to perform some building inspection tasks.[35] Businesses that employ inspectors and plan reviewers can also be so used.[36]

Significantly, as discussed further below, the current statutes do not permit municipalities to contract out an entire building inspection program to private entities. This in effect reserves final decisionmaking authority and oversight to the public body through its building official.[37] For example, the official is not required to accept any inspection, plan, or plan review that does

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[30] ***Qwest***, 205 Or App at 385 (emphasizing that the public body resolved disputed issues of facts); ***Corvallis Lodge***, 67 Or App at 21 (suggesting fewer concerns if "the agency itself were to determine the availability of Class A facilities on the basis of information it gathers from Class A licensees" or if "the agency itself makes the ultimate choice").

[31] ***Medford Firefighters***, 40 Or App at 525 ("Discriminatory action is unlikely because the arbitrator may have no personal interest in the outcome * * *.).

[32] *Id.* at 525–26 (less concern with delegating to arbitrator bound to apply specific factors laid out by legislature).

[33] ***Warren***, 222 Or at 314.

[34] *Id.* at 315 (noting the availability of an appeal procedure conducted by a separate administrative body); ***Medford Firefighters***, 40 Or App at 526 (less concern with delegating to arbitrator where judicial review of arbitrator's decision was available); ***Bercot***, 31 Or App at 452 (noting availability of review under the Administrative Procedures Act).

[35] *See* ORS 455.457 (requiring the director to establish a licensing system for these inspectors and reviewers); ORS 455.148(9) (requiring municipalities to recognize the work of these persons).

[36] ORS 455.457.

[37] This official is of course a public official subject to the constraints of the Oregon Government Ethics Code. *See* ORS 244.040(1) (generally prohibiting public officials from using their position to obtain financial gain, including financial gain for an associated business).

not meet the requirements of the state building code, even if the private inspector or reviewer approved it.[38] And the private inspectors and reviewers are not given any rulemaking authority that would allow them to prospectively set any standards for how the code is enforced.[39] That is, their governmental authority is limited relative to that of the building official.

In addition, permit applicants may appeal decisions made by a building official to DCBS or to a specialty code chief inspector at DCBS, depending on the type of decision.[40] This review offers a further check in situations where the building official's decision is based on information provided by the private inspectors and reviewers.

Furthermore, extensive standards and governmental oversight exist to constrain these entities' exercise of authority: First, these private inspectors and reviewers are charged with enforcing a detailed regulatory scheme that was adopted by the DCBS director, a government official.[41] Second, they are subject to quality control procedures developed by the director.[42] Third, they must meet minimum training and experience standards developed by the director.[43] Fourth, they are prohibited from involvement with any project they, a relative, or employer have a financial interest in or business affiliation with.[44] And fifth, the municipality, not the private inspectors and reviewers, is charged with developing the fee schedule for charging permit applicants.[45]

IV. Current Statutory Scheme

ORS 455.148(1)(a) and ORS 455.150(1) both allow a municipality to assume the administration and enforcement of a building inspection program.[46] These provisions do not on their face permit the municipalities to contract with a private entity, such as a limited liability company, to provide all the functions performed by the building official, inspectors, and plan reviewers. We first note that the current statutes do not expressly authorize such a

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[38] ORS 455.148(9); 455.150(9).

[39] *See* ***Qwest***, 205 Or at 384 (noting that the Public Utility Commission had not delegated any rulemaking authority to private parties).

[40] ORS 455.475(1)–(2).

[41] *See, e.g.*, *Oregon Structural Specialty Code* (laying out a detailed code governing the construction, reconstruction, alteration, repair, and installation of materials of equipment in covered buildings and structures).

[42] ORS 455.461(1).

[43] ORS 455.720(1)(a).

[44] ORS 455.459(1).

[45] ORS 455.210(3).

[46] ORS 455.150 addresses municipalities that assumed the administration and enforcement of a building inspection program prior to January 1, 2002, while ORS 455.148 addresses municipalities that assumed a program after that date. *See* ORS 455.150(1).

subdelegation. Instead, they specify that it is the *municipality* that assumes the program,[47] and that the municipality has responsibility for the program.[48]

The general rule in Oregon is that while "there is no general legal proscription against the retransmission of authority by government agencies," the authority to subdelegate needs to be expressly authorized, or impliedly authorized if there is a reasonable basis to do so.[49] We note that this analysis is distinct from the nondelegation analysis we discussed above. The nondelegation analysis applies to constitutional limitations on the ability to delegate governmental functions, while the subdelegation analysis applies to interpreting statutes to discern legislative intent.[50]

The Oregon Supreme Court has previously rejected an attempt by a public body to abdicate its function: in ***Voth v. Fisher***, the court concluded that an arbitration board could not delegate its decisionmaking to the voters.[51] The court explained that the board had been expressly granted the authority to decide the issue submitted to it, and could not abdicate its function by delegating this power to others.[52]

We see a similar problem here with a municipality's attempt to contract out an entire program, without specific statutory authorization.[53] While the ***Voth*** court suggested that the prohibition on subdelegating power was limited to discretionary or quasi-judicial functions, Oregon courts have not clearly defined the scope of a discretionary function. At a minimum, though, it refers to using judgment to decide whether or not to exercise a governmental power.[54]

A municipality, acting through its appointed building official, exercises several types of discretionary authority. For example, the building official can waive the requirement to submit building plans and calculations if "the nature of the work applied for is such that reviewing of plans is not necessary to obtain compliance with th[e] code."[55] The official can also generally

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[47] ORS 455.148(1)(a); ORS 455.150(1).

[48] ORS 455.148(7).

[49] ***Warren***, 222 Or at 320.

[50] For example, in ***Warren v. Marion County***, the Oregon Supreme Court applied these analyses in distinct ways. The court first applied the constitutional analysis to determine that the legislative delegation of the power to establish a building code was valid. *Id.* at 311–15 (discussing safeguards as the key factor in the analysis). The court then applied the subdelegation analysis to determine that the enabling statute authorized the governing body to delegate the task of establishing appeal procedures. *Id.* at 315–21 (discussing what was "reasonable to assume that the legislature intended").

[51] 214 Or 590, 595, 407 P2d 848 (1965).

[52] *Id.*

[53] Of course, having statutory authorization to subdelegate is distinct from being constitutionally permitted to delegate.

[54] *See* 28 Op Atty Gen 208, 210 (1958) ("[I]t is clear that a power that involves the exercise of discretion cannot be delegated * * * .); *Black's Law Dictionary* (10th ed 2014) (defining "discretionary power" similarly).

[55] *Oregon Structural Specialty Code* § 107.1.

grant modifications in individual cases if certain requirements are met, such as the modification complying with the intent and purpose of the code.[56] And the official can waive or modify the requirement for a site plan in certain circumstances, including "when otherwise warranted."[57]

While statutory context can in some instances support implied authority to subdelegate, the context here supports the opposite conclusion. The legislature has explicitly provided elsewhere that certain building-code functions *can* be contracted out to other entities. For example, if a county decides not to administer and enforce a building inspection program, the DCBS director is authorized to "contract with a municipality or other person or use such state employees or state agencies as are necessary to administer and enforce" the program.[58] And, as already discussed above, municipalities are expressly authorized to "contract with" properly licensed plan reviewers, specialty inspectors, and businesses that employ reviewers and inspectors.[59] Given that the legislature has specifically identified functions that can be contracted out, we find the omission of any authorization to contract out the entire program to be significant.

We conclude that the current statutes do not authorize a municipality to contract out its entire building inspection program to a private entity.

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[56] *Id.* § 104.10.

[57] *Id.* § 107.2.5.

[58] ORS 455.148(6); ORS 455.150(6).

[59] ORS 455.465(1)(b).