



STATE OF OREGON
LEGISLATIVE COUNSEL COMMITTEE

February 7, 2018

Representative Paul Holvey
900 Court Street NE H277
Salem OR 97301

Re: Municipal building officials and inspectors

Dear Representative Holvey:

You have presented us with questions regarding municipal use of nonemployees to administer and enforce municipal building inspection programs. Your questions and our answers are as follows:

1. Given the current situation in which the Building Codes Division has approved municipalities to administer and enforce the building inspection program under ORS 455.148 and 455.150, and knowing that some municipalities have no in-house credentialed building officials or inspectors, does this situation raise constitutional concerns regarding the delegation of authority to a private entity?

Your question concerns situations in which a municipality designates a private entity to carry out the functions of a building official or building inspector. A municipality may not constitutionally cede control over a municipal building inspection program to a private entity. However, a municipality may contract with a private party to receive personal services to assist municipal administration and enforcement of a program. The issue raised by your question is which of the two situations applies for building official services and building inspector services. Although our conclusion is not free from doubt, we believe that a municipality cannot constitutionally appoint a private entity to perform building official services for the municipality. We believe that a municipality may constitutionally contract with a private entity to provide building inspector services on behalf of the municipality.

Governmental powers may be either legislative or ministerial in nature. Powers that involve determining whether there is to be a law, and what the policy of the law should be, are legislative in nature and cannot be delegated. City of Damascus v. Brown, 266 Or. App 416 (2014). When the power consists of making a factual determination regarding whether a condition specified in the law exists, the delegate is exercising a purely ministerial function. A ministerial function, even if it involves some discretion, may be freely delegated to a governmental entity as long as the legislative body has fully expressed the legislative policy and there is an adequate system in place to remedy any misapplication of the law. Id. However, the issue is cloudier when a governmental entity appoints a private entity to act as agent for the governmental entity. A widely accepted legal principle of common law is that if a duty that is otherwise ministerial involves the exercise of discretion, the duty cannot constitutionally be delegated to a private entity. See, e.g., West v. Coos County, 115 Or. 409 (1925); County of Santa Clara v. Superior Court, 50 Cal 4th 35 (2010); Bunger v. Iowa High School Athletic

Association, 197 N.W.2d. 555 (Ia. 1972); Covington v. Covington Lodge No. 1, 622 S.W.2d. 221 (Ky 1981); Andy's Ice Cream v. City of Salisbury, 125 Md. App. 125 (1999); Hetherington v. McHale, 458 Pa. 479 (1974); FM Props. Operating Co. v. City of Austin, 22 S.W.3d 868 (Tx. 2000).

ORS 455.148 (3) provides in part:

(3) When a municipality administers a building inspection program, the governing body of the municipality shall, unless other means are already provided, appoint a person to administer and enforce the building inspection program, who shall be known as the building official. A building official shall, in the municipality for which appointed, attend to all aspects of code enforcement, including the issuance of all building permits.

Since ORS 455.150 (3) is essentially identical to ORS 455.148 (3), this opinion will not discuss ORS 455.150 (3) separately. When a municipality administers and enforces a building inspection program under ORS 455.148 or 455.150, the municipality is carrying out aspects of the state building code specialty codes adopted by rule by the Director of the Department of Consumer and Business Services. ORS 455.040 preempts a municipality from adopting local ordinances that relate to a matter encompassed by the state building code but provide different requirements. ORS 455.055 allows the director to establish uniform permit, inspection and certificate of occupancy requirements by rule. A building official may obtain a ruling on acceptability of materials and methods from the director, and the official is required to follow the ruling. The comprehensive state statutes and codes make many of the duties of a building official ministerial in nature. However, the requirement that a building official attend to all aspects of code enforcement implies that the building official will at times need to exercise discretion. The building official exercises authority over, and gives direction to, building inspectors. ORS 455.715 (3)(a). That supervisory function implies the ability to exercise discretion. ORS 455.737 (1) indicates the role of local building officials in reviewing inspector and plan reviewer qualifications. ORS 455.815 (4)(b) allows a building official determination to waive inspection of work performed by a master builder. We believe it likely that building officials have sufficient discretionary authority in administering and enforcing building programs and attending to all aspects of code enforcement to prevent municipalities from appointing a private entity as a building official.

We believe that the duties of a building inspector do not raise the same delegation concerns as the duties of a building official. The duty of a building inspector is to provide "routine enforcement" of one or more specialty codes or parts of specialty codes. ORS 455.715 (3)(a). The term "routine enforcement" does not indicate the power to exercise discretion. The duty of the building inspector is to determine whether an existing condition meets standards set out in a specialty code. The building inspector acts under the direction of the building official to provide routine enforcement and is not charged with the exercise of discretion. We believe that retaining a private party to act as an agent for the municipality in performing building inspections would not violate constitutional restrictions on delegation.

We also do not find any statutory requirement that a municipality have in-house building inspectors. ORS 455.152 (2)(b) provides that when the director reviews objections to a municipality's assumption of a building inspection program, the review process must include "[d]emonstration by the municipality that all building inspection program permits and services will be available, including any service agreements for carrying out building program services."

(Emphasis added.) It is a familiar principle of law that every grant of power carries with it the use and necessary means of its exercise. “To employ the means, necessary to an end, is generally understood, as employing any means calculated to produce the end, and not as being confined to those single means without which the end would be entirely unattainable.” Barrett v. Union Bridge Co., 117 Or. 566 (1926), quoting 2 Story, Const., section 1248.

2. If there are constitutional concerns, does House Bill 4086, as introduced, alleviate them? (HB 4086, as introduced, requires an in-house credentialed building official.)

Section 12 of HB 4086 would amend ORS 455.148 (3) to read, in part:

(3) When a municipality administers a building inspection program, unless otherwise provided under a charter described in ORS 203.710 to 203.770, the governing body of the municipality shall appoint an employee of the municipality to be the building official for the municipality. A building official shall be responsible for ensuring the administration and enforcement of all aspects of the state building code under the municipal building inspection program, including but not limited to the issuing of building permits and the exercising of supervision and control over, and giving direction to, the building inspectors who are employed by or otherwise designated to act on behalf of the municipality.

We believe that the duties of a building official are ministerial duties that may be properly delegated to a municipal employee. The Legislative Assembly has fully expressed its legislative policy and, under ORS 455.020 and 455.157, has put an adequate system in place to remedy any misapplication of the law. House Bill 4086, as introduced, properly delegates building official duties. We believe that the discretionary nature of building official duties likely prevents delegation of building official duties to a private party. House Bill 4086, as introduced, does not alter the discretionary nature of building official duties to allow delegation to a private party. The bill does require that the building official be an employee of the municipality, which would act to expressly prevent any unconstitutional delegation of building official discretion to a private party.

We concluded in our answer to question 1 that there is not a constitutional problem regarding the use of private building inspectors as agents of the municipality. That conclusion is based on the lack of discretion given to building inspectors. House Bill 4086, as introduced, does not confer any discretionary powers on building inspectors. House Bill 4086, as introduced, expressly allows the use of building inspectors who are not employees of the municipality. It is worth noting that HB 4086, as introduced, nonetheless strengthens the requirement that the building inspector be overseen by the building official. Section 4 of HB 4086 amends ORS 455.715 (3)(a) to define an inspector in part as being a person “acting under the supervision, control and direction of a building official.” Although that stronger language was inserted in part to guard against any antitrust problem, the new language also serves to reinforce that a building inspector does not exercise discretion.

3. If not, would an amendment that requires an in-house credentialed structural A-level inspector alleviate them?

Although we believe there is no problem with regard to building inspectors, any requirement that at least one inspector for a particular specialty code be in-house would clearly

eliminate any delegation question with regard to that individual inspector. It would not affect other inspectors, even if enforcing the same specialty code. However, if the in-house inspector were given supervisory power over the other inspectors, that arguably might strengthen the assertion that the other inspectors are not exercising discretion.

4. If not, would an amendment that requires an in-house credentialed structural A-level inspector, plumbing specialty code inspector and electrical specialty code inspector alleviate them?

Please see our answer to question 3.

5. If the municipality does not have any in-house credentialed building inspectors, does liability extend to the State of Oregon for actions taken by the private entity or does liability rest solely with the municipality?

We believe that the described situation would not cause greater liability for the municipality than would be true if the municipality used municipal employees as building inspectors. Neither do we believe that the described situation would create greater liability for the state. The Oregon Tort Claims Act (OTCA), ORS 30.260 to 30.300, makes a municipality liable both for the torts of municipal employees and the torts of municipal agents. The OTCA is intended to apply with regard to municipal agents only in the types of situations for which a private principal would be vicariously liable at common law. Vaughn v. First Transit, Inc., 346 Or. 128 (2009). The vicarious liability of a private principal at common law for the actions of its agent would depend on the scope of the authority given to the agent and the nature of the tort.

An agency relationship results when a person (the principal) manifests consent that another (the agent) act on behalf of the principal and be subject to control by the principal, and the agent consents to act in that manner. Id. The principal is responsible for the acts of the agent only if the acts are within the actual or apparent authority of the agent. Eads v. Borman, 351 Or. 729 (2012). Actual authority to perform an act may be express or implied. Implied authority is that which the principal actually intends the agent to have. It is often discerned by the nature of the task to be performed. Apparent authority exists when the principal engages in conduct that when reasonably interpreted would cause another to believe that the principal consents to the actions of the agent. Wiggins v. Barrett & Associates, 295 Or. 679 (1983).

Mere negligence of an agent in carrying out an assigned duty does not give rise to liability of the principal. The negligence must be related to the right of the principal to control the actions of the agent. Vaughn. To be liable for the torts of its agents, the principal must have intended or authorized the negligent manner in which the agent performed the duty. Eads. A misinterpretation of a valid law is immune from liability under the OTCA. Cruz v. Multnomah County, 279 Or. App. 1 (2016). Therefore, a municipality could be liable for the actions of a private building inspector only if the municipality, most likely through the building official, directed the private building inspector in bad faith to perform the inspection in a manner that resulted in harm.

We do not perceive any basis on which the vicarious liability of a municipality for the acts of its contracted private agent would attach to the state. A principal and agent relationship requires that the agent is asked to work on behalf of the principal and under the control of the principal. A private building inspector would be an agent of the municipality that elected to administer and enforce the state building code within its jurisdiction. The private building inspector would not be the agent of the state, so no state liability would attach.

A principal may be directly liable for its negligence in hiring an agent. Unless there is a special relationship or standard of care between the municipality and the building owner, negligence would exist if the harm actually incurred was a foreseeable outcome of hiring the private building inspector. See Fazzolari v. Portland School District No. 1J, 303 Or. 1 (1987). That municipal hiring decision would not be imputable to the state. Neither do we perceive how the status of a private building inspector versus a municipally employed building inspector would alter any duty under ORS 455.715 to 455.740 when reviewing the qualifications for issuance or renewal of a building inspector certificate. To the extent that a party might assert liability of the state for approving municipal assumption or continuation of a building inspection program that uses private building inspectors, we believe that decision by the state would be entitled to discretionary immunity under ORS 30.265 (6)(c). In short, we do not perceive a risk that the use of private building inspectors to act on behalf of a municipality would present any special risk of liability to the municipality or to the state.

The opinions written by the Legislative Counsel and the staff of the Legislative Counsel's office are prepared solely for the purpose of assisting members of the Legislative Assembly in the development and consideration of legislative matters. In performing their duties, the Legislative Counsel and the members of the staff of the Legislative Counsel's office have no authority to provide legal advice to any other person, group or entity. For this reason, this opinion should not be considered or used as legal advice by any person other than legislators in the conduct of legislative business. Public bodies and their officers and employees should seek and rely upon the advice and opinion of the Attorney General, district attorney, county counsel, city attorney or other retained counsel. Constituents and other private persons and entities should seek and rely upon the advice and opinion of private counsel.

Very truly yours,

DEXTER A. JOHNSON
Legislative Counsel



By
Charles Daniel Taylor
Senior Deputy Legislative Counsel