Newly Elected Officials Workshop

City of Florence and Western Lane Public Agencies

March 28, 2001

LEGAL FRAMEWORK FOR CITIES

Jerome Lidz
Harrang Long Gary Rudnick P.C.
101 E. Broadway, Ste. 400
Eugene, OR 97401
(541) 485-0220
jerome.s.lidz@harrang.com

Jerome Lidz practices public law at Harrang Long Gary Rudnick P.C. He serves as city attorney for the cities of Roseburg and Florence, and as the deputy attorney for the City of Eugene.

The Public Law Group at Harrang Long serves as general counsel for numerous Oregon cities and other local governments, including Eugene, Roseburg, Florence, Brownsville, Lowell, Dunes City, Lane Council of Governments, Lane Regional Air Pollution Authority, Housing Authority of Douglas County, Western Lane Ambulance District, Siuslaw Library District, and urban renewal districts. In addition, we have served as special counsel to municipalities throughout Oregon, from Medford to Astoria, and Lincoln County to Ontario.

*The Fine Print: The Public Law Group prepared this document to provide a general discussion of the legal framework for cities. The document is not legal advice, and should not be used as a substitute for consulting with your city attorney. City charters and city codes vary from city to city: the provisions in those documents may affect the answers to many questions local officials have about what they can and cannot do. Also, all statutes are subject to change. Only by consulting legal counsel on a specific question can you ensure that your proposed course of action is lawful.

We wish to acknowledge the efforts of Keith Martin, Pete Wells, Rich Rodeman and Tom Sponsler, whose previous outlines formed the basis for this document.

LEGAL FRAMEWORK FOR OREGON CITIES

CONTENTS

PART I: LEGAL AUTHORITY

§ 1 Overview

All governments in the United States derive their authority from some legal source – such as a constitution, a statute, or a charter. Through the Oregon Constitution, the people in Oregon granted broad powers to the state government. Pursuant to these broad powers, the Legislature has created state agencies and local governments (such as counties, school districts, fire districts, and irrigation districts). When the Legislature created these governmental entities, the Legislature also specified what powers the entities could possess. Thus, for most local governments in Oregon, it is the Legislature that determines how the governments are established, what procedures they must follow, what powers they can exercise, and what actions they can take.

Cities are different from other forms of local government. Although the people granted the state government significant powers, the people reserved to themselves the authority to grant power directly to their city governments. Article XI, section 2 of the Oregon Constitution reserves to local voters the power to adopt a city charter, in which the people can structure their city government and grant powers directly to that city government. The city charter cannot authorize a city to take action that violates the U.S. Constitution, the Oregon Constitution, or federal or state statutes. But unless federal or state law prohibits a city from exercising some power or taking some action, a city may do so if authorized by the city charter. Occasionally, even if a charter does not authorize an action, a state statute nevertheless may authorize that action.

In other words, a city council can take any action it desires so long as three conditions are met. First, the action must be authorized (by charter or statute); this issue is discussed in Part I of this document. Second, the council must comply with procedural requirements established by city charter, local code, and state law; these procedural requirements are discussed in Part II. Third, the action must not be preempted by federal or state law (*i.e.*, constitution or statute); limitations upon city action are discussed in Part III. In Parts IV and V, we summarize issues related to liability – both city and personal liability – and how to effectively and efficiently use your city attorney.

§ 2 City Charter

Article XI, section 2 of the Oregon Constitution authorizes a city's voters to adopt and amend a city charter. The city charter is similar to a constitution. Like a constitution, your charter may (1) create and structure your city government (for example, creating a city council, city manager, municipal court judge); (2) empower your city government (by granting certain powers to the city council, the city manager/administrator and the municipal court judge); and (3) limit your city government (prohibiting certain actions, such as adopting an ordinance without two readings at two separate meetings).

There are two basic types of city charters: those which contain a "general grant of powers" and those with "enumerated powers."

§ 2.1 General Grant

Most city charters contain a "general grant" of power, such as the following: "The city has all powers that the constitution or laws of the United States or of this state expressly or impliedly grant or allow cities, as fully as if the charter specifically stated each of those powers." Such a provision generally authorizes the city government to take any action which is not prohibited by the U.S. Constitution, the Oregon Constitution, or federal or state law.

§ 2.2 Enumerated Powers

Charters which lack a general grant of powers have "enumerated powers." This type of charter will list each specific power granted by the voters to their city government, often including more than 100 separate powers and authorized functions. These specific grants will include such powers as the power to tax, to levy assessments, to sue and be sued, to hold property, to employ assistants, to enter into contracts, and to license businesses. For cities with charters containing enumerated powers, a city council cannot take any action unless the council can identify a specific power in the charter authorizing that action.

§ 3 Statutory Powers

Occasionally, the Legislature will grant to cities specific powers. For example, ORS 223.005 grants to every incorporated city the power to condemn property. For some cities, these statutorily granted powers may merely duplicate powers granted by a city charter. For other cities, these statutory powers will supplement the powers authorized by an enumerated powers charter. For some cities, these statutory powers may allow a city to take an action which the charter actually prohibits. For example, ORS 287.003 states that "[n]otwithstanding any other provision of law, including the city charter," a city with a certain population may issue certain types of debt. Consequently, even if your city charter does not authorize you to exercise a certain power (or, goes further by prohibiting the council from exercising that power), you still may be able to take an action if authorized by state statute.

§ 4 Summary of Limitations on City Powers

Even where authorized by city charter, a city may not be able to take certain actions if those actions violate the U.S. Constitution, the Oregon Constitution, or federal or state statutes. Listed below are some of the more common federal and state provisions which have prohibited Oregon cities from exercising powers otherwise authorized by city charter. In Part III of this document, we discuss in more detail some of the most significant limitations imposed by state statute.

§ 4.1 U.S. Constitution

1st Amendment - free speech
5th Amendment - takings clause
14th Amendment - due process clause

§ 4.2 Federal Statutes

Environmental Laws
Civil Rights Laws
Fair Housing Act
Anti-trust Laws
Telecommunications Act of 1996
Fair Labor Standards Act

§ 4.3 Oregon Constitution

Property Tax Limitations (such as Measure 5 and Measure 50)
Oregon "Bill of Rights" (Article I)
Initiative and Referendum (Article IV, § 1)

§ 4.4 State Statutes

Public Records - ORS 192.410 *et seq*
Public Meetings - ORS 192.610 *et seq*
Land Use - ORS Chapter 197
Annexations - ORS 199 and 222
Cities - ORS Chapter 221
Public Improvements - ORS 223
Ethics - ORS Chapter 244
Elections - ORS 250.255 *et seq*
Street Vacations - ORS Chapter 271
Public Contracts - ORS Chapter 279
Public Budget Law - ORS Chapter 294
Criminal Laws, Civil Forfeiture, and many others

PART II: STRUCTURE AND PROCESS

§ 5 Types of City Government

There are four basic types of city government in Oregon. The most popular are the "council/manager" and "weak mayor" forms of government. Other forms of government include "commission" and "strong mayor."

§ 5.1 Council/Manager

The council/manager form of municipal government was originally formulated by the National Short Ballot Organization (NSBO), in 1911. The mission of the NSBO was to make government more responsible by reducing the number of elective offices. The NSBO adopted the council/manager plan after being convinced that the concentration of administrative authority in such an appointed official under a single commission would be most effective.

Under the plan initially promoted by the NSBO, managers merely reflected the wishes of the city council in all actions and appointments. Managers did not advance or institute their own ideas. The city council, elected at large, was responsible for setting the broad policies of local government.

Most cities adopting the council/manager plan in the early years followed the restrictive approach advocated by the NSBO. Local governments at that time were involved in fewer activities and spent less money. Since that time, however, the job description of city managers has expanded considerably, and most city managers have authority and discretion with which city councils should not (and in some instances, cannot) interfere, including policy implementation, hiring decisions and administrative matters.

As cities grow and encounter governmental and management problems that cannot be handled by part-time elected officials, the council/manager plan provides a governmental mechanism for dealing with the problems of city services in a growth environment. The use of a city manager provides a focal point for administrative action and control and is often accompanied by broad improvements in the basic administrative plan of municipal government through a reduction in the number of elected executives, the elimination of independent boards and commissions, and the introduction of an improved departmental structure.

§ 5.2 Weak Mayor/Council

In cities with the weak mayor form of government, the city council exercises most of the powers of city government. The council is responsible for adopting not only legislation, but also creating and approving most policies for the city. Council committees are often responsible for the day-to-day oversight of city functions, such as parks, public works, police and fire services. The council also may be responsible for appointing some or all administrative personnel for the city. The mayor, in this form of government, is the ceremonial head of the city, and presides at council meetings. However, the mayor will not have the power to appoint administrative personnel or to veto ordinances. Many small cities have this form of government.

§ 5.3 Strong Mayor/Council

Under a strong mayor form of government, like the weak-mayor form, the elected council is the legislative and policy-making body of the city. However, unlike the "weak mayor" form of government, here, the mayor is generally designated as the executive officer of the city charged with careful supervision over its general affairs and its subordinate officers. The mayor may call meetings of the council and preside over the meetings, but he will vote only in the event of a tie. The mayor supervises the operations of the city, appoints officers, and in cooperation with the council creates committees that oversee the various departments or divisions of the city. The mayor may appoint officers such as the police chief, fire chief, recorder or treasurer, usually subject to council approval, and the duties are prescribed by ordinance of the council. Any of those appointed by the mayor may be removed by the mayor or by a majority vote of the council.

§ 5.4 Commission

Under the council/manager, weak mayor, or strong mayor forms of government, neither the mayor nor the councilors receive any compensation for their services. The commission form of government consists of full-time elected members who are compensated for serving as commissioners. In addition to establishing and carrying out city policies, the commission is responsible for the day to day operations of the city, including the hiring and firing of personnel, and may create or disband city departments.

§ 6 Quorum and Votes

The city charter specifies the quorum and voting requirements. As a general rule, a majority of the members of the council constitutes a quorum for the transaction of council business, although a lesser number may meet for the purpose of compelling the attendance of absent members. Similarly, a majority vote of the members present at a meeting will ordinarily be sufficient to pass or defeat a motion, resolution or ordinance. A city may impose a different requirement in its charter or ordinances, however, and require a specific number of votes for passage of certain measures. For example, the city may require the approval of two-thirds of all members of the council for passage of ordinances with emergency clauses.

§ 7 Legislative Actions

The city council is the legislative body of the city. The council may adopt laws or policies applicable to all persons within the city, subject to any limitations imposed by the city charter or conflicting or preemptive provisions in state or federal law. The manner in which the council acts depends to some degree on the subject matter under consideration. In some instances, state statutes or city code provisions dictate the form the action must take.

§ 8 Ordinances

Ordinances constitute the city's local laws. Formal action, with adoption by a majority of the council and approval by the mayor, is required to enact an ordinance.

Under most charters, the mayor may veto an ordinance, and the council may override the veto by an affirmative vote of two-thirds of the councilors. Absent a different effective date, and except for ordinances with emergency clauses, an ordinance generally becomes effective by operation of law 30 days after passage by the council and approval by the mayor. If the ordinance contains an emergency clause, it becomes immediately effective upon passage by an affirmative vote of two-thirds of the councilors and approval by the mayor. An ordinance may also include provision of a specific effective date (subject to the limitations noted above) in order to implement its provisions at a time certain.

An ordinance will be utilized to add, amend, or repeal sections of a city's code (the city's compilation of local laws), and may also involve any other subject matter where the intent is to establish a permanent or long-term rule, policy or procedure. In addition, some state statutes, city charter or code provisions may require that the council act by ordinance in specific situations. Some common examples include: (a) granting franchises; (b) withdrawing annexed territories from special districts (water, parks, etc.); (c) condemning real property; (d) levying assessments; and (e) amending comprehensive land use plans.

Unless an ordinance directs a specific action or contains its own expiration date, it remains in effect until amended or repealed by another ordinance. Some ordinances will contain findings that in essence provide a legislative history for the action being taken, while others, such as land use ordinances, are required to contain findings that show conformance with statewide planning goals.

§ 9 Resolutions

Resolutions generally deal with matters of a special or temporary nature and reflect an expression of council opinion or policy. As with motions, resolutions are adopted by majority vote. They are, however, separate written documents that can be readily accessed to confirm the nature of the action taken. Resolutions often contain findings or recitals that provide information about the action being taken. Resolutions may: (a) call public hearings; (b) adopt specific policies or plans (other than land use plans); (c) state an official position on global or statewide political concerns; (d) commend or honor an individual's service to the city or community; (e) adopt the budget; (f) establish city funds and authorize transfers between funds; (g) form a local improvement district; or (h) call an election.

Because resolutions generally deal with matters of a special or temporary nature, when the purpose of the resolution has been accomplished it ceases to have any further effect. However, in those instances where specific procedures of an on-going nature are involved, such as adoption of a specific program or procedures to be followed in administering a specific program, those procedures remain in effect until amended or repealed by another resolution or an ordinance.

§ 10 Quasi-Judicial Actions

State law and most city codes require quasi-judicial evidentiary hearings on land use matters such as a proposed grant or denial of an application for a planned unit development or conditional use permit, review by a hearings officer of a grant or denial of a variance request, a proposed change in zone classification of property, a proposed quasi-judicial amendment of a comprehensive plan or refinement plan, or such other matters as designated by state law or city codes. The procedures for conducting the hearings are detailed and must be followed carefully.

§ 11 Motions/Consensus

"Consensus" refers to an informal acknowledgment that a majority of the council agree on a particular position. No formal vote is taken, and the action is not binding, but it does provides staff with the general direction the council wishes to proceed with respect to a particular matter.

The council may also express an opinion, adopt or establish a policy, or direct further action by motion. A motion must be adopted by a majority vote, is usually oral, and the only documentation of the action is by reference to the council minutes. Motions are most frequently utilized to: (a) approve minutes; (b) direct staff to prepare reports, take certain actions, or refrain from certain action; (c) call public hearings; and (d) conceptually approve programs or projects.

§ 12 Administrative Rules and Orders

Many cities with a council/manager form of government have provided in their codes or by ordinance a process for the adoption of administrative rules by the city manager. These rules may implement provisions of the city code or other ordinances, or may be administrative orders establishing fees or delegating duties. Specific procedures must be set forth for the manner in which rules are to be adopted to ensure adequate public notice and an opportunity to be heard before implementation. City managers also need authority to adopt emergency or temporary rules without prior notice when necessary because of newly enacted code provisions or an imminent threat to public safety that would occur if the rules were not effective immediately.

Rules should be adopted by an administrative order and assigned an identifying number, and a file containing each order should be maintained in the city recorder's office.

In many cities, fees for services, goods, use of municipal property, licenses and permits are established by council resolution or ordinance. In order to provide uniformity and relieve the council of administrative fee-setting duties, the council may delegate that authority to the city manager and establish a process to be followed by the city manager that ensures public notice and an opportunity for the public (and council) to comment on the proposed fees before they are implemented.

The city manager may also utilize administrative orders to appoint department heads, create or disband city departments, or delegate authority to others to act on the

manager's behalf, such as limited contract signing authority or authority to enforce specific provisions or chapters of the code or ordinances. Those to whom the manager delegates authority may in turn be authorized to subdelegate all or a portion of the authority.

Land Use Matters

Land use matters are highly regulated by state statutes. Not only is there significant substantive regulation (*i.e.*, what use can be made of land), but there also are pervasive regulations governing how a local government must make decisions that involve the use of land.

§ 13 State Land Use Laws

In 1973, the Legislature adopted Senate Bill 100 which established the standards by which local governments must make land use decisions. The legislation also established the Land Conservation and Development Commission ("LCDC") to develop Statewide Planning Goals and guidelines. Local governments were required to adopt comprehensive land use plans to implement the Goals developed by LCDC. Local governments' comprehensive plans had to be approved, or "acknowledged," by LCDC to ensure Goal compliance.

As a result of a 1973 decision by the Oregon Supreme Court, the courts began to separate land use decisions into different types: legislative, quasi-judicial, and administrative/ministerial actions. For each type of land use decision, a different procedure is required. The types and their procedures are discussed more thoroughly below.

§ 14 Comprehensive Plan

The comprehensive plan sets out a city's goals and direction for land use planning. It must cover a planning period of 20 years. The comprehensive plan includes provisions which implement each of LCDC's Statewide Planning Goals in a way that applies to the specific area covered by the comprehensive plan. It contains textual provisions which usually include policies, findings, some narrative sections and, perhaps, goals. The policy provisions prevail over other conflicting provisions. Other textual provisions may help to interpret the policies, but may not be given greater weight than the policies. The comprehensive plan will also contain at least one map. This map depicts the city's urban growth boundary and the land use designations within that boundary.

§ 15 City Land Use/Development Code

In addition to a comprehensive plan, cities have a land use code that implements the land use policies and map contained in the comprehensive plan. The code contains more specific zoning designations, consistent with the land use designations on the comprehensive plan map. In addition, the code sets out procedures for making land use

decisions and the criteria and standards that the decision-maker must apply for each type of decision.

The code will contain a description of each of the city's land use zones and what types of uses are allowed. In each zone, there may be uses that are permitted outright, without the need for a hearing. Other uses may be allowed if certain standards and criteria are met. These may include such things as a requirement that the proposed development will not cause unreasonable street congestion or will not prevent access to adjoining property. The code will also contain development standards that govern how a particular use may be developed. These standards include such things as setbacks, parking, landscaping, and solar access.

The procedural provisions in the code will designate a decision-maker for each type of decision and whether or not there is an opportunity for an appeal to another local decision-maker. The code will set out the procedures that must be applied during the initial local-level decision and the procedures that must be adhered to on appeal. These procedures must be applied, along with those required by state law.

§ 16 Types of Land Use Decisions

In general, there are four types of land use decisions. For each, there is a different procedure to follow.

§16.1 Administrative/Ministerial Decisions

An administrative, or ministerial, decision is one that requires the decision-maker to use no discretion because the applicable standards are clear and may be applied mechanically. Examples of this type of decision include issuance of building permits and sign permits. For this type of decision, the state imposes no notice or hearing requirements. In most cities, a hearing is provided if the decision is appealed by the applicant. Generally, city staff make the initial decision and an appeal is heard by the planning commission.

§ 16.2 Limited Land Use Decisions

A limited land use decision is one that requires little discretion. These will usually be either subdivision, partition, or site review applications for which the only discretion involved pertains to regulation of physical characteristics of a use permitted outright. For these decisions, notice is given and citizens may submit written comments. City staff usually makes the initial decision and, if appealed, the planning commission will have a hearing. The only issues for consideration are those brought up in written comments.

§ 16.3 Quasi-Judicial Decisions

Quasi-judicial decisions require a public hearing at which the decision-maker takes evidence and hears arguments. Common examples of quasi-judicial decisions include consideration of a subdivision plan, annexation requests, zone changes, or applications for a conditional use permit. In all cities, a quasi-judicial decision will require a hearing for the initial decision and another if the decision is appealed. In most cities, the first hearing will be held by the planning commission. The city council likely will be the decision maker at an appeal hearing.

Quasi-judicial decisions require the most procedure. The procedural requirements include:

(a) Notification of pending decision. This may include publication, mailing and/or posting. There are detailed requirements for the content of the notice;

(b) Providing public access to application materials and staff reports prior to the hearing;

(c) Reading of a script at the beginning of the hearing describing participants' rights at the hearing and the procedures to be used;

(d) Providing an opportunity for the applicant and general public to be heard. This includes the opportunity for the applicant to rebut evidence;

(e) Providing an impartial decision-maker whose impartiality is ensured through rules addressing conflict of interest, ex parte contacts and bias;

(f) In certain circumstances, allowing a continuance of the hearing, or leaving the record open for more evidence or argument;

(g) Adopting a decision that includes findings;

(h) Keeping a record of the hearing; and

(i) Notification of final decision.

§ 16.4 Legislative Decisions

Legislative decisions are those which result in policy-making. They affect the community as a whole rather than a small area or a few individuals. These decisions give the government body a great deal of discretion. The most common example of a legislative decision is the adoption or amendment of an ordinance or plan. For these decisions, there are few standards or criteria for the council to consider. Rather, the council will be making determinations about the legislative decision's consistency with other land use code provisions (if the decision is on another code provision) and the comprehensive plan and Statewide Planning Goals.

Notice is generally required through publication and, in most cities, there will be an initial hearing by the planning commission and a final hearing before the city council. Because these decisions may result in an adoption of policy, the final decision is always made by the city council.

Personnel Matters

§ 17 Hiring Issues

The city should have an established policy and set of procedures for hiring. The starting point for any hiring process should be the development of a job description for the position. The description should be up-to-date and accurate, and should set the minimum qualifications for satisfactory performance.

The hiring process should be consistent for all applicants. Consistent interview questions should be asked, and the decision should be made based on objective, job-related criteria. Questions must not be asked about an applicant's protected class status (for example, "how old are you?" or "what country were you born in?"). It is helpful to have more than one person involved in the interviewing and selection process. The process and decision should be documented and the documentation retained for at least three years.

The Americans With Disabilities Act (ADA) prohibits employers from taking actions during the hiring process that could discriminate against individuals with disabilities. Employers may not use qualification standards, employment tests or other selection items that screen out or tend to screen out individuals with disabilities, unless the standard is job-related and consistent with business necessity. Further, employers may not make medical inquiries or require medical examinations prior to making a conditional job offer.

§ 18 Discipline and Discharge

A number of different laws apply to discipline and discharge of public employees. An employee may be covered by local ordinances or written policies, or by a collective bargaining agreement or an individual contract. All of those sources must be reviewed and their requirements followed before taking disciplinary action against an employee. In addition, public employees are protected by the U.S. Constitution, which imposes substantive (just cause) and procedural (due process) standards on disciplinary actions.

Some employees are considered "at will." An "at will" employee serves at the pleasure of the employer and can be discharged at any time without any reason or "cause" to justify the discharge. Some city charters require the city manager to serve at the pleasure of the council. In the case of employees who are intended to be "at will," it is important that no oral or written agreement be made which inadvertently could destroy this "at will" relationship. Additionally, although "at will" employees do not have a property interest in their jobs, a public body or its members should avoid making public statements which could affect the employees' future employability, as this may affect other

constitutional interests or private rights. Likewise, even though an "at will" employee can be discharged without any cause to justify the discharge, such an employee may not be discharged for any illegal, discriminatory reason.

Before an employee can be disciplined, he or she must have specific notice of the rule or regulation he or she is charged with violating, unless it is the kind of activity that an employee should know will not be tolerated on the job. An employee must also have specific notice of the possible penalties which may be imposed for such violations.

Due process requires a timely, thorough and objective investigation to determine whether the individual did commit the conduct charged. The investigator should interview all the witnesses, obtain all physical or documentary evidence, and get the employee's side of the story. The documentation should be immediate, permanent and complete.

Some common pitfalls in the area of progressive discipline are: off the record conduct; past disciplinary records that are too old to be relied on; no opportunity for improvement after a warning or suspension; discipline which is not imposed promptly; and a penalty which is too severe under the circumstances.

§ 19 Leaves of Absence

Public employers are required to provide leave to their employees in accordance not only with any provisions for sick leave and vacation set forth in policies or collective bargaining agreements, but also in accordance with a number of federal and state laws mandating such leave.

The Federal Family Medical Leave Act (FMLA) requires all public employers to provide leave to care for family members with serious health conditions, for the birth or adoption of a child, or for the serious health condition of an employee, including pregnancy or maternity leave.

The Oregon Family Leave Act (OFLA) applies to employers with 25 or more part-time or full-time employees who have been employed for at least 180 days before the start of the leave. For the most part, OFLA now tracks the FMLA, but there are some significant differences. Under OFLA, there is a possibility that certain types of leave can be "tacked" together, resulting in more than 12 weeks of leave under certain limited circumstances. This is a highly technical area of the law and employers are encouraged to contact their legal counsel if they have specific questions about the application of the leave laws.

Employees may also be entitled to leave under the ADA and under the Workers' Compensation statutes. It is possible for an employee to qualify for leave under FMLA, OFLA, ADA and Workers' Compensation all at the same time. Usually it is in the employer's best interest to have all such leave run concurrently, rather than consecutively. Public employers need to have policies in place that address both statutory and contractual leaves in a comprehensive and coordinated manner, and should review those policies on an annual basis for continued compliance with the law.

PART III: LIMITATIONS ON CITY AUTHORITY

Public Expenditures

City councils have broad authority to expend funds on those services, goods and public improvements which the council believes further the public interest. However, state statutes require the council to follow a set of procedures in developing and adopting the city's budget. In addition, the Oregon Constitution, as well as some statutes, prohibit certain types of expenditures.

§ 20 Personal Liability

Should the council (or other city official or employee) unlawfully authorize an expenditure, the person or persons responsible may be personally liable for that expenditure. In other words, **if you authorize an unlawful expenditure, a court may require that you, personally, reimburse the city for that expenditure.** If in doubt as to whether you may be on the verge of unlawfully authorizing an expenditure of public funds, check with your city attorney.

§ 21 Local Budget Law

The primary procedural limitation on the council's expenditure of public funds is the Local Budget Law in ORS Chapter 294. The Oregon Department of Revenue publishes a handbook for local governments which explains in detail the requirements of the local budget law. That handbook also contains forms for the budget, public hearing notices, notices to the county assessor and the Department of Revenue.

The local budget law establishes procedures the city must follow both for adoption and implementation of the annual budget. If a city fails to follow the procedures for adoption, state statutes make it unlawful for the city to expend money, or to collect a property tax. The procedures for adoption include preparation of a proposed budget; presentation to a local budget committee (comprised of the city council and an equal number of citizens); public hearings before the budget committee; approval of a recommended budget by the budget committee; public hearings before the city council on the recommended budget; and approval of the budget by the city council. The local budget law also imposes strict requirements on the timing, manner and content of public notices of the budget's preparation, and of the public hearings before the budget committee and the city council.

§ 22 Public Purpose

All public expenditures must have a public purpose. Any expenditure without a public purpose results in personal liability. The following are examples of expenditures which lack a public purpose: directing the city's parks department to maintain landscapes

at councilors' homes, or directing the city's public works department to repair a leaking roof at the Mayor's house. Another expenditure which was declared to lack a public purpose was a public entity's publication of an advertisement in support of an election measure.

§ 23 Debt

Most local governments find it necessary to borrow money from time to time in order to make significant purchases (such as fire trucks or ambulances), undertake capital improvements (such as parking garages, sewage treatment plants, libraries, or performing arts centers), or have sufficient cash flow prior to the receipt of property taxes in the middle of the fiscal year. There are a variety of different types of debt instruments, including general obligation bonds, revenue bonds, certificates of participation, and lease-purchase agreements.

The Oregon Constitution does not limit the amount of debt for a city (unlike counties, where the constitution imposes such a limit). State statutes, however, limit the amount of bonds which a city may issue for general city purposes to 3% of the city's taxable true cash value. Many city charters also contain limits on the amount of debt that a city can issue.

§ 24 Election Measures (Advocacy by Elected Officials)

The following guidelines offer general legal principles found in case and statutory law. City officials are encouraged to consult with their city attorney when specific questions arise. Whenever the guidelines refer to "public resources," the term means city funds, city employees during their working hours, city vehicle or travel allowances, or city facilities and equipment.

Cities are subject to the general rules prohibiting the use of public resources to advocate a position on a ballot measure. For example, city personnel cannot be used to do research or write speeches designed to advocate a particular position on a ballot measure, and it would be improper for a city to pay travel expenses for officials to promote a campaign position.

City officials may use public resources to develop and distribute objective material on the effects of a ballot measure. Such material must be "informational," providing the public with a "fair presentation" of the relevant facts, and may not expressly or by implication advocate a particular position.

Elected city officials may fully campaign for or against a ballot measure if they do not use public resources. The courts have recognized the right of elected officials to speak out on major issues, particularly on matters that affect the governmental body on which they serve. In doing so, they may use the objective information prepared by the city or other material prepared by advocates or interest groups.

City councils can take a position on a ballot measure so long as public resources are not used to advocate that position or to have it distributed.

Public Meetings Law

Oregon law requires that decisions of governing bodies be arrived at openly. As such, state law contains several requirements to ensure that the meetings of governing bodies at which decisions about the public's business are made or discussed are open to the public. In addition, a local government may also have charter provisions or ordinances which regulate the openness of meetings. Violation of the public meetings law could void a local government decision.

§ 25 What is a "Meeting" Subject to the Public Meeting Laws?

A meeting occurs whenever a "public body" conducts "public business." For purposes of applying the Public Meetings Law to cities, a "public body" is any city council, board, commission, bureau, committee, subcommittee or advisory group created by an official act. However, the Public Meetings Law only applies if the body has the authority to make decisions for a public body, or make recommendations to a public body.

The Public Meetings Law may apply whenever a quorum of the "public body" is present. A quorum is, generally, 50% of the members, plus one. For example, a city council with five members has a quorum of three.

"Public business" is conducted whenever the public body discusses any policy or administrative matters that pertain to the city. As such, if a quorum of city councilors went to the same party, their presence could constitute a meeting (subject to the public meeting laws) if as a group they discuss matters pertaining to the city. However, if the councilors simply enjoyed a social evening together, and did not discuss matters relating to the city, then there would be no "meeting" under the Public Meetings Law.

§ 26 Where Must a Public Meeting be Held?

Public meetings must be held within the geographical limits of the city. One exception is for "training sessions," so long as a session does not include any discussion of city business. The other exception is where the public body is holding a joint meeting with a public body from another jurisdiction. In that case, the meeting must be held within the geographic boundaries of the area over which one of the bodies has jurisdiction, or at the nearest practical location. Finally, the meeting site cannot be a place where discrimination is practiced or which is inaccessible to individuals with mobility impairments.

§ 27 When May a Meeting be Private?

In limited circumstances, a governing body may meet in private, or to the exclusion of certain persons. Such exclusive meetings are called "executive sessions." Members of the news media normally cannot be excluded from an executive session. A governing body has the authority to hold an executive session only for one of the specific reasons set out in state statutes. Some of the common reasons for city governing bodies to hold executive sessions include:

(a) To discuss the hiring of a new public officer, employee or agent; or the discipline of an existing public officer or employee;

(b) To discuss performance evaluations of public officers and employees;

(c) To deliberate with a labor negotiator (for this type of executive session, the media may be excluded);

(d) To consider exempt public records;

(e) To consult with legal counsel concerning legal rights and duties regarding current litigation or litigation likely to be filed (a news media member may be excluded if she/he is a party to the litigation being discussed); or

(f) To deliberate with its negotiator in a real property transaction.

During an executive session, the body may deliberate and discuss, but state law prohibits it from reaching a final decision during that session. To take action, the governing body must return to an open session.

§ 28 Notice

The Public Meetings Law requires that notice be given of the time and place of any meeting subject to the law. This includes meetings of subcommittees and advisory committees in addition to city council meetings. For a regular meeting, notice must be reasonably calculated to give actual notice of the time and place of the meeting to "interested persons including news media that have requested notice." The notice must include a list of the principal subjects anticipated to be discussed at the meeting. However, if an unplanned item comes up at the meeting, it may be addressed. Except in an emergency, all public meetings (including executive sessions) must be called with at least 24 hours prior notice.

§ 29 Minutes

Minutes of every public meeting must be prepared and approved at a subsequent meeting. At the least, minutes must contain the following information: (a) members present; (b) motions, proposals, resolutions, orders, ordinances, and measures proposed and their disposition; (c) results of all votes; (d) the substance of any discussion on any matter; and (e) a reference to any document discussed at the meeting.

Public Records Law

Under Oregon law, nearly every document or record (including computer records, voice-mail messages, and handwritten notes during council meetings) created or held by a city, is available to anyone who wants to see it. Unless a specific exemption covers a document, the document must be disclosed.

§ 30 Who Has the Right to Inspect Public Records?

Under state law, "every person" has a right to inspect any nonexempt public record. The identity, motive and need of the person making the request are irrelevant unless an exemption from disclosure allows consideration of those characteristics. The government is allowed a reasonable time to respond to the request, which may include an opportunity to consult with legal counsel.

§ 31 Whose Records are Subject to the Public Records Law?

All local governments are subject to the Public Records Law.

§ 32 What Kinds of Records are Covered by the Public Records Law?

A "public record" is "any writing containing information relating to the conduct of the public's business . . . regardless of physical form or characteristics." This includes "handwriting, typewriting, printing, photographing and every means of recording, including letters, words, pictures, sounds, or symbols, or combination thereof, and all papers, maps, files, facsimiles or electronic recordings." Your e-mail messages are subject to the Public Records Law if they relate to the conduct of the public's business. Also, the handwritten notes you take at a meeting are subject to disclosure.

The city may charge a reasonable fee to recover its costs for producing and copying records. The fee schedule should be adopted by ordinance, resolution or administrative order.

§ 33 What Types of Records are Exempt From the Public Records Law?

To deny public disclosure of a record, the public body has the burden of proving that the record information is exempt from disclosure. The only exemptions are listed in state statutes. Among the exemptions are those records which pertain to litigation, personnel matters, trade secrets and criminal investigatory material. There are many more. A public body may choose to disclose an exempt record; it is not required to deny disclosure of a record which fits into an exemption category.

§ 34 Limited/Selective Disclosure

In some circumstances, a city may wish to disclose an exempt public record to a specific private party, but not to the public at large. Where doing so will not "thwart the

policy supporting the exemption" the city will still retain the power to claim the exemption as to other requesters. These are rare circumstances, however.

Public Contracting Law

ORS Chapter 279 governs the manner in which public contracts are solicited, awarded and performed. Unless an exemption or exception applies, the awarding of all public contracts must be based on competitive bidding under the control of the public body's Contract Review Board.

§ 35 Who is Subject to the Public Contracting Rules?

All public agencies are subject to the public contracting rules, including agencies of the state or any political subdivision thereof, and any body created by an intergovernmental agreement. The definition of public agency includes every county, city, school district, special district and any public board, commission, branch, agency or other subdivision of the foregoing that has the authority to enter into a public contract.

§ 36 What is a Public Contract?

For purposes of the competitive bidding requirements, "public contracts" generally include any purchase, lease or sale by a public agency of personal property, public improvements or services. A contract does not have to be in written form to be a public contract. Contracts for the purchase, lease or sale of real property are not included in the definition of public contracts. In addition, contracts for certain types of highly skilled services, called "personal services," are specifically excluded from the definition of public contracts.

For purposes of public contracting conditions, the definition of "public contracts" is much broader and includes personal service contracts.

§ 37 Contract Review Board

Each local government public body with the authority to enter into public contracts must have a contract review board to perform the functions that the state Department of Administrative Services performs for state agency contracts. Those functions include such things as exempting certain contracts or classes of contracts from competitive bidding, designating certain types of service contracts as "personal service contracts," and establishing rules and procedures for special situations. Any public agency that has a governing body may designate its governing body as its own Local Contract Review Board ("LCRB") by a resolution or ordinance that sets forth the rules under which the LCRB will solicit and award public contracts. The organizing act must be filed with the county in which the administrative office of the public agency is located to be effective.

A public agency other than a state agency or county may contract with another public agency or with the Oregon Department of Administrative Services to serve as its

own LCRB. The agreement must be filed with the county in which the public agency seeking the services has its administrative office. The Oregon Department of Administrative Services will provide contract review services to local public agencies for an annual maintenance charge of $300.00 plus a fee for each exemption request. If a public agency does not create or contract for a contract review board, the county contract review board must serve as the public agency's LCRB.

§ 38 Public Bidding Requirements

With the exception of public improvements, in which case cost must be the dominant criterion for award, formal competitive procurement may be accomplished by either bid or competitive proposal. A bid is a competitive offer that is binding on the bidder, where price, delivery (or project completion), and conformance with specifications and the requirements of the Invitation to Bid will be the predominant award criteria. The bidding period is the span of time between the date of issuance of the Invitation to Bid and the closing of the solicitation, *i.e.*, the time and date set as the deadline for submitting bids. A competitive proposal is a competitive offer in response to a request for proposals where the request specifies criteria other than, or in addition to price as the predominant award criteria.

§ 39 Brand Names Prohibited

The specifications or advertisement for bids cannot require a certain brand name, trademark, manufacturer, or seller unless a specification is exempt by rule of the LCRB under statutory criteria. An exemption would be warranted, for example, for the purchase of a replacement part or addition to existing equipment where only one make or model will integrate efficiently with the existing system.

§ 40 Negotiation With Bidders

After a contract is awarded, further negotiations with the successful bidder may enhance the value of the contract. No negotiations with a bidder should be held prior to the award, unless all responsive bids exceed the cost estimate.

§ 41 Model Bidding Rules

The Attorney General is charged by statute with the duty to promulgate model rules of contracting procedure for use by public agencies. Every public agency is subject to the "model rules," and all modifications to the model rules that the Attorney General may adopt, unless the public agency adopts its own rules of procedure for public contracts.

§ 42 Exemptions from Public Bidding

Public contracting laws provide a number of exemptions from public bidding laws. For example, specific state statutes exempt contracts with other public agencies; contracts with certain qualified non-profit agencies providing employment opportunities for disabled

individuals; contracts for less than $5,000; and contracts for medical insurance and service. The LCRB is authorized to exempt individual contracts, or classes of contracts, from competitive bidding if statutorily required findings can be made. State statutes provide a process for negotiation of value engineering and other options to reduce the cost of a project where all responsive bids exceed the public agency's cost estimate. Sales of surplus property are exempt from public bidding when the cost of conducting the public bidding sale would result in less net revenue to the public agency than a liquidation sale. Contracts for personal services are specifically excluded from the definition of public contracts for purposes of competitive bidding requirements. Local public bodies may negotiate with one or more private or public entities to make contracts and agreements for the use, operation, maintenance or ultimate lawful disposition of personal property owned by or under the control of the local public body.

§ 43 Public Improvements

Public improvements are public contracts for construction, reconstruction or major renovation on real property. Public improvements generally do not include emergency work, minor alterations, ordinary repair or maintenance necessary to preserve a public improvement. Special rules apply to contracts for public improvements.

§ 44 Provisions Required to be Included in Public Contracts

ORS 279.310 to 279.342 contain provisions that generally apply to all public contracts, including limitations on labor hours and overtime, termination of contracts for public interest reasons, and provisions relating to environmental laws. Many of these statutes contain boilerplate language or statements that must be set forth in public contracts. For purposes of these laws, "public contract" has a very broad definition that includes contracts for personal services.

§ 45 Public Works Requirements

"Public works" include roads, highways, buildings, structures and improvements, the construction, reconstruction, major renovation or painting of which is carried on to serve the public interest. Public works do not include projects for privately-owned property leased to a public agency. Special statutory requirements are imposed for "public works" contracts. No public contracting agency may divide a public works project into more than one contract for the purpose of avoiding the prevailing wage requirements.

§ 46 Discrimination

A contractor may not discriminate against minorities, women or emerging small businesses in the awarding of subcontracts, and a public contracting agency may disqualify a bidder upon a finding that the contractor has so discriminated.

§ 47 Penalties for Failure to Comply With Public Contracting Laws

A contract entered into in violation of the public contracting laws may be held void, voidable or unenforceable, even after completion.

A public contracting agency may be subject to suit by a supplier, contractor or trade association for equitable relief and for the cost of preparing or submitting a bid or proposal. Attorneys fees may be awarded to the winner.

Real and Personal Property

§ 48 Property Disposal (Sale or Lease)

The use and disposition of real property and real property interests controlled or owned by political subdivisions is not subject to public contracting law but is subject to the provisions of ORS 271.300 to 271.440. These statutes generally provide that a political subdivision may dispose of real property not needed for public use by sale, lease or exchange. Most of the provisions of these statutes are not "stand alone" provisions. Although they generally grant power to local governments to sell and lease surplus properties, other statutes or the charter or code provisions applicable to a property transaction by a local government may impose additional requirements or restrictions on the manner of disposal of such property. For example, ORS 271.735 requires a city to hold a public hearing on the issue of sale of city real property not less than five days after publication of a notice of the hearing in at least one newspaper of general circulation in the city.

Before real property may be sold or leased to a private entity, the governing body of the political subdivision that owns or controls it must find that it is not needed for public use. If real property is needed for public use, it may be exchanged for other real property of equal or superior useful value. Any property not needed for immediate public use may be leased as provided in ORS 271.310(3).

A political subdivision may convey land, as a grant and without consideration, to: (a) another governmental body to be used for a public purpose; (b) a 501(c)(3) organization or a municipal corporation for the purpose of providing low income housing, social services or child care services; or (c) any nonprofit or municipal corporation for the creation of parks and green spaces for perpetual public use.

§ 49 Lease Purchase Financing

In addition to any other power provided by any other law or charter provision, ORS 271.390 authorizes counties, cities and districts described in ORS 198.010 or 198.180 (1)

to (5) to enter into lease/purchase agreements and similar contractual arrangements for the acquisition, lease, and financing of real and personal property. A contract that is made under and complies with the provisions of ORS 271.390 will not be considered to incur a debt for the contracting entity.

The types of contracts authorized by the statute include rental contracts, long term leases with options to purchase, and financing agreements with vendors, financial institutions or others. The contracts cannot be supported by a general obligation of the governmental unit.

Government Ethics

Public office is a public trust. This concept is enforced through state law, as well as many city charters and codes, in provisions that prohibit public officials from using their positions to enrich themselves, their families or businesses with which they or their close relatives are associated.

§ 50 Local Charter and Statutory Limitations

Many cities address conflicts of interest in their charters and ordinances. Often, cities have specific prohibitions tailored to particular public offices or to specific duties of those offices. For example, the Eugene City Charter provides that "No member of the council may be pecuniarily interested in any contract the expenses of which are to be paid by the city or vote upon any subject in which pecuniarily interested." As another example, the Eugene City Code has a provision which prohibits any member of the planning commission from participating in a proceeding in which that member, the member's relatives, or certain businesses to which the member is connected, has a "direct or substantial financial interest."

Public officials should be aware that the type of activity at issue may trigger federal statutory guidelines regarding the use of funds which are derived from the federal government. For example, 24 C.F.R. sec. 570.611(b) limits the ability of governing body members to gain financial benefit from the expenditure of community development block grant funds and other federal monies.

§ 51 State Ethics Law

In 1974, Oregon voters adopted a code of ethics and guidelines for situations involving conflicts of interests. The ballot measure also provided that a state commission (presently known as the Oregon Government Standards and Practices Commission) would investigate and enforce violations of the state ethics law.

§ 52 Covered Officials

The state ethics law applies to "public officials." The definition of public officials is very broad. It includes all persons "serving" a government entity (such as a city, county,

or special district) as an "officer, employee, agent or otherwise." It does not matter whether such persons receive compensation for their service. For example, a person serving on a city council or a commission like a planning commission is a public official within the meaning of the ethics law.

§ 53 State Ethics Code Prohibitions

The state ethics code prohibits several actions: (a) using public office to obtain a financial benefit; (b) acceptance of "large" gifts; (c) soliciting or receiving a promise of future employment based on an understanding that the promise would influence the official; (d) using confidential information for personal gain; and (e) representing a client before the governing body of which the person is a member.

§ 54 Use of Office to Obtain Financial Benefit

The primary rule in the ethics code prohibits the use of public office for financial benefit. That rule prohibits the use or attempted use of a public official's office or position to obtain financial gain for the public official or closely associated persons. If a public official takes an action in order to avail himself of an opportunity to save money or gain a benefit that would not be available but for the official's position, the official violates the ethics code. The rule is set forth in ORS 244.040(1)(a), which provides, in part:

> "No public official shall use or attempt to use official position or office to obtain financial gain or avoidance of financial detriment that would not otherwise be available but for the public official's holding of the official position or office . . . for the public official or the public official's relative, or for any business with which the public official or a relative of the public official is associated."

The rule does, however, allow the following types of financial "gain": honoraria; reimbursement of expenses; unsolicited awards for professional achievement; and official salary.

§ 54.1 The Ethics Code Applies to Public Officials and Their Relatives

The ethics code prohibits public officials from using, or attempting to use, their positions to obtain a monetary benefit for their relatives. The term "relative" means only the following persons: (a) spouse of the public official; (b) children of the public official or public official's spouse; and (c) brothers, sisters or parents of the public official or public official's spouse.

§ 54.2 Businesses Associated with Public Officials or Their Relatives

Public officials are prohibited from using their position to obtain financial benefit for businesses with which they or their relatives are associated. This applies to businesses which are operated for economic gain; however, certain income-producing non-profit

corporations are excluded. A person is associated with a business if the person or the person's relative is a director, officer, owner or employee, or agent of the business. Also, anyone who has owned least $1,000 worth of stock in a corporation during the preceding year is associated with that corporation.

§ 54.3 What Constitutes "Using" Official Position or Office

To "use" one's public office generally requires some affirmative act or omission which is related to the public office. For a member of a public body, use of office includes discussing, debating or voting as a member of the body. For a public official who is not a member of a body, use of office includes any act such as approval of a contract, hiring an employee and failing to enforce the law. The prohibition also extends to any **attempt** to use public office. This prohibition is fairly broad, as the following examples illustrate.

Example: A SAIF official violated the ethics law when he purchased a personal car as an "add on" to SAIF's fleet purchase at a savings of almost $1,300. This purchase did not involve any additional cost to SAIF. Because this discount would not have been available to him **but for** the fact that he worked for SAIF, he had used his office for gain.

Example: A city official may not use the city telephone account for long-distance calling, even if he were to reimburse the city at city rates, because the rates government entities pay for telephone service are significantly less than what individuals pay. In such a case, the public official would not enjoy the discounted rate he received **but for** the fact that he held a position with the city.

Example: Use of the office can be direct or indirect. A state senator was chairman of the senate committee which considered all bills affecting workers' compensation. The senator received a financial benefit when he was paid by a friend to use the influence of his office to obtain business for the friend. The senator used his office directly by requesting business for that friend; he also used his office indirectly by letting it be known that he supported that friend's business enterprise.

Example: An Oregon State Police (OSP) major's duties included negotiating with private parties for development of OSP facilities. In a private trade with one such party, he traded three handguns with a total value of $1,257 for a motor home and a car with a total value $11,425. The ethics commission found he violated the ethics code.

§ 55 Large Gifts

During any one calendar year, a public official or relative may not receive a gift or gifts with an aggregate value in excess of $100 from any single source who could reasonably be known to have a "legislative or administrative interest" in any agency over which the official can exercise any authority. The following items are not prohibited: (a) gifts from family members; (b) campaign contributions; (c) food, lodging and travel for events attended in official capacity; (d) giving or receiving food or beverage if consumed

by the official or relative in the presence of the purchaser or provider; and (e) entertainment experienced in the presence of the purchaser or provider where the value does not exceed $100 per person on a single occasion and is not greater than $250 in any one calendar year.

§ 56 Jobs

Officials may not solicit or receive any promise of future employment based on an understanding that the official's vote, official action or judgment would be influenced thereby. The ethics code also prohibits private citizens from offering such promises to officials.

§ 57 Confidential Information

Officials may not use confidential information gained in the course of their official duties or position for the purpose of furthering personal gain.

§ 58 Representation

No person shall attempt to represent or represent a client for a fee before the governing body of a public body of which the person is a member. This does not apply to the person's employer, business partner or other associate.

§ 59 Actual and Potential Conflicts of Interest

Public officials may face situations in which their actions may, or will, result in pecuniary benefit for themselves, their relatives, or businesses with which they or their relatives are associated. In such cases, the state ethics law describes the proper response. The response depends upon whether the conflict is an **actual** conflict or a **potential** conflict. Keep in mind, however, that under no circumstances may an official *use* their office for the purpose of benefitting the official, a relative or an associated business.

§ 59.1 Actual Conflict of Interest

An actual conflict of interest exists when a public official is faced with acting, deciding or recommending an action, and the effect of that action certainly ***would*** be to the private pecuniary benefit or detriment of the official, the official's relative, or any business with which the person or a relative of the person is associated.

Example: A city councilor owns one of two well-digging companies in the city. The council is voting upon whether to adopt a proposed ordinance that would impose licensing fees on well-digging companies. His vote will certainly have the effect of a financial detriment or benefit upon his company.

Example: A systems operation official approves an employment agreement with a technical support company that employs her son. The approval would be to the pecuniary benefit of a business with which her relative is associated.

§ 59.2 Potential Conflict of Interest

A potential conflict of interest exists when a public official is faced with acting, deciding or recommending an action, and the effect of that action ***could*** be to the private pecuniary benefit or detriment of the official, the official's relative, or any business with which the person or a relative of the person is associated.

Example: If the public official as an independent contractor performs services for a business that comes before the public body upon which the official sits, a potential conflict exists. The decisions of the public body could result in private pecuniary benefit to the official.

§ 59.3 Exceptions

Actions affecting an entire class do not create a conflict of interest. In other words, no conflict exists if the public official's action would affect other members of a large class of people in the same way it would affect the public official. For example, if a city council was voting to adopt a city-wide tax cut for retail businesses, council members who owned retail businesses would not have a conflict because of the exception. However, if the city council was voting to adopt a tax cut for software companies, and a city councilor owned one of only three software companies in the city, the councilor would have an actual conflict of interest for which the "class" exemption would not apply. In that case, three software companies would not be considered a large enough class to gain the exception.

Other exceptions include the following:

(a) Membership in a particular class required by law as a prerequisite to holding office does not give rise to a conflict of interest. For example, a commission which recommends fees for the use of certain chemicals requires that one of its positions be filled by a representative of a company which uses such substances. That person is not faced with conflict when deliberating upon the amount of a fee.

(b) No conflict exists when the pecuniary benefit or detriment arises out of membership in or membership on the board of directors of a nonprofit corporation which is tax-exempt under section 501(c) of the Internal Revenue Code.

§ 59.4 Methods of Handling Actual or Potential Conflicts of Interest

In every case in which a public official is met with an actual or potential conflict of interest, the official must **disclose** the conflict. Elected or appointed officials serving on

a board or commission must publicly announce the nature of the conflict. The conflict must be recorded in the official records of the public body. A public official need only announce a conflict of interest once during the course of the particular meeting, even though discussion or action may be interrupted.

When faced with an **actual conflict** of interest, a public official must, after disclosing the conflict, refrain from participating as a public official in any discussion or debate on the issue out of which the actual conflict arises or from voting on the issue. The public official should make certain that the minutes reflect that the public official did not participate in the discussion or vote.

> Rule of necessity: If the official's vote is necessary to meet a requirement of a minimum number of votes to take official action, then the official is eligible to vote, but not to participate as a public official in any discussion or debate on the issue out of which the actual conflict arises. **Caveat:** If voting under the "rule of necessity" would violate the code of ethics (for example, where a vote would constitute "using" the office to obtain financial gain or avoid financial detriment), then the public official may not vote.

When faced with a **potential conflict** of interest, a public official must announce publicly the nature of the potential conflict prior to taking any action thereon in the capacity of a public official. Following the declaration of the conflict, the official may discuss and vote on the matter.

Caveat: A public official may not take official action after declaring a potential conflict of interest if such action would violate any provision of the code of ethics. (See Section 53 above.)

§ 60 Statement of Economic Interest

On or before April 15 of each year, the following officials must file a statement of economic interest with the Government Standards and Practices Commission: (a) elected officials; (b) city managers; (c) planning, zoning and boundary commissioners; (d) municipal judges; and (e) members of governing bodies of metropolitan service districts and executive officers of such districts. The economic interest statement must be on a form provided by the Government Standards and Practices Commission.

The state ethics law also requires public officials to report each source of income over $1,000 if the source is derived from an individual or business that does, or could be expected to do, business with or have a legislative or administrative interest in the public official's government agency. In addition, the public official must report all debts over $1,000 that he or she owes to such an entity.

§ 61 Ethics Manual

The Oregon Government Standards and Practices Commission publishes an ethics guide for public officials. It is available upon request from the Commission, and it is particularly helpful because it immunizes from prosecution any government official that acts in accordance with it.

PART IV: LIABILITIES

§ 62 Tort Claims Act

Common law concepts of sovereign immunity have been replaced in Oregon by the Oregon Tort Claims Act ("OTCA"). Under the OTCA, the general rule is that a city in Oregon is liable for its own torts (*e.g.*, negligence) and for the torts of its officers, employees and agents. However, there are significant exceptions to this general rule, special notice requirements, and limits to the amount of a city's liability.

§ 62.1 Who is Liable?

Cities are liable for their own torts and for the torts of their officers, employees and agents.

If a city's officer, employee or agent is acting within the course and scope of his or her employment and is eligible for representation and indemnification by the city, as discussed below, a tort claim must be brought against the city only, and not against the officer, employee or agent.

§ 62.2 Defenses

If the officer, employee or agent of a city who is alleged to have caused the injury is immune from liability, the public body is also immune from liability. The individual's immunity often arises under common law. Some of the more common individual immunities are (a) judicial or quasi-judicial immunity, (b) prosecutorial immunity, and (c) legislative immunity.

A city is itself immune from liability for: (a) claims covered by worker's compensation law; (b) claims in connection with the assessment and collection of taxes; (c) claims based on the performance or failure to perform a discretionary function or duty; (d) claims which are limited or barred by statutes of limitation, statutes of repose, or any other statute; (e) claims arising out of riot, civil commotion or mob action; and (f) claims arising out of an act done or omitted under apparent authority of a law which is later found to be invalid or inapplicable, unless the act or omission was done in bad faith or with malice.

One of the more commonly litigated "other statutes" which provides a defense to a tort claim is ORS 30.275. Under this statute, a potential claimant must provide notice to the public body that a claim will be asserted against the city. The notice must describe the

time, place and circumstances that give rise to the claim and give the name and mailing address of the claimant. This notice of claim must be delivered to the public body within 180 days of the alleged loss or injury or, in the case of a wrongful death claim, within one year of the alleged loss or injury. Also, the claim must be filed within the time period provided in any other applicable limitations period or within two years of discovery of the alleged loss or injury, which ever time period is shorter.

§ 62.3 Indemnity

A public body is required to defend and indemnify its officers, employees and agents against any tort claim arising out of an alleged act or omission occurring in the performance of that person's duties, unless the act or omission was the result of malfeasance in office or willful or wanton neglect of duty.

At the written request of the officer, employee or agent, a city must hire counsel to defend the officer, employee or agent unless the city investigates and determines that the claim does not arise out of an alleged act or omission occurring in the performance of the employee's duties or that the act or omission amounted to malfeasance in office or willful or wanton neglect of duty.

§ 62.4 Limits of Liability

The amount for which a public body may be liable is limited by statute. Generally, a claim for property damage is limited to $50,000 per claimant. A claim for personal injury is limited to $100,000 for both general and special damages, unless total damages exceed $100,000, in which case the claimant can recover additional special damages up to $100,000. If a single accident or occurrence causes injuries to more than one person, the city's liability is limited to a total of $500,000 for all claimants. Punitive damages are not available against a city for state law tort claims.

§ 63 Civil Rights Actions – § 1983

The liability limits and notice of claim requirements of the OTCA do not apply to federal statutory or constitutional claims brought under 42 USC § 1983.

A city is not automatically liable for the actions of its employees which violate federal constitutional laws. Generally, however, a city is liable for the constitutional violations of its employees if the employee's actions were taken pursuant to a city-instituted policy. Also, where the actions were not taken pursuant to a formal city policy, the city may still be found liable if the city knew that such actions were being committed and did nothing to prevent them. A city may also be liable under certain circumstances where the constitutional violation resulted from a willful failure to train its employees.

§ 64 Personal Liability

Under ORS 294.100, a public official who unlawfully expends public funds, or authorizes or directs another to unlawfully expend public funds, is personally liable for those misspent funds. Examples of past claims of unlawful expenditures include using urban renewal funds for purposes not authorized; using road funds for projects not authorized by the Constitution; and using funds to support passage of a ballot measure. Generally, reliance on an opinion from your city attorney will protect you from such liability.

PART V: CITY ATTORNEY

§ 65 Appointment of Attorney

In some cities, the attorney is appointed by the City Council. In other cities, the attorney is appointed by the City Manager or Administrator. The appointing body has the authority to evaluate and to remove the city attorney.

§ 66 Full- or Part-Time/Special Counsel

Small cities generally contract with an attorney or law firm to provide legal assistance as needed. In larger cities, with legal needs exceeding one FTE, attorneys may be on contract, or hired as employees. Portland, Salem, Gresham and Medford, for example, all have in-house attorneys. Eugene, Roseburg, Hillsboro and Florence, on the other hand, contract with law firms to act as the city attorney.

All cities, at various times, will hire "special counsel" to handle specific projects. The need to hire "special counsel" is usually based on obtaining specialized expertise; dealing with attorney shortages during critical times; or needing to get a second opinion on a particularly sensitive or risky issue.

§ 67 Duties

The duties of the city attorney are determined by the person or council who appointed the attorney. The duties also may be identified in the city code or charter. Duties often include: (a) representing the city before courts and agencies; (b) furnishing legal opinions and advice; (c) interpreting law and documents; (d) drafting ordinances, resolutions and ballot titles; and (e) drafting and reviewing proposed contracts and other legal documents.

§ 68 City is Client

The "city," rather than the city council or city manager/administrator, is the attorney's client. According to ethical consideration EC 5-18 of the American Bar Association Model Code of Ethical Consideration, the attorney's allegiance is owed to the city, and not to an individual councilor, manager, or employee. Under disciplinary rule DR 5-108(b), adopted by the Oregon Supreme Court, and EC 5-23, an attorney's professional judgment must be

independent, and not subject to control by the council, manager, employee or other lay person.

§ 69 How to Use Attorney

If a legal issue or potential liability is involved, make timely contacts so you get a considered opinion under at least the following two circumstances: before final preparation of meeting agenda, and before making any public commitments.

Make full disclosure of all facts, no matter how painful.

If possible, make the request in writing, stating the issue you wish the attorney to address. Supply the attorney with all background material and a draft of what you propose.

Set a time by which you want the attorney to respond.

Follow the attorney's advice, or get a second opinion if you believe the legal advice may be wrong and you do not want to follow it.