COUNTY HOME RULE

IN OREGON

Prepared by Tollenaar and Associates

for the

Association of Oregon Counties

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A 1958 amendment to the Oregon Constitution reserved to the voters of Oregon counties the right to adopt charters prescribing how their county governments should be organized, what powers they should have, and what procedure they should follow in administering county affairs. Since 1958, nine of Oregon's 36 counties have adopted charters.

In 1973, the Oregon Legislative Assembly enacted a statute delegating to all counties the power to enact local legislation on matters of county concern. The 1973 statute greatly expanded the discretionary authority of general law (non-charter) counties, although charter counties have more options than general law counties with respect to reorganization.

Oregon counties therefore enjoy two kinds of home rule: constitutional and statutory. The U.S. Advisory Commission on Intergovernmental Relations concluded in a 1981 report that Oregon counties have a greater degree of local discretionary authority than counties in any other state.

The Association of Oregon Counties is pleased to make available these County Home Rule Papers. The papers will help explain county home rule to interested citizens, civic organizations, legislators, newly elected county officials, and others interested in county government. They should be particularly useful to members of county charter committees or other groups established to study and make recommendations regarding county home rule charters.

The County Home Rule Papers were prepared by Tollenaar and Associates, a Eugene consulting firm specializing in public affairs. Ken Tollenaar is a former Executive Director of the Association of Oregon Counties who has provided consultation to charter committees in several counties.

Respectfully submitted,

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OREGON COUNTY GOVERNMENT PRIOR TO HOME RULE[1]

SUMMARY

- **Historically, counties were created and maintained as mere administrative districts to perform functions and duties on behalf of the sovereign. In England, that meant the Crown. In America, it meant the colonial governors initially, and after independence, the state governments.**

- **In addition to their role as agents of the state, counties gradually took on a second role as units of local government, providing services in response to the needs and preferences of their local constituencies.**

- **Both as agents of the state and as units of local government, however, counties operated under legal interpretations that confined their powers to those expressly granted to them by state law. They were unable to act in response to local needs until they received express authority from the state legislature to so act.**

- **Efforts to relieve counties of these constraints were made in Oregon as early as 1906, but they were largely unsuccessful until the county home rule constitutional amendment was adopted in 1958.**

[1] In these papers, the term "home rule" generally refers to both (1) the 1958 constitutional county home rule amendment (Article VI, section 10, Constitution of Oregon) that reserved to the people the power to adopt county charters providing for the organization, procedures and powers of their county governments and (2) the 1973 legislative delegation of powers to all counties now codified at ORS 203.035. As noted later in this paper, Oregon counties enjoyed some types of local discretionary authority long before enactment of Article VI section 10 or ORS 203.035, and in that sense may be said to have always had a degree of "home rule."

DISCUSSION

Counties are often said to perform a dual role as both agents of the state government and as units of local government. This paper describes how both roles have developed, beginning with the county's role as an agent of the state.

THE BRITISH TRADITION

County government has a long history. It dates back at least as far as the Norman Conquest (1066), which consolidated the civil governance of England under the Crown. Counties (then called "shires") emerged at that time as geographic areas within which certain agents of the Crown — particularly the sheriff — looked after collection of the king's taxes and the enforcement of his military service requirements. The county also became the area within which the local magistracy carried out the administration of justice.

Most American colonies imported this same basic pattern of county government, with counties serving as agents of the colonial governors, and operated by officials (sheriffs and local magistrates) appointed by the governors. After independence, the early state constitutions continued this system, with individual county officers appointed by the governor or by the legislature administering various state laws more or less independently of each other. There was a gradual conversion from appointment to popular election of county officials, but the basic role of the county was still to serve as an agent of state government.

COUNTIES IN OREGON HISTORY

One of the first actions of Oregon's 1843 provisional government was to divide the area into four "districts" — Tuality, Yamhill, Clackamas and Champooick — the first counties. The counties were made responsible for recording deeds and other property documents, probating estates, administering the minor courts, enforcing state laws,

operating jails and conducting elections — all basically state functions. The county officers were the sheriff, clerk, and treasurer, and a court of three judges provided general oversight of county affairs. A few years later provision was made for a county assessor.

Under the territorial government (1849 - 1859), county government expanded to include additional functions such as the care of indigents, public health, and agricultural services. There was also some development of local functions, such as roads, regulation of certain businesses, and county fairs. By the time of statehood (1859), the dual role of counties as both agencies of the state and units of local government was well established.

THE LEGAL STATUS OF COUNTIES

In law, counties historically were agents of the state and their role as local units was given little if any recognition, especially as compared with the role of cities. As stated by an Ohio judge in 1857:

> A municipal corporation proper is created mainly for the interest, advantage, and convenience of the locality and its people; a county organization is created almost exclusively with a view to the policy of the state at large, for purposes of political organization and civil administration, in matters of finance, of education, of provision for the poor, of military organization, of the means of travel and transport, and especially for the general administration of justice. With scarcely an exception, all the powers and functions of the county organization have a direct and exclusive reference to the general policy of the state and are, in fact, but a branch of the general administration of that policy.[2]

As a corollary of this narrow view of the county, the courts looked primarily to state statutes as the measure of what counties could or could not do, and how they are organized to perform their functions. Dillon's rule, the prevalent legal interpretation of the powers of local government, stated:

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[2] Commissioners of Hamilton County v. Mighels, 7 Ohio St. 110, 118-119.

> It is a general and undisputed proposition of law that *a municipal corporation possesses and can exercise the following powers and no other:* First, those granted in *express words;* second, those *necessarily or fairly implied* in or *incident* to the powers expressly granted; third those *essential* to the accomplishment of the declared object and purposes of the corporation — not simply convenient, but indispensable. Any fair, reasonable, substantial doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied.[3] (emphasis in original)

This rule applied to counties. In 1926 the Oregon Supreme Court stated:

> Counties are created for purposes of government and authorized to exercise to a limited extent a portion of the power of the state government. They have always been held to act strictly within the powers granted by the legislative acts establishing and controlling them. The statute is to them their fundamental law and their power is only co-extensive with the power thereby expressly granted, or necessarily or reasonably implied from their granted powers . . . When a power is given by statute everything necessary to make it effectual is given by implication.[4]

These narrow interpretations constrained county government during the 19th century and most of the 20th with the following consequences:

- Counties could perform only those functions expressly mandated or authorized to them by state laws. In addition to a growing number of mandated functions, over time, the legislature enacted a large number of permissive statutes under which counties generally (or sometimes classes of counties) could carry on particular functions (e.g., libraries, parks, hospitals, airports, cemeteries, fire protection, etc.).

- To undertake any new function, counties had to have express or clearly implied statutory authority from the state. They could not on their own act locally in response to the needs of their communities.

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[3] J. Dillon, *Municipal Corporations* section 237, at 448-450 (5th edition, 1911). [4]

Fales v. Multnomah County et al., 119 Or at 133.

- Counties could enact local "legislation" only for expressly or clearly implied authorized functions — i.e., they could adopt orders and resolutions implementing an authorized function, but they could not enact "ordinances" unless expressly permitted or required to do so by state law.

After World War II, this situation became very cumbersome and difficult for many counties, especially those with urbanizing areas faced with problems of providing the kinds of services and regulations required to cope with urban development. Mike Gleason, then chair of the Multnomah County Board of Commissioners, testified to the Joint Legislative Interim Committee on Local Government in 1956:

> Laws controlling county government in Oregon are too antiquated to respond adequately to the needs and demands of our rapidly growing populations. The necessity of waiting for the next legislative session to solve a county problem is and will become an increasingly dangerous political practice. . . .Thus county government needs a framework of laws that will give it the authority to plan and provide for future needs of its people, with sufficient flexibility so it can take care of the emergency problems. These need not necessarily parallel the authority given cities but should certainly be more than county government now possesses. This might be summed up as a judicious amount of 'Home Rule' for counties, providing a framework for the counties to work under to provide adequate service to their communities.

COUNTY DISCRETIONARY AUTHORITY BEFORE HOME RULE[5]

The fact that county powers were narrowly restricted by legal interpretations did not prevent the legislature from allowing counties considerable discretion in carrying out their statutorily mandated or authorized functions. In fact, from territorial days, counties enjoyed local discretion of several kinds: county officers were elected by the people of the counties, rather than appointed by the governor or the legislature, as had been the

[5] The material in this and the next section draws heavily on Orval Etter, "County Home Rule in Oregon Reaches Majority" 61 *Oregon Law Review* 3. Etter drafted many of Oregon's county charters, and is the draftsman of the *Model County Charter* published by the Bureau of Governmental Research and Service in 1977. He has done extensive research on both municipal and county home rule in Oregon, and his research has been cited frequently in appellate court and Attorney General opinions regarding home rule.

practice in many other states; counties enjoyed considerable local discretion regarding *how* and *to what extent* they carried out such mandated or authorized functions as roads, care of indigents, construction of public buildings and location of county seats; and they determined the amount of taxes to be levied for county government purposes.

One area in which the legislature held on to its legal authority for many decades was in fixing salaries for both elective and some appointive county offices. The salaries were fixed by state statute until almost the turn of the century, when the legislature began to let counties fix salaries for assistants to certain county offices. Authority over county officers' salaries was relinquished to the counties gradually until 1953, when the legislature finally turned all salary setting over to the county governing bodies.[6]

PRECURSORS TO COUNTY HOME RULE

County home rule did not suddenly emerge when the constitutional amendment was adopted in 1958. Several efforts were made to extend home rule to counties as early as 1906, when the municipal home rule amendments were adopted. Municipal home rule was achieved by adoption of two constitutional amendments: Article XI, section 2 which grants the voters of cities the power to enact and amend their own municipal charters, and Article IV section 1(5) which reserves to the voters "of each municipality and district" initiative and referendum powers "as to all local, special and municipal legislation of every character in or for their municipality or district."

There is historical evidence that by including the phrase, "each municipality and district" in the latter amendment, W.S. U'Ren and other sponsors of the municipal home rule amendments intended to extend home rule to counties as well as to cities. Indeed, in Schubel v. Olcott (1912), the state Supreme Court affirmed that counties were included in that phrase. In 1918, however, the Court ruled in Carriker v. Lake County that any rights reserved to county voters under the amendment were limited to legislative

[6] Oregon Laws 1953 Chapter 306.

authority already possessed by counties — i.e., the initiative and referendum exercised by county voters could apply only to county functions already mandated or authorized for county governments. Thus, under Carriker, county voters could not, for example, enact a jackrabbit bounty by an initiative petition because the legislature had never delegated the authority to counties to provide for such bounties. That line of interpretation was generally followed by the courts thereafter, and was affirmed as recently as 1954 in the case of Kosydar v. Collins.

The first half of the 20th century saw several additional efforts to establish county home rule in one form or another, but it's important to note that neither the 1906 amendment nor most of its successor efforts proposed to vest general legislative authority in county governing bodies. Rather, the effort was to empower the voters of counties to enact county legislation through the initiative and referendum process. There were some proposals in the 1920s for constitutional amendments similar in scope to the one actually adopted in 1958, including one that used provisions and language included in the 1958 amendment.[7] During the 1930s there were several proposals to authorize adoption of the county manager plan, a limited type of home rule. A county manager constitutional amendment was adopted in 1944, but it was repealed when the county home rule amendment was adopted in 1958.

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PURPOSES AND PROVISIONS OF CONSTITUTIONAL AND STATUTORY COUNTY HOME RULE IN OREGON

SUMMARY

Oregon counties may achieve "home rule" in two ways. They may adopt county charters in accordance with the 1958 county home rule constitutional amendment. Even without adopting a charter, counties enjoy broad home rule powers under a 1973 statute delegating general legislative powers to all counties.

The 1958 constitutional amendment was developed by a legislative interim committee established to study and make recommendations regarding local government problems, especially problems of providing services to urbanizing areas outside cities. The framers of the 1958 amendment had two objectives:

- **to authorize counties to address local problems by adopting their own local legislation without seeking prior permission from the state legislature, and**

- **to enable counties to revise the organization structure imposed upon them by state law.**

The 1958 constitutional amendment had the following key features:

- **it mandated the legislature to provide a method for adopting, amending, revising, and repealing a county charter;**

- **it stated that "a county charter may provide for the exercise by the county of authority over matters of county concern";**

- **it required that county charters prescribe the organization structure of the county government, except that no charter could affect judges or district attorneys;**

- **it stipulated that counties that adopt charters remain agents of the state and must carry out duties imposed upon counties by state laws; and**

- **it reserved the voters' right of initiative and referendum as to the adoption, amendment, revision or repeal of county charters.**

Enabling legislation adopted in 1959 provided for development of county charters by county charter committees appointed by county governing bodies and by members of a county's legislative delegation. In addition to charters developed by charter committees, county charters may be developed and proposed by voters

themselves, exercising the right of initiative guaranteed by the county home rule constitutional amendment.

Statutory county home rule was established by 1973 legislation requested and supported by the Association of Oregon Counties (AOC). AOC sought to extend to all counties the local legislative powers then enjoyed only by counties that had adopted charters. The 1973 legislation granted all counties "authority over matters of county concern" in a manner quite as broad and comprehensive as the authority vested by county charters under the constitutional home rule amendment. The courts have subsequently affirmed the intended broad scope of legislative authority extended by the 1973 legislation, now codified at ORS 203.035.

Statutory home rule, however, comes with certain restrictions. General law (non-charter) counties have no protection against preemptive state legislation, whereas charter counties have a limited amount of exclusive local control even under the current narrow interpretations of the Oregon Supreme Court. General law counties have only limited power to reorganize, since the offices of county sheriff, clerk, and treasurer are made elective by the constitution, and ORS 203.035 itself exempts the office of county assessor from reorganization in general law counties. Another restriction is implicit in the form of the delegation: since it is only a statute, the legislature may further qualify or restrict it or may indeed repeal it at any legislative session.

Both constitutional and statutory county home rule operate within the scope of "matters of county concern." There is no precise definition or listing of specific matters that come within the meaning of that phrase. Some guidance is available in the form of contemporaneous construction, including many statutes that were repealed in 1981 and 1983 because ORS 203.035 had made them obsolete. Additional guidance is provided by court interpretations of both city and county home rule, including the 1978 case of LaGrande/Astoria v. PERB, which narrowed previous appellate court rulings regarding the scope of home rule.

DISCUSSION

I. CONSTITUTIONAL COUNTY HOME RULE

Rationale and Intent of the Framers

Although beginning as early as 1906 there were several efforts to achieve home rule for counties in Oregon (see County Home Rule Paper #1), those efforts did not succeed until 1958, when the state's voters approved the constitutional county home rule amendment (Article VI, section 10, Constitution of Oregon).

The Legislative Interim Committee on Local Government had developed the 1958 proposal. Five legislators and four lay members, including a city commissioner and a county judge, served on the Interim Committee. SJR 31 of the 1955 legislative session directed the Committee to:

> ascertain, study and analyze all facts relating to governmental relations between cities, counties and districts as these relationships have been affected and made more difficult and complex by reason of the great growth in population of Oregon and particularly the growth in population and development in the unincorporated urban areas of the counties.

The Committee conducted and sponsored extensive research on the state's urbanization problems, including detailed studies of local government organization and operations in eight areas of the state and special studies of county government and statelocal relations conducted by Willamette University's Institute of State Affairs. It conducted 14 public hearings around the state, during which 200 individuals, including 35 county officials, made presentations.

Based on its studies and information presented at the hearings, the Committee found that one problem was the "failure or inability of counties to take initiative in the solution of urban problems." Although by 1956 counties had sought and obtained legislative authority for planning and zoning, local improvement districts for streets and

sidewalks, and construction and operation of sewage disposal systems, they lacked the power to enact local legislation to deal with either urban or rural problems. Asking the legislature for enabling legislation to deal with each problem as it arose was a cumbersome, uncertain, and inefficient way to respond to changing county government needs.

The Committee therefore concluded that there was a need to provide "a means whereby counties can achieve freedom from their present subordination to the state legislature."[1] The Committee saw the need for both local legislative authority and the ability to reorganize for more efficient county operations:

> Urban counties should not be made to rely on specific statutory authority for each act, but should be permitted to exercise legislative power locally. Equally important is the power to provide locally for the form of county organization. Counties which attempt to play a larger role in urban affairs will be handicapped if they are not permitted to modify the cumbersome organization structure currently imbedded in the Oregon constitution and statutes.[2]

In asking the Legislative Counsel to prepare a draft of a county home rule amendment, the Interim Committee transmitted a copy of the "Plan for County Home Rule" it had used as a basis for its county home rule discussion. In view of questions that arose later over the meaning and effect of the county home rule amendment, it is significant that the Committee's "Plan" stated that "county home rule would permit county action without specific state authorization *in matters of local concern* and also would provide a means of changing the form of county organization so that central direction and coordination could be achieved." (emphasis added). The italicized phrase, "matters of local concern," reflected the Committee's understanding (as supported by previous state Supreme Court holdings regarding city home rule) that local legislation would prevail over conflicting state law to the extent that it addressed purely local concerns. When the Legislative Counsel returned the requested draft amendment to the

[1] Oregon Legislative Committee on Local Government, *Findings and Recommendations,* p. 131

[2] ibid.

Committee, his transmittal letter affirmed that the draft's reference to "matters of county concern" "would make county legislation supreme over state legislation in areas of county concern if the county has adopted a charter."

Legislative and Voter Approval of the County Home Rule Amendment

The Committee's county home rule proposal took the form of HJR 22 in the 1957 legislative session. In hearings before the House Local Government Committee, a Farm Bureau representative expressed the fear that county home rule might result in making rural areas pay part of the cost of urban services for the unincorporated urbanizing areas. Accordingly, the bill was amended to add a sentence to the proposed constitutional amendment: "Local improvements or bonds therefore authorized under a county charter shall be financed only by taxes, assessments or charges imposed on benefited property."

The bill then passed the House by a vote of 47 to 13, and the Senate passed the bill with no further amendments by a vote of 21 to 9. Opponents tried to get the Senate to reconsider, but the motion to reconsider failed by a vote of 15 to 15.

The legislative action was followed by a low-key campaign for voter approval. The League of Women Voters provided some support for the measure, but there was little or no organized opposition. The 1958 Voters' Pamphlet explanation stated, "A county charter could not supersede any provision of the constitution or general state law *as to matters of state concern* . . . However, the voters of any county could settle questions of county organization, functions, powers and procedures which are of concern only within a county by adopting, amending or repealing a local charter, instead of by seeking state legislation." This expressed the intent of the amendment to distinguish between matters of state concern and matters of county concern, and to give charter counties some degree of exclusive authority over the latter.

In November 1958, the proposed amendment was approved by a statewide vote of 311,516 yes to 157,023 no.

Shortly afterwards, the Multnomah County District Attorney produced an opinion regarding the sentence added to the amendment by the House Committee. His view was that almost any kind of public improvement could be a "local improvement" and that the sentence therefore would preclude the county from using general county taxation to finance most kinds of public improvements. A subsequent Attorney General opinion partially confirmed the Multnomah County opinion. Accordingly, SJR 48 was introduced at the 1959 session, further amending the sentence to read as it does today: "Local improvements shall be financed only by taxes, assessments or charges imposed on benefited property, *unless otherwise provided by law or charter."* The italicized language in effect clarifies that a charter county's governing body may make its own determination whether a given improvement is or is not "local" and therefore may choose to finance it by either special assessments or general revenues, or both. The amendment was approved by the legislature and subsequently by a vote of the people, 399,210 yes to 222,736 no.

Provisions of the County Home Rule Amendment

The county home rule amendment as approved in 1958 and amended in 1960 contained eight sentences:

- Section 9a, Article VI of the Constitution of the State of Oregon is repealed; and the Constitution of the State of Oregon is amended by creating a new section to be added to and made a part of Article VI of the Constitution and to read as follows:

This sentence repealed the constitutional provision that allowed counties to adopt the county manager form of government. Under that provision, added to the constitution in 1944, no county had adopted the county manager form, although Clackamas and Lane Counties had both voted twice on county manager proposals. Under county home rule, a county could still adopt the county manager form, but it had many other options as well, so there was no longer any need for Section 9a, Article VI.

- The Legislative Assembly shall provide by law a method whereby the legal voters of any county, by majority vote of such voters voting thereon at any legally called election, may adopt, amend, revise or repeal a county charter.

The mandate to the legislature to provide "a method" for charter adoption was carried out at the 1959 legislative session (see discussion of the enabling legislation below).

- A county charter may provide for the exercise by the county of authority over matters of county concern.

This is the shortest but arguably the most important sentence in the county home rule amendment. The Legislative Counsel, in explaining this provision at the 1959 Association of Oregon Counties convention, commented that "This sentence defines the boundaries of authority exercisable by the county through its charter," but he warned that " 'Matters of county concern' is a broad phrase without clearly defined limitations and subject to many interpretations." As indicated above, both the report of the 1955-56 Legislative Interim Committee on Local Government and the 1958 Voters' Pamphlet expressed the view that the county home rule amendment was intended to carve out and insulate from legislative interference a sphere of exclusive authority regarding "matters of county concern."

- Local improvements shall be financed only by taxes, assessments or charges imposed on benefited property, unless otherwise provided by law or charter

This sentence was discussed in the preceding section.

- A county charter shall prescribe the organization of the county government and shall provide directly, or by its authority, for the number, election or appointment, qualifications, tenure, compensation, powers and duties of such officers as the county deems necessary.

This sentence placed the whole question of the form of county government within the scope of "matters of county concern." Although it is mandatory for a charter to

"prescribe the organization of the county government," no particular form is prescribed, and the requirement of this section may be satisfied by merely adopting the same form of organization provided for general law counties. Nevertheless, eight of the nine county charters adopted since 1958 have in fact made some changes in the form prescribed by state statutes.

- Such officers shall among them exercise all the powers and perform all the duties, as distributed by the county charter or by its authority, now or hereafter, by the Constitution or laws of this state, granted to or imposed upon any county officer.

This sentence makes it clear that even if a county adopts a charter, it is still in legal purview an agent of the state government, and it must perform all functions and duties mandated by state law. The allocation of such functions and duties among county officers is, however, a matter for local determination. What if the state legislature mandates that counties perform a function or duty that falls within the scope of "matters of county concern?" That question is discussed in County Home Rule Paper No. 6.

- Except as expressly provided by general law, a county charter shall not affect the selection, tenure, compensation, powers or duties prescribed by law for judges in their judicial capacity, for justices of the peace or for district attorneys.

This sentence provides that unless otherwise provided by statute, a county charter may not include provisions affecting judges or district attorneys. In 1961, however, the legislature in fact "expressly provided" for a county charter to transfer the judicial duties of the county judge to the circuit courts. That provision is now codified as ORS 3.130.

- The initiative and referendum powers reserved to the people by this Constitution hereby are further reserved to the legal voters of every county relative to the adoption, amendment, revision or repeal of a county charter and to legislation passed by counties which have adopted such a charter.

This sentence guarantees the right of initiative and referendum as to county charters and as to legislation enacted by charter counties. The sentence may not have been necessary, in view of the 1906 reservation of initiative and referendum powers to

"municipalities and districts," a phrase the courts have determined includes counties (see County Home Rule Paper No. 1). The expansion of county legislative powers under the county home rule amendment effected a corresponding expansion of the voters' right of initiative and referendum, since the courts had previously held that the initiative and referendum could apply only to matters upon which counties had authority to legislate.

The eighth sentence was amended in 1978 to stipulate that voters must have at least 90 days after adoption of county legislation to submit a referendum petition. Most of the county charters had provided for effective dates on nonemergency ordinances of only 30 days.[3] The 1978 amendment also stipulated the percentage requirements for initiative petitions (eight percent for charter amendments, six percent for ordinances) and for referendum petitions (four percent), with all percentages based on the number of votes within the county for the office of governor at the last election a governor was elected for a full four year term. The 1978 amendment was silent as to the signature requirement for an initiative or referendum petition for a measure to repeal or revise a county charter.

Provisions of the Enabling Legislation

The enabling legislation adopted in 1959 deals mainly with the procedures for initial adoption of a county charter, leaving to charter counties a choice between following procedures in general state statutes (ORS 250.155 to 250.235) for amending, revising, or repealing a charter or providing their own local procedures for such purposes. One section of the enabling legislation that deals only with charter amendments requires such amendments to consist of only a single subject.

The enabling legislation (ORS 203.710 to 203.810) as amended from time to time since 1959 contains the following provisions:

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[3] Most county charters still provide for effective dates 30 days after adoption of county ordinances. This apparently means that an ordinance might conceivably go into effect and then be suspended if a referendum petition is filed before the 90th day.

- A county charter committee may be established either by a county governing body resolution or by a citizens' petition signed by four percent of the number of votes cast within the county for governor at the most recent election for a full four-year term.

- The county governing body appoints four members of the charter committee, the county's state legislative delegation appoints another four, and those eight appoint a ninth member. Members of the appointing bodies may not serve on the committee, nor may anyone engaged in business with the county "which is inconsistent with the conscientious performance" of his or her committee duties.

- The charter committee serves until the election at which a charter is submitted to the voters, or two years from the date the governing body's resolution or the citizens' petition was filed. The county must provide the committee with free office space and make available for committee expenses at least one cent per capita or $500, whichever is greater. The committee is authorized to "conduct interviews and make investigations" and it may submit a charter to the voters after it has held at least one public hearing on its proposed draft charter.

- The enabling legislation provides that a charter (or any amendment, revision, or repeal) may be submitted at a biennial primary or general election. However, a 1977 Court of Appeals decision (Brummel v. Clark, 31 Or App 405) held that a county charter amendment could be submitted at a special election if the county's charter and ordinances so provided.

As an alternative to preparing and submitting a county charter using a charter committee under the enabling legislation, a county charter may be prepared and submitted directly to the voters by exercise of the initiative. The eighth sentence of the county home rule amendment (quoted above) reserves the right of initiative with respect to county charter adoption, and the method for submitting an initiated charter has been provided by ORS 250.155 to 250.235. The same ORS sections apply to charter amendments unless a charter county has provided a different procedure under its charter authority.

II. STATUTORY COUNTY HOME RULE

The 1973 Legislation

By 1972, five Oregon counties had adopted charters and many more had voted on and rejected proposed charters. In counties where charter proposals had proven controversial, the controversy mostly revolved around proposed changes in the county's organization structure. There seemed to be general support for expanding the scope of the county's legislative authority, as had been done by charters adopted in the five counties. Accordingly, the Association of Oregon Counties sponsored legislation in the 1973 session to provide a general delegation of legislative powers to all counties, whether or not they had adopted charters.

The AOC contracted with Eugene attorney Orval Etter to draft the proposed legislation. Etter had drafted several of the county charters, the central feature of which was the "general grant of powers." Unlike older city charters in Oregon and other states which enumerated specific powers to be exercised (e.g., power to regulate businesses, power to levy taxes, etc.), the newer city charters and all five county charters had brief sections under which the voters in broad and general terms granted their local governments all the powers that the legislature *could* grant them consistently with the Oregon and U.S. constitutions.

Etter took the same approach in drafting the AOC's proposed legislation. As drafted, as adopted in 1973, and as they currently read in ORS 203.035, the two key subsections of the AOC legislation provided:

> (1) The governing body or the electors of a county may by ordinance exercise authority within the county over matters of county concern, to the fullest extent allowed by the Constitutions and laws of the United States and of this state, as fully as if each particular power comprised in that general authority were specifically listed.

> (2) The power granted by this section is in addition to other grants of power to counties, shall not be construed to limit or qualify any such grant and shall be liberally construed, to the end that counties have all powers over matters of county concern that it is possible for them to have under the Constitutions and law of the United States and of this state.

The 1973 legislation included provisions setting forth a procedure for adopting county ordinances, stipulating that county ordinances do not apply inside incorporated cities, establishing signature requirements for county initiative and referendum measures, requiring a referendum vote on any county ordinance imposing or providing an exemption from taxation, providing for judicial review of county ordinances, and establishing penalties for violation of county ordinances. Most of those provisions remain in the statutes today, now codified at ORS 203.030 to 203.065.

In 1975, the Court of Appeals affirmed that ORS 203.035 had indeed conveyed broad legislative authority to general law counties. Citing the phrase "matters of county concern" that appears in both the county home rule amendment and in ORS 203.035, the Court concluded, "in the absence of state preemption or a limiting charter provision, home rule and general law counties have the same legislative authority."[4]

Legislative Intent and Subsequent Amendments

Testifying on the1973 legislation (HB 3009), Jerry Orrick, then AOC Executive Director, told the legislative committees that "the ability to reorganize the county, e.g., combine offices, eliminate office heads, change the number of the members of the governing body, is not addressed in this bill."[5] It was the AOC's intent to vest counties with the power to legislate locally on "matters of county concern," but not to allow

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[4] *Allison v. Washington County,* 24 Or App 571 at 581.

[5] Senate Committee on Local Government and Urban Affairs, minutes, May 10, 1973.

general law counties to convert elective offices to appointive offices or otherwise change the form of county government.

Nevertheless, in view of the broad language of the legislative delegation, a few general law counties concluded that it might be possible to make some kinds of organization changes, since such changes would logically be "matters of county concern." In 1977, state senator Richard Groener asked the Attorney General for an opinion as to whether the voters of Clackamas County could by initiative increase the membership of the Board of County Commissioners from three to five. The Attorney General, in a letter opinion dated April 18, 1977, concluded "that they probably have such power," basing his conclusion on the 1973 legislation, ORS 203.035.

The AOC response was to seek clarification by additional legislation. In 1981 the legislature enacted Chapter 140, which expressly prohibited county ordinances under ORS 203.035 that "change the number or mode of selection of elective county officers that are prescribed by statute."

However, the 1985 legislature adopted legislation repealing 1981's Chapter 140 prohibition and substituting the present ORS 203.035(3). This section states that a county ordinance "that changes the number or mode of selection of elective county officers" must be submitted for a referendum vote of the people at a biennial primary or general election. The 1985 legislation as introduced was amended during the session to provide that no such ordinance could change the mode of selection of a county assessor.

To summarize the effect of statutory county home rule, ORS 203.035 delegates in the most comprehensive terms local legislative authority over "matters of county concern." The delegation has some restrictions, however. County ordinances enacted under the delegation that make changes in the form of county organization or that impose taxes or exemptions from taxation must be submitted for a referendum vote of the people. Also, such ordinances may have no effect inside incorporated cities without the consent of the city governing body or city voters.

Three other major qualifications to the legislative delegation must be noted:

- General law counties enjoy no insulation against preemptive state legislation, whereas charter counties have some limited insulation even under the narrow interpretation of home rule embraced by the Oregon Supreme Court in 1978 (see County Home Rule Paper No. 6).

- ORS 203.035 provides only limited power to change the form of county government organization prescribed by the state constitution and statutes. The statute itself expressly exempts the county assessor, and the state constitution requires that the county sheriff, clerk and treasurer be elective offices. The only changes in offices made elective by the state constitution and statutes that could come within the scope of ORS 203.035, therefore, are the size and manner of selecting the county governing body and the question of whether to elect or appoint the county surveyor.

  However, some types of reorganization could probably be achieved without affecting the offices made elective by the constitution and statutes. For example, general law counties can establish additional elective or appointive offices, such as a county administrator or performance auditor. It would probably be possible, also, to establish a type of "elected executive" form of government by centralizing the administrative authority of the board of county commissioners in the hands of one commissioner (as has been done by the Multnomah County charter).

- The third major qualification is implicit: the entire delegation of power under ORS 203.035 exists at the sufferance of the state legislature. At any legislative session, the legislature can further qualify, limit, or even repeal the entire delegation of legislative authority.

"MATTERS OF COUNTY CONCERN"

A major question confronting counties operating under either constitutional or statutory home rule is what, exactly, is meant by "matters of county concern." As indicated in the above discussion, the framers of the county home rule amendment meant

to establish that matters of "county" concern are in some sense different from matters of "state" concern, and to provide charter counties some degree of insulation against state interference with respect to matters of county concern.

Orval Etter, in transmitting his draft of the 1973 statutory home rule legislation to AOC, commented:

> Someone is bound to ask, 'Just what are matters of county concern?' To this question neither I nor anyone else can give a definitive answer. 'Matters of county concern' is a broad, flexible concept that appears in the county-home-rule amendment to the state constitution. The list of matters of county concern may be one list in 1970, a somewhat different list in 1980, and a still somewhat different list in 1990. We can get some idea of what the list includes at any given time by noting what particular state laws provide with reference to counties, what functions counties are generally engaging in or being called on to engage in, and what are matters of municipal concern under municipal home rule.

One indication of matters considered to be of "county concern" is legislation passed in 1981 and 1983 repealing several state statutes considered to be superfluous since enactment of ORS 203.035. In 1981, 18 bills were introduced at the request of the County Law Subcommittee of the Interim Committee on Intergovernmental Affairs. Each bill repealed or amended one or more state statutes considered to be unnecessary in view of the powers then enjoyed by all counties under ORS 203.035. Each of the 18 bills was prefaced by the following preamble:

> Whereas the fifty-seventh Legislative Assembly enacted ORS 203.035 in 1973 in order to grant to the governing body of each county power to exercise legislative authority within the county over matters of county concern, to the fullest extent allowed by Constitutions and laws of the United States and of this state; and
>
> Whereas many statutes relating to matters of county concern had previously been enacted by the Legislative Assembly; and
>
> Whereas such statutes are unnecessary since the governing body and voters in each county can now enact ordinances which

> treat the subject matter of the statutes in the manner deemed necessary or desirable in each county; and
>
> Whereas repeal of statutes relating to matters of county concern, therefore, does not indicate a lack of power in the county governing bodies to act on the subject matter of such statutes nor express any judgment by the Legislative Assembly as to the policies established therein; and
>
> Whereas the sixty-first Legislative Assembly supports the principle that matters of county concern should be left to the governing body and voters of each county to be regulated by county ordinance in the manner deemed necessary or desirable in the county; now, therefore . . .

One of the statutes repealed in 1981 was ORS 203.120, which for many decades had provided a partial enumeration of county powers, including power to erect and repair public buildings, provide accommodations for county officers, establish, vacate or alter county roads and bridges, license and fix rates for ferries, license and regulate dance halls and grocery stores, levy property taxes, provide for maintenance and employment of "paupers," have the general care and management of county property, funds and business "where the law does not otherwise expressly provide," compound or release debt or damages arising out of county contracts, provide and maintain fairs, public parks and other recreation facilities, refund fines or fees erroneously or illegally charged, sell or lease county materials or equipment and perform work with county forces for private parties, grant vacations and sick leave to county employees, and provide sewage disposal systems. Repeal of this section was recognition that ORS 203.035 covers all of these powers as "matters of county concern."

The 1981 and 1983 legislative sessions amended or repealed many additional statutory sections dealing with specific matters not included in ORS 203.120. The subjects of these additional legislative actions included:

> Compensation of county officers and employees (1981 Chapter 48)
>
> Meeting times for county governing bodies (1981 Chapter 140) Bonded debt procedures (1981 Chapter 41)

Multnomah County retirement plan, county lands, sheltered workshops, museums and monuments, ferries, and county appraiser salaries (1981 Chapter 126)

County surveyor duties and compensation (1981 Chapter 111)

County health departments (1981 Chapter 127)

County nuisance abatement (1981 Chapter 81)

Regulation of outdoor mass gatherings (1981 Chapter 82)

County hospitals and nursing homes (1981 Chapter 45)

Regulation of businesses (1981 Chapter 76)

Bounties (1981 Chapter 95)

County museums (1983 chapter 260)

Boarding of prisoners, correctional facilities, procedure for adopting housing ordinances, agricultural fairs and exhibits, and agricultural demonstrations (1983 Chapter 327)

Still another 1981 legislative action taken partly in response to the expansion of county legislative authority under ORS 203.035 was a comprehensive revision of the county road statutes (Chapter 153, Oregon Laws 1981). Section 3 of that act stipulated that with certain exceptions, "a county may supersede any provision in this chapter by enacting an ordinance pursuant to the charter of the county or under powers granted the county in ORS 203.030 to 203.065." Section 4 provided, again with certain exceptions that "the exercise of governmental powers relating to a road within a county is a matter of county concern."

In summary, it is not possible to produce a definitive list of specific "matters of county concern." Whether counties operate under charters or merely under the general delegation of powers under ORS 203.035, they can only rely on such indications of contemporaneous construction as the 1981 and 1983 actions listed above, plus their own common sense judgment of whether a particular county action would have strictly local impact or whether it could affect statewide interests, or even the interests of other local

governments within the county. Those indications and judgments must in turn be guided by appellate court decisions interpreting city and county home rule, including the 1978 case of LaGrande/Astoria v. PERB, which narrowed previous judicial rulings regarding the scope of city and county home rule. County Home Rule Paper No. 6 addresses these issues in greater detail.

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IMPLEMENTATION OF THE COUNTY HOME RULE AMENDMENT

SUMMARY

- **As of May, 2005 thirty of Oregon's 36 counties have established charter committees at one time or another, and 25 have voted on proposed charters at least once. Nine counties are operating under charters.**

- **Provisions of county charters include:**

  - **Preambles**

  - **Preliminaries (name, legal status, boundaries, and county seat)**

  - **Powers (all nine charters contain a general grant of powers rather than enumeration of specific powers)**

  - **Structure of county government (governing body, elected administrative officers, county administrators, other officers and employees, and departmentalization)**

  - **Legislation (board operations, ordinance procedures, initiative and referendum)**

  - **Personnel (civil service or merit system, compensation, nondiscrimination)**

  - **Finances (budgeting, local improvements, and miscellaneous finance provisions)**

  - **Intergovernmental relations and miscellaneous provisions** ○

  Transition provisions

DISCUSSION

I. RECORD OF COUNTY ACTION UNDER THE AMENDMENT

Thirty of Oregon's 36 counties have established charter committees since the county home rule amendment was adopted in 1958. Twenty five counties have voted at least once on proposed county charters: four of those have voted twice, seven have voted three times, and one has voted on four charter proposals.

Nine counties adopted charters between 1962 and 1992. The counties range in size from Hood River (21,050) to Multnomah (685,950). Most of the state's population lives in counties that have county charters.

Five counties have voted on proposed charter repeals, and all five repeal efforts failed. Six months after adopting a charter in 1966, voters in Multnomah County actually approved an initiative measure to repeal it, but a court order voided the election because it turned out that insufficient signatures had been gathered on the initiative petition.
There have been no further efforts to repeal the Multnomah County charter.

Table 1 (next page) summarizes the record of county actions under the county home rule constitutional amendment.

II. OVERVIEW OF COUNTY CHARTER PROVISIONS

This section briefly summarizes provisions of the nine Oregon county charters and compares them with each other and with the Model County Charter published by the Bureau of Governmental Research and Services (BGRS), University of Oregon in 1977.

STATUS OF COUNTY HOME RULE IN OREGON
AS OF MAY, 2005

County	Ever Had a Charter Committee	Ever Had a Charter Election	Election Results[1] 1st	2nd	3rd	4th	Date of Approval	Repeal Elections
Baker	No	No	-	-	-	-	-	-
Benton	Yes	Yes	F	P	-	-	11/72	No
Clackamas	Yes	Yes	F	-	-	-	-	-
Clatsop	Yes	Yes	F	F	P	-	5/88	Yes(F)
Columbia	Yes	Yes	F	-	-	-	-	-
Coos	Yes	No[2]	-	-	-	-	-	-
Crook	Yes	Yes	F	-	-	-	-	-
Curry	Yes	No[2]	-	-	-	-	-	-
Deschutes	Yes	Yes	F	F	F	F	-	-
Douglas	No	Yes[3]	F	F	F	-	-	-
Gilliam	Yes	No[2]	-	-	-	-	-	-
Grant	Yes	Yes	F	-	-	-	-	-
Harney	No	No	-	-	-	-	-	-
Hood River	Yes	Yes	F	P	-	-	5/64	No
Jackson	Yes	Yes	F	F	P	-	11/78	No
Jefferson	No	No	-	-	-	-	-	-
Josephine	Yes	Yes	P	-	-	-	11/80	Yes(F)
Klamath	Yes	Yes	F	-	-	-	-	-
Lake	Yes	No[2]	-	-	-	-	-	-
Lane	Yes	Yes	P	-	-	-	11/62	Yes(F)
Lincoln	Yes	Yes	F	F	-	-	-	-
Linn	Yes	Yes	F	-	-	-	-	-
Malheur	No	No	-	-	-	-	-	-
Marion	Yes	Yes	F	F	F	-	-	-
Morrow	Yes	Yes	F	-	-	-	-	-
Multnomah	Yes	Yes	P	-	-	-	5/66	Yes(F)
Polk	Yes	No[2]	-	-	-	-	-	-
Sherman	Yes	Yes	F	-	-	-	-	-
Tillamook	Yes	Yes	F	F	F	-	-	-
Umatilla	Yes	Yes	F	F	P	-	11/92	No
Union	Yes	Yes	F	-	-	-	-	-
Wallowa	No	No	-	-	-	-	-	-
Wasco	Yes	Yes	F	-	-	-	-	-
Washington	Yes	Yes	P	-	-	-	11/62	Yes(F)
Wheeler	Yes	No[2]	-	-	-	-	-	-
Yamhill	Yes	Yes	F	F	-	-	-	-

[1] F = Failed; P = Passed

[2] Committee disbanded before submitting a charter

[3] Charter submitted by initiative petition: no charter committee appointed

A. Charter Preamble

A charter preamble is customary, but it is not legally an integral part of the charter. It explains the purpose of the charter, but the preamble itself confers no powers and establishes no limitations or requirements for the county government.

Eight of the nine Oregon county charters have preambles similar to the BGRS Model. The Model begins with the familiar "We, the people," a phrase that reminds us that the source of home rule is not the state legislature: rather, it is a constitutional right exercised by the county's citizens when they adopt a charter. The preamble goes on to acknowledge the dual role of the county as an agent of the state and a unit of local government and states the charter's purpose ("to avail ourselves of self-determination in county affairs").

The only county charter with a preamble that varies substantially from the Model's language is Hood River's, which merely states that the county's prior charter is repealed and the new one is established "as our charter and form of government."

B. Preliminaries

The "preliminaries" chapter of the BGRS Model has five sections: four sections establishing the county's name, its legal nature ("an agency of the state and a body politic and corporate"), its boundaries as determined by state law, and the county seat. A fifth section describes in summary form the organization structure of the county government, the details of which are spelled out in later sections of the charter.

Most of the nine charters have the same first four sections, but only Jackson includes the summary description of the county's organizational structure. Benton and Umatilla have no provision regarding boundaries, and Hood River has no preliminaries at all.

C. Powers

The Model and all nine charters feature a general grant of powers. This is the single most important part of the charters, since it accepts to the maximum possible extent the full range of home rule offered to the people of counties under the state constitution. Oregon counties, and cities as well, have opted for the general grant as opposed to the enumeration of specific powers found in early city charters in Oregon and in many other states.

The Models' general grant of powers reads as follows:

> Except as this charter provides to the contrary, the county has authority over matters of county concern to the fullest extent now or hereafter granted or allowed by the constitutions and laws of the Untied States and the State of Oregon, as fully as though each power comprised in that authority were specified in this charter.

This statement is followed by sections stating that the charter shall be "liberally construed," and vesting the powers (both legislative and administrative) in the county governing body.

All nine county charters have the sections establishing the general grant and the section stating how the charter is to be construed, but only Hood River, Jackson, Multnomah and Washington have the provision specifically vesting the powers in the county governing body. Lane, Washington and Hood River supplement the general grant with an "including, but not limited to" or "in addition to" list of enumerated powers such as the powers to levy taxes, incur bonded debt, create service and local improvement districts, and enact various types of regulations. Jackson's general grant echoes the preamble by stating that "The people…hereby grant the County authority over matters of County concern…" Washington qualifies its charter powers with an admonition that the charter does not "take away or encroach upon any power vested in the cities."

D. Structure of County Government

Governing Body

Structure: The Model provides for a three member board of county commissioner-elected at large, but includes alternative wording for counties that decide on a larger number of commissioners and for election by district or for nomination by district and election at large. Four of the nine charter counties (Benton, Jackson, Josephine and Umatilla) have three commissioners elected at large, including two (Benton and Umatilla) that provide for numbered positions. The other five counties have five commissioners each. Three of these (Hood River, Multnomah and Washington) elect the chair at large and the other four commissioners by district, while the other two elect all five commissioners by district. Clatsop County formerly nominated commissioners by district and elected at large, but changed to election by district in 1999. Three charters (Benton, Lane and Umatilla) specify that commissioners shall serve full time.

Reapportionment: Under U.S. Supreme Court interpretation of the equal protection clause of the federal constitution, counties that elect part or all of their commissioners by district must provide for periodic revision of the district boundaries to maintain the principle of "one person, one vote." The Model provides suggested wording for reapportionment that calls for boundary revision when the decennial census shows that the "disparity of population among the districts has become so great as to deny any person the equal protection of the laws."

All five of the counties that elect commissioners by district empower the board of county commissioners to revise district boundaries. The Lane and Multnomah charters identify specific geographic areas for the districts but authorize their boards to make revisions. Two of the charters (Multnomah and Washington) specify ratios of population among districts that must trigger reapportionment. Four charters (Clatsop, Lane, Multnomah and Washington) require reapportionment in connection with the decennial census, while Hood River sets no specific time.

Commissioner qualifications: The Model Charter requires that county commissioners be legal voters and have resided in the county six months before assuming office. Josephine also requires only six months residence before assuming office, but seven charters have longer durational requirements: five (Benton, Clatsop, Hood River, Jackson and Umatilla) require one year, one (Multnomah) a year and a half, and one (Lane) requires two years residence. Washington's charter requires residency but has no specific durational requirement.

Selection of commissioners: The Model merely adopts state law as to the nomination and election of commissioners, thus in effect calling for partisan elections with nominations to be accomplished at the primary election. Benton and Jackson also call for partisan elections, while the other seven specify that elections for commissioner be nonpartisan. Clatsop, Lane and Hood River provide specifically for nonpartisan elections at the primary with two leading candidates facing off in November. Washington and Multnomah, both with nonpartisanship, follow state law procedures for nomination of nonpartisan candidates (Multnomah specifically providing that the procedures shall be the same as that for circuit court judges). Umatilla's charter is silent as to nomination procedure, and the county presumably follows state law with primary nominations and election in November.

Multnomah's charter limits all elective offices to two successive terms within any twelve-year period and prohibits them from running for another elective office during the first three years of their terms.

Recall: The Model adopts state law with reference to recall. Five of the county charters (Jackson, Josephine, Lane, Multnomah and Washington) have similar provisions, and the other four and are silent regarding recall. There may be a legal question as to whether recall comes within the mandate of the county home rule amendment for a charter to "provide directly, or by its authority, for the...election or appointment...(and)

tenure..." of county officers. Even though a charter is silent as to recall, the constitutional right of recall may still apply.

Vacancies: The Model adopts state law provisions specifying the causes of commissioner vacancies, and adds a provision that creates a vacancy if the incumbent is absent from the county or the duties of the office for 60 days without the consent of the other commissioners. The Model also adopts state law regarding the method of filling vacancies (basically, a board of county commissioners appointment to serve until the next election).

Seven of the county charters spell out the causes for vacancies and two (Jackson and Josephine), like the Model, merely adopt the causes identified in state law. The charters authorize the board to make appointments to serve until the next election, but they vary with respect to the details of the method for filling vacancies. If the majority of board positions become vacant, Josephine provides for appointment by the other elective county officials, while Benton and Umatilla follow state law by providing for the Governor to appoint. Hood River requires that if the position of chair is vacant, the appointment be made from the remaining commissioners if possible; otherwise the vacancy is filled at a special election.

Board organization: The Model calls for designation of a board chair at the first meeting of each year and sets forth the chair's duties (preside, preserve order, enforce the board's rules, and have additional functions the board may prescribe). All nine charters provide for designation of a vice chair. Other provisions include specification that the chair has a vote (Benton and Lane), that the chair may make a motion (Hood River), that the senior commissioner serves as chair if the other commissioners can't agree on a chair (Josephine), and that the chair presents the annual budget message (Hood River). Hood River's charter has a provision stating that "No commissioner including the Chair shall have the authority to make statements or act independently without the express authorization of the Board of Commissioners."

Office of county judge: The Model Charter has several provisions to accommodate charter adoption in counties that still have an office of county judge, with or without judicial functions. The county home rule amendment states that "Except as expressly provided by general law" a county charter may not affect the positions of judges in their judicial capacity. A statute adopted in 1961 (ORS 3.130) provides that a county charter may abolish the position of county judge and transfer its judicial duties, if any, to the circuit court. Of the nine charter counties, only Hood River had a county judge at the time the charter was adopted, and its original charter has since been replaced by a new one. Therefore, none of the nine existing charters deal with the office of county judge.

Elective Administrative Officers

The Model Charter provides for no elective administrative officers. Of the nine charter counties, three (Clatsop, Hood River, and Umatilla) elect only the sheriff, Lane and Benton elect the sheriff and the assessor, and Washington and Multnomah elect the sheriff and a county auditor. Jackson elects the sheriff, assessor, clerk and surveyor, but the treasurer is appointive. Josephine continues to elect all five (sheriff, assessor, clerk, treasurer and surveyor), and Josephine also elects the county counsel. The offices are nonpartisan in all but Benton and Jackson.

Although the county home rule amendment requires charters to provide for the "qualifications" for county officers, two constitutional amendments adopted subsequent to the county home rule amendment authorize the legislature to establish qualifications for the offices of sheriff and assessor. The question appears not to have arisen in court, but it is likely that statutory qualifications enacted pursuant to the two subsequent amendments would be found to apply in a charter county. Eight of the county charters establish qualifications of experience and education for sheriff and assessor the same as or similar to those in state law, while Lane requires only that they be voters and have two

years residence in the county. Two counties prescribe minimum ages (Benton 21 years, Hood River 25 years). Multnomah County's two-term limit and prohibition against running for another office except in the last year of a term apply to its two elective administrative offices.

County Administrators

The Model Charter establishes the position of county administrative officer (CAO) with duties to be fixed by the board of county commissioners. It requires that the CAO have prior education or experience in public or business administration, and need not be a county resident when appointed. The Model includes alternative wording for counties that choose to have no central executive and for counties that prefer other types of executive such as an elected executive, a county manager, or an administrative assistant to the board.

Only four county charters make explicit provision for a central executive officer: Clatsop, Hood River and Washington (county administrator), and Multnomah, where the board chair is the county's chief executive. The Multnomah charter requires that department head appointments made by the executive must have the approval of the county commissioners. Although the Washington county administrator is generally responsible for administration, the charter states that the departments "exercise their functions under the direction and the supervision of the board of county commissioners."

Other Appointive Officers and Employees

The Model Charter vests authority to appoint and supervise other administrative employees in the board of county commissioners or, as the board directs, in the CAO. Six charter counties have similar provisions, while the Clatsop and Multnomah charters fix the appointing authority in the central executive and Hood River defers to the county's administrative code to fix responsibility for appointing and supervising the other appointive officers and employees. Josephine County has a lengthy charter provision

mandating that the board "regularly" do a performance review of department heads and supervisors during budget committee meetings and whenever there are changes in the membership of the board of county commissioners.

Departmentalization

The Model and all nine county charters authorize the board of county commissioners to establish and reorganize county departments. Lane's charter sets forth an initial departmental arrangement but gives the board authority to change it. Four county charters (Benton, Hood River, Umatilla and Washington) establish one or two but not all departments. The Lane and Benton charters give the sheriff and the assessor veto power over reorganization of their respective departments, subject to a countervailing vote of the people, and Umatilla does the same for its Department of Law Enforcement.

E. Legislative Authority

Board Legislative Procedures

The Model Charter provides for the board to make rules governing its procedures, requires 48 hours notice of regular meetings and eight hours for special meetings (with provision for waiver by unanimous vote), requires that board meetings be public, provides for a journal of proceedings that includes recording ayes and nays for all ordinances plus other actions at the request of any member, and a quorum consisting of a majority of the "incumbent" members. (For example, if there were two vacancies on a five-member board, the quorum would be two).

All nine charters have provisions generally similar to most of those in the Model, but there is considerable variation with respect to notice times for regular and special meetings ranging from six to 96 hours for special meetings. Josephine provides for notice "appropriate to the circumstances" and has detailed definitions and requirements for emergency meetings (as contrasted with special meetings). Eight charters (all but

Multnomah) also specify a minimum number of meetings: five counties (Benton, Clatsop, Lane, Umatilla and Washington) require two meetings a month, two (Jackson and Josephine) require one per week, and one (Hood River) requires one per month. For quorums, Benton and Umatilla require a majority of commissioners "in office" (thus similar to the Model's "incumbent" requirement), while the other quorums require a majority of the number of positions on the board. Two counties (Multnomah and Washington) require that action taken at special meetings be ratified at regularly scheduled meetings.

Ordinances

The Model sets forth procedures for adopting ordinances, requiring that ordinances embrace a single subject, prescribing the ordaining clauses, providing that ordinances be introduced only at meetings where they are listed on the agenda, requiring two readings at least seven days apart before adoption unless by unanimous vote an emergency is declared, providing for reading by title only under certain circumstances (either no request made for reading in full or copies provided seven days before introduction and notice of availability of the proposed ordinance is posted or published), and providing for an effective date 30 days after adoption except for emergency ordinances and ordinances prescribing a different effective date.

Of the nine charters, only Jackson and Josephine have single subject requirements for ordinances.[1] All except Hood River require at least two readings (Washington requires three) but the days of separation between readings range from six to 14 days. Hood River provides that an ordinance is set for a public hearing at least one week after it is introduced and published, when it may be adopted. Most of the counties also require two readings or reading in full for substantial amendments.

[1] Note, however, that ORS 203.725 requires that charter amendments " must "embrace but one subject and matters properly connected therewith."

All nine provide for adoption of emergency ordinances at a single meeting: unanimous votes are required to adopt an emergency ordinance in all charter counties except Hood River, Lane and Washington. Emergency ordinances expire after 60 to 120 days in Benton, Hood River, Jackson, and Josephine, and must be reenacted as nonemergency ordinances if they are to be continued in effect. Jackson, Josephine and Hood River prohibit emergency clauses on revenue ordinances, and Hood River prohibits them also on ordinances granting franchises or incurring debt.

Most of the charters provide for reading by title only if no member requests reading in full and/or if copies are provided to members and the general public in advance, a simpler procedure than that suggested by the Model Charter. Multnomah permits reading by title only if the board so directs, and Washington permits it by unanimous vote.

Seven charters prescribe effective dates for nonemergency ordinances of 30 days after enactment (60 days in Jackson and 90 days in Josephine). Because the constitutional county home rule provision was amended in 1978 to require that referendum petitions be filed not more than 90 days after enactment, in counties other than Josephine ordinances may go into effect and then be suspended if referendum petitions are filed within the 90 day period.

Initiative and Referendum

The county home rule amendment establishes the right of initiative and referendum as to "adoption, amendment, revision or repeal of a county charter and to legislation passed by counties which have adopted such a charter." The amendment also sets signature requirements "equal to but not greater than" four percent to refer a county ordinance, six percent to initiate an ordinance, and eight percent to initiate a charter amendment. The constitution sets no signature requirements for repealing a charter.

The Model Charter merely provides that the method for exercising the initiative and referendum on county propositions (ordinances and charter amendments) is the method prescribed by state law, but it also provides that the county may enact ordinances establishing different procedures. The Hood River charter has no specific procedural provisions relating to the initiative and referendum. The other charter counties have specific initiative and referendum provisions including adopting the procedures prescribed by state law but allowing for exceptions by ordinance (Lane and Washington), providing for initiatives or referendums at primary and special elections (Clatsop, Jackson, and Josephine) and stipulating signature requirements. Charter signature requirements vary but they are probably without effect if they differ from the constitutional "equal to but not greater than" four, six and eight percent requirement.

Five county charters (Benton, Clatsop, Jackson, Josephine and Umatilla) make specific provision for charter repeal. Benton, Clatsop, and Umatilla stipulate signature requirements of 15 percent to initiate a repeal of a county charter, while Jackson and Josephine require eight percent. Josephine provides that charter amendment, revision or repeal maybe effected only by the initiative process.

F. Personnel

Merit System or Civil Service

The Model requires establishment of a merit system of personnel administration, including division of employees into the classified and unclassified service, requiring that personnel actions be based on merit and fitness and the needs and finances of the county, and requiring the board to adopt personnel rules. Benton, Hood River and Umatilla have no specific charter provisions of this type. The other six charters generally mandate or require continuation of existing merit or civil service systems.

Employee Compensation

The Model requires the board of county commissioners to maintain a compensation plan. Benton, Jackson, Josephine, Umatilla, and Washington authorize the board of county commissioners to fix employee salaries. Lane's charter sets forth specific criteria for employee compensation (competence, service record, comparable wages, the county's financial condition and policies, and "other factors.")

Elected Official Compensation

The Model and three county charters (Benton, Hood River and Umatilla) provide for elected official compensation to be fixed by public members of the county budget committee. Clatsop prohibits pay for service on the board, but allows a "stipend" to be fixed by the public members of the budget committee. Jackson, Josephine, and Washington provide for the whole budget committee to fix elected official's salaries, but the Washington charter establishes initial ranges ($27,000 - $31,514 for the chair, $6,000 - $10,800 for commissioners) and allows for cost of living adjustments. Josephine's charter has a $30,000 maximum for commissioner's salaries and benefits, but allows voters to approve increases at a primary or general election. Lane lets the board of county commissioners fix salaries, but requires that increases not become effective until the first odd numbered year after amounts are set. Multnomah's charter establishes a fivemember salary commission appointed by the county auditor, and the commission sets salary levels for the chair and t he commissioners.

Nondiscrimination

The Model Charter prohibits discrimination in county employment based on political affiliation, religion, race, nationality, ethnicity, or sex. Clatsop merely requires "accordance with all state and federal laws pertaining to nondiscrimination." Jackson prohibits discrimination based on race, sex, politics, or religion. Hood River prohibits

discrimination based on race, religion, age, ethnic origin, or gender. Multnomah simply adopts state law. The other five charters have no nondiscrimination provisions.

G. Finances

The Model has no provisions regarding county finances. Four charters (Hood River, Jackson, Josephine and Washington) have provisions adopting the state local budget law by reference. Three charters (Jackson, Josephine, and Washington) require multi-year projections of the operating and capital budgets. Four charters (Clatsop, Lane, Multnomah, and Washington) contain local improvement and special assessment provisions.

Seven of the charters have special financing provisions. Clatsop specifies that audits, contracts, and procurement be in accordance with state statutes. Hood River specifies that contracts over a certain amount to be set in the administrative code be by sealed bid and awarded to the lowest responsible bidder. Jackson and Josephine provide for budget committee approval of supplemental budgets. Josephine has provisions (enacted by voter initiative) adopting the constitutional debt limit by reference, requiring the county to pay off all debt in excess of $4 million existing as of the date of the charter amendment and to "revoke" any debt incurred after the initiative petition was filed for the amendment. Josephine's charter also requires a vote of the people for any capital program or project and for any new or increased fee, and prohibits the county from adopting an income tax. Washington requires central purchasing, uniform accounting, pre- and post-audits, and inventories of capital assets.

Lane County has a spending limit for the discretionary general fund of $24,250,000 plus increases for inflation and population growth since the provision was adopted in 1984. Revenue in excess of that amount goes first to certain reserve funds and to property tax reduction or rebate. The limitation may be adjusted to reflect costs mandated by the state or court order. (The county's discretionary general fund revenues have never reached the charter limitation).

H. Miscellaneous Provisions

The charters of Benton, Hood River, Lane, Umatilla, and Washington Counties have sections authorizing the board of county commissioners to enter into intergovernmental agreements for joint and cooperative activities with other local governments, including in most cases transfers of functions between units.

Other miscellaneous charter provisions are:

- Benton, Clatsop, Hood River, Multnomah, and Umatilla charters require appointment of charter review committees on a regular basis (Benton and Umatilla every two years, Clatsop every five years, Multnomah every six years, and Hood River every ten years). In Multnomah placing recommendations of the committee on the ballot is mandatory, and it is permissive in the other three counties.

- Clatsop, Lane and Washington have provisions for establishment of county service districts.

- Hood River requires the Board of County Commissioners to adopt and maintain an administrative code. The code governs the operations, procedures and systems of all county departments and institutions and prescribes the powers and duties of county employees and officials, including the Sheriff, the District Attorney, and the Justice of the Peace.

- Hood River also provides that no chair or commissioner may "make statements or act independently" without the "express authorization" of the Board of County Commissioners.

- Multnomah and Washington have provisions for citizen involvement. Multnomah's charter requires the county to establish and fund an office of citizen involvement. Washington's provision is for citizen involvement in the planning process.

- Josephine's charter has provisions regarding animal abuse and nudity in public places, and mandatory support of the library and animal control.

- Hood River prohibits a person found in violation of state ethical standards from holding a county office or position for five years.

- Washington has a lengthy section requiring annual countywide mailed notices describing procedures for adoption of land use ordinances, individual mailed notices of proposed land use ordinances to anyone requesting them, prohibiting the emergency clause on such ordinances, and requiring that no hearings or actions on land use ordinances, and requiring that no hearings or actions on land use ordinances take place between November and February.

- Amendments to Josephine County's charter establish certain civil rights, most of which are protected by the U.S. and Oregon Constitutions. These include the right to bear arms, due process, just compensation for takings, bans on bills of attainder and ex post facto laws, search and seizure, freedom of speech and religion, and rights of parents and guardians. Each charter-established right is accompanied by provisions prohibiting county officials from denying or eroding the respective rights; preventing enforcement in Josephine County of non-county laws, rules, etc. that deny or erode the rights; requiring a two-thirds vote of the people to amend any of the "rights" provisions; requiring the board of county commissioners and the District Attorney to enforce the provisions as Class B misdemeanors, and guaranteeing the right to civil relief from injury due to violation of the provisions.[2]

I. Transition Provisions

The Model Charter suggests wording for transition to charter status in several provisions stating the effective date, assurances that the charter causes no break in the legal status of the county, continuation of claims, causes of action, contracts, etc., as well as of existing county legislation, rules, and regulations, and continuation and/or termination of specified county elective offices. All nine county charters have similar provisions, although some have been repealed as no longer needed.

[2] The Oregon Court of Appeals held in 2000 that the Josephine County charter prohibition against illegal search and seizure could not be used to suppress evidence in a criminal trial. The Court held that this provision is not a "matter of county concern" within the meaning of the county home rule amendment and the county charter. *State v. Logsdon,* 165 Or App 28; 995 P2d 1178 (2000).

INFORMATION SOURCES

Association of Oregon Counties, *Pilot Charter for County Home Rule* (Salem, OR, 1967)

Bureau of Governmental Research and Service, *Model Charter for Oregon Counties* (Eugene, OR, University of Oregon, 1977)

Benton County Charter

Clatsop County Charter

Hood River County Charter

Jackson County Charter

Josephine County Charter

Lane County Charter

Multnomah County Charter

Umatilla County Charter

Washington County Charter

EXERCISE OF LEGISLATIVE POWERS UNDER COUNTY HOME RULE

SUMMARY

Both charter counties and general law counties are authorized to enact legislation (i.e., ordinances) on "matters of county concern." County legislative powers include the police power (the power to regulate private conduct in order to preserve and promote the public order, safety, health, morals, and general welfare) and the power to raise revenue for county purposes.

Some county ordinances address purely local concerns unrelated to state law, but the bulk of county legislation supplements, amplifies, and otherwise assists in performing duties that state law imposes on counties. In some cases state statutes impose certain regulations but expressly authorize counties using their home rule powers to enact ordinances that alter or even conflict with the state requirements.

This paper illustrates the scope of county police power legislation under home rule by summarizing the ordinances of four selected counties.[1] Subjects addressed in these county ordinances include alarm systems, second hand businesses, noise, nuisances, discrimination, animals, solid waste, social gatherings, ambulance services, farm practices, abandoned and impounded vehicles, and tobacco sales and smoking. Brief references are made to the subjects of ordinances of other Oregon counties that responded to a questionnaire.

Oregon counties have only rarely used their home rule authority to raise revenue. The non-property tax ordinances of a few counties are identified in this paper.

[1] This paper has not been revised to reflect any changes in the ordinances of the four selected counties that may have been made since 2000, when the first version of the County Home Rule Papers was written. The ordinances as they stood in 2000 still provide an adequate illustration of the types of county legislation enacted by counties exercising their constitutional and/or statutory legislative powers.

DISCUSSION

INTRODUCTION

Home rule for Oregon counties has two objectives: the ability to enact local legislation without prior statutory authorization, and the ability to reorganize county government (see County Home Rule Paper #2). This paper describes the ways and the extent to which counties have exercised their legislative authority under home rule.

The scope of local legislative authority is the same for both charter counties and general law counties in Oregon. Authority over "matters of county concern" is provided by both the constitutional county home rule amendment (Article VI, section 10, Constitution of Oregon) and the general statutory delegation of legislative authority (ORS 203.035). The courts and the Attorney General have consistently ruled that the scope of legislative authority derived from both sources is the same.

The legislative powers of Oregon counties may be classified by their major purpose as (1) power to acquire, manage, and dispose of property; (2) power to employ persons; (3) power to enter into contracts; (4) police power; and (5) power to raise revenue.[2] Both the police power and the revenue power operate directly upon individuals, while the first three powers in this five-way classification are incidental to the performance of governmental functions. The last two powers are unique to government, and they are the kinds of governmental power addressed in this paper. The police power is far more than law enforcement: it embraces the entire range of governmental actions to preserve and promote the public order, safety, health, morals, and general welfare. The revenue power includes authority to raise money for governmental purposes from taxes, charges, and fees.

[2] Bureau of Governmental Research and Service, *Guide to Local Government in Oregon: County Version* (Eugene, OR, University of Oregon, 1980). Sections 3C.105 et.seq.

Exclusions

A great deal of county legislation addresses land use planning, zoning, and development regulation (including building regulation). County legislation in these areas is controlled to a very great extent by state law, and is not addressed in this paper. Also excluded from the paper are county ordinances dealing with the internal processes of government such as contracting, personnel, management of county property, elections, and methods of enforcing county law.

Relation to State Law

Some county ordinances address purely local concerns, but many are designed to assist the county in performing functions and duties imposed upon them by state law. These county ordinances often supplement state law by providing administrative details or in some cases amplifying provisions of state law as they relate to circumstances in a particular county. Some state statutes set minimum standards and expressly call for counties to enact local ordinances that meet the state standards. Examples include the state laws regarding ambulance services, solid waste management, and outdoor gatherings. Other state laws establish regulatory programs but defer to local legislation: for example, the state dog control law applies "except as otherwise provided by county charter or ordinance." Similarly, the ORS chapter dealing with county roads provides in ORS 368.011 that, with specified exceptions, "a county may supersede any provision in this chapter by enacting an ordinance pursuant to the charter of the county or under powers granted the county in ORS 203.030 to 203.065."

EXERCISE OF POLICE POWERS

When the county home rule constitutional amendment was up for consideration in the 1957 legislative session, opposition centered around a fear that if counties were

empowered to enact local ordinances without prior authorization from the state legislature there would be a flood of regulatory activity that would unduly burden the lives of citizens and the activities of businesses in the communities. History has proven those fears to be unfounded. As this paper indicates, a great deal of county legislation responds and is closely related to various state statutes, and the exercise of local police powers on purely local matters has been quite modest.

Examples of County Police Power Ordinances

Information about county police power ordinances was derived mainly from inspection of the codes or compilations of county ordinances in two charter counties (Lane and Benton) and two general law counties (Linn and Polk.) The ordinances of these counties were scanned and their general features noted. Provisions of selected ordinances are summarized in the following paragraphs. The four counties included in this analysis are not necessarily representative of all counties, but the information is at least suggestive of the general scope of county ordinances.

Alarm system regulations: Lane, Benton, and Polk Counties regulate alarm systems on private property. Lane's ordinance sets maximum times for alarm service companies to disable alarms after calls. Benton and Polk impose service charges for false alarms in excess of a given number during a certain time period, and Polk lets the Sheriff discontinue response to an alarm system that has had eight false alarms in the same calendar year.

Second hand businesses and pawnshops: Lane, Linn, and Polk have ordinances licensing and regulating second hand businesses. These ordinances require that such businesses keep certain records of their transactions, hold items for certain periods of time, and make reports to the Sheriff. Lane's ordinance prohibits purchase from or sale to persons under 18 years of age unaccompanied by a parent or guardian or to intoxicated persons, and prohibits purchase of items with obliterated serial numbers.

Noise regulation: Lane regulates noise by an ordinance that sets decibel limits measured at the property line, establishes technical requirements for measuring sound, provides for certain exceptions and variances, and provides procedures for handling complaints.

Nuisance regulation: County nuisance ordinances generally include prohibitions and limitations on junk, noxious or overgrown vegetation, old tires, inoperable vehicles, animal carcasses, solid waste, refrigerators, litter, etc. on private property. Polk's ordinance also covers dangerous buildings and drug labs and defines public nuisance broadly as "unlawfully doing an act, or omitting to perform a duty, which act or omission annoys, injures or endangers the safety, health, comfort or repose of others." Enforcement is usually by some kind of abatement procedure under which property owners are given time to correct the problem, after which the county may with its own forces correct it and recover its costs from the property owner.

Discrimination: Lane prohibits discrimination in public accommodations "because of race, color, religion, sex, national origin, physical handicap or marital status." Benton's ordinance prohibits discrimination in public accommodations, employment, and renting or selling real property "based on race, religion, color, sex, marital status, familial status, national origin, age, mental or physical disability, sexual orientation, gender identity or source of income." Linn County has an ordinance that prohibits any ordinance, rule, etc. extending minority status based on homosexuality or sexual preference.

Animal control: All four counties have animal control ordinances, and Lane declares the purpose of its ordinance "is to supercede to the greatest extent allowed by law the provisions of ORS Chapter 609" (with certain exceptions). The ordinances generally provide for licensing dogs, prohibit dogs running at large and chasing, injuring or killing livestock, provide for impoundment, redemption, and sale or other disposition of animals, licensing and regulating kennels, dealing with animal abuse and neglect, and powers of animal control officers.

Solid waste: The Benton, Linn, and Polk County ordinances provide for franchising solid waste collection and disposal within specified service areas, regulation of rates and service levels, and rules for users of collection services. Lane's ordinance regulates solid waste hauling and disposal but does not provide for franchising collection or disposal services.

Social gatherings: Benton, Linn, and Polk counties regulate large social gatherings such as concerts and other events. These ordinances require permits for gatherings expected to attract large crowds, require minimum facilities such as sanitary, fire, traffic control, parking, and public safety patrol, establish rules for operation of the events (e.g., sound limits, prohibition of liquor or drugs, etc.), and include additional provisions such as termination of admissions when attendance exceeds a certain percent of expectations (Benton) and requirement to take a LCDC goal exception if an event is to take place on land with certain farm or resource zoning (Polk).

Ambulance service: Benton, Linn, and Polk Counties have ordinances implementing state laws regulating ambulance services and personnel. The ordinances are concerned mainly with establishing ambulance service areas.

Farm practices: These ordinances in Benton and Polk Counties implement state law that prohibits declaring ordinary farming practices as nuisances or trespasses. The Benton County ordinance establishes a peer review board to process complaints and to determine whether farm practices complained of are protected by the state law. Polk County limits the prohibition against declaring farm practices nuisances or trespasses to areas outside urban growth boundaries, but allows for such prohibition inside UGBs if the resource use predated the affected nonresource use and if it has not increased in size or intensity after the effective date of the ordinance, or if the UGB was changed to include the resource use.

Abandoned and impounded vehicles: Linn County has ordinances that prohibit leaving abandoned vehicles on a county or state right of way, providing for impoundment of certain vehicles (including vehicles operated by persons driving with suspended or revoked drivers' licenses or under the influence of intoxicants if the driver is in diversion or has previous vehicle convictions), and allowing law enforcement officers to search impounded vehicles, including closed containers found in such vehicles. Polk County has similar provisions relating to vehicle impoundment, following state law provisions in ORS chapter 368 and 810.

Tobacco sales and smoking: Linn has an ordinance regulating tobacco vending machines. Benton has extensive regulations regarding sale of tobacco, requiring retailer licenses, prohibiting sale to minors including self-service, and prohibiting sale to persons under 27 years of age without requesting identification. Benton also has an ordinance prohibiting smoking in public enclosed areas including retail stores, restaurants, and theaters, or within ten feet of an enclosed area where smoking is prohibited. The ordinance also requires that employers provide smoke-free workplaces and prohibits retaliation against persons who report violations. The ordinance permits smoking in bars, tobacco stores, and private residences.

Ordinances found only in a specific county: Counties whose ordinance codes or compilations were reviewed for this paper have many "one of a kind" ordinances that address "matters of county concern" as defined by the respective county governments or their citizens. Examples include:

> *Lane* has ordinances setting criteria for tax differentials, prohibiting trespass or loitering on county property, regulating nudity, requiring that impounded animals be killed only by injection (enacted by a citizen initiative), prohibiting nonemergency use of 9-1-1, prohibiting the taking of whales, dolphins and porpoises by any person "subject to the jurisdiction of Lane County," authorizing a reward for information leading to conviction of persons causing damage to county property, regulating use of wood stoves, establishing standards for rental housing, and declaring the county a nuclear free zone.

Benton has ordinances regulating the speed and manner of operating off road vehicles, providing for the management of the county fair and declaring the "structure, organization and management" of the fair and fairgrounds to be "matters of county concern under the Benton County Charter," and providing for abatement of nuisance trees (i.e., diseased trees or trees with structural defects).

Linn has ordinances providing for the management of county parks and forests, prohibiting the export of unprocessed timber from public lands, and establishing procedures for liquor license renewals.

Polk has ordinances prohibiting swimming in a certain location, providing for civil forfeiture and disposition of property used in certain crimes, and franchising cable TV.

In addition to the review of ordinances in the four counties presented above, questionnaires were sent to all county counsels and county clerks asking them to identify some general subjects addressed by their county ordinances. Only a few counties responded to the questionnaire, but the responses included prohibition against use of official police symbols on private clothing or vehicles(Multnomah), taxicab regulation (Hood River), standards for cattle guards (Crook), weed control (Gilliam), regulation of "adult" entertainment businesses (Coos), economic improvement and business incentives (Coos), "no spray" program (Coos), and flood damage prevention (Grant). In addition, the responding counties indicated that they have many of the same types of ordinances included in the four-county analysis above.

EXERCISE OF REVENUE POWERS

Oregon counties have made very little use of their home rule powers to raise revenue. Several counties have enacted transient room taxes, two counties (Multnomah and Washington) have real estate transfer taxes, and two counties (Multnomah and Lane) have taxes on car rentals. Multnomah has a business net income tax, Gilliam charges a major landfill operation a "host fee" that produces general revenue for the county, and

Washington County has enacted a traffic impact tax on new development based on the amount of traffic expected to be generated by the type of development.

INFORMATION SOURCES

Prior to preparation of this paper, there have been no studies or reports on the exercise of legislative powers by Oregon counties (nor counties in other states, as far as can be determined). The paper cited below deals mainly with the political, administrative and legislative roles of county governing body, rather than with the content of county legislation. Persons interested in additional information on the kinds of ordinances adopted by Oregon counties may contact individual counties and inspect their ordinance files, compilations, and codes.

Sokolow, Alvin D., "Legislatures and Legislating in County Government" in David R. Berman (ed.) County Governments in an Era of Change (Westport CN, Greenwood Press, 1993)

REORGANIZATION UNDER COUNTY HOME RULE

SUMMARY

- **Reorganization has been the central focus of movements to adopt county charters in Oregon.**

- **All Oregon charter counties except Josephine have reorganized county government to some extent. Major changes have been in the size and manner of selecting governing bodies, establishment of a central executive office, and converting some department heads from elective to appointive status.**

- **County government reorganization choices are influenced by the kinds of communities involved, the selection among various values reorganization attempts to realize, and the life experiences of those who make reorganization decisions (including the voters).**

- **A central issue involves the differences between policy making and carrying out policies, or administration. The dominant view used to be that policy and administration should be assigned to separate entities, and that while policy makers should be elected, administrators should be appointed based on their technical and professional qualifications. More recently, research has shown that in fact both policy and administrative roles and responsibilities are shared between elected and appointed office holders, although elected officials are dominant in policy making and appointed officials are chiefly responsible for administration.**

- **There are numerous pros and cons to consider in making organization choices, including choices about:**

    - **The size, terms, and method of nominating and electing members of the county governing body;**

    - **Whether to establish a central executive office and if so whether the executive should be elected or appointed; and**

    - **Whether county department heads should be appointed or elected.**

DISCUSSION

Movements for charter adoption in Oregon counties have mostly featured proposals for some kind of restructuring or reorganization of county government. Controversy around charter proposals has focused on reorganization issues, rather than expansion of the county's local legislative powers. Some reorganization issues may be addressed in general law counties also, but as indicated in County Home Rule Paper #2, general law counties have only limited options with respect to reorganization.

Reorganization under Oregon County Charters

Nine Oregon counties have adopted county charters: Lane and Washington in 1962, Hood River in 1964, Multnomah in 1966, Benton in 1972, Jackson in 1978, Josephine in 1980, Clatsop in 1988, and Umatilla in 1992. The major changes in county government organization effected under these charters are as follows.

Boards of County Commissioners

Lane: Originally retained three-member board, with partisan at-large elections, and extended terms from four to six years. Later, the charter was amended to reduce the terms from six back to four years. The charter was amended further in 1976 to provide a full-time, nonpartisan, five-member board elected by districts.

Washington: Originally provided for a part-time, five-member board, partisan election, with two members elected at large and three by district for four-year terms. The charter was amended in 1978 to provide for a full-time, three-member board elected at large on a nonpartisan basis; but in 1980, the voters approved an amendment restoring a five-member board, with four part-time members elected from districts and one full-time member elected at large, all on a nonpartisan basis.

Hood River: Part-time, five-member board, nonpartisan elections. Four commissioners are elected by district for four-year terms, and the chair is elected at large for a two-year term.

Multnomah: Originally provided for a full-time, five-member board, partisan election at large for four-year terms. Amended in 1976 to provide for election by district, nonpartisan basis, for two-year terms. In 1977,

returned to at large election for four-year terms. In 1978 went back to district elections. Amended in 1982 to establish a two-term limit. Further amended in 1984 (effective in 1987) to provide for chair elected at large and four members elected by district.

Josephine: Originally provided for three-member board, partisan election by district for four-year term. Amended in 1993 to return to at-large election.

Benton and Jackson: Three-member board, partisan election at large for four-year terms. (No change from general law.)

Clatsop: Nonpartisan five-member board elected for four-year terms. The original charter provided for nomination by district and election at large, but a 1999 charter amendment changed to election by district.

Umatilla: Three-member board, nonpartisan election at large for fouryear terms.

Central Executive

Lane: No charter provision, but position of general administrator has been established by order of the county commissioners.

Washington: Charter establishes appointive office of county administrative officer, with such duties as the board may delegate.

Hood River: Charter establishes appointive office of county administrator.

Multnomah: Charter originally provided that the elected chair of the board serve as chief executive and made this office responsible for administration of all county departments. Amendments enacted in 1978 separated the elective office of county executive from the board. Further amendments in 1984 (effective in 1987) abolished the position of elected executive and again made the board chair responsible for administration.

Benton and Josephine: No charter provision for a central executive, but the Board has provided for an appointive administrative assistant to the board.

Jackson: No charter provision for central executive, but the board has established the position of county administrative officer.

Clatsop: Position of county manager established by charter, but title was changed to "county administrator" in 2002.

Umatilla: No charter provision for central executive.

Elective Department Heads

Lane: Abolished elective offices of clerk, treasurer, surveyor, and constable. Retained sheriff and assessor as elective offices.

Washington: Abolished elective offices of assessor, clerk, treasurer, and surveyor. Retained sheriff as elective office. An amendment approved in May 1980 establishes a new elective office of county auditor.

Hood River and Umatilla: Abolished elective offices of assessor, clerk, treasurer, and surveyor. Retained sheriff as elective office.

Multnomah: Charter originally abolished elective offices of sheriff, assessor, clerk, treasurer, district court clerk, surveyor, and constable and retained auditor as elective office. Amendments approved in 1982 restored elective offices of sheriff, assessor, clerk, and district court clerk. Further amendments approved in 1984 abolished the office of district court clerk and restored the assessor and clerk to appointive status, leaving the sheriff and auditor as the only elective department heads.

Benton: Abolished elective offices of clerk, treasurer, and surveyor. Retained sheriff and assessor as elective offices.

Jackson: Made office of county treasurer appointive. Otherwise, no change in elective offices under charter.

Josephine: Provides for election of the county counsel, in addition to sheriff, assessor, clerk, treasurer and surveyor. All elective department heads are nonpartisan offices.

Clatsop: Originally abolished all elective offices except county commissioner. Restored sheriff to elective status in September 1994.

General Considerations in County Government Reorganization

The issues in county government organization and reorganization are issues of art, not science. There is no "one best form of county government," and no "one size fits all" approach to reorganization.

Different organization choices may be made by different kinds of communities, may reflect different combinations of values, and may reflect the different life experiences of those making the choices.

Small communities may be best served by organization forms that provide direct interfaces between citizens and officials, while larger communities may prefer organization forms that focus responsibility on relatively few officials who can be tracked in the public media. Similarly, rural communities may adhere to traditional county government forms even though decision-making is fragmented and generally slow paced, while urban communities with numerous complex public policy and service issues may need a more streamlined structure that is capable of acting swiftly in response to rapidly changing needs and circumstances. Socially diverse communities may have problems of public access and representation requiring a degree of organization responsiveness that may be of less importance in socially homogeneous communities.

Organization issues also reflect values and combinations of values, and sometimes these values conflict with one another. Values that may come into play in making organization choices include:

- *Access to decision-making officials.* Some organization formats maximize opportunity for direct, personal access while others rely on more indirect and impersonal means of communication with officials.

- *Accountability.* This value requires that public functions be conducted by individuals or entities that are subject to oversight by some external authority. Different organization formats may promote different degrees of accountability.

- *Responsiveness.* Although similar to accountability, responsiveness implies awareness of diverse community needs and flexibility to adapt to changing circumstances. A decentralized organization form may maximize responsiveness, although it may make it more difficult to achieve other values.

- *Representativeness.* This value calls for structuring governments to parallel the geographic, demographic, and political characteristics of the communities they serve.

- *Efficiency and effectiveness.* These strong cultural values require organization structures that get the "biggest bang for the buck" and that achieve the results they intend to achieve. Again, efficiency and effectiveness may conflict with other values, such as responsiveness and access.

- *Professionalization.* Personnel with specific professional training and public service experience may be more likely to seek employment in some kinds of organizational settings than in others. Highly politicized organizational environments are less likely to attract the services of qualified professionals than organizations that provide better insulation from political influences.

- *Simplicity.* Some organization formats are so complex that citizens and voters have difficulty understanding who is in charge and whom to hold accountable.

Finally, those who make or influence organizational choices — office holders, community activists, civic leaders, newspaper editorialists, and the voters themselves — are influenced by their respective individual life experiences. Based on their individual experiences in business organizations, churches, schools and other organizations, people develop preferences and assumptions about how organizations should be structured. These different experiences will affect the kinds of value choices that must be made in designing organization structures.

Separation of Powers and Policy v. Administration

Those who framed the U.S. constitution in 1787 endorsed a principle of organization developed by 17th century political philosophers: that the legislative functions and executive functions of government should be assigned, respectively, to separate branches of government. The "separation of powers" principle, together with its corollary of "checks and balances," is applied not only in the structure of the federal government, but also in the structures of each state government. Its most obvious feature is the direct election of the chief executive — the president and the governors — a feature that ensures separation and distinguishes our form of government from parliamentary systems, which draw executive leadership from the ranks of the legislative branch.

Separation of powers has only rarely been followed in local governments, however. Local governments that utilize appointed chief executives (city and county managers, school superintendents, etc.) combine legislative and executive functions by making the legislative body responsible for hiring and firing the chief executive. The combination of legislative and executive functions is found in all Oregon counties, both general law and charter counties. State law and all but one of the county charters explicitly make the county governing body responsible for both legislative and executive functions, and the one charter county that does not (Multnomah) nevertheless combines legislative and executive functions by making the chair of the board of county commissioners the chief executive of the county.

A distinction somewhat similar to legislative v. executive functions is the familiar distinction between "policy" and "administration." The municipal reform movement of the late 19th and early 20th century stressed a need to separate policy functions from administrative functions, with the idea that policy makers should be elected and administrators should be appointed, and that administration should be freed from "politics." That idea "stuck," and today it is still a common perception that elected governing bodies make the policy, and appointed administrators carry it out.

However, students and other observers of local government have for many years doubted that there is — or even should be — a hard and fast separation between policy and administration. Rather, research on local government operations indicates that in actual practice local legislators and their executives each have roles to play in both "policy" and "administration," although legislators are chiefly responsible for policy while executives are chiefly responsible for administration.

The following chart[1] illustrates how governing bodies and their administrators share in both policy and administration. The governing body's role is dominant but not exclusive in identifying the county's mission and establishing its policies, while the administrators' role is dominant but not exclusive in carrying on administrative and management duties.

GOVERNING BODY TASKS		ADMINISTRATORS' TASKS
Within scope of home rule powers, determine purpose and goals of county programs and conduct strategic planning	MISSION	Advise governing body on what the county "can" do; analyze conditions and trends
Enact ordinances, resolutions, etc, adopt budgets, approve new projects and programs	POLICY	Make recommendations on the governing body's policy decisions; prepare and recommend the annual budget
Make implementing decisions, e.g., approve contracts and intergovernmental agreements; handle complaints; oversee administration	ADMINISTRATION	Establish administrative practices and procedures; make decisions on how to implement policy decisions of the governing body
Suggest management changes to administrators; review organizational performance when conducting managers' performance evaluations	MANAGEMENT	Control the human, material and informational resources of the organization to support policy and administrative functions

[1] This chart is adapted from one developed by James H. Svara. Svara's chart is included in his article, "Dichotomy and Duality: Reconceptualizing the Relationship Between Policy and Administration in Council-Manager Cities," *Public Administration Review,* January/February 1985, p. 221.

Reorganization Options

The following paragraphs discuss various options available for county government reorganization. They focus on options for restructuring the county governing body, provisions for a central executive, and the issue of electing v. appointing county department heads. Some advantages and disadvantages of the various options are suggested, but those cited are not necessarily authoritative or complete, and persons charged with developing and revising organization structures may make different judgments.

The County Governing Body

Changing the size and manner of selecting the members of the county governing body is an option available to both charter and general law counties in Oregon. Three general law counties (Clackamas, Marion, and Gilliam) have voted on proposals to increase the number of members of the county governing body, but the voters rejected all three measures.

Size: Most interest in Oregon has been to increase the number of governing body members from the traditional three to five members, although there have been proposals for even larger governing bodies.

The advantages of larger governing bodies include:

- Improving representativeness by increasing the number of geographic areas represented, achieving better balance between rural and urban populations, and accommodating a greater variety of demographic groups, economic interests, etc. and
- Making it possible for more citizens to serve in public office.

Smaller governing bodies:

- Simplify decision-making,

- Make it easier to provide for full time service, and
- Enhance visibility and accountability to the voters.

Terms of office: All Oregon counties presently have four year terms for county commissioners except Hood River, which has a two-year term for the board chair. There have been brief experiments with six-year terms (Lane) and two-year terms (Multnomah), but both counties returned to four-year terms after a short time. Multnomah County has established a limit of two four-year terms within any twelve-year period for county elective offices, the only Oregon county to do so.

Shorter terms of office:

- Enhance accountability and responsiveness to the voters, and
- Increase opportunities to run for public office.

Longer terms:

- Foster development of experience and expertise, and
- Probably increase efficiency and effectiveness in conducting county business.

Term limits:

- Increase opportunities to run for public office and may enhance accountability and responsiveness to the voters, but discourage development of experience and expertise in public office.

Partisanship: Most of the charter counties have opted for nonpartisanship in electing county commissioners and other county officers. Partisanship elections are said to promote competition for county offices and to strengthen political parties generally. The claims for nonpartisanship are that it enhances opportunities for independents and members of minority parties to serve in county office, and that it avoids confusion of strictly local issues with various state and national political and philosophical issues.

Election by district v. election at large: The question of electing commissioners by districts has been a central issue in many of the county charter committees, and most of them have recommended electing part or all commissioners by district. Five of the nine charter counties (Clatsop, Hood River, Lane, Multnomah and Washington) elect some or all of their commissioners by district.

Election by district:

- Ensures representation of a county's various geographic areas and communities,
- Reduces the cost of running for the office of commissioner,
- Facilitates personal contact between officials and their constituents,
- Simplifies voting for the office of commissioner, and
- Improves access for minority groups within the county.

Election at large:

- Promotes county-wide perspectives on county issues,
- Avoids "log rolling" (gaining support for ordinances or appropriations of special benefit to one commissioner's district by promising to support another commissioner's preference on other issues),
- Expands the individual voter's influence on county commissioner elections, and
- Avoids the need to provide for periodic reapportionment of districts to comply with constitutional "one person, one vote" requirements.

There are various approaches short of electing all commissioners either by district or at large. Several counties, including several general law counties, require that commissioners elected at large file for a specific numbered position. Three of the charter counties (Hood River, Multnomah and Washington) elect some commissioners by district

and others at large. Another option is nomination by district but election at large, a feature of the original Clatsop County charter that was changed to election by district in 1999. The latter option offers the advantage that nomination districts may be of unequal size, since the "one person, one vote" requirement is satisfied by electing at large.

Central Executive

Central executive v. no central executive: County government has traditionally operated without a chief executive officer, with department heads appointed directly by the governing body or elected by the voters. The federal and state governments, most city governments, and most school and special district governments have some kind of elected or appointed chief executive. The absence of a central executive in county government is said to result in a confusion of policy-making with administration and to involve commissioners in administrative decisions they are not qualified to make. Conversely, establishing a chief executive position in county government is said to relieve commissioners of administrative burdens and to improve accountability of county departments by having them report to a single, often professional, chief executive.

Appointment v. election of the central executive: Assuming a decision to provide for a central executive officer, the next issue is whether that officer should be appointed by the governing body or elected by the people.

Appointment of the central executive:

- Makes it possible to recruit professional managers for county government service,
- Fosters continuity in administration of county affairs, and
- Ensures ultimate accountability to the elective governing body, and keeps the elected commissioners in control of county administration.

Election of the central executive:

- Promotes political leadership and community consensus-building,
- Provides an office with high public visibility that can enhance public awareness of county government, and
- Institutionalizes the separation of powers concept that many believe is an important feature of democratic government.

Role of the central executive: The actual functions of the central executive and the role the office plays in county government vary widely from county to county. County manager positions typically are established and have their duties generally defined in a county charter, which gives them a degree of independence from political influence many deem desirable. Appointive county administrator positions, on the other hand, are typically established either by ordinance or merely by a line item in the county budget. Their duties are delegated by the county governing body, which may change them from time to time. There is great variation among counties with respect to the role and duties of a county administrator. Some county administrators have authority to hire and fire department heads and enjoy broad discretion in performance of their administrative duties. Other county administrators have only limited authority in selection of department heads and in carrying out other delegated duties. Elected county executives generally have greater independence and broader authority than appointed executives, although in many elected executive counties the governing bodies exercise some checks and balances, such as approving appointment of department heads. Elected executive counties may be more vulnerable to legislative-executive conflict than counties that appoint their chief executives.

Departments, Boards, Commissions, Committees

A few county charters call for establishment of particular county departments, such as public safety or law enforcement, public works, assessment

and taxation, health and social services, and general administration, but they stipulate that the county governing body may revise the departmental structure from time to time. A few charters also establish certain boards, commissions, or committees (e.g., the charter review committee, citizen involvement committee, and civil service commission in Multnomah and the land use ordinance advisory committee in Washington).

Still other county boards, commissions and committees are mandated by state statutes, including intergovernmental entities such as the Commission on Children and Families and the Public Safety Coordinating Council; Boards of Property Tax Appeals and Review; the county budget committee; the fair board; and the elected officials compensation committee. The extent to which a charter county must establish these state-mandated groups is a question that may arise in the future. It could be argued that at least some of these required entities fall within the scope of local organization and "political forms" that recent home rule case law indicates may be "matters of county concern" with immunity against conflicting state enactments.

With the possible exception of some or all of the state-mandated entities, both charter and general law counties have considerable local discretion to create boards, commissions, and committees to carry on various county functions and activities. The chief advantages of such groups is that they provide opportunities for lay citizens to participate actively in county government and that they take some of the governance burden off the shoulders of the county governing body. The chief disadvantage is that they tend to fragment decision-making and pose barriers to the accountability of the governing body to the voters.

Election v. Appointment of Department Heads

Nothing has created more controversy in county charter elections than proposals to appoint rather than elect the county sheriff, assessor, clerk, treasurer and surveyor.

Incumbents of these offices typically resist conversion to appointive status. The county sheriff has most often been left as an elective office, and the two counties that at one time made it appointive (Clatsop and Multnomah) have since returned it to elective status. There has been more conversion to appointive status for the other department heads, and except for Multnomah County those conversions have not been reversed once made. Multnomah County originally made its department heads (including the sheriff) appointive. Later, charter amendments restored them to elective status, but that action was in turn subsequently reversed.

Election of county department heads:

- Is traditional in county government, and
- Enhances public access to departmental management.

Appointment of county department heads:

- Encourages professionalism and expertise in departmental management,
- Enhances oversight of administration by the governing body and reinforces the governing body's accountability to the voters,
- Depoliticizes county administration, and
- Simplifies voting and improves the public's ability to make informed decisions about county affairs.

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THE SCOPE OF COUNTY HOME RULE

SUMMARY

Home rule has two dimensions: empowerment and immunity. In its empowerment aspect, home rule enables local governments to take action on their local affairs without first obtaining specific legislative authorization to so act. In its immunity aspect, home rule protects local governments from legislative interference on matters within their home rule jurisdiction.

Courts have readily sustained home rule powers in their "empowerment" aspect, but the "immunity" aspect has proven to be both complicated and controversial. In deciding cases under the municipal home rule amendment, the Oregon courts have vacillated between two basic approaches to home rule immunity. Some of these cases have taken the position that any general state law prevails over a conflicting local enactment. Others have insisted that there are limitations on the extent to which legislative acts can impinge on the constitutional home rule powers of charter counties and cities.

Using these alternative approaches to interpretation, the Oregon courts have sometimes (but not always) recognized that some objects of municipal action are "purely" or "predominately" of local concern and thus entitled to some degree of immunity against conflicting state laws or regulations.

Since the advent of constitutional county home rule in 1958 and statutory county home rule in 1973, appellate court cases and Attorney General opinions have generally analogized county home rule to city home rule, and have applied the city precedents (conflicts and all) to county cases. They have not yet thoroughly examined any differences between county and city home rule that may arise from differences between the wording and/or historical contexts of the two home rule provisions.

The current leading case, LaGrande/Astoria v. PERB has usually been followed in county home rule cases, even though it was decided under the municipal home rule amendments. LaGrande/Astoria is generally regarded as having narrowed previous expansive interpretations of home rule so that under the current interpretation, any "substantive" state law trumps a conflicting local enactment if it was intended to do so, and unless it violates a local government's home rule right to choose its own "political form." LaGrande/Astoria was decided by a 4-3 vote of the state Supreme Court in 1978.

DISCUSSION

INTRODUCTION

Home rule has been defined generally as "local or regional self-determination." More specifically, home rule defines and structures the relationship between the state government and its home rule jurisdictions — in Oregon, cities, counties, and the Portland Metropolitan Service District.

Home rule has two aspects: empowerment and immunity (sometimes referred to as the "sword" and the "shield" of home rule).

In its empowerment aspect, home rule enables local governments to take action regarding their local affairs without first obtaining authorization from the state legislature to do so (see County Home Rule Paper #1). There has been little or no controversy about the empowerment aspect of home rule. The courts have consistently upheld the rights of home rule jurisdictions to act locally on local matters absent any conflict or inconsistency with state law.

The immunity aspect, on the other hand, has proven to be very complicated and highly controversial. Immunity becomes an issue when both the state and a local government act on the same matter, especially when the state and local actions conflict with each other. The ultimate forum for resolving such conflicts is in the courts.

The central question when such conflicts arise is whether, to what extent, and under what circumstances does a state law, rule, or other action prevail over a conflicting local government charter, ordinance, regulation, or policy — and vice versa. One answer to that question has been that any general[1] state law prevails over a conflicting local

[1] A "general" law is one that applies to all subject entities (all cities, all counties, etc.) or to all within a classification (cities over 50,000 population, e.g.). General laws are distinguished from "special" laws, which apply only to a specific geographic area or named entity (Polk County, e.g.).

enactment. The other main approach has been to identify some circumstances under which a local enactment may prevail in a conflict with a general state law. The Oregon courts have vacillated between these two general points of view for many decades, as will be documented in the discussion that follows.

It's important for county officials and county citizens (including especially members of county charter committees) to be aware of legal interpretations and guidelines that determine the scope of local discretion exercisable by counties under either constitutional or statutory home rule. County home rule is a relatively recent development in Oregon, and relatively few appellate court decisions are available to provide that kind of guidance. Since the courts have generally interpreted both constitutional and statutory county home rule in a manner that parallels their interpretation of city home rule, a review of the city home rule cases may shed some light on the scope of county home rule.

INTERPRETATIONS OF MUNICIPAL HOME RULE[2]

Adoption of the Municipal Home Rule Amendments

At a time when constitutional amendments could be referred to a vote of the people only after having been adopted by two successive sessions of the state legislature, the legislature in 1901 and 1903 passed a municipal home rule amendment. The amendment was not referred for a vote in 1904, however, probably because there were some slight differences in the wording of the amendments passed in 1901 and 1903. In 1905, the People's Power League circulated a draft of a municipal home rule amendment

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[2] This summary is based primarily on the extensive research done by Orval Etter. Etter's work is presented most comprehensively in a 598-page treatise (with 2,431 footnotes) entitled *Municipal Home Rule in Oregon: "Unconstitutional Law in Oregon" Now and Then* published by the University of Oregon Law School Library in 1991. The Library published a short summary of that treatise in 1995 under the title *Municipal Home Rule in Oregon: Unfulfilled Revolution.* An apparently independent study of municipal home rule generally parallels Etter's analysis and reaches similar conclusions: see Cynthia Cumfer, *Original Intent v. Modern Judicial Philosophy: Oregon's Home Rule Case Frames the Dilemma for State Constitutionalism* 76 Oregon Law Review 909 (1997).

it proposed to submit directly to the voters by an initiative petition. Instead, two initiative measures were then circulated for signatures and submitted to votes of the people in 1906. One of the measures passed by a margin of 47,661 yes to 18,751 no and the other passed by 47,678 yes to 16,735 no.

The two home rule bills passed in 1901 and 1903 and the draft circulated by the People's Power League in 1905 all enabled municipalities to frame and adopt their own charters, but, in the terms of the People's Power League draft, home rule authority would be "subject to and controlled by general laws." When the initiative measures were actually put on the ballot, however, a significant change had been made: the measure that provided for local adoption of city charters subjected the charters only to the "constitution and *criminal* laws of the state." Comparing the two versions, the conclusion seems inescapable that under the initiative measures actually adopted by the people, municipal charters were not to be subject to the *civil* laws of the state — only to the state's *criminal* laws.

The available historical record does not clearly indicate why the change was made.[3] However, a statement attributed to People's Power League leader W.S. U'Ren was published in the *Oregonian* for October 26, 1906, indicating that the League's intent was "to leave the people of cities as nearly as possible wholly free from interference by the Legislature in their purely local city legislation, except as it might affect the criminal laws of the state."

In any event, the main provisions of the two amendments adopted in 1906 were as follows:

[3] Orval Etter, a leading authority on Oregon city and county home rule, has suggested that the change was a reaction by "drys" against city efforts to license liquor businesses even in counties that had voted "dry" under the state's 1904 local option law. See Etter, *Municipal Home Rule in Oregon: Unfulfilled Revolution* (Eugene, University of Oregon School of Law, 1995) pp. 13-15.

> The initiative and referendum powers reserved to the people by this constitution are hereby further reserved to the legal voters of every municipality and district, as to all local, special, and municipal legislation, of every character, in or for their respective municipalities and districts. (Article IV, section 1a, now Article IV, sec. 1(5))
>
> 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. (Article XI, sec. 2)

The Oregon courts have many times held that the two amendments must be read together, and together they constitute the constitutional provision for municipal home rule.

Interpretation by the Courts

Cases under the municipal home rule amendments soon began coming to the courts. The rapid emergence of such litigation was due to the fact that before 1893, when the legislature first passed a general law for incorporation of cities, all cities had "charters" provided by their special legislative acts of incorporation. There was great potential, therefore, for conflicts to arise between city charters and various state laws, particularly as some state law was alleged to have "amended" a city charter, directly or by implication.

The first noncriminal case decided under the municipal home rule amendments seemingly ignored the change that had been made from "general" to "criminal" laws, and held that general state laws would prevail in any conflict with a city charter, ordinance, or other local municipal action. Straw v. Harris, 54 Or 424 (1909) validated a port district organized under a general law that provided for areas inside cities to be included in such districts, even though such a law impliedly amended the city's charter and thus violated the proscription in Article XI, sec. 2 against amendment of a city charter by the legislature.

This interpretation was affirmed in Kiernan v. City of Portland 57 Or 454 (1910) which, however, acknowledged that "for purposes . . . purely municipal" a city charter could include any "provision or right" the legislature itself could have granted the city prior to the 1906 amendments (an explicit judicial endorsement of the "empowerment" aspect of home rule). In a rehearing of Kiernan, the court took the position that Article XI, sec. 2 only prevents the legislature from amending city charters by special acts, not by general laws.

A contrary view of the municipal home rule amendments emerged soon after the holdings in Straw and Kiernan, most forcefully in Branch v. Albee 71 Or 188 (1914). Branch held invalid a state statute establishing a pension system for Portland's policemen, when Portland's charter already provided for such a system. Branch held that Article XI sec 2 expressly prohibits the legislature from amending a city charter and the prohibition is *not* limited to special laws. It went on to affirm that city home rule powers are "not made subject to the civil laws of the state," and that cities "on matters purely local" are immune from "regulation by the . . . legislature." These statements were made without expressly overruling Straw or Kiernan. Shortly thereafter, in Kalich v. Knapp 73 Or 558 (1914), the court upheld a city speed limit that conflicted with a speed limit set by state statute, following the reasoning in Branch. Vigorous dissents in Kalich argued that Article XI sec. 2 only prohibits legislative amendment of city charters by special acts, and that in any event speed limits are criminal laws to which city charters are expressly made subject.

Since this conflict between Straw and Kiernan on the one hand and Branch and Kalich on the other, Oregon appellate court holdings have wavered between the two basic points of view, and have brought forth additional variations and permutations of both basic doctrines. A few of the more significant cases are summarized in the following paragraphs.

> Rose v. Port of Portland 82 Or 541 (1917) acknowledged the conflict between the two lines of interpretation and in a lengthy analysis of the issues sided with Straw. Justice Lawrence T. Harris,

the author of this opinion, had been Speaker of the House of Representatives in 1903, and claimed to have special knowledge of the intent of the municipal home rule amendments. That may explain why the opinion ignored the substitution of "criminal" for "general" in the amendment actually submitted to the voters in 1906. Rose held that "The legislative assembly can enact a general law affecting the charters . . . of all cities . . . or municipalities or districts." Rose involved a port district rather than a city, but its main holding was applied to cities in Lovejoy v. City of Portland 95 Or 459 (1920). Rose did not make an exception, as did some earlier holdings, for "purely municipal" matters. However, a *dictum* in In re Application of Boalt 123 Or 1 (1927) reverted to that exception: "the legislature . . . may enact a general law governing the exercise of municipal authority in matters not strictly local or municipal, but pertaining in part to the general welfare of the state."

Burton v. Gibbon 148 Or 370 (1934) followed Rose and Lovejoy in upholding a state law that permitted cities to issue refunding bonds, even bonds exceeding the debt limits established in their respective city charters. Burton was cited in many subsequent cases as the leading authority for municipal home rule.

City of Portland v. Welch 154 Or 286 (1936) held that cities in Multnomah County, operating under home rule charters, were exempt from provisions in the state statute authorizing the Multnomah County Tax Supervising and Conservation Commission to reduce budgeted city appropriations and tax levies. Welch held that "While a general law supersedes a municipal charter or ordinance in conflict therewith, it should be borne in mind that the subject matter of the general legislative enactment must pertain to those things of general concern to the people of the state. A law general in form can not, under the constitution, deprive cities of the right to legislate on purely local affairs germane to the purposes for which the city was incorporated."

Subsequent cases generally followed Burton and overlooked the qualification in Welch, but Schmidt v. City of Cornelius 211 Or 505 (1957) reverted to the Welch doctrine in holding that "the legislature . . . may enact a general law governing the exercise of municipal authority in matters not strictly local or municipal, but pertaining in part to the general welfare of the state . . ."

State ex rel. Heinig v. City of Milwaukie 231 Or 473 (1962) was a city home rule case, but it is particularly significant for county home rule because it was decided in the same year the first county

> charters were adopted, and it established some general precedents that influenced the early court cases and Attorney General opinions on county home rule. Heinig reaffirmed Welch in holding invalid a state statute that required cities employing four or more firefighters to establish a specified civil service system, a statute Milwaukie claimed to be inconsistent with its city charter. The statute, the court held, did not involve a matter "of general concern to the state as a whole, that is to say that it is a matter of more than local concern to each of the municipalities purported to be regulated by the enactment." Heinig acknowledged that most subjects of legislation have aspects of both state and local concern, but quoted with approval a political scientist's statement that "the real test is . . . whether the state's interest or that of the city is paramount." Thus emerged what Etter has dubbed the "predominance" doctrine of home rule. This was a more rigorous test than earlier tests that upheld state laws conflicting with local enactment unless the subject matter was "purely" of local concern.

This brings us to City of LaGrande and City of Astoria v. Public Employees Retirement Board 281 Or 137 (1978) aff'd on rehearing 284 Or 173. Since 1978 this case has been commonly regarded as the leading case in municipal home rule, with implications for county home rule discussed below. In a 4-3 decision, the LaGrande/Astoria court upheld a state statute that required cities and other local governments to provide for their police and firefighters a retirement system equal to or better than the state's Public Employees Retirement System (PERS). Although it did not overrule Heinig, it narrowed the Heinig holding significantly — so significantly that many regard LaGrande/Astoria (as did the LaGrande/Astoria dissent) as returning home rule from the doctrine of "predominance" to the doctrine of "legislative supremacy." In the main holding of the case, the LaGrande/Astoria court promulgated the following two-pronged test to determine whether a state law in conflict with a local enactment prevails:

> When a statute is addressed to a concern of the state with the structure and procedures of local agencies, the statute impinges on the powers reserved by the [home rule] amendments to the citizens of local communities. Such a state concern must be justified by a need to safeguard the interests of persons or entities affected by the procedures of local government.
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> Conversely, a general law addressed primarily to substantive social, economic, or other regulatory objectives of the state

> prevails over contrary policies preferred by some local governments if it is clearly intended to do so, unless the law is shown to be irreconcilable with the community's freedom to choose its own political form. In that case, such a state law must yield in those particulars necessary to preserve that freedom of local organization.

The LaGrande/Astoria court viewed local charters as involving primarily matters of local governance forms, organization, and procedures, although it acknowledged that, in the absence of conflicting state law, home rule jurisdictions might enact substantive regulations under their general police powers. The decision, however, abandoned the Heinig view that a local enactment could prevail over a conflicting state enactment if the subject matter of the enactment was predominately of local rather than state concern. It substituted a new rule that a state law would prevail if "addressed primarily to substantive social, economic, or other regulatory objectives of the state" and "is clearly intended to" so prevail, even though the subject matter might be predominately of local concern. Even the small sphere of "structure and procedures of local agencies" and "the community's freedom to choose its own political form" protected by what was left of home rule was qualified where "the interests of persons or entities" were affected by the local enactment.[4]

Within a few years, LaGrande/Astoria was applied in Medford Firefighters Association v. City of Medford 40 Or App 519 rev den'd 287 Or 507 (1979), upholding the 1973 state collective bargaining law as a substantive state regulation and City of Roseburg v. Roseburg City Firefighters Local No. 1489 50 Or App 188 (1981), holding that state mandated compulsory arbitration trumped a city charter provision calling for collective bargaining impasses to be submitted to a vote of the people for resolution. The Roseburg court held that the state law was not irreconcilable with the city's freedom to choose its own political form, was an exercise of substantive state regulation, and safeguarded the interests of "persons or entities."

[4] In a lengthy and vigorous dissenting opinion in LaGrande/Astoria, Justice Tongue deplored the majority's substitution of a "new rule of 'legislative supremacy' for settled law that since 1936 (in City of Portland v. Welch) had affirmed that the home rule amendments granted cities "exclusive power" to legislate on matters of local concern "free from intervention by the state legislature."

Subsequent city (and county) home rule cases and Attorney General opinions have followed LaGrande/Astoria when addressing alleged conflicts between state law and local enactments. In applying the LaGrande/Astoria rule, these cases and opinions have first asked whether the state legislation evinces a "clearly expressed" intent to preempt local government charters, ordinances, rules etc. If legislative intent to preempt is not found, the analysis proceeds to examine whether the local enactment can "operate concurrently" with the state law. If it cannot, the analysis looks at whether the state law is a "substantive" regulation and if so whether it invades the local government's home rule right to choose its own political form or determine its own governmental procedures. If the state law does impinge on that home rule authority, the analysis then looks at whether the "interests of persons or entities" are adversely affected by the local enactment.[5]

IMPLICATIONS FOR COUNTY HOME RULE

The cases and opinions regarding municipal home rule have some strong implications for county home rule. The implications are somewhat more relevant to constitutional county home rule than to statutory home rule, as indicated in the following paragraphs.

Constitutional County Home Rule

In considering the implications of the city interpretations for constitutional county home rule, the similarities and differences in the wording of the two constitutional

[5] To date the cases and opinions have rarely if ever proceeded beyond the determination of legislative intent, inconsistency between the state and local enactments, and the substance/procedure issue.

provisions may be significant.[6] Both the city and the county amendments reserve the right of initiative and referendum to city and county voters. Both the city and the county amendments grant to city and county voters the right to adopt and amend their own charters, although the county amendment also states expressly that county voters may also revise and repeal their charters.

One major difference between the city and county home rule amendments is that the city amendments make city charters "subject to the Constitution and criminal laws of the State of Oregon," while the county amendment requires counties to "exercise all the powers and perform all the duties" imposed upon them by the state constitution and laws. If, as some have argued in the past, the city wording exempts home rule cities from the state's civil laws, it is clear that the same exemption would not apply to home rule counties.

Another major difference between the city and county home rule amendments is that the county amendment specifies that "A county charter may provide for the exercise by the county of authority over matters of county concern," while the city home rule amendments are silent as to what kind of authority a city charter may bestow on city governments. The absence of such specification in the city home rule amendments has opened the door for the courts to fill the void with a variety of interpretations, as discussed in the preceding section.

Nevertheless, the basic intent of the framers of both the city and county home rule amendments appears to be similar if not identical. William S. U'Ren was quoted above as stating the intent of the city home rule amendments: "to leave the people of cities as nearly as possible wholly free from interference by the Legislature in their purely local

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[6] A footnote in the 1984 Court of Appeals decision in Pacific Northwest Bell v. Multnomah County 68 Or App 375 noted that "The parties did not brief or argue whether there is any difference between county and city home rule provisions in the constitution . . . For the purposes of this opinion, we assume there is not." Similarly, Chief Judge Joseph's dissenting opinion in Buchanan v. Wood 79 Or App 722 (1985) included the following footnote: "Although I do not wish to comment on the matter at any length, I do not necessarily agree that LaGrande/Astoria v. PERB has anything to do with a county home rule charter under Article VI, section 10." (emphasis in original)

city legislation . . .” Because the county home rule amendment is more recent, there is substantial documentation of its intent to also free counties from legislative domination in “matters of county concern” (see County Home Rule Paper No. 2, pp, 4-5).

Appellate court cases interpreting the county home rule amendment have come along more slowly than did city home rule cases during the early decades of municipal home rule. Nevertheless, at least 15 appellate court cases have interpreted the county home rule amendment since it was adopted in 1958. In general, these cases have relied extensively on analogies to the city home rule interpretations.

The 15 county home rule cases as well as several city home rule cases with implications for county home rule are briefly summarized in the appendix to these papers. Five of the more significant county cases are discussed in the following paragraphs.

> Schmidt v. Masters 7 Or App 421 (1972): This was the first county home rule case to come before an appellate court. It resulted from a challenge to a Washington County ordinance allocating waste collection permits to certain providers in specified areas of the county. The court upheld the ordinance as an exercise of the county’s charter authority over “matters of county concern” and the general grant of powers in its charter, even though there was no particular state statute authorizing the county to adopt such an ordinance when it was enacted. This case stands mainly as an affirmation of the “empowerment” aspect of county home rule. Petitioners in the appeal also alleged that state statutes preempted the county’s charter authority, but the court found there was no state intent to preempt, and thus avoided the necessity of balancing any alleged “state concern” interest against a “county concern.”
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> Multnomah Kennel Club v. Department of Revenue 295 Or 279 (1983): This case affirmed that the Multnomah County charter’s general grant of powers included the power to levy a business income tax, thus extending the Schmidt interpretation of general grants to include taxation power as well as regulatory power. Similarly to Schmidt, the court in this case found that a statute preempting “licenses and privilege taxes” for pari-mutuel race tracks failed to establish an intent to preempt Multnomah County’s business income tax, which was designed to produce county revenue, not to regulate race tracks.

Pacific N.W. Bell v. Multnomah County 68 Or App 375, *rev den* 297 Or 547 (1984): This case dealt with a conflict between a county ordinance imposing permit fees for construction within county road rights of way and a state statute (ORS 758.010) that permits such construction "free of charge." The county alleged in part that its charter authorized it to establish the fee as a "matter of county concern." The court rejected that argument, finding that the state statute prevailed because it dealt with "substantive social, economic or other regulatory objectives" — the test promulgated in LaGrande/Astoria v. PERB.

Buchanan v. Wood 79 Or App 722 (1985): In this case, Multnomah County sued to recover salary paid to its district court clerk (Wood), whose position and salary had been established by an initiated amendment to the county charter. Under the 1981 Court Reorganization Act, the duties of the district court clerk had been assumed by the state Court Administrator, but Wood claimed that the county home rule amendment precludes the state abolishing an elective office created by the county charter. Following LaGrande/Astoria, the court held that the Court Reorganization Act involved substantive state policy and "did not impinge on the county's freedom to choose its own political form."

Ashland Drilling Inc. v. Jackson County 168 Or App 624 (2000): The plaintiff in this case alleged that the state Ground Water Act preempts a Jackson County ordinance regulating well location, flow and water quality. The court first looked for indications of legislative intent (finding no "clearly manifested" intent to displace all county regulation). It then proceeded to compare each specific county ordinance provision with the state statute, reaching the conclusion that the statute preempted some but not all of the county provisions.

To summarize, it appears that since 1978 the appellate courts have consistently applied the LaGrande/Astoria "substance/procedure" test to constitutional county home rule cases, abandoning the "state v. local concern" test established by Heinig and earlier cases. In cases involving no conflict between state and local enactments, they have given a liberal interpretation to the "matters of county concern" phrase in the county home rule constitutional amendment. However, in cases involving conflict between state and county enactments, they have consistently followed LaGrande/Astoria, holding for the state where the LaGrande/Astoria tests for intent and substantive content are met.

Attorney General Opinions on county home rule follow and reflect the courts' interpretations. Earlier AG opinions reflect the holdings in Branch v. Albee and Heinig v. Milwaukie, while opinions rendered after 1978 reflect the shift to LaGrande/Astoria. As in the court decisions, the AG opinions rely more on analogies between city and county home rule than on the literal words of the county home rule amendment. A footnote in 46 AG Ops 362 (1990) recognizes a possible issue as to whether Article VI section 10 "implicitly" limits county home rule to non-criminal matters, as is the case with city home rule.

AG opinions regarding both constitutional and statutory county home rule are summarized in the appendix to these papers.

Statutory County Home Rule

A case decided in 2002, GTE Northwest Incorporated v. Oregon Public Utility Commission 179 Or App 46 is the clearest appellate court indication to date that Oregon's 27 statutory home rule counties enjoy broad local discretionary authority under ORS 203.035, the 1973 statute initiated by the Association of Oregon Counties to give non-charter counties local legislative powers as broad in scope as those of the nine charter counties. The GTE case plaintiff alleged that ORS 203.035 did not provide authority for Lincoln County to build and operate a fiber optic network. After a detailed analysis of the legislative history of ORS 203.035, the court concluded that the statute does give the county the requisite authority, even though the network would compete with private providers and would serve customers in adjoining counties as well as in Lincoln County.

Attorney General opinions rendered prior to the 1973 enactment of ORS 203.035 routinely denied general law counties authority to act in different situations. For example, 33 AG Ops 481 (1968) applied long standing precedents in its conclusion that the initiative and referendum powers of county voters is only as extensive as the county's

own delegated legislative powers, and suggested that county voters should adopt charters if they want greater legislative authority. As another example, 34 AG Ops 1000 (1970) found that a general law county could not spend public funds to buy or develop land for industrial uses.

Beginning with 36 AG Ops 672) (1973) (the first opinion to be rendered regarding ORS 203.035), the Attorney General opinions have consistently upheld the "empowerment" aspect of statutory home rule. The Attorney General rulings have found the general statutory delegation of "authority over matters of county concern" sufficiently broad to authorize general law counties to take a wide variety of actions including actions to provide health insurance to county employee dependents, regulate soil erosion, call for an advisory vote on a matter of county concern, reallocate administrative duties among members of the board of county commissioners, adopt personnel rules for county employees, provide for the election of planning commissioners, contribute money to a youth center, regulate forest practices on non-commercial forest land, pay a county clerk's attorney fees in a private action, order evacuation of an area threatened by fire, and impose a fee for disposing of solid waste.

What neither the court cases nor the Attorney General opinions have addressed to any extent, with one exception, is the situation where a general law county acts under ORS 203.035 in a way that conflicts with another state statute. In constitutional county home rule, there is at least some room to argue (even under LaGrande/Astoria) that a county enactment may under some circumstances, however limited, prevail over a conflicting state statute. As explained in County Home Rule Paper No. 2, the 1981 and 1983 legislatures repealed a large number of county statutes made obsolete and superseded by the general delegation of power under ORS 203.035, but many such statutes remained on the books, and several have been added since.

This issue was addressed in 37 AG Ops 543 (1975), which denied that ORS 203.035 gave a general law county authority to reimburse county commissioners for travel between their homes and the county seat because that would violate ORS 204.401.

The opinion stated that "any specific statutory limitation on the power of a non-home rule county would take precedence over" ORS 203.035. If that point of view should be sustained in future court decisions, general law counties will continue to have "empowerment" without specific legislative authorization but they have no "immunity" under ORS 203.035 against preemptive state legislation.

COUNTY HOME RULE v. CITY HOME RULE

Since cities are parts of counties, a question arises whether county home rule powers extend to areas inside city limits, even though cities have home rule powers equivalent to those of counties. For general law counties, ORS 203.040 expressly limits the exercise of county police power (i.e., regulatory power) to areas outside cities unless the city consents. However, the statute is silent as to county taxation powers inside cities. One county charter (Washington) has a provision limiting the county's home rule authority to areas outside cities, but there is nothing in the constitutional county home rule amendment that expressly confines charter county jurisdiction to areas outside cities.

Tom Sponsler, former Multnomah County Counsel, has noted:

> No Oregon case has yet analyzed a direct conflict between city and county charters or ordinances. Faced with a conflict between "municipal legislation" and "matter(s) of county concern," courts will probably look to traditional areas of city and county authority and regulation . . . . A historical approach will probably permit a court to resolve a conflict between county and city authority without great difficulty . . . Looking to tradition may also help a court resolve a conflict between a city ordinance and "matters of county concern" defined by county ordinance."[7]

Despite some uncertainty, it seems probable that courts will favor city home rule over county home rule powers in any future conflict, at least as far as the exercise of police power regulation is concerned. This conclusion is based on case holdings from

other states as well as a common law rule that two municipal corporations cannot exercise the same powers within the same territory at the same time.[8]

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[7] Thomas Sponsler, "County & City Legislative Authority: Esoteric and Real," n.d.
[8] See Orval Etter, *"County Home Rule in Oregon,"* 46 Oregon Law Review, pp. 265 - 273.

ATTORNEY GENERAL OPINIONS REGARDING COUNTY HOME RULE IN OREGON

Prepared by Tollenaar and Associates
for the
Association of Oregon Counties

The following summaries include opinions regarding both constitutional county home rule (Article VI, section 10) and statutory county home rule (ORS 203.035). They must be read in their historical context (see County Home Rule Papers #1 and #6), because subsequent events may have affected their relevance or validity. For example, the second opinion listed (29 AG Ops 183) interprets a constitutional provision that was amended after the opinion was rendered.

Similarly, opinions rendered before 1978, when the state Supreme Court decided LaGrande/Astoria v. PERB, reflect a more expansive view of county home rule than decisions rendered after that date. See County Home Rule Paper #6 for further discussion of the impact of LaGrande/Astoria.

29 AG Ops 137 (4369) 2/26/59. The Attorney General found that a proposed bill mandating that local governments engage in collective bargaining with public employees might violate municipal home rule, but not county home rule, because the fifth sentence of the county home rule constitutional amendment requires charter counties to perform duties imposed on them by state law.

29 AG Ops 183 (4449) 5/1/59. The third sentence of the county home rule amendment would prevent the legislature from authorizing charter counties to levy countywide taxes to finance "local improvements," but what constitutes a "local improvement" depends on facts and a local judgment will not be disturbed by the courts unless it is arbitrary or unreasonable. In part of the opinion, the Attorney General commented that in adopting the county home rule amendment the people "patently intended to carve out for exclusive county control a sphere of local governmental autonomy *comparable* to that possessed by the cities." (Emphasis in original)

29 AG Ops 390 (4862) 5/10/60. A county charter may be adopted only at a general election (and not a special election).

30 AG Ops 145 (5161) 2/3/61. Legislation mandating that public employers participating in PERS provide for disability retirement is of general statewide concern and does not conflict with the county home rule amendment.

30 AG Ops 388 (5401). The constitutional mandate to elect the sheriff, clerk, and treasurer does not apply to counties that adopt charters under the constitutional county home rule amendment.

30 AG Ops 403 (5413) 4/10/62. Home rule charters give counties powers similar to those of cities under home rule charters. Charter counties may provide for a method of filling vacancies in county offices. However, home rule county charters may not include budget and equalization board provisions that conflict with general state law, and the jurisdiction and selection of judges may not be affected by county home rule charter.

30 AG Ops 407 (5416) 4/12/62. A county charter may be put on the ballot either directly by an initiative petition or by referral from the county governing body.

32 AG Ops 11 (5838) 7/16/64. A county charter may not abolish the position of county judge or reduce its salary prior to the expiration of the incumbent's term of office, even though the judge has no judicial functions.

32 AG Ops 25 (5850) 8/18/64. A county charter may transfer the non-judicial duties of the county judge to other county officers.

32 AG Ops 143 (5933) 3/8/65. The legislature "has plenary power to change county boundaries and this power was not affected by the adoption of Article VI, section 10."

32 AG Ops 287 (6037) 11/4/65. In a county whose charter provided that county "offices, departments or institutions" were to operate under the direction of the Board of County Commissioners, the Board could change the statutory duties of the county library board so as to make it purely advisory to the Board, rather than an independent administrative agency. The opinion cites a statement in the 1958 voters' pamphlet regarding the then-proposed county home rule amendment to the effect that charter counties would be subject to general state laws only "as to matters of state concern," thus applying the key holding of Heinig v. Milwaukie (1962) to county home rule.

32 AG Ops 429 (6135) 5/26/66. In this opinion dealing with interpretation of the thenproposed 1.5 percent property tax limitation, the Attorney General ruled that county home rule would not conflict with legislation apportioning taxing authority among local government units so as not to exceed the limitation.

33 AG Ops 33 (6172) 8/60/66. Although the county home rule amendment directs the legislature to provide a method for adopting, amending, revising or repealing a county charter by vote of the people "at any legally called election," a 1961 amendment to ORS 203.710 defining "legally called election" as a primary or general (November) election

applies to a county whose charter adopted state law for purposes of the initiative and referendum.

33 AG Ops 47 (6182) 9/22/66. The third sentence of the county home rule amendment (as amended in 1960) does not prevent charter counties from issuing bonds for a stadium because the amendment permits such funding when "otherwise provided by law or charter." ORS 280.150 provides the necessary authorization, and the charter involved has no provision to the contrary.

33 AG Ops 173 (6256) 3/14/67. Under authority of the general grant of powers in its home rule charter, a home rule county may prohibit pinball machines but the prohibition would not apply inside cities that also have authority to enact such a prohibition. The county's police power is a "matter of county concern" and "is substantially as broad as that which a city may exercise under its own charter." Nothing in the report of the Legislative Interim Committee on Local Government (1956) or the 1958 voters' pamphlet suggests an intent to apply county police powers inside cities, but the "rule may be different with respect to revenue measures as distinguished from measures enacted under the police power."

33 AG Ops 241 (6293) 5/1/67. Charter counties have authority to adopt sales and income taxes if authorized by their charters to do so. "Matters of county concern" include "the method and manner of financing, i.e., taxation."

33 AG Ops 242 (6294) 5/3/67. The state legislature may not submit a proposed county charter directly to the people of a county. Article VI, section 10 empowers the legislature only to provide the general method of adopting, amending, revising or repealing a county charter.

33 AG Ops 260 (6303) 5/15/67. A home rule county would not have the power to enact an ordinance superseding ORS 609.040 to 609.060 regarding dog control, because dog control is a matter of general statewide concern.

33 AG Ops 457 (6416) 12/15/67. A home rule county may enact reasonable legislation affecting the noise and whistling from railroad trains. The opinion cites Heinig v. Milwaukie (1962) and other cases that differentiate matters of local concern from matters of statewide concern, and reiterates previous Attorney General opinions stating that municipal home rule precedents in this regard would apply to county home rule.

33 AG Ops 479 (6428) 1/18/68. The general grant of powers in a home rule county's charter empowers the county to establish a council on aging. The opinion found no express or implied preemption under the state's aging program.

33 AG Ops 481 (6429) 1/19/68. The initiative and referendum in a general law (non-charter) county cannot be used to enact an ordinance that the county itself has no authority to enact. The opinion suggests in *dicta* that if county voters want to expand

their power to legislate through the initiative and referendum they can adopt a county charter.

33AG Ops 518 (6448) 2/26/68. A city-county consolidation would require the voters of both units to repeal their respective city and county charters. The consolidated unit would have no home rule authority.

33 AG Ops 596 (6495) 5/17/68. Health and sanitation ordinances enacted under home rule charter authority are not effective within any city having power under its own charter to enact similar measures, even with the consent of the city. Cities may not delegate legislative power to counties.

34 AG Ops 183 (6555) 10/3/68. Under ORS 450.715 which provides that any portion of both incorporated and unincorporated areas may join in sanitary authorities, the ordinances of such authorities would be effective in participating home rule counties. Differentiates this opinion from 33 AG Ops 596 because the state statute delegates legislative power to the sanitary authority.

34 AG Ops 203 (6559) 10/18/68. This opinion reaches the same conclusion as 32 AG Ops 429 (see above) regarding the 1968 version of a proposed 1.5 percent property tax limitation (apportionment applicable to home rule jurisdictions), but says that state legislation implementing the then-proposed amendment "might" impinge on home rule if it restricted the manner of making a levy, e.g., by requiring a vote or imposing an additional limitation.

34 AG Ops 356 (6577) 12/5/68. Although a county charter does not prevent the legislature from changing the county's boundaries, there is "serious doubt" that state legislation could consolidate a charter county with another county. The opinion cites a California case holding that the state constitution did not authorize a county to surrender its charter.

34 AG Ops 1000 (6698) 2/11/70. A general law (non-charter) county may not spend public funds to buy or develop land for industrial sites.

34 AG Ops 1043 (6707) 3/12/70. Charter counties are subject to a 1969 state law that relieved counties of the duty to finance public assistance but for three fiscal years reduced their tax levies accordingly and required them to pass the reduction through to taxpayers. The opinion holds that the law dealt with a matter of general statewide concern.

35 AG Ops 530 (6810) 3/25/71. A charter county may not establish a records retention schedule that does not comply with ORS Chapter 192, since records retention is a matter of general statewide concern.

35 AG Ops 986 (6879) 12/6/71. The voters of a county may directly initiate a county charter, and appointment of a charter committee is not the exclusive method of getting a

charter on the ballot. The opinion cites the seventh sentence of the county home rule amendment and ORS 203.780 as authority for its conclusion.

35 AG Ops 1185 (6910) 5/4/72. Multnomah County's payment of dues to the Portland Freight Traffic Association was challenged on the basis of the "lending credit" provision of the state constitution. The opinion cites Schmidt v. Masters (1971) as standing for the proposition that "the charter grants to the county the full measure of home rule as to matters of county concern."

35 AG Ops 1291 (6926) 6/22/72. In a footnote to an opinion involving the ability of a state agency to require employees to work more than eight hours in a day without payment of overtime, the opinion cites Heinig v. Milwaukie (1962) and observes that a state law prohibiting work over eight hours without payment of overtime would probably apply to charter counties.

35 AG Ops 131 (6949) 10/20/72. A county with appropriate charter authority may levy a gross revenue tax on utilities that would apply both inside and outside cities. A charter's general grant of powers includes authority to levy such taxes (citing Schmidt v. Masters as well as cases interpreting municipal home rule, and observing "The power of home rule counties, while it may not be identical, substantially equates with that of home rule cities.")

36 AG Ops 672 (7041) 11/15/73. A law passed by the 1973 legislature (since codified as ORS 203.035) delegating to all counties power to enact ordinances that "exercise authority within the county over matters of county concern" provides a general law (noncharter) county authority to operate public transit systems. The "new law . . . gives general law counties very broad powers to enact any ordinance pertaining to matters of county concern."

36 AG Ops 898 (7053) 3/13/74. A statute prescribing qualifications for county assessor would not apply to charter counties even though it was authorized by a then-proposed constitutional amendment.

36 AG Ops 1044 (7071) 4/23/74. A charter county's comprehensive plan and zoning ordinance are not subject to the referendum since they were adopted under statutory authority rather than charter authority.

36 AG Ops 1070 (7078) 5/17/74. Although ORS 203.035 vests general law counties with "general legislative power,' it does not override constitutional provisions requiring the election of certain county officers. Charter counties have "more flexibility" in this respect than general law counties.

36 AG Ops 1115 (7085) 6/11/74. A statute that permits counties to provide health and disability insurance to county officers and employees (but does not expressly include dependents) is now supplemented by general legislative authority under ORS 203.035, which does include authority to provide such insurance to dependents.

37 AG Ops 14 (7092) 7/17/74. A charter county could by ordinance permit an advisory vote of the people on an issue, even though the issue is not "legislation," if the issue is a matter of county concern.

37 AG Ops 103 (7104) 8/30/74. In an opinion dealing with siting of nuclear power plants, the Attorney General notes that general law counties are state agencies for the purpose of nuclear siting.

37 AG Ops 280 (7129) 12/11/74. A charter county may fill a county commissioner vacancy at a special election if its charter so provides, even though state statutes provide another method.

37 AG Ops 319 (7133) 12/27/74. A charter county is not subject to the requirement of ORS 203.055 that requires general law counties to refer tax measures for voter approval.

37 AG Ops 505 (7161) 4/28/75. A charter county is not bound by ORS 236.100, requiring that appointments to fill vacancies in partisan offices be made from the same political party as the former incumbent. (This opinion did not address the applicability of the statute to general law counties).

37 AG Ops 543 (7166) 5/14/75. A general law county may not reimburse travel expenses for county commissioner travel between home and the county seat. Such reimbursement would conflict with ORS 204.401, and "any specific statutory limitation on the power of a non-home rule county would take precedence over" the general grant of power to general law counties under ORS 203.035.

37 AG Ops 819 (7207) 9/18/75. Counties may regulate soil erosion or sedimentation to the extent that they involve matters of county concern, but some aspects of the regulation may be matters of statewide concern. Also, any county regulations would not apply inside cities without the consent of the city.

37 AG Ops 979 (7234) 11/26/75. A footnote in this opinion observes that the state legislature " has lately treated land use planning as a matter of considerable state-wide significance."

37 AG Ops 1232 (7270) 3/31/76. State constitutional and statutory provisions establishing residency requirements for local government officers do not apply to charter counties.

37 AG Ops 1258 (7274) 4/14/76. ORS 203.035 enables a general law county to enact an ordinance providing for an advisory vote on a matter of county concern.

38 AG Ops 103 (7328) 9/7/76. Multnomah County may audit records (including taxpayers' copies of their tax returns) of businesses subject to the county's business license tax (citing Schmidt v. Masters and Davidson Baking Co. as establishing the

power to tax under a general grant of powers), but it may not examine Department of Revenue files due to a statute providing confidentiality for such files.

38 AG ops 359 (7367) 12/14/76. A proposed statute requiring a "vote of the constituency affected" for any new or increased tax, fee, etc., would be unconstitutional under the county home rule amendment as well as other constitutional provisions. Such a statute would make a charter county's "constitutionally guaranteed right to legislate on matters of local concern subject to a limitation over and above any prescribed in the constitution."

38 AG Ops 387 (7371) 12/29/76. The holding in Multnomah County v. Mittleman (1976) that a charter county may not attach the emergency clause to a tax measure does not prevent charter counties from providing effective dates of less than 90 days for their ordinances.

38 AG Ops 437 (7380) 12/29/76. A state statute could not prohibit charter counties from establishing residency requirements for their employees.

38 AG Ops 510 (7393) 1/12/77. A state statute requiring nonpartisan election of county officers would not apply to charter counties.

38 AG Ops 653 (7420) 3/17/77. A state agency is not required to pay the portion of its utility bills that includes a pass-through of Multnomah County's business income tax: "provisions for collection of the tax, so far as they affect the people of the state at large, are a matter of statewide concern."

38 AG Ops 922 (7461) 6/3/77. A county commissioner may not be appointed to an administrative position in the county government (incompatible offices), but under either constitutional or statutory home rule, the board of county commissioners could assign the administrative duties to the county commissioner.

38 AG Ops 1130 (7492) 9/1/77. In an opinion involving the delegation to LCDC of authority to adopt goals, the Attorney General observed that under the county home rule amendment the initiative and referendum are allowed on county land use plans and ordinances.

38 AG Ops 1356 (7519) 10/21/77. ORS 203.035 as well as other more specific statutes empower a general law county to adopt personnel rules for county employees.

38 AG Ops 2045 (7619) 5/10/78. ORS 203.035 does not authorize a general law county to share general revenues with cities in the county. Taxes must be used for public purposes of the levying district, and the same principle applies to O&C revenue.

39 AG Ops 7 (7646) 7/11/78. A general law county's ordinance enacted by an initiative petition and a vote of the people may provide for the election of planning commissioners, but there must be compliance with ORS 215.030(5), which requires that no more than

two planning commissioners be from the same occupation. The opinion notes that LaGrande/Astoria v. PERB (1978) "has narrowed the area in which cities *and home rule counties* are free to legislate without the authority of the legislature to preempt, and even the authority of those governments with respect to their structure and organization may be subject to limitation where a matter of predominately statewide concern is involved." (emphasis added)

39 AG Ops 81 (7653) 7/24/78. Voters of neither a general law nor a charter county may enact an initiative measure prohibiting nuclear power plants. Siting of such plants is not a "matter of county concern."

39 AG Ops 428 (7690) 11/30/78. Charter counties must comply with ORS 204.141 (now ORS 204.126) requiring budget committee approval of elected official compensation. The opinion cites LaGrande/Astoria v. PERB (1978) to the effect that even though the statute addresses "structures and procedures of local agencies," the requirement is "justified by a need to safeguard the interests of persons or entities affected by the procedures of local government" and the state law therefore prevails over conflicting county policies and legislation.

39 AG Ops 481 (7704) 1/12/79. State legislation establishing uniform election dates is binding on home rule jurisdictions. The opinion cites LaGrande/Astoria v. PERB (1978) (the statute safeguards the interests of "persons or entities") as well as the fifth sentence of the county home rule amendment (requiring charter counties to provide for the exercise of powers and duties imposed upon counties by state law).

39 AG Ops 597 (7734) 3/15/79. Charter counties must comply with ORS 274.100 requiring notice and hearing for county land exchanges. Cites LaGrande/Astoria v. PERB (1978) as authority (the state law safeguards the "interests of persons or entities affected by the procedures of local government"), and notes that "by analogy, the same limitation would apply to county 'home rule' under art VI, sec. 10," as well as ORS 203.035.

39 AG Ops 605 (7737) 3/27/79. Neither Article VI sec. 10 nor the county home rule enabling legislation require that a county charter amendment must deal with only a single subject, but a county charter or legislation authorized by a charter could enact such a requirement.

39 AG Ops 721 (7764) 5/29/79. A charter county may not charge a fee in excess of its actual cost of providing copies of public records, citing LaGrande/Astoria v. PERB (1978) ("interest of persons or entities") as well as ORS 192.001, a clear expression of legislative intent to override local policies and enactments.

40 AG Ops 11 (7783) 7/17/79. ORS 203.035 delegating to all counties authority over "matters of county concern" authorizes a general law county to contribute money for a youth center, even though there is no specific state statute providing such authority.

40 AG Ops 316 (7865) 3/13/80. A county whose charter contains a general grant of powers may levy a business income tax. LaGrande/Astoria v. PERB requires that state law can preempt a local enactment only where "legislative intent to do so is clear and unambiguous."

40 AG Ops 446 (7894) 4/28/80. Counties have authority under ORS 203.035 to regulate forest practices on land zoned for other than commercial forestry. (The state Forest Practices Act preempts county authority as to commercial forest land)

40 AG Ops 464 (7900) 5/14/80. A county charter requirement that a candidate for sheriff must meet state minimum qualifications when he or she becomes a "candidate" prevails over the state law that requires that minimum qualifications be met only when a certificate of election is issued.

40 AG Ops 486 (7906) This opinion holds that the state may not require referendum petition signatures to be verified before the petition is filed, but notes in passing that a home rule county charter or ordinance might "provide a different result."

41 AG Ops 21 (7924) 7/11/80. State and federal pesticide laws preempt county regulatory authority under home rule (not a "matter of local concern"). The opinion states that "We assume that this modification [i.e., LaGrande/Astoria v. PERB] will be extended to conflicts of state law with county ordinances under Oregon Constitution Article VI, sec. 10."

41AG Ops 103 (7948) 9/11/80. This opinion dealing with a proposed one percent property tax limitation reiterates previous opinions that state legislation may apportion taxing authority among taxing jurisdictions including home rule jurisdictions.

41 AG Ops 461 (8027) 5/14/81. A charter county may not charge a fee to cities and special districts for the services of the county treasurer, citing the fifth sentence of the county home rule amendment (charter counties must perform state mandated duties). Also cites City of Banks v. Washington County (1977) reaching the same conclusion regarding tax assessment and collection but based on Oregon Constitution Article IX sec. 1 (uniformity of taxation).

42 AG Ops 403 (8125) 6/22/82. Under ORS 203.035, a general law county may adopt an ordinance providing for payment of a county clerk's attorney fees for a successful defense against charges of abuse of public office.

43 AG Ops 16 (8130) 9/1/82. Reiterates previous opinions that state law may apportion taxing authority among taxing jurisdictions under a proposed 1.5 percent property tax limitation constitutional amendment.

46 AG Ops 362 (8215) 4/20/90. This opinion finds that some but not all aspects of a charter county's firearms control ordinance are preempted by state or federal law, but those aspects not preempted are authorized under constitutional and statutory county

home rule. A footnote observes that the opinion does not require a decision as to whether Article VI sec. 10 "implicitly" is limited to non-criminal matters, as is the case with municipal home rule under Oregon Constitution Article XI, sec. 2.

47 AG Ops 176 (8232) 11/21/94. A footnote to this opinion observes that no express statutory authority is needed to empower local governments to pay the employee share of PERS contributions.

47 AG Ops 27 (8239) 9/3/96. Article VI sec. 10 and ORS 203.035 both empower counties to order evacuation of an area if fire threatens public safety if so authorized by county ordinance.

48 AG Ops 67 (8243) 10/17/96. Reaffirms prior opinions regarding apportionment of taxing authority under a constitutional property tax limitation. Refers to LaGrande/Astoria v. PERB (1978) and states that taxation under Ballot Measure 47 is "substantive regulation" and therefore not a "matter of county concern."

48 AG Ops 241 (8246) 2/24/97. In this opinion regarding Ballot Measure 47, the Attorney General finds that the legislature may by statute direct a city or county to levy less than the maximum allowed under the measure. Cites the "by now well-settled" LaGrande/Astoria case and says "state-wide regulation of property taxes would be a general law addressed to economic or regulatory objectives, as opposed to an alteration of the structure and procedure of local agencies."

OP 1998-4, 6/11/98. Home rule counties probably have authority under Article VI section 10 and ORS 203.035 to return to taxpayers county government property taxes unintentionally collected as "reauthorized" local option taxes imposed during the first year of implementation of 1997 ballot measure 50.

49 AG Ops 112, 8/26/98. Finds that Gilliam County ordinance imposing a solid waste fee is authorized as a matter of county concern under ORS 203.035 (but also finds that the benefits of the fee to county residents could not be confined to the present area of Gilliam County if Wheeler County were annexed to Gilliam County, since that would violate the privileges and immunities section of the Oregon Constitution).

OP 2003-2, 9/12/03. Grants Pass ordinance prohibiting a tavern located as a non-conforming use from expanding its business to include video poker conflicts with ORS 461.030, which preempts local ordinances and regulations that conflict with state lottery laws.

APPELLATE COURT HOLDINGS REGARDING COUNTY HOME RULE IN OREGON

Prepared by Tollenaar and Associates
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The following cases interpret and apply both constitutional county home rule (Article VI, section 10, Constitution of Oregon) and statutory county home rule (ORS 203.035). Some of the cases arose under municipal rather than county home rule, but the courts (and the Attorney General) have frequently cited the city cases as precedents in the county home rule opinions, and have generally regarded county home rule as analogous to city home rule for purposes of interpretation.

State ex rel Heinig v. Milwaukie, 231 Or 473, 373 P2d 680 (1962*)*
Issue: Whether a state law requiring a city to establish a civil service system contravenes Article XI, section 2 of the state constitution (which forbids the legislature from passing any law that amends or repeals the charter of any city) or Article IV, section 1(5) (which reserves to the people of all municipalities and districts the statewide initiative and referendum powers)
Holding: The legislature does not have authority to enact a law relating to city government, even though it applies to all cities in the state, unless the subject matter "is of general concern to the state as a whole." The statute requiring a civil service system fails this test and is therefore unconstitutional.
Note: This opinion arose under the municipal home rule amendments rather than the county home rule amendment, but the general distinction it makes between matters of state-wide concern and matter of local concern was applied in subsequent court holdings and attorney general opinions regarding county home rule. However, see LaGrande/Astoria v. PERB (below), a 1978 case that modifies Heinig v. Milwaukie but does not expressly overrule it.

Schmidt v. Masters, 7 Or App 421, 490 P2d 1029 (1971), *rev den* (1972)
Issue: whether a charter county's ordinance awarding a waste collection and disposal certificate to a private party violates the Oregon or United States Constitutions.
Holding: The ordinance is constitutional, even though there was no express statutory authority to enact such an ordinance at the time it was adopted. The general grant of power in the county's charter included power to adopt the ordinance. The opinion observes:

a major reason for offering to counties broadening of authority under home rule was the need for a more sophisticated form of government than existed for such (urbanizing) areas, carrying with it authority to do in localities what needs to be done there to seek order where there is confusion, and efficiency in public affairs where

inefficiency increases, and to promote the public health, peace and safety. County home rule was an adaptation of city home rule, with limitations thereon to assure that state functions traditionally imposed upon counties by the state be continued. *We conclude that with reference to matters of local concern, the authority of a county under a home rule charter may be as broad as that of a city.* (Emphasis added)

Grant v. Multnomah County, 14 Or App 78, 511 P2d 1278 (1973)
Issue: Whether Article VI, section 10 gives home rule counties the authority to give employees of the county's department of judicial administration retirement benefits different from those given to employees of the county's department of public safety.
Holding: Yes. Article VI, section 10 gives home rule counties broad powers over county administrative departments.

Allison v. Washington County, 24 Or App 571, 548 P2d 188 (1975)
Issue: Whether county-created zoning ordinances and comprehensive plans are subject to the initiative and referendum process.
Holding: In the absence of state preemption or a limiting charter provision, the authority given a home rule county by Article VI, section 10 and the authority given a general law county by ORS 203.035, is the same. That authority subjects land use laws to the local initiative and referendum process when the laws are primarily of local concern. This result follows, in part, from *State ex rel Heinig v. Milwaukie,* 231 Or 473, 373 P2d 680 (1962)

Multnomah County v. Mittleman, 275 Or 545, 552 P2d 242 (1976)
Issue: Article VI, section 10 reserves to the people the "referendum powers" given them by the constitution. The issue was whether these powers included the power of a referendum as to new taxes; specifically, whether a home rule county may attach the emergency clause to an ordinance levying a new tax, thus preventing a referendum on the ordinance.
Holding: The power to hold a referendum concerning new taxes is indeed reserved by Article VI, section 10. A charter county may not avoid a referendum on a tax measure by declaring an emergency.

Olsen v. State ex rel Johnson, 276 Or 9, 554 P2d 139 (1976)
Issue: None relevant to Article VI, section 10.
Dictum: In dictum, the court compared the authority of home rule counties to the authority of municipalities. The court stated: "In Oregon [the] emphasis on local control is constitutionally accentuated. Art XI, section 2, and Art VI, section 10, of the Oregon Constitution provide for home rule by cities and counties; that is, the voters of the cities and counties can enact their own charters which shall govern on matters of city or county concern." 276 Or at 25.

City of Banks v. Washington County 29 Or App 495, 564 P2d 720 (1977)
Issue: Whether Article VI, section 10 gives a home rule county authority to pass on to the taxing districts within the county the cost of collecting taxes.

Holding: No. Article IX, section 1 of the constitution mandates that taxes are to be collected "under general laws operating uniformly throughout the State." Implicit in state law is that the counties are to bear the cost of tax collection. Article VI, section 10 "does not diminish in any way the responsibility of the county as administrative agent of the state for performance of assigned state functions." 29 Or App at 502

Brummell v. Clark, 31 Or App 405 (1977)
Issue: Whether a charter county may submit a charter amendment at a special election.
Holding: Yes, if its charter and ordinances provide for such elections. Although ORS 203.710 (3) defines a "legally called election" as a biennial primary or general election, ORS 203.720 provides that amendment, revision, or repeal of a county charter are "matters of county concern" and a county may establish its own rules as to the time for voting on proposed charter amendments.

LaGrande/Astoria v. PERB, 281 Or 137, 576 P2d 1204 (1978)
Issue: Whether Article XI, section 2 of the Oregon Constitution was violated by a state statute that required local governments to bring their police officers and firefighters into PERS, or to provide retirement benefits equal to or better than PERS. Article XI, section 2 forbids the legislature from amending or repealing any city's charter.
Holding: (a) There is no constitutional issue when a local rule is intended to function consistently with a state law, or when a state law is not designed to displace a local regulation; (b) when a local enactment is incompatible with a state law in an area of substantive policy, the state law is controlling; (c) when a local enactment is incompatible with a state law in an area primarily concerned with the modes of local government, the local law is controlling; (d) the PERS scheme is one of substantive policy and, therefore, state law controls.

Specifically, the court stated that "the following principles for resolving a conflict between [a state] law and an inconsistent local provision for the conduct of city government are consistent with our past interpretations of the 'home rule' amendments:"

> "When a statute is addressed to a concern of the state with the structure and procedures of local agencies, the statute impinges on the powers reserved by the [municipal home rule] amendments to the citizens of local communities. Such a state concern must be justified by a need to safeguard the interests of persons or entities affected by the procedures of local government.
>
> "Conversely, a general law addressed primarily to substantive social, economic, or other regulatory objectives of the state prevails over contrary policies preferred by some local governments if it is clearly intended to do so, unless the law is shown to be irreconcilable with the local community's freedom to choose its own political form. In that case, such a state law must yield in those particulars necessary to preserve that freedom of local organization." 576 P2d 1204 at 1215"

Note: Like Heinig v. Milwaukie summarized above, LaGrande/Astoria interpreted the municipal home rule amendments, not the county home rule amendment, which is worded entirely differently from the municipal home rule amendments. Nevertheless, LaGrande/Astoria mentions county home rule at three points, one of them apparently extending to county home rule the same assumption it makes for city home rule, namely, that a charter deals mainly with matters of local organization and procedures: ". . . processes of government are the chief object of the municipal charters mentioned in article XI, section 2, as has been set forth more expressly in the more recently formulated constitutional provisions for county charters."

Despite the court's statement that its holding is "consistent with our past interpretations" LaGrande/Astoria is widely regarded as having narrowed the expansive view of home rule taken by previous court holdings, including Heinig v. Milwaukie. When there is conflict between a state and a local enactment, under Heinig the local enactment prevails if the subject matter is of predominately local concern, while under LaGrande/Astoria any state enactment addressing "substantive social, economic, or other regulatory objectives of the state" prevails over a conflicting local enactment and policies. This narrowing is reflected in court decisions and Attorney General opinions rendered after 1978.

LaGrande/Astoria v. PERB, 284 Or 173, 586 P2d 765 (1978) (decision on rehearing)
Issue: Same
Holding: Same. However, the court emphasized that its holding was limited to a ruling on the constitutional limits on the state legislature imposed by Article XI, section 2. The holding was not meant to set out the law as to what may be done under local authority under Article IV, section 1(5) (which reserves to the voters of every "municipality or district" (including counties) the initiative and referendum as to local legislation.)

Fifth Avenue Corporation v. Washington County, 282 Or 591, 581 P2d 50 (1978)
Issue: Among the issues was the effect of the right of referendum found in the Washington County charter on the right of referendum guaranteed by Article VI, section 10.
Holding: the referendum right set out in a county charter cannot nullify the right established by the constitution. Therefore, any county-created zoning plan will remain subject to the people's referendum right.

Budget Rent-A-Car v. Multnomah County, 287 Or 93, 597 P2d 1232 (1979)
Issue: Whether ORS 203.055, which requires counties to obtain voter approval of a county tax, bars a charter county from imposing a motor vehicle rental tax without voter approval.
Holding: No. ORS 203.055 applies only to counties whose authority is created by ORS 203.035. The present case involves a county whose powers are created by Article VI, section 10.

Jarvill v. City of Eugene, 289 Or 157, 613 P2d 1 (1979)
Issue: whether the city's home rule powers include the power to establish a "downtown development district" and tax persons and property within the district.
Holding: Yes. *LaGrande/Astoria* supports the court's conclusion that the city charter's general grant of powers included authority to establish the district, and that the city did not need an act of the state legislature to do so.

Multnomah Kennel Club v. Department of Revenue, 295 Or 279, 666 P2d 1327 (1983)
Issue: whether a constitutional home rule county has power to impose a business income tax.
Holding: Article VI, section 10 and the county charter's general grant of power include the power to levy an income tax. Although the state could choose to preempt the county's tax, present law has no explicit direction to that effect and, therefore, preemption has not occurred.

Pacific N.W. Bell v. Multnomah County, 68 Or App 375, 681 P2d 797, *rev den* 297 Or 547 (1984)
Issue: Whether a home rule county may enact an ordinance imposing permit fees on utilities for construction performed alongside county roads.
Holding: No. ORS 758.010(1) provides that such construction is to be allowed without charge. In accordance with the holding in *LaGrande/Astoria,* the statute regulates a matter concerning "substantive social, economic or other regulatory objectives," and therefore state law controls.

Caffey v. Lane County, 298 Or 183, 691 P2d 94 (1984)
Issue: Whether a county's dog control ordinance may be enforced by means of adjudication by a county hearings officer.
Holding: A violation of county law enacted under a county charter or ORS 203.035 may be adjudicated in a county-provided forum if the county so chooses.

Buchanan v. Wood, 79 Or App 722, 720 P2d 1285 (1985), *rev den* 302 Or 158 (1986)
Issue: whether Article VI, section 10 barred application of the Court Reorganization Act from having effect in home rule counties. Specifically, whether amendments to Multnomah County's home rule charter, which conflicted with the Court Reorganization Act (the charter made certain court-connected officers county officers; the Act made these same officers state employees), were preempted by the Act.
Holding: The court Reorganization Act controls. Citing *LaGrande/Astoria,* a state statute "prevails over contrary policies preferred by some local governments if it is clearly intended to do so, unless the law is shown to be irreconcilable with the local community's freedom to choose its own political form." 79 Or App at 728.

Seto v. Tri-County Metropolitan Transportation District, 311 or 456, 814 P2d 1050 (1991)
Issue: whether a statute establishing a special review process for the siting of the Westside Corridor Project (Portland area light rail project) violates a county's home rule rights.
Holding: No. The law is one that addresses primarily "substantive social, economic, or other regulatory objectives of the state," and it does not affect local governments' freedom to choose their own political form. Therefore, it is constitutional and controlling.

State v. Logsdon, 165 or App 28, 995 P2d 1178 (2000)
Issue: Whether a county's charter prohibition against search and seizure by public officials can be used in a criminal trial to suppress evidence.
Holding: No. Although Article VI, section 10 gives counties authority over "matters of county concern," the charter purports to govern the conduct of any public official, including agents of the state and federal government. The charter provision goes well beyond controlling a matter of "county concern."

Oregon Restaurant Association v. City of Corvallis, 166 Or App 506, 999 P2d 518 (2000)
Issue: Whether state law preempts a city ordinance prohibiting smoking in public places.
Holding: No. The closest applicable statute — the Oregon Indoor Clean Air Act, ORS 433.835 to 433.875 — is less restrictive than the city ordinance but does not prohibit additional restrictions. The two laws are not inconsistent, and there is no preemption.

Ashland Drilling, Inc. v. Jackson County, 168 Or App 624, 4 P3d 748 (2000)
Issue: Whether ORS 537.769, which regulates ground water, preempts county regulation of ground water wells.
Holding: Pursuant to *LaGrande/Astoria v. PERB,* the relevant inquiry is whether the legislature intended to preempt county ordinances. Preemptive intent is assumed when a statute and an ordinance duplicate each other, conflict with each other, or are incompatible. ORS 537.769 forbids a local government from adopting an ordinance to "regulate" "the inspection of wells, construction of wells or water well constructors," but it must be viewed as applicable only to the items listed (well inspection, well construction and well constructors). As to those items, to the extent that ordinances duplicate the statute, conflict with it, or are incompatible with it, they are preempted. Under the facts of the present case, most, but not all, of the relevant ordinances are preempted.

Stabelman v. City of Bandon, 173 Or App 106, 20 P3d 857 (2001)
Issue: Whether Bandon's city charter, which capped sewer rates at the rates in effect in September 1994, was preempted by state statutes governing loans from the Water Pollution Control Revolving Fund and which expressly provided that "charter

provisions affecting rates" would have no effect if to do so would impair the city's ability to repay the state loan.
Holding: The relevant charter provisions are preempted. State statutes, particularly ORS 288.594, render ineffective charter provisions that prevent repayment of the loan. Bandon cannot repay its loans unless the sewer rates are raised.

AT&T Communications v. City of Eugene, 177 Or App 379, 35 P3d 1029 (2001)
Issue: Whether a city ordinance that imposes fees on telecommunications providers of two percent annually for registration and seven percent annually for licensing is preempted by state legislation.
Holding: State law does not preempt the city's registration and license fees. ORS 221.515, which sets a maximum of seven percent on privilege taxes cities may impose on telecommunications carriers that use city rights of way does not apply because plaintiffs do not meet the statutory definition of "telecommunications carrier." However, the city charter's general grant of power includes authority to impose the fees at issue in this case, and the city's power to impose these fees is not measured or limited by ORS 221.515, which "evinces no intention to go beyond [authorizing city privilege taxes up to seven percent] and to preempt any other form of municipal taxation." This case analyzed several other state and federal statutes cited by the plaintiffs, finding that none included a clearly expressed legislative intent to preempt the city fees at issue here.

GTE Northwest Inc. v. PUC 179 Or App 46, 39 P3d 201 (2002)
Issue: Whether Lincoln County (a general law county) may provide its citizens with telecommunication services that compete with services provided by a private provider. In particular, whether "matters of county concern" (i.e., matter over which a county, under ORS 203.035, may exercise authority) include such services.
Holding: Yes. The provision of telecommunications services is indeed a matter of local concern. In the present case, this is true even of services rendered outside the county: the citizens of Lincoln County are benefited by communications along the entirety of the coast and they have an interest in the jobs generated and the attraction of new businesses that may occur because of the enhanced telecommunications.

Baker v. City of Woodburn, 190 Or App 445, 79 P3d 901 (2003)
Issue: Whether state law preempts a city resolution establishing a "reimbursement district" within which a fee was imposed upon property benefited by road improvements financed by a private developer.
Holding: The city's district and fee were not facially incompatible with state statutes prescribing procedures for special assessments within local improvement districts (LIDs) or for systems development charges. Those statutes relate to improvements funded by governments, not private developers, and they do not preempt the city's home rule authority to create its reimbursement district and impose a fee to reimburse the private developer.

Springfield Utility Board v. Emerald PUD, 191 Or App 536, 84 P3d 167, *review allowed* 337 Or 247 (2004)

Issue: Where the Public Utility Commission has allocated to a People's Utility District the exclusive right to provide electrical services to a given area that was subsequently annexed to a city, whether the city may stop the District from providing the services, and, on its own, become the sole provider of electrical services. The city argued that its home rule authority enabled it to override the PUC's allocation.

Holding: Following *LaGrande/Astoria*, the court held that the statute under which the PUC allocated territory to the PUD was a substantive regulation that conflicts with the city's effort, through its utility board, to serve the annexed territory. The court also examined several related statutes and concluded that they provided sufficient indication of legislative intent to preempt the city's authority.

SUGGESTIONS FOR OREGON COUNTY CHARTER COMMITTEES

INTRODUCTION

Establishing a charter committee presents an unusual opportunity to stand back and take a broad view of a community's governance needs. Federal and state constitutions and statutes contain some parameters and restrictions that limit the options available to those who would construct a county government "from scratch," but charter committees nevertheless have considerable flexibility and discretion in designing a framework for county government that promotes the public interest in good government.

These suggestions for Oregon county charter committees were drafted primarily to serve the needs of general law counties considering adopting an entirely new county charter. However, they should also be helpful to committees created to revise or amend existing county charters.

GENERAL COMMENTS

Stick to the Fundamentals

A charter is "the basic law that defines the organization, powers, functions, and essential procedures" of a local government.[1] It is the county government's constitution, serving the same purpose for the county that the state and federal constitutions serve for their respective jurisdictions.

Charters, like constitutions, best serve their purpose if they include only the most basic and fundamental provisions for county government. They should lay the foundation

and erect the framework, but they should not establish specific public policies, programs, or administrative detail. A charter can do its job most effectively if it is kept brief and general, enabling the citizens and their elected representatives to adapt county government to changing circumstances by enacting ordinances from time to time.

Take Reasonable Risks

Probably every county charter committee reaches a point where it must decide whether to develop what its members feel is the "best" charter or to design a charter that is most likely to gain political support. There is no easy answer to this dilemma, but it's clear that some balance must be sought between what's best for the county in the long run and what's politically feasible in the short run. The National Civic League has some good advice for charter committees: "a poor charter may get the same opposition as a good one without arousing the enthusiasm to carry it."[2]

Stay the Course

There is a tendency for charter committees to consider their work finished when they have approved a draft charter and turned it in to the county clerk to put on the ballot. This is unfortunate, because charter committee members are in the best position to provide leadership in the campaign for voter approval of a proposed charter. Through their efforts in developing the charter they have gained understanding of the issues and they are familiar with the arguments of both proponents and opponents of various charter provisions. Indeed, the best assurance that their efforts will not have been in vain is a commitment by each charter committee member to participate actively in the campaign for voter approval.

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[1] National Civic League, Inc., *Guide for Charter Commissions, Fifth Edition* (Denver, NCL, 1991), p. 3 [2] *ibid.* p. 18

SUGGESTED ACTIVITIES

Read the Law

The charter committee should begin its work by reading the constitutional county home rule amendment (Article VI, section 10, Constitution of Oregon) and the enabling legislation for charter committees (Oregon Revised Statutes sections 203.710 - 203.770). Among other things, note that the terms of charter committee members start from the date appointment of the committee is first authorized (not from the date each member is appointed) and run for two years, or the date of an election on a proposed charter, whichever is sooner. If the two year terms expire before the date of the election, the county governing body must act to extend the terms.

Also note that there are deadlines for holding the first charter committee meeting (80 days after terms begin to run) and for submission of the charter (90 days before the date of the election). A new charter may be presented for voter approval only at the biennial primary or general (November) election. Once adopted, charter amendments may be presented at special elections if the county's charter and ordinances so provide.

Get Organized

The committee must designate a chair. Any member may serve as chair, but several committees have chosen to designate as chair the ninth committee member appointed by the other eight. Most committees also designate a vice chair.

Some charter committees have used subcommittees for special purposes, but the full committee should be able to conduct most if not all its business without setting up standing subcommittees. Group consensus is most likely to be achieved when all members receive all the information and participate in all the discussions and decisions.

The committee should adopt some rules to govern the conduct of its meetings. Choices may be made to reach decisions either by consensus or by vote. Responsibility for setting the agenda for each meeting should be fixed. Committees may want to set aside specific amounts of time at each meeting for public input. There may be a need to designate the chair or some other member to serve as a central point for media contacts. There should be committee agreement to use some standard source for parliamentary procedures, such as Roberts Rules of Order.

Arrange for Staff Support

At a minimum, a charter committee must have someone to take minutes, send out meeting notices, and otherwise perform clerical duties. Often the board of county commissioners makes some county employee available for these purposes.

Another requirement is to obtain the services of an attorney to advise the committee on legal issues and to prepare drafts of charter provisions. Most counties have a county counsel, and often that person can fulfill the committee's needs for legal assistance. If the county counsel is not made available for this work, the committee will have to arrange for outside counsel, but it would be important to find an attorney who is experienced and familiar with public law generally and charter preparation specifically.

Additional staff may be considered to conduct research and develop information for the committee. The county may be able to assign management analysts or other professional staff to assist the committee. Alternatively, if a college or university is located in the county, it might be possible to get some help from faculty members or student interns. If funding is available, the committee might obtain the services of a consultant with appropriate experience in charter preparation or other public affairs work.

The committee may have to ask the governing body for additional funding to cover staff costs. ORS 203.750 requires the county to allocate at least one cent per elector

or $500, whichever is greater, to pay committee expenses. For most counties, that amount would not be sufficient to pay for outside counsel or other outside staff support.

Review Written Information

One document that has proven useful to many county charter committees is the *Model County Charter* prepared by the University of Oregon's Bureau of Governmental Research and Service in 1977. The Bureau no longer exists, and the Model Charter is out of print, but copies may be available from a public library or the Documents Section of the University of Oregon Knight Library in Eugene. Copies may also be available from the Association of Oregon Counties (AOC) in Salem.

In 2001, the AOC published a set of papers on county home rule. The papers address several topics including legal provisions for county home rule, the contents of Oregon county charters, the exercise of local legislative powers, reorganization options, and the scope of county home rule as it relates specifically to the state constitution and laws. Copies of these papers are available from the AOC office in Salem.

Another useful source would be minutes and reports of previous county charter committees. Most Oregon counties have had at least one charter committee in the past, and several have had two or three. Records of the proceedings of any previous committees may be available from the county governing body or the county clerk.

Interview County Officials and Departmental Personnel

It will be essential to invite presentations to the committee from county commissioners and the elected department heads, and equally important to hear from other county officials and employees. The purpose of these presentations is to educate the committee members about what county government does and how it does it. It is not the committee's mission to evaluate or pass judgment on the quality of county administration, but decisions about county government organization and powers

presuppose knowledge and understanding about county functions and programs. Even if these officials and employees have no recommendations to make to the committee, they can respond to committee questions and provide other useful information.

In addition to gaining an understanding of how county government works, committee members may use these presentations to probe for indications of needs to improve interdepartmental coordination and to clarify lines of authority and responsibility within county government. These inquiries can yield ideas about county government organization that must be addressed in the county charter.

Inform the Public and Seek Their Input

Typically, preparation of a county charter is not a dramatic event that captures the attention of the media or the general public. Even when charters are presented to the voters, they rarely generate the public attention bestowed on most other kinds of ballot measures. Nevertheless, gaining voter approval of a proposed charter will be difficult without public understanding of what is being proposed and why**.**

If the general public is to become informed about charter issues at all, it is up to members of the charter committee to take positive steps to create visibility and interest in their activities. Merely holding public meetings and public hearings is not enough. Charter committees should seek opportunities to present charter issues through print media articles, TV programs, and personal appearances before community organizations.

These same activities offer an important opportunity for the charter committee to get public feedback to inform and influence their decisions. The committee should solicit presentations from representatives of county employee unions, community businesses, civic and service organizations, and other community interest groups. Some charter committees may want to consider the use of polling and focus groups in an effort to get ideas from the general public that may not be forthcoming from political and community leaders.

Visit or Invite Presentations from Charter Counties

Several county charter committees have found it helpful to make visits to counties that are already operating under county charters, or to arrange for presentations to the committee by representatives of such counties. It would probably be more useful to visit or hear from counties that have adopted charters recently than from counties that have operated under charters for many years. Those who have experienced the change over from general law to charter status are likely to have sharper insights as to the impact of the change than those who have served in county government or observed county operations under charters for many years.

Decide Whether to Prepare a Charter and Submit It to the Voters

A county charter committee is not legally obligated to prepare a charter and submit it to the voters. Several committees have abandoned their efforts after hearing presentations from county officials and community representatives and conducting their initial investigations. A decision to proceed or not proceed with charter preparation should be made before committing resources and the committee's time and energy to the work of drafting proposed charter provisions.

Deliberate and Make Tentative Decisions on Major Charter Issues

If the decision is to go ahead with charter preparation, some tentative decisions must be made about major features to include in the charter. It is essential that all committee members and the general public understand that at this point no decisions are final, but some assumptions must be established regarding the following key issues:

- *What format should be used for the basic grant of powers?* There are two basic approaches to defining the county's powers: a general grant of powers, or an enumeration of individual powers. Using a general grant, the county in effect accepts the full measure of local powers that the legislature could

delegate to it, consistently with the state and federal constitutions. Under the enumerated powers approach, the charter lists specific powers the county may exercise, such as the power to raise revenue and incur debt and the power to enact and enforce regulations for specific subjects (e.g., land use, traffic, business operations, etc.). After considering this issue, every Oregon charter county has opted for the general grant of powers, which Oregon courts have sustained in numerous cases involving both city and county government. Two counties (Lane and Washington) have supplemented the general grant of powers in their charters with partial enumerations of specific powers, even though the partial enumeration is not essential to make those powers available to the county.

- *What form of government should be prescribed for the county?* Tentative decisions must be made about the size and manner of selecting the county governing body, whether to provide for a central executive and if so whether the executive should be appointed or elected, and whether to appoint or elect county department heads. These are the key variables to consider in deciding upon the form of government, and decisions on these matters are likely to generate the most public controversy around county charter proposals.

- *What key procedures and limitations should be included in the charter?* State law sets forth many procedures for county operations, including procedures to adopt county ordinances, make local improvements and assess their costs to benefited property, enter into public contracts, develop the annual county budget, and conduct collective bargaining with county employees. In some cases, procedures established by state law may preempt those a county might prefer to establish locally, and in other cases local procedures can supplement or even replace those provided by state law. State law also establishes limitations on property taxes and county debt and imposes numerous mandates that must be carried out by both charter and general law counties. County charter committees will need competent legal advice to sort through their options regarding key procedures and limitations, avoiding illegal conflicts with state law but taking advantage of opportunities for local self-determination where appropriate.

Arrange for Drafting Services

Drafting a county charter is a task requiring specific expertise that can best be developed by prior experience in such work. The charter must be written in a way that not only meets technical legal requirements, but is also understandable and meaningful to lay citizens who must vote on it. The drafting work cannot be done by the committee itself, but must be assigned to an individual who works with the committee in writing charter provisions that carry out the committee's general directions.

A county counsel or other person assigned to do the drafting may wish to consult certain publications for suggestions regarding drafting techniques. One such publication is the *Manual For Ordinance Drafting and Maintenance* published by the University of Oregon's Bureau of Governmental Research and Service in 1984. This publication is available from the UofO Knight Library in Eugene. County law libraries may contain other references on drafting techniques.[3]

Deliberate and Make Tentative Decisions on Charter Provisions

A charter committee will probably have to meet several times to discuss and make tentative decisions on each charter section as it is presented to the committee by the person who does the drafting. Typical sections of a county charter are the preamble, preliminaries (name, legal status, boundaries, and county seat), powers, government structure, legislative procedures, personnel provisions, finances, intergovernmental relations, transition provisions, and miscellaneous provisions. Again, it is important to avoid making final decisions on charter provisions until the tentative charter has been made available for public review and comment. The public must not get the impression that it is being asked only to ratify an accomplished fact.

Solicit Review by Outside Experts

The tentative charter draft may be submitted to persons outside the county who may be in a position to offer helpful comments and suggestions. Particularly valuable would be the county officials, counsels and administrators of counties that are operating under charters. Others who might be consulted include the AOC staff and university or college faculty members with special knowledge of state and local government.

[3] Examples include Thornton, G.C., *Legislative Drafting* (London, Butterworth, 1987) and Dickerson, F. Reed, *The Fundamentals of Legal Drafting* (Boston, Little, Brown, 1986)

Release the Draft Charter to the Public and Conduct Public Hearings

State law requires that the charter committee conduct at least one public hearing before finalizing the charter and turning it over to the county clerk. However, most county charter committees have conducted several hearings, often in different locations in the county, and scheduled for times that enable broad public participation. The committee should stress that at this point all of its decisions are still tentative, and that public input will be taken into consideration before final decisions are made.

Finalize Decisions and Turn Charter In to the County Clerk

After the public has had full opportunity to comment on the tentative draft, it will be time for the committee to enter into its final deliberations. The committee should take special pains to be sure that the charter is internally consistent, since at this point there will have been many changes to specific sections that may have affected the meaning or purpose of other sections.

It should be noted that under ORS 203.760, the county clerk must submit the proposed charter to the district attorney for preparation of a ballot title. There is no provision for independent judgment and action by the county governing body as to whether or not the proposed charter should be submitted to a vote of the people.

Develop an Explanatory Statement

Charter committees can contribute a great deal to the success of the charter effort by preparing a brief statement setting forth the rationale for major charter provisions, and indicating what the charter might do to improve the governance of the county. Many voters will not make the effort to read the charter itself, and those who do face a daunting task. Media coverage will help fill in some of the blanks in public understanding, as will voters' pamphlet explanations and arguments, but the committee's own reasoning may be

the public's best source of information in deciding how to vote on a proposed county charter.

Campaign!

An earlier suggestion must be reiterated here: charter committee members must demonstrate their belief and commitment by participating actively in the campaign for charter adoption. Retiring from the charter effort when the document is turned over to the county clerk not only deprives the voters of an invaluable source of information, but sends a message that those who know most about the charter proposal are indifferent toward its adoption. Charter committee members must make a positive and energetic effort to explain and advocate for the charter if the proposal is to overcome the natural tendency to vote "no" on measures the voters don't completely understand.

FREQUENTLY ASKED QUESTIONS
ABOUT COUNTY HOME RULE IN OREGON

What, exactly, is a county charter?

A county charter is the means by which a county's voters may exercise their constitutional right to determine how their county government should be organized, what powers it should be granted, and what limitations and requirements should be established for the conduct of county business.

The National Civic League defines a charter as "the basic law that defines the organization, powers, functions, and essential procedures" of a local government.[1] The explanation of county home rule that appeared in the Oregon Voters' Pamphlet for November 1958 (when the county home rule constitutional amendment was adopted) stated that under home rule, "the voters of any county could settle questions of county organization, functions, powers and procedures which are of concern only within a county by adopting, amending or repealing a local charter, instead of by seeking state legislation."

Without county home rule, the state legislature determines and controls county government organization, powers, functions and procedures: it is, in effect, the legislative body of each county. Without home rule, counties may enact local legislation only within the scope of authority delegated to them by the state constitution and statutes. Home rule enables counties to take action on matters of county concern even though no state law requires or authorizes such action.

[1] National Civic League, Inc., *Guide for Charter Commissions, fifth Edition* (Denver, NCL, 1991), p. 3

What does a charter county gain in comparison to a general law county?

First, adopting a charter gives a county and its voters options for county government organization that are not available to general law counties. For example, only by adopting a county charter may county voters change the manner of selecting the county sheriff, assessor, clerk, and treasurer. Election of the sheriff, clerk and treasurer is required by the state constitution, but the county home rule constitutional amendment overrides that requirement by directing that county charters prescribe the organization of county government.

The statutory delegation of legislative powers to general law counties (ORS 203.035) expressly prohibits changes in the manner of selecting the county assessor, and general law counties must comply with the constitutional mandate to elect the sheriff, clerk and treasurer. General law counties may make some kinds of organization changes, but charter status would be important for any county considering a strong central executive position such as a county manager.

Second, charter counties enjoy greater (although still very limited) immunity from state control than do general law counties. General law counties derive their authority over matters of county concern from a state statute (ORS 203.035), and this statute could be changed or even repealed at any legislative session. Because their home rule authority is based only on a statute, general law counties must comply with requirements imposed by other state statutes, even though they may deal with "matters of county concern." Charter counties, on the other hand, derive their authority from a constitutional provision that has been interpreted to give them some immunity from certain kinds of state laws.

Under current judicial interpretations, that immunity extends to state laws that would prescribe particular structures and procedures, but does not include immunity from substantive state mandates. Even the immunity for local structures and procedures of government may be unavailable if a court determines there is a need to safeguard the interests of persons or entities affected by the procedures of local government. These

interpretations are based on LaGrande/Astoria v. PERB, a city home rule case decided in 1978. Since 1978 the courts have used the LaGrande/Astoria holding when interpreting county home rule as well as city home rule.

What organization changes can be made without adopting a charter?

Under ORS 203.035, general law counties may adopt ordinances changing the number of county commissioners, providing for their election by district or at large, requiring that they be elected on a nonpartisan basis, changing their terms of office, and perhaps making other similar changes. They may also change the manner of selecting the county surveyor (from election to appointment). Any such changes in the number or mode of selection of elective county officers must be submitted to and approved by the voters at a biennial primary or general election.

General law counties may also provide for appointment or election of a chief executive officer, such as a county administrator or manager, without adopting a charter. Such a position might be created by ordinance, or merely by adding a line item in the county budget. The duties of a position established in this manner would be those the board of county commissioners chooses to delegate to it, either by county ordinance or by less formal means, and they could be changed or retracted at any time.

Which is more important: the form of county government, or the people chosen to operate it?

In theory, competent and well-motivated people can make any form of government work. The real question, however, is how best to assure that county government will attract such competent and well-motivated people.

The answer to that question depends in no small part on the form of government. Good leaders want to work in organization environments that facilitate (and do not frustrate) goal achievement. If a county government organization is highly fragmented and burdened with procedures and requirements that impede goal achievement, it is not likely to attract the best qualified leadership. Well qualified technical and professional staff people seek organization environments that protect them from political interference and that afford them an opportunity to develop careers in public service.

Thus, both people and forms of government are important, and the two components are in fact interdependent.

Does adopting a county charter save money or reduce taxes?

The mere act of adopting a county charter will not affect county government revenues or expenditures unless the charter contains specific provisions such as putting limits on county taxes or debt or establishing programs that require the county to increase expenditures.

However, as indicated in the previous question, some government structures prescribed by a county charter are more likely to attract good leaders and managers than other structures. Good leaders and managers, in turn, are more likely to achieve economies in the provision of county services than those who may be less experienced or qualified.

What alternative forms of government might be considered in developing a county charter?

Four basic forms of county government might be considered: commission, commission-administrator, commission-manager, and commission-elected executive.

The commission form is the form prescribed by law for general law counties. It calls for a three-member county court or board of county commissioners and for five elective department heads -- the sheriff, clerk, treasurer, assessor, and surveyor.[2] The board of county commissioners (or county court) is collectively responsible for both policy and administration, except to the extent that it may delegate some of its administrative duties to subordinate officials and employees.

The commission-administrator form may be identical to the commission form except for the addition of an appointed administrator whose functions and duties are prescribed by the board of county commissioners. The scope of responsibilities delegated to the administrator varies widely from county to county, with some administrators assuming full administrative authority including the power to hire and fire department heads, while others exercise only limited authority over the county's internal financing and management procedures and activities. The county administrator form is found in both charter counties and general law counties, and some charter counties with this form have also reduced the number of elected department heads.

The commission-manager form is similar in many respects to the stronger commission-administrator forms. County managers typically have broader powers and operate with greater independence than county administrators, although they are fully accountable to the board of county commissioners, who have the authority to hire, discipline, and if necessary fire the manager. The duties and responsibilities of a county manager are usually formalized by specific provisions of a county charter. Like commission-administrator counties, commission-manager counties usually reduce or in some cases eliminate entirely the elective county department head positions, and make the manager responsible for hiring, supervision, and firing all county employees.

The commission-elected executive form creates an elective chief executive officer, usually with administrative responsibilities similar to those of a county manager

[2] The term "commission form" is also used to describe the form of government in the city of Portland, which has five elected commissioners, each of whom serves also as a department head. In county

but with important policy roles in county government as well. The elected executive may be a separate office or, as in Multnomah County, it may be one of the county commissioners who serves both as a commissioner and as the chief executive of the county.

County charters are in no way constrained to choose among these alternative forms, but may effect adaptations that seem suitable for a particular county.

In the commission-administrator and commission-manager forms, how is the line drawn between the policy role of the governing body and the administrative role of the administrator or manager?

It is a common perception that in these forms of county government, the job of the elective governing body is to make policy, and the job of the administrator or manager is to carry it out. While there is substantial truth in that perception, there is in fact no "bright line" between policy and administration. County managers and administrators participate in policy development by advising the governing body about policy options and making recommendations regarding specific county policies. Conversely, elected policy makers participate in county administration and management by oversight activities, handling citizen complaints, approving contracts and intergovernmental agreements, suggesting management changes, and above all in evaluating the performance of administrators and managers and in making decisions to retain or terminate their services.

County government functions best when governing bodies respect the administrative roles and authority of their appointed administrators or managers, and when managers and administrators acknowledge the primacy of elected officials in setting county policy. Elected and appointed officials must work together as a team in pursuing their mutual interest in effective and efficient county government.

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government, county commissioners do not serve as department heads.

Does home rule limit the number, scope, or type of state mandates as they apply to counties?

Neither charter nor general law counties are immune from state mandates. The county home rule constitutional amendment requires charter counties to "exercise all the powers and perform all the duties . . . granted to or imposed upon any county officer" by the state constitution or laws. General law counties derive their home rule authority from a statute rather than from the state constitution, and in that respect they are even more vulnerable to state mandates than are charter counties.

Counties, however, often have considerable local discretion as to the level of service provided in response to state mandates. For example, a county must elect a county sheriff and provide means for the sheriff to enforce state laws, but it is not required to fund those activities at any specific level. Also, it should be noted that the Article XI section 15 of the state constitution requires the state to provide for funding state mandates enacted after January 1, 1997, with certain exceptions (including state mandates approved by a 3/5 vote of the legislature).

What are the disadvantages of county home rule?

A poorly drafted county charter or a charter with ill-advised provisions may be worse than having no charter at all. Charter committees or citizens interested in proposing a charter through the initiative process should obtain the services of attorneys or other qualified persons who have experience in drafting charters. Whether or not a given charter provision is "ill-advised" is of course a matter of opinion, but generally charters should avoid such provisions as setting specific dollar amounts that may become obsolete with the passage of time, duplicating state constitutional or statutory provisions that apply to the county in any event and may change or disappear in the future, and establishing specific county policies or programs that may have to be adapted to changing circumstances. Charters should be limited to basic provisions for the county's

organization, powers, functions, and key procedures, and should not be used to immunize public policies and programs against revision by the elected policy makers in county government.

Another drawback to county home rule is that it probably exposes counties to more potential litigation than would be the case in the absence of home rule. This is particularly true for charter counties, since there can be controversy over the applicability of some state laws to counties that have adopted charters. General law counties may also have some heightened exposure to litigation because they may exercise their home rule legislative authority in ways that invite controversy.

Finally, county charters may be amended, and the experience in several Oregon counties has been that amendments (particularly those proposed by the initiative) may cause greater instability than occurs in general law counties. For example, some organization changes made by charters as originally adopted have remained controversial, and have sometimes invited further changes as time goes by.

How does a county charter affect the office of county judge?

Gilliam, Sherman, Wheeler, Grant, Harney, Malheur, and Morrow Counties have county judges who not only serve as one of three county commissioners but also exercise certain judicial functions, such as juvenile and probate jurisdiction. In addition, Baker, Crook, and Wasco Counties have county judges who serve only as county commissioners and do not have any judicial jurisdiction. (None of these counties has a county charter).

The county home rule constitutional amendment says that "Except as expressly provided by general law, a county charter shall not affect the selection, tenure, compensation, powers or duties prescribed by law for judges in their judicial capacity . . .", The state legislature has, however, "expressly provided" in ORS 3.130 for a county charter to abolish the position of county judge and transfer its judicial functions to the circuit courts. Alternatively, a county charter may make provision for the transfer of

judicial functions at some time in the future. A county judge having judicial functions whose position is so abolished is entitled to serve out the full six-year term to which he or she was elected, and compensation for the position may not be reduced until expiration of that term.

If a county judge has no judicial functions, another statute (ORS 203.230) permits the county court to adopt an order abolishing the office of county judge and creating a third county commissioner position. If such an order is adopted, the incumbent county judge is entitled to serve as chair of the board of county commissioners until the expiration of the term to which he or she was elected. The order may (but is not required to) stipulate that the new third commissioner position has powers, duties, and compensation differing from those of the other commissioners, and it also may stipulate that the person in the new commissioner position continue to serve as chair of the board of county commissioners.