



GUIDEBOOK

LEAGUE OF OREGON CITIES

INCORPORATION GUIDE

**City Incorporation in
Oregon**

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INTRODUCTION

This guide is designed for use by citizens in unincorporated areas who believe the needs or circumstances of their area have changed in such a way that county government alone is no longer able to respond adequately to local needs or conditions. The guide is designed to help those residents define the unique circumstances or needs of their area and match those needs or conditions with a wide range of possible governmental forms, ranging from creation of a new city to just becoming a stronger advocate for the area's needs with county government. There is no intention to suggest one form of government over another. In fact, residents should consider incorporation as the most extreme response to their needs – to be considered only if the other alternatives available to them prove insufficient in meeting local needs or desires. Generally, incorporation is most appropriate when the needs and desires of residents in the area are for a full range of governmental services, or there is strong desire for local control which can only be met by becoming a city. Short of those unique characteristics, there are a number of other alternatives available to area residents that may actually serve local needs better than becoming a city.

This guide first outlines briefly the various forms of local government available to solve problems that may be encountered in unincorporated areas. Next, it suggests methods for measuring needs, citizens' desires and potential future development of the area in question, by relying on extensive assistance of area residents. This process can help determine whether the area's needs are limited and can be satisfied by county government, by a single purpose district, or if there are a broad range of services needed that may require incorporation.

If incorporation appears to be the answer, the guide further defines the process to be followed for incorporating a city.

Finally, assistance and information may be available from state and local agencies to help area residents address their needs.

Chapter 1

INCORPORATION AND ALTERNATIVES

Incorporation gives residents greater control over local affairs and provides a financing and delivery device for urban services. However, becoming a city can also cause fundamental changes in the social character of a community. Becoming a city can create social strains, particularly in smaller communities, even while important service needs are met. Some alternatives to becoming a city are outlined below. They may require no governmental change or the creation of special districts to meet specific service needs.

Ask the County for Help

The county may be able to respond to your area's needs. The key to that response may be better communication of your needs to county officials. Elected county officials have regularly scheduled open meetings and office hours. In addition to local procedures to seek your involvement, local governments are required by many state and federal laws to provide full opportunity for citizen involvement. The opportunity for seeking assistance is there.

County Service Districts

The county may not be able to respond directly, but may offer to participate with the unincorporated community in the formation of a county service district. Some counties, as a matter of policy, have chosen not to create county service districts. The county board's position should be determined before proceeding.

County service districts may provide one or more of the following services: comprehensive planning; sewage facilities; drainage works; street lighting; public parks and recreation services; diking and flood control; water supply; solid waste disposal (except in Clackamas, Multnomah and Washington counties); agricultural educational extension services; animal control; and emergency medical services. The following additional services may be established: fire prevention and protection; enhanced law enforcement services; hospital and ambulance services; library services; vector control; cemetery maintenance; roads; and weather modification. Additional functions from the list may be added after the initial formation by vote.

Actual districts vary in size from neighborhood to countywide service areas. They offer a similar range of functions.

The county board always functions as the governing board of a county service district. They are responsible for all of its operations. Many counties appoint an area advisory committee, although the law does not require one.

A county service district may be initiated by the county or by initiative petition. The petition must be signed by 15 percent or 100 registered voters in the proposed district, whichever number is greater.

Unlike proposed cities, county service districts may be disapproved by the county if it determines no benefit would result. Economic, demographic and social trends and projections, past and predicted physical development of land, and compliance with state land use goals and laws must be considered in determining benefit. An election to form a county service district is not automatic.

County service districts have the authority to issue bonds and to raise money through district property taxes, property assessments, service or user charges, and connection charges. The manner of financing construction, maintenance and operation of the services is subject to referendum by 10 percent of the voters in the district. County service districts are subject to the local budget procedures prescribed by state law.

Special Service Districts

Special districts are another alternative. They vary from county service districts in that they are usually singular in function and have their own elected or appointed board. Exceptions are park and recreation districts, and water supply districts, which, with voter approval, may add fire protection. Chapter 198 of the Oregon Revised Statutes (ORS) lists 29 different types of special districts. They are governed by appointed or elected boards of as many as nine members. The authority of the districts are defined by statute. They are initiated in the same fashion as county service districts and local budget law also applies.

If an area's problems are multiple, it could require several districts with separate boards to provide services. This tends to make coordination among various special districts more difficult and makes citizen involvement more difficult when there are several districts, each with its own elected officials and budget.

Join a Nearby City

Annexation should also be considered when the unincorporated community is close to an existing city. If the area is within the urban growth boundary of a city, an estimate should be made about when possible annexation could be expected. The city should be asked for a timetable for the extensions of facilities, the level of service to be provided and the projected cost to the new area as well as the entire city. If the unincorporated area is outside the urban growth boundary, the existing city can be asked to determine if its comprehensive plan might be amended to allow for future annexation of the unincorporated area. This would allow full study of the advantages and disadvantages of annexation. Cities within three miles can veto an incorporation. The results of an annexation feasibility inquiry may influence the exercise of that veto (ORS 221.034).

City Incorporation

If the area needs a broad range of services, or if citizens in the area believe that the provision of one service will precipitate the need for others, consideration should be given to becoming a city. In addition to providing a device for delivering and financing public services, a major function for a city is to provide a means of broad local self-government that is not available through special service districts.

Oregon cities are general purpose governments with broad powers. With a few exceptions (the major one being land use planning) there are no requirements that cities provide specific services. A city is a vehicle for local determination of the level and type of public services and regulation. However, if some services such as water, sewer, police and building inspection are chosen, state and federal standards apply. Also, if a city is in a county of more than 100,000 population and wishes to receive state shared revenues after its third year of existence, it must provide directly or by contract four “urban” services. These services include: police protection; fire protection; street construction, maintenance and lighting; sanitary sewers; storm sewers; planning, zoning and subdivision control; and one or more utility services.

Chapter 2

FEASIBILITY STUDY

If the county is unable to respond to your area's needs and you still want to review the other alternatives mentioned in Chapter 1, a thorough study of the area and its present and future needs is in order. The decision to create or reject incorporation or some other change in governmental status should be an educated one. That education begins with establishing a study area and gathering together all available community information, from history and attitudes to a map of soils suitable for septic tanks. The education also begins with actual collection of the information and continues through sharing it with others in the community. The goal of the initial study should not be to justify a pre-determined course of action. Rather it should be to provide as complete an understanding of the area as possible so that alternative courses of action can be measured and community direction developed.

This chapter spells out in some detail an extensive list of items to be examined before incorporating. Don't let the list overwhelm you. You can do as much of it—or as little of it—as you wish. The broader the study, the more informed a decision on incorporation can be.

On the other hand, size, location and development of an area can suggest elimination of some items and place less emphasis on others. A study for an area of 200 people might be quite simple, while a study for an area of 5,000 people would likely be more extensive.

Residents will be the primary source of information, so open community discussion should be the primary activity. Participants in past efforts to develop community goals and effect major changes in governmental status all stress the need to contact all residents at the beginning and then provide continuing opportunities to exchange ideas throughout the process. Non-resident property owners will not have a vote in any incorporation election, but they do have a stake in what happens and should be asked to participate. Efforts to involve area residents at this stage will pay dividends when final review of incorporation alternatives take place.

The citizens initiating the effort will most likely find themselves considered the study steering committee. If the group is not representative of the community, an immediate effort should be made to make it so. Otherwise, community discussion may question how objective the study is rather than its substance.

Community acceptance will be strengthened by having as many people as possible involved in the actual data collection and presentation. Pride of authorship has value, as it translates into continuing citizen commitment. There's also a considerable monetary value in volunteer efforts and products, i.e., if volunteers don't do it you may have to hire someone to get the work done. It is often quite helpful to assign specific study components to subcommittees with a steering committee member functioning either as advisor or chairman. Try to assign volunteers to committees where their daily experience can be used.

Very early in the process all local governments and local government organizations existing in the area should be asked to comment on the proposed study area and the study elements. They should also be asked to help develop a list of existing plans, reports and data that include the area and for possible assistance in the study effort. This early contact should eliminate the necessity of reinventing wheels that already exist.

Early contact should also be made with electrical, natural gas and telephone utilities serving the area. As part of their planning for service expansion, they often do extensive community studies and are willing to share information about their existing and projected service areas.

Elementary and secondary schools often have courses dealing with local government. Teachers and students alike usually welcome an opportunity to have the community as the laboratory, and community fact-finding efforts as the assignments. When the scope of the community fact-finding study is determined, the local school districts should be asked if the study elements can be presented to the school staff so they can decide whether and how they might participate in the study. In addition to the actual work products, the students will gain first-hand knowledge of an important community issue.

Colleges and universities often offer academic credit for community studies. University assistance could include the services of graduate interns in administration, an economics class doing a cost-benefit analysis on service delivery, a political science class designing a public opinion survey, and many others. You should show them your study outline to help them see how they might be part of the effort.

Setting the Study Area Boundary

The boundary of the initial study area should be tentative in name and fact. Its purpose is to define the area in which facts will be gathered, not to etch in stone the city limits. Its tentative nature, however, should not detract from its importance to the effort. Anticipate the inquiries of a county board asking for a demonstration of benefit to property by being included or excluded from a city or a district. If questions exist about particular areas, the study could be designed to illustrate effects from alternate boundaries.

Boundaries of the elementary school district or attendance area and special or county service districts should be examined before designating the study area. Their boundaries represent community needs and decisions. The use of existing district boundaries may also facilitate fact finding.

Both developed and developing areas should be examined for inclusion. The growth rate will influence the amount of vacant land included.

The sense of community should be an additional test in designating the study area. Care should be taken at the study stage, however, not to gerrymander the study boundary to exclude known pockets of opposition. At this stage excluding part of the area from the study on the basis of potential opposition could distort the results.

Fact Sharing Process

Maps will probably be the best way to share much of the community information. The county assessor's maps are a good resource. A community-wide base map should be developed, and depending upon the area's size, may need to be divided by neighborhood. These can then be used at community and neighborhood meetings to demonstrate characteristics of the area and how public services might be provided.

At a minimum, the base map should include major streets, streams, public parks, schools and existing governmental boundaries. As additional information is gathered, it may be placed on the map, illustrated on plastic overlays or displayed on additional maps. Relationships are easier to demonstrate if separate maps are similarly scaled.

Aerial photographs are also helpful. The county planning department, the state transportation department and the federal government often use them and are willing to share. If the photos have been taken over a period of years, growth rate and impacts will be graphically illustrated.

The local and regional newspapers serving the area should be provided information as it is gathered. They will be an important link during the fact-finding process. They often are willing to print questionnaires as well as write news stories. Their editorial comments, if any, will undoubtedly influence the ultimate community choice of direction. Their editorial stance will be enhanced by having been part of the fact finding and sharing process.

Depending on the nature of your area, written flyers may be helpful in informing and surveying residents. They should be used to supplement and complement personal contact and open discussion, not replace it.

Population

Population information will be available from a number of sources. The county should have recent figures from comprehensive planning efforts. In some areas, the council of governments maintains the most recent figures used by all agencies. Data from the U.S. Bureau of Census dating to the 1940 census is maintained by and available from Portland State University (PSU). Enrollment and census figures from the local school district will also be helpful in establishing trends. Electric, gas and telephone utilities serving the area will often share information about past and current service loads as well as their service projections for the area. They also maintain vacancy statistics. Of course, a door-to-door survey will provide the most accurate population information. The other sources will provide a means of making comparisons and projections.

The goal should not just be to determine the total population but also its characteristics. Such information as age groups, place of employment, length of residency, owner/renter occupied status, and nature of housing would be valuable. The customary method in predicting future population is to plot the historical patterns. Longtime residents will be able to assist in describing the reasons for the patterns.

Economic Characteristics

The economic character of the community will need to be determined in order to judge its capacity to support growth and services. The county planning department will have maps for your use showing the zoning by parcel. More generalized county land use maps are also available. The assessed value of the area by parcel will be available from the county assessor. Historical assessments and sales trends are useful public information and may be obtained from the county. County building permits should also be reviewed for information on area growth.

An inventory of current land uses can be developed through a walking or driving survey. Information about changes in use that have occurred through the years cannot be easily discerned, however. Again, the memories of the long-time residents will be important in documenting change.

The community being studied does not exist in isolation from its neighbors. The use and the ownership pattern of the surrounding territory could also be useful information. If a community's economic activity is primarily based in agriculture and forestry, it raises questions about where urban growth should occur. If some bordering lands are in federal or state ownership, large tract exclusive farm use zoning or small tract rural residential, these are considerations that affect the question of incorporation.

The employment division of the county's department of human resources is the primary source of labor force data on a countywide basis. Their information is by place of employment, so the best information about the resident work force characteristics should be sought as part of the door-to-door survey or in visits to principal employers in the area. If an economic development district or port district exists in your area, they should be asked what economic data and analysis they use for your area. Businesses within the study area should be asked about their current and projected level of operations including payroll, employees and volumes. Additional resources include financial institutions and chambers of commerce.

Geographic Features

The natural characteristics of the area are equally important to the decision. For example, elevations will affect the feasibility, design, placement and cost of sewer, water and storm systems, streets and housing. Geologic hazards can eliminate some areas for development and influence placement of public facility grids. Flooding patterns of the area's waterways have similar impacts. Soil types and lot sizes are critical to whether or not septic tanks can continue to serve the community. In the surrounding territory, prime agricultural designation is a limiting factor to future urban expansion of the area. The capacity of the area's existing water supply as well as the potential of additional ground and surface water should also be researched. The county planning, public works and surveying departments should have the most recent natural resource information. Other sources of information about the area's geography are listed in Appendices A and B.

Natural resources determine opportunities as well as limitations for development. Local resource-based industries themselves as well as the employee organizations should also be asked about how they visualize their future community role.

Community Plans

The county comprehensive plan is much more than a map. It's a series of general and specific goals and objectives that guide both private and public development and conservation decisions within the county. The plan will be valuable to a fact-finding study, not only in providing the county goal framework, but in its documentation of the local data and assumptions upon which the plan is based.

It will be helpful to review public facility plans, county capital improvement programs, and economic development plans developed within the last 15 years, as well as the current ones. It will assist in developing an understanding of the assumptions that led to past decisions and the impact of those actions. The community facts developed as part of this study should be compared with past assumptions.

The zoning code, including the subdivision ordinance and county rural development policies, also need to be reviewed. An examination of how the documents have been used by the county planning staff, planning commission, and board in recent zoning decisions may be as revealing as reviewing the substance of the codes and policies themselves. Measure 37 may also play a factor in the consideration of incorporation. This initiative measure, adopted in 2004 and now codified as ORS 192.506, would apply to a new city's land use regulations. Those regulations that diminish the value of real property within the city would require the city to compensate the land owner or waive the regulation.

Existing Public Services

The study should include a list and evaluation of public services currently provided to the area by the county and special districts, as well as federal and state programs. The analysis should include an estimate of service costs to area residents and a description of the method used in financing past improvements. In addition, the current provider should be asked what services would still be available if the area's governmental status were changed by annexation, incorporation or formation of a district. The survey of services type, including current and potential level, adequacy, and cost of services could include some or all of the following: police protection, fire protection, planning, zoning, building inspection and permits, water service, sewerage disposal, garbage disposal and collection, parks and recreation, library services, elderly and low-income housing assistance, street planning, construction and maintenance, street lighting, storm drainage, nuisance abatement and animal control.

Tax Effort

The tax rate and boundaries for the various taxing districts in the area should be noted. The nature of the levies (i.e., with the tax base, rate levies, serial levies, annual operating levies or bond retirement), should be included. The continuing tax obligation to existing districts if the area becomes a city should be determined, along with the total general government tax in the area, as compared to the \$10 limitation. In addition, state and federal revenues available

to the city should also be explored. See Chapter 3 for details.

Governing Bodies

The study needs to include a list and description of boards, commissions and advisory groups that make decisions concerning the study area. The inquiry should focus not only on who makes decisions, but the mechanism, if any, for communication and coordination.

Survey Area Residents

A survey of area residents is important to identification of public sentiment for additional services or increased local control. Such a survey can also indicate the willingness to pay the additional taxes or fees such services may require.

Community Review

It is important for those who gather the facts to assemble them for community presentations. The hard data and perceptions of community attitudes need to be shared in a series of informal meetings that encourage discussion and provide for consensus building. Citizens should have a non-threatening environment as they inquire about their community and share their thoughts. The goal is to assess of community needs. It should be based on facts, but it must be tested against how the residents feel about their community. The primary indicator for change will be a community-wide belief that there are unmet needs. If the community reaction to the fact-finding study is one of satisfaction with the performance of existing institutions, a study of different governmental approaches would not seem to be warranted. If the results reinforce the sense of need that prompted the study, the next steps should include refining the list of the area's service needs and possible boundaries.

Contact with a city that has incorporated in recent years is helpful. The three most recent incorporations in Oregon were: La Pine in 2006; Damascus in 2004; and Keizer in 1982. In addition, city staff and elected officials can be helpful as you collect information and think through the idea of incorporating. Resource staff from state and federal agencies and the League of Oregon Cities can be asked to attend community meetings to answer questions of area residents. Other publications relating to city government are identified in Appendix C.

Remember, while this list of study items seems long, it should be adapted to local conditions. Information required to study the feasibility of incorporating a relatively small, remote area will be much less than the information required for a proposal affecting a larger area in one of the state's metropolitan areas.

Chapter 3

WHAT WILL IT COST?

The list of needs in your feasibility study should receive careful community discussion. As the community facts and attitudes are discussed, continuing opportunities should exist for adding or deleting needs. For example, many citizens may not list storm water runoff as a problem. Problems of future water supply and quality are also not easily discernible, but the cost of service expansion or improvement could be significant.

General operating start-up costs such as office personnel, space and equipment, meeting space, the official census and insurance should be estimated. Portland State's Population Center can estimate the census cost. Citycounty Insurance Services has insurance and liability information to assist in estimating insurance costs.

As the community moves from describing needs to ranking them in terms of importance, the issue of cost and who will pay should rightfully be raised.

Comparison cities and districts can provide rough comparisons of cost figures although precise comparisons are almost impossible to make. Efforts should be made to find existing cities and districts that are similar in population, geographic location, assessed value, nature of development and need for public facilities. The League of Oregon Cities may be able to assist in this selection.

When seeking cities and districts for comparison, be sure to relate the level, cost and method of financing of services to the total cost to residents. Personal visits with comparison communities can aid the analysis. If your area anticipates considerable growth, a similar look might be given to a community that resembles your population estimate 10 and 20 years from now.

Budget totals by each function from the comparison communities should be made available for community review. Their source of revenues should also be provided.

If your area is within or near special service or county service district, inquiry should also be made about the cost of remaining within the district or contracting with the district. Many cities are within fire or park and recreation districts. Some rural fire protection districts also contract with the cities for service.

The county should be approached about its willingness to provide additional services on a contractual basis and an estimate of contract costs. Even though the fact-finding stage would include a discussion of county services, the question needs to be raised again so the community cost of providing, contracting or doing without the service can be computed. Some counties provide minimal services to a newly incorporated city, feeling a primary responsibility to serve residents in the unincorporated area. Your discussions with the county should not only include their willingness to continue present services to your area, but also their future capacity and willingness to provide enhanced services to serve urbanizing areas. The experiences of other cities in the county will aid in predicting available types and levels

of service in the future, if you incorporate.

Estimating Revenues

The ledger sheet should not only include the cost, but also the revenues available for financing services. After the city's population is certified by the Portland State Population Research Center, state shared cigarette, liquor and gas taxes (minimum 5,000 population) will automatically be distributed to the city on a per capita basis in monthly installments. The amount of the current allocation will be available from the League of Oregon Cities. Each February, the League publishes estimated revenues for the next fiscal year each spring. Beginning with its fourth year, a city in a county with more than 100,000 people must provide at least four of the following services to continue to be eligible for state shared revenues: police protection; fire protection; street construction, maintenance and lighting; sanitary sewers; storm sewers; planning, zoning and subdivision control; one or more utility services. The new city is automatically considered to be providing four or more services until the fourth year.

Cigarette and liquor revenues may be used for general purposes. Gas tax revenues are restricted to the road system and related activities. This includes the construction, reconstruction, improvement, repair, maintenance, operation and use of public highways, roads, streets and roadside rest areas. Cities currently receive a share of cigarette tax, liquor tax revenues, and state highway funds. None of these funds are available for special districts.

State Revenue Sharing

A percentage of the available state liquor funds is distributed to cities as state revenue sharing. A city must have levied property taxes in the prior year to be eligible. State revenue sharing can be used for any purpose, and cities must report annually on its use. Also, a city must hold two public hearings, one before the council, prior to requesting these funds. The formula for distribution considers population, local property tax effort and per capita income. The amount allocated to a comparison city could provide guidance in predicting future revenue from this source.

User Fees

If such services as water, sewer and recreation are expected to be provided, the fees should be estimated. Also, anticipated fees for processing land use requests and building permits should be listed. If business licenses and utility franchises fees are planned they too should be considered.

Property Taxes

With voter approval, a city may levy a tax for operating expenses or retiring bonds. Any obligation that area residents may currently have from special or county district bond sale remains after incorporation. If the area is withdrawn from the district, however, taxes for operating expenses of the district do not continue.

The Balancing Act

The community's feasibility study should now include a social, physical and economic community description, an appraisal of community goals, a list and description of perceived

needs, estimates of costs for services to meet those needs and estimates of possible revenues. Within that framework, decisions should now be made about existing and projected boundaries. The “fit” of alternative forms of local government can then be measured against the community’s fiscal capacity and goals.

Chapter 4

BOUNDARY SELECTION

The county will make the final boundary determination based on benefit. The boundary submitted by the community should therefore demonstrate benefit by including within its findings recognition of factors such as the following: existing service district boundaries and urban development; limits to future growth; capacity to provide services; and community sentiment.

The boundary will establish an expectation for urban services from the property owners and residents within the proposed city limits. This expectation for services should be considered when deciding how much vacant land to include.

The urbanization goal of the Oregon Land Conservation and Development Commission will not apply to the incorporation. It will, however, apply to future annexations, so it should be considered in planning logical future service areas, particularly drainage areas for sewers.

The legal description of the exterior boundaries of the city must be described on the incorporation petition.

Legislation in 2005 precludes using a boundary that would encompass certain industrial property in Jackson County unless the owner of the property consents (see 2005 Or. Laws Chapter 539 § 8). This provision expires on June 30, 2016.

Chapter 5

INCORPORATION PROCEDURES & ELECTIONS

The Legislature enacted the first Oregon Incorporation Act in 1893. The current act is in ORS 221.010 to 221.110. Those sections set out the procedural requirements for creating a new city from unincorporated territory. A newly incorporated city may also be created through consolidation of existing cities, an existing city and unincorporated territory, or from both. Those procedural requirements are found in ORS 222.210 to 222.310.

Cities in Oregon have historically been created through either:

- (1) A special act of the Legislature;
- (2) A general law governing incorporation; or
- (3) The adoption of a home-rule charter.¹

The League has prepared a white paper, attached as Appendix B, which reviews the probable legality of the above three incorporation processes. This white paper: notes that municipal corporations are no longer created through special legislation in Oregon; argues that incorporation solely through the adoption of a home-rule charter, as opposed to the state's Incorporation Act, is theoretically permissible; and concludes that it is likely that the only method of incorporation currently permissible in Oregon is through the general incorporation statute.

General Requirements

People in an area with at least 150 residents that is outside of an existing city may incorporate a new city (ORS 221.020).

1. *Petition* – Petitioners must use an incorporation petition form approved by the secretary of state. The petition must be filed with the county clerk before it is circulated in the unincorporated area (ORS 221.031). The secretary of state has adopted city incorporation forms by administrative rule (OAR 165-004-0005). For further instructions on filing a petition for incorporation, see Appendices D and E.

ORS 221.031(2) requires that the petition contain:

- (a) The names and addresses of not more than three chief petitioners, who must be electors registered within the boundaries of the proposed city;
- (b) The name of the proposed city;
- (c) A proposed permanent tax rate that would generate operating tax revenues sufficient to support an adequate level of municipal services; and

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

(d) A map of the exterior boundaries of the proposed city. Secretary of State Petition Form SEL 701 meets these requirements.

A copy of the petition must be attached to each signature page (ORS 221.031(3)). No more than 20 signatures will be counted on each sheet. Secretary of State Petition Form SEL 702 meets these requirements and is attached.

2. *City Resolution* – Formal comment by nearby or overlapping special or county service districts is not required. If the area to be incorporated includes special or county service districts, however, there are public hearing and notice requirements if the districts are to be withdrawn from the city (ORS 222.524, 222.460(4)). If the entire area of a district is within the boundary of a new city, the district will cease to exist upon incorporation of the city (ORS 222.510). The new city assumes the assets, liabilities, obligations and functions of the district. If only part of a district is within the city, the city remains part of the district unless it takes specific action to withdraw from the district.

ORS Chapter 195 requires the new city to enter urban service coordination agreements with special districts. These agreements must be in place before the first periodic review for the new city's comprehensive plan. The agreements will be facilitated by the county or the metropolitan service district (Metro). Proposed city incorporations within the boundaries of Metro may face additional requirements (Metro Code 3.09.130).

3. *Economic Feasibility Statement* – ORS 221.035 requires filing an economic feasibility statement for the proposed city with the county clerk along with the incorporation petition. The economic feasibility statement must form the basis for the proposed permanent tax rate for operating revenues as required by ORS 221.031(3)(c). ORS 221.035(2) requires that the statement contain:
 - (a) A description of the services and functions to be performed or provided by the proposed city;
 - (b) An analysis of the relationship between those services and functions and other existing or needed government services; and
 - (c) Proposed first and third year budgets for the new city demonstrating its economic feasibility.
4. *County Commission* – Incorporation petitions must be filed with the county commission once they have been signed by 20 percent of the electors registered in the area proposed for incorporation, or 10 percent of the electors if the proposed area is in a county with a population larger than 300,000 (ORS 221.040). All petition signatures must be obtained within six months of the date of filing under ORS 221.031 (i.e., the initial date of authorization for circulation by the county clerk).

The county commission must set a time and place for a public hearing and give the required notice under ORS 221.040(1). At the public hearing, persons may present oral and written objections to the petition, the proposed city, or the permanent tax rate. The county commission may alter the boundaries of the proposed city to add all territory that

may be benefitted. It may not exclude any land that would be benefitted by the proposed city. The county commission may not include any land that in its judgment will not be benefitted (*Millersburg Dev. Corp. v. Mullen*, 14 Or. App. 614 (1973)).

The Oregon Supreme Court has held that determining what areas are benefitted is a quasi-judicial decision, not a legislative decision.² As such, the county's governing body is serving as an impartial decision-maker rather than as a political body; the county must make its decision based on evidence, and the petitioners are entitled to certain due process rights in the proceeding.³ The county commission may not determine that no part of the proposed area would be benefitted to avoid an incorporation election.⁴

If the commission determines that any land has been improperly omitted and the owner is not at the hearing, the commission must continue the hearing and give notice to the non-appearing owner. The owner must show cause as to why the land should not be included in the proposed city (ORS 221.040(2)).

5. *Election* – After the final hearing, if the county commission approves the petition, it must order an incorporation election. The order must set the election date at the next primary or general election not sooner than 90 days after the date of the order. ORS 221.040(3) requires that the order contain:
 - (a) The boundaries of the proposed city;
 - (b) The requirement that the ballot contain a street description of the boundaries and the proposed permanent tax rate; and
 - (c) The date of the election in the proposed city.

ORS 221.050(1) requires the election of five city council members for the proposed city at the same election as the incorporation proposal.

The general election provisions in ORS Chapters 246 to 260 govern the council election with the following exceptions:

- (a) There is no primary election for city council candidates;
- (b) Candidate petitions or declarations must be filed not sooner than 100 days and not less than 70 days before the election;
- (c) The filing fee is \$25; and
- (d) A nominating petition must contain the signature of at least 25 electors in the incorporation area or at least 10 percent of the electors in the area, whichever is less (ORS 221.050(2)).

ORS 221.050(3) requires that the ballot title for the election comply with the standards for form of ballot titles at ORS 250.036.

² See *1000 Friends of Oregon v. Wasco Cty Court*, 304 Or 76, 41-42 (1987) (citing criteria in *Strawberry Hill 4 Wheelers v. Benton Bounty Bd. of Comm.*, 287 Or 591, 601 (1979)).

³ *Id.*

⁴ See *McManus v. Skoko*, 255 Or. 374, 380 (1970).

The county commission must proclaim the results of an election favoring incorporation within 30 days of the election date. The commission must also declare which city council candidates are elected. The results favor incorporation if a majority of the votes cast favor incorporation and: at least 50 percent of the electors eligible to vote cast a ballot; or the election was part of held in May or November of any year (ORS 221.050(4)).

If the election results favor incorporation:

- (a) The area proposed in the election notice is incorporated as a city from the election date;
- (b) The proposed rate limit is the permanent tax rate for the new city; and
- (c) The five council members elected must take office not later than the 10th day after the county commission proclamation (ORS 221.050(5)).

ORS 221.061 requires that the new city pay from its general fund for all expenses of the election, and for the expenses for the legal description of the incorporation petition. If the incorporation is not approved by the voters, all expenses of the election and the legal description must be paid from the general fund of the county.

Additional Requirements Within Three Miles of City and Outside Urban Growth Boundary

ORS 221.034 was added to the incorporation statutes in 2001. It applies when the area to be incorporated is within three miles of an existing city, and outside a city or metropolitan urban growth boundary. Under this section the incorporation petition must be accompanied by an affidavit signed by a chief petitioner stating that 10 percent of the electors within the area favor the proposed incorporation. It must also state that the chief petitioners have discussed the proposed city, including expansion of urban growth boundaries, with neighboring cities. See Appendix E for additional information.

ORS 221.034(2)(c) requires that the economic feasibility statement required by ORS 221.035 contain:

- (a) A plan and provision for cost-effective urban services at a minimum level adequate to meet current needs and projected growth; and
- (b) A proposed permanent tax rate for operating revenues for the urban services, and
- (c) A plan for residential development at or above urban density of a similar existing city within county, or within three miles of the Metro boundary.

Under ORS 221.034(2)(d), if the proposed city is required to complete a public facility plan and a transportation systems plan, it must demonstrate the ability to provide urban services to meet current needs and projected growth. This requirement may be met with urban services agreements with cities or districts under ORS 195.060.

ORS 221.034(3) provides that if the council of a neighboring city determines that the proposed incorporation adversely affects the existing city, the council may ask the county

commission to reject the petition and terminate the incorporation proceedings. The city objections must be heard and considered by the county commission at a public hearing held under ORS 221.040.

At the hearing, if the county commission finds either that any of the requirements of ORS 221.034(2) are not met, or that the proposed incorporation will adversely affect a neighboring city, the county commission must order the termination and prepare findings and reasons for its order (ORS 221.034(4)).

The county commission order is subject to review by the Oregon Land Use Board of Appeals as provided in ORS 197.830 to 197.845(ORS 221.034(5)). In addition, Metro Code 3.09.060 *et seq.* requires appeals to the Metro Boundary Appeals Commission of contested final boundary change decisions. This seems to apply to city incorporation decisions made by the Clackamas, Multnomah and Washington county commissions.

Additional Requirements for Lane County

Lane County is within the only remaining local government boundary commission. Incorporation petitions for cities proposed within Lane County must use Secretary of State Form SEL 702A. A certified copy of the incorporation petition must be filed with the boundary commission within 10 days of its filing with the county commission (ORS 199.476). The petition must be accompanied by an economic feasibility analysis and an estimate of the tax rate derived from the analysis. Unless the boundary commission approves the economic feasibility analysis, the county clerk cannot authorize the circulation of the petition. Additionally, for proposed cities within Lane County, each signature page of the petition must contain a statement that the economic feasibility analysis was approved by the boundary commission, that the analysis is available for inspection at the offices of the boundary commission, and that, subsequent to the gathering of the petitioners, the boundary commission must review and approve the proposal prior to submission at an election. See Appendix E for details.

Procedures for Rural Unincorporated Community

ORS 221.036 was also added to the incorporation statutes in 2001. It applies to areas that include a rural unincorporated community outside of Metro's urban growth boundary, but which are in the process of being included in the Metro urban growth boundary. If a notice of intent to prepare an economic feasibility statement or incorporation petition has been filed for the area, it may continue incorporation under ORS 221.034 before the area is included in the Metro acknowledged urban growth boundary. The area proposed for incorporation may also include lands within the Metro urban growth boundary. See Appendix E for more information.

Chapter 6

THE COUNCIL

As explained earlier, the five initial city council members are elected at the incorporation election, and take office within 10 days of the county commission proclamation of the election results (ORS 221.050).

The two members receiving the highest number of votes have terms ending the first Monday in January, following the second general election after incorporation. The terms of the other three councilors end the first Monday in January following the first general election after incorporation (ORS 221.090).

Once a city is incorporated under ORS 221.010-221.100, then ORS 221.110-221.140 provides the legal basis for city council decisions until city voters adopt a home rule charter (*Davidson Baking Co. V. Jenkins*, 216 Or. 51 (1959)).

ORS 221.120 provides that the council may fill council vacancies by appointment for the remainder of the term. The powers of the city are vested with the council. A majority of the council members constitutes a quorum for council decisions. To have legal effect a majority of the council must approve council decisions. The council must meet at least once each month.

The council must appoint one of its own members to serve as mayor. The council must appoint a mayor at its first meeting of each odd-numbered year. The mayor's term is two years. The mayor is the council presiding officer and must sign all ordinances passed by the council (ORS 221.130).

The council may appoint a municipal judge and any other city officers it deems necessary. City officers may be removed at the discretion of the council, and their compensation is set by the council. City officers have the duties assigned by the council (ORS 221.140).

ORS 221.160 provides for special elections to fill council vacancies whenever the number of remaining city council members is insufficient for a quorum.

Chapter 7

COUNCIL MEETINGS

Call for Meeting

City councils are “governing bodies” and must comply with provisions of the Oregon Public Meeting Law (ORS 192.610–192.690). This law applies to all city council meetings. Council meetings must be held in a place where there is no discrimination on the basis of race, creed, color, sex, age, national origin or disability (ORS 192.630). The council organizational meeting may be initiated by a call for a special council meeting that is circulated for the signatures of the council members. At least 24-hour notice of the meeting is required and it must meet the requirements of ORS 192.640.

Election of Mayor

ORS 192.650 requires the recording of the vote of each council member. This includes election of the mayor. The council may choose to vote by signed ballots. Voice or hand voting is sufficient as long as it is recorded.

Minutes and Council Rules

ORS Chapter 192 also prescribes that minutes must include the attendance and the disposition of all motions, resolution, orders and ordinances proposed. The substance of any discussion should be recorded in the minutes. Verbatim transcripts are not required.

The League of Oregon Cities has sample council rules for agendas and order of business.

Census

The city’s monthly share of state shared revenues does not begin until the local census has been taken and certified by the Population Research Center at Portland State University. Contact with Portland State should take place so the city council can approve the census request at its very first meeting.

Budget

The expenditure of money by a city requires an approved budget. For this reason, the budget process should begin immediately. The council must appoint a budget officer and the citizen members of the budget committee. The budget committee is made up of the governing body and an equal number of citizens. The term of the citizens is three years, and the initial terms are staggered so that about one-third of the terms end each year.

Cities are subject to local budget law as set out in ORS Chapter 294. This law establishes procedures for the annual preparation, adoption, and administration of the budget and prescribes opportunities for citizen involvement. The Property Tax Division of the Oregon Department of Revenue explains the requirements in its “Local Budgeting Manual.” The Oregon Government Finance Officers Association has developed supplementary materials to assist the budget officer and budget committee.

If the adopted budget calls for a property tax as a revenue source, council may levy by ordinance a tax up to the limit of its permanent tax rate. A permanent tax rate provides continuing taxing authority.

Oregon's local budget law is silent about the fiscal actions of a city between the council election and the budget adoption. The city should seek advice from the Property Tax Division of the Oregon Department of Revenue about how to handle necessary financial transactions during the interim.

Comprehensive Planning

ORS Chapters 197 and 227 govern the new city's land use planning responsibilities. The city must prepare and adopt a comprehensive plan consistent with the statewide goals adopted by the Oregon Land Conservation and Development Commission (LCDC). There are LCDC administrative rules that apply the statewide goals to incorporation and the adoption of a comprehensive plan for the new city (OAR, Chapter 660, Division 14).

The plan must be coordinated with the county and acknowledged by the LCDC before it is official. The typical plan contains a generalized map indicating preferred land uses, a series of goals and policies defining those uses, and references to the data and assumptions on which the plan is based. The nature of the plan will directly respond to the complexity of the community.

The council should officially ask the LCDC county coordinator and field representative to begin the development of a comprehensive planning work program and grant application.

The county coordinator and the area's field representative from the Oregon Department of Land Conservation and Development (DLCD) will assist the city in developing a suggested work program. Information gathered for the feasibility study should provide much of the base data for the comprehensive plan and should be shared with the DLCD to assist in determining what tasks still need doing. The work program will be reviewed by the DLCD and a mutually accepted compliance schedule (work program) will be developed.

Historically, the program has provided funds for a portion of the planning effort. Small cities have generally contracted with the county, the local council of governments, or a private planning consulting firm to prepare the comprehensive plan.

The opportunity for citizen involvement in all phases of the planning process is a state requirement. The city is required to develop a participation program and submit it to the LCDC for approval. It's helpful to involve citizens in designing the involvement strategy.

ORS 227.020 allows but does not require appointment of a city planning commission. A city may choose to have the governing body also serve as the planning commission. If a city does create a planning commission, ORS Chapter 227 includes requirements for the occupational makeup of the commission.

The community can anticipate at least a year for preparation, review and adoption of the plan. ORS 197.757 allows up to four years to accomplish this task.

Employee Recruitment

The first employee as well as all subsequent employees must be chosen under procedures that are job-related and non-discriminatory. The city council should write a job description and recruit, interview and select on the basis of that description. The Local Government Personnel Institute can provide technical assistance and sample procedures.

Insurance

Arrangements should be made to secure property and liability insurance coverage. Cities and their councils are not immune from lawsuits. The property coverage must come from a private carrier. Liability insurance may be obtained from a private carrier or through Citycounty Insurance Services.

Intergovernmental Relations

Other local governments in the area, including the county, other cities, special districts and school districts will have an interest in and be affected by city decisions. These should be contacted early in the incorporation process and can be very helpful.

Chapter 8

FORM OF CITY GOVERNMENT

The government provided by ORS Chapter 221 is essentially the weak-mayor form. The legislative and administrative functions, including appointments of city officers and employees, rest with the city council. The state statutes may serve indefinitely as the city's "charter." On the other hand, city voters may choose to adopt a city home rule charter that provides for the government structure that better suits local needs and desires.

Almost all of Oregon cities have developed their own charters. Reasons for home rule charter adoption include: direct election of the mayor; delegating authority to the mayor; adding a primary election; increasing the number of council members; nominating the council by district; electing the council by district; filing vacancies by special election; changing length of terms; and establishing a city manager position.

Cities normally appoint a citizen charter committee to suggest charter provisions after extensive public involvement. Since 1947, charter drafting has been guided by a model charter prepared and revised by the Bureau of Governmental Research and Service and the League of Oregon Cities (LOC). The most current "Model Charter for Oregon Cities" was updated by LOC in 2004. The model charter provides for a general grant of powers to the city rather than a list of specific city powers. Most policy decisions are left to ordinances.

Most small Oregon cities have chosen a weak-mayor form of government. Some by ordinance have created the position of city administrator. Medium-sized cities generally use a council-manager form of government. An exception is Beaverton, which has a strong-mayor charter. Portland is the only city in Oregon with a full-time paid commission form of government.

Under a weak-mayor form of city government, the mayor does not appoint administrative personnel, directly supervise employees, have a veto over council ordinances, or appoint committees without council confirmation. All administrative as well as legislative authority rests with the council. Weak mayor cities sometimes create by ordinance a city administrator position to implement council policy.

The strong-mayor form of government makes the mayor the chief executive while leaving the legislative role with the council. In addition to administrative responsibility and authority, the strong-mayor usually has veto power over council ordinances.

Commission government places administrative and legislative responsibility with the same group of three to five elected officials. For their legislative role, Portland's four commissioners and the mayor comprise the city council with the mayor presiding. The mayor chooses which commissioner heads what department to carry out administrative duties.

The council-manager form of government places legislative responsibility with the council (that includes the mayor). The city council appoints the city manager, who is responsible for all administration including appointment of city personnel.

Regardless of the form of government or size of city, councils generally consider policy formulation their most important responsibility. That responsibility also includes how their policy is administered. The smaller the city, the more likely it is for the council to be both the policy-setters and the policy-administrators. As a city grows, the council's role usually shifts from doing to supervising and eventually monitoring. The administrative involvement of the council is not just a function of size. It also responds to the interests and time of the council members, as well as constituent expectations. A council member's tasks can include everything from shelving books and cleaning storm drains to representing the city before state agencies and the legislature. Sometimes council tasks are formalized by the use of council committees.

Except for Portland's full-time commissioners and Beaverton's mayor, Oregon's city councils and mayors serve with little or no compensation. Compensation may take the form of a mileage allowance, or a per diem for official meetings or expenses for official functions. Charters may prescribe or prohibit compensation, or they may, as in the Incorporation Act (see Chapter 5) and the model charter, leave it for city council determination.

Chapter 9

DISINCORPORATION

A city may disincorporate if it has no outstanding debt or “other obligation.” The city may surrender its charter, disincorporate and cease to exist if a majority of the city voters authorize it. The election may be called in response to an initiative petition. The procedures are found in ORS 221.621.

Under ORS 221.650, the city has 30 days after the disincorporation election to convey all its property to the county. At the end of 60 days after the election the city ceases to exist.

Disincorporation efforts are rare. The city of Juntura, population 60, disincorporated in 1976 after 63 years as a city. Draperville and Long Martin disincorporated in 1950 and 1968 after less than one year as cities. Waterloo, incorporated in 1893, rejected disincorporation in a 2002 election.

Appendix A

FOR ADDITIONAL RESOURCES SEE...

LOCAL GOVERNMENT SOURCES

1. County Governments
General Listing (Oregon Blue Book):
<http://bluebook.state.or.us/local/counties/counties.htm>
2. League of Oregon Cities
1201 Court St. NE, Suite 200
Salem, OR 97301
3. Local Government Personnel Institute
660 Hawthorne Ave. SE, Suite 150
Salem, OR 97301
Phone: (503) 588-2251
<http://www.lgpi.org/>
Toll-free phone: (800) 452-0338
Salem phone: (503) 588-6550
www.orcities.org

STATE AGENCY SOURCES

4. Boundary Commission, Lane County
99 E. Broadway, Suite 400
Eugene, OR 97401
Phone: (541) 682-4425
5. Election Division
Secretary of State
900 Court Street NE
Capitol Room 136
Salem, OR 97310-0722
Phone: (503) 986-1518
www.sos.state.or.us/elections/elechp.htm

LEAGUE OF OREGON CITIES PUBLICATIONS*

Model Charter for Oregon Cities

A-Z Index

Home Rule in Oregon Cities

Conducting Effective Meetings

City Handbook

Recruiting a City Administrator

Evaluating a City Administrator

*These publications, as well as others, can be ordered or downloaded (if available) on LOC's web site at: <http://www.orcities.org>.

Appendix B

INCORPORATING A CITY IN OREGON – A WHITE PAPER

This memorandum provides a brief explanation of the procedures for incorporating a city under Oregon law, and once incorporated, what source of law governs the form and function of city government. The answer to the first question is found in Oregon’s Incorporation Act, ORS 221.010 to 221.110, which sets out the procedure for incorporating a new city from unincorporated territory. The answer to the second question depends on whether a city has adopted a home rule charter; if not, Oregon’s Incorporation Act dictates the form and function of city government, unless and until the voters of the city adopt a home-rule charter. Both of those issues are explored in more detail below.

I. Forming a City: Oregon’s Incorporation Act

The Oregon Legislature first adopted the Incorporation Act in 1893. *See* Or Laws 1893, p 119. Currently codified at ORS 221.010 to 221.110, the Incorporation Act sets out the procedure for incorporating a new city from unincorporated territory.⁵ ORS 221.020 grants the citizens of Oregon living in an unincorporated area the right to incorporate a city if certain conditions are met: “The people of an area, no part of which lies in an incorporated city and in which [at least] 150 persons reside, may incorporate a city by approving at an election called and held according to ORS 221.031 to 221.061 a proposition provided by those sections for incorporating the city.” ORS 221.031 to 221.061, in turn, prescribe the procedures for gathering signatures and holding an incorporation election. For example, ORS 221.035 requires the proponents of incorporation to file an economic feasibility statement with the county clerk along with the completed incorporation petition. If the county clerk determines that the incorporation petition meets statutory requirements, the clerk will order an incorporation election. ORS 221.040(3). At that election, the voters will decide whether to incorporate and choose “five city council members for the proposed city[.]” ORS 221.050(1). Following the election, the county clerk will proclaim the results of the incorporation election and, if the results favor incorporation, which candidates for city council were elected. ORS 221.050(4). Assuming the return favored incorporation, the five new city council members take office within 10 days of the county clerk’s proclamation of the results of the election. Because the process for establishing a new city under the Incorporation Act is quite involved, the League of Oregon Cities published a guide to the Incorporation Act to help make sense of the process.⁶

II. Other Methods of Incorporation

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

According to a prominent treatise on municipal law, municipal corporations can be created in one of three ways: (1) through a special act of the a legislature; (2) through a general law governing

⁵ A new city can also be created through the consolidation of existing cities, the consolidation of an existing city and unincorporated territory, or both. *See* ORS 222.210 to 222.310.

⁶ *See* League of Oregon Cities, *Incorporation Guide: City Incorporation in Oregon* (Feb 2016), <http://www.orcities.org/Portals/17/Library/LOC%20Incorporation%20Guide%20UPDATED%20Feb%202016%20FINAL-2.pdf>.

incorporation; or (3) through the adoption of a home rule charter.⁷ As the following sections explain, municipal corporations are no longer created through special legislation, at least in Oregon, and it is not entirely clear whether incorporation through adoption of a home rule charter is permissible. It is likely that the only method of incorporation currently permissible is through the general incorporation statute.

A. *Special Legislation*

From the colonial era through the Gilded Age, cities in the United States were created through special legislation.⁸ That is, a territorial or state legislature would create a new municipal corporation (whether city, port, water district, *et cetera*) by enacting a bill that both created the new corporation and acted as the corporation's charter. If the citizens of the state or territory wanted to incorporate a city, they had to lobby the legislature to do so on their behalf. Many Oregon cities were originally created via special legislation.⁹ For example, the Legislative Assembly of the Oregon Territory incorporated the city of Portland in 1851.¹⁰ This legislation also outlined the structure of Portland's government¹¹ and vested the city council with certain powers and duties.¹² Likely because municipal corporations were directly created by state and territorial legislatures, the prevailing legal theory of the time posited that cities and other local governments were simply subordinate departments of the state. Indeed, the United States Supreme Court declared that apart from state constitutional protections, "municipalities have no inherent right of self-government which is beyond the legislative control of the state."¹³ Thus,

⁷ Eugene McQuillin, 1 *The Law of Municipal Corporations*, § 3.35 (3d ed 1998) (hereafter "McQuillin").

⁸ McQuillin, § 3.36 ("Originally, in this country, the power to create municipal corporations was always exercised by a special act of the legislature.").

⁹ Examples include the City of Adams, see Act of February 5, 1903 (SB 76), the City of Ontario, see Act of February 13, 1903 (HB 236), and the City of Stayton, see Act of February 2, 1903 (SB 28).

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

¹¹ For example, the governing body of the new city consisted of "one mayor, one recorder, and five councilmen[.]" *Id.* § 2.

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

¹³ *City of Trenton v. New Jersey*, 262 US 182, 187 (1923). The Court went on to state that

"[a] municipality is merely a department of the state, and the state may withhold, grant or withdraw powers and privileges as it sees fit. However great or small its sphere of action, it remains the creature of the state exercising and holding powers and privileges subject to the sovereign will."

Id. See also *Hunter v. City of Pittsburgh*, 207 US 161, 178-79 (1907) (declaring that municipal corporations are mere "convenient agencies" of the state).

It should be noted that some scholars reject the Hunter/Trenton doctrine and argue that the federal constitution does indeed offer substantive protections for cities qua cities. They typically find that protection in the Tenth Amendment, which reserves powers to the states "or to the people." See Jake Sullivan, *The Tenth Amendment and Local Government*, 112 *Yale LJ*, 1935 (2003); see also David J. Barron, *A Localist Critique of the New Federalism*, 51 *Duke LJ* 377 (2001) (setting out a federalism versus localism inquiry); Jay S. Bybee, *The Tenth Amendment Among the Shadows: On Reading the Constitution in Plato's Cave*, 23 *Harv JL & Pub Pol'y* 551 (2000) (exploring ways in which to understand the Tenth Amendment in the context of American federalism).

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

B. *Special Legislation Abolished*

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

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

Second, Article IV, section 1(5) extended initiative and referendum powers “to the qualified voters of each municipality and district as to all local, special and municipal legislation of every character in or for their municipality or district.”¹⁷ Taken together, Article XI, section 2, and Article IV, section 1(5), “allow the people of a locality to decide upon the organization of and the scope of its powers under its charter without having to obtain statutory authorization from the legislature, as was the case before the amendments.”¹⁸ The people of a municipality no longer

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

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

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

¹⁷ Or Const, Art IV, § 1(5).

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

had to lobby the state Legislature—and grapple with special interests in Salem—to amend their municipal charter in order to confront local policy issues.

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

C. *General Laws of Incorporation*

Since 1906, new cities in Oregon have been incorporated pursuant to the Incorporation Act. Currently codified at ORS 221.010 to 221.110, the Incorporation Act sets out the procedure for incorporating a city from unincorporated territory. Even though the Incorporation Act is a statewide law enacted by the Legislature, it has general applicability across the state. Thus, the Incorporation Act does not violate Article XI, section 2, of the Oregon Constitution, which prohibits the legislature enacting or amending municipal charters via special law.²⁰

D. *Adoption of a Home Rule Charter*

As noted above, Article XI, section 2, of the Oregon Constitution, grants to the “legal voters of every city and town” the “power to enact and amend their municipal charter[.]” It is clear that Article XI, section 2, prohibits the state legislature from enacting or amending a city’s charter, and it is equally clear that the voters of an existing city can adopt their own home-rule charter, independent of the state Incorporation Act. What is less clear is whether Article XI, section 2, permits a group of citizens living in an unincorporated area to adopt a home rule charter and thereby establish a new city, *apart* from the procedure outlined in the Incorporation Act. The constitutional text offers conflicting clues. On the one hand, Article XI, section 2, states that the “Legislative Assembly shall not enact, amend or repeal any charter or act of incorporation for any municipality, city or town.” That language suggests that only voters can establish a city—presumably, apart from the confines of the Incorporation Act. However, Article XI, section 2, goes on to state that the “legal voters of *every city and town* are hereby granted power to enact and amend their municipal charter [.]” That language presupposes that the “voters” empowered to enact a municipal charter already reside in a “city” or “town.”²¹

¹⁹ For a more detailed look at home rule in Oregon, see the League’s publications on home rule, including Philip Thoennes, *The Origins and Evolution of Home Rule in Oregon*, LOC Research Paper (2017).

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

²¹ Article XI, section 5, of the Oregon Constitution provides: “Acts of the Legislative Assembly, incorporating towns, and cities, shall restrict their powers of taxation, borrowing money, contracting debts, and loaning their credit.” At first blush, Article XI, section 5, seems to clearly state that the legislature has the authority to incorporate a city. However, Article XI, section 5, was part of the original Oregon Constitution of 1857. At that time, all cities and towns in Oregon were incorporated through special legislation. Further inquiry reveals that Article XI, section 5, is less concerned with *who* can incorporate a city than with ensuring municipal corporations did not become so

No Oregon court has addressed the question whether a group of citizens can adopt a home-rule charter apart from the Incorporation Act and thereby establish a new municipality. The better interpretation is likely that the state legislature retains plenary authority over the means of incorporation, as expressed in the Incorporation Act. The right to adopt a home-rule charter, as guaranteed by Article XI, section 2, then arises *after* the city is duly incorporated. But the matter is not free from doubt.

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

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

A. City Governance Under the Incorporation Act

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

B. City Governance Under a Home Rule Charter

Rather than relying on state law to prescribe the form and function of its government, a city can adopt a home-rule charter under the Oregon Constitution. As the Oregon Supreme Court recently explained: “Home rule is the authority granted to Oregon’s cities by Article XI, section 2, and Article IV, section 1(5), of the Oregon Constitution—adopted by initiative petition in 1906—to regulate to the extent provided in their charters.”²³ As noted above, Article XI, section 2 provides, in part:

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

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

indebted as to make them insolvent. See Charles Henry Carey, ed., *The Oregon Constitution and Proceedings and Debates of the Constitutional Convention of 1857*, 267-70 (1926).

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

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

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

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

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

IV. Conclusion

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

²⁴ See *LaGrande/Astoria*, 281 Or at 142.

²⁵ For example, the League’s Model City Charter suggests the following provision: “The city has all powers that the constitutions, statutes and common law of the United States and Oregon expressly or impliedly grant or allow the city, as fully as though this charter specifically enumerated each of those powers.” See League of Oregon Cities, Model Charter for Oregon Cities, chapter 2, section 4 (2004), available at <http://www.orcities.org/Portals/17/Premium/LOC2004ModelCharter%20new%20cover%2011-2011.pdf>.

²⁶ *LaGrande/Astoria*, 281 Or at 148.

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

Appendix C

FILING A PETITION FOR INCORPORATION

File the petition forms (using Secretary of State Forms SEL 701 and SEL 702)* and economic feasibility statement with the county clerk (of county in which proposed city lies, or, if proposed city lies in more than one county, to the clerk of the county in which the largest part of its territory lies) to be authorized for circulation.

Petition Cover Page

The petition cover page shall contain:

- The name of the proposed city;
- Instructions for circulators and signers;
- A statement that the chief petitioners are legal voters residing within the boundaries of the area proposed for incorporation;
- A statement of the estimated tax base sufficient to support an adequate level of municipal services;
- A statement of the estimate of a tax rate in dollars per thousand of assessed value necessary to raise an amount of revenue equal to the proposed tax base, calculated for the latest tax year for which the assessed value of the proposed city is available;
- A place for the signature, residence address, mailing address (if different), city, state, and zip code of up to three chief petitioners; and
- A map (no larger than 14 by 17 inches in size) indicating the exterior boundaries of the proposed city attached to the cover page.

Completing Secretary of State Form SEL 701 fulfills these requirements.

<http://sos.oregon.gov/elections/Documents/SEL701.pdf>

Statement of Economic Feasibility

The statement of economic feasibility shall contain:

- A description of the services and functions to be performed or provided by the proposed city;
- An analysis of the relationship between those services and functions and other existing or needed government services; and
- Proposed first and third year budgets for the new city demonstrating its economic feasibility.

Signature Pages

Signatures must be gathered within 6 months of initial filing. A full and correct copy of the petition cover page (Form SEL 701) and map shall be attached to every sheet of signatures.

The signature sheet shall contain:

The title “PETITION FOR INCORPORATION OF THE CITY OF _____”
with the name of the proposed city filled in;

- The sub-title “SIGNATURE SHEET”;
- A statement that the undersigned voters of the area proposed to be incorporated petition the county court to form the city named on the petition and described by the map attached to the petition; The signature, printed name, date of signing, residence address, city or post office and zip code for each person who signs the petition;
- Statement of circulator that each person who signed the petition did so in his presence and that circulator believes that each individual is a qualified voter in the area proposed to be incorporated; and
- No more than twenty (20) signatures per page.

Completing Secretary of State Form SEL 702 fulfills these requirements.

<http://sos.oregon.gov/elections/Documents/SEL702.pdf>

Appendix D

ADDITIONAL REQUIREMENTS

In Lane County

If the proposed city is within the jurisdiction of Lane County, which has the only remaining local government boundary commission:

- When submitting to clerk for authorization for circulation, the Petition Cover Page (Form SEL 701) shall be accompanied by the economic feasibility analysis required under ORS 199.476. This analysis must be approved by the Lane County Local Government Boundary Commission before the county clerk can authorize the circulation of the petition.

In Lane County, the Signature Sheet shall contain:

- The title “PETITION FOR INCORPORATION OF THE CITY _____” name of the proposed city filled in;
- The sub-title “SIGNATURE SHEET”;
- A statement that the boundary commission has approved the economic feasibility analysis for the area proposed for incorporation, that the analysis is available for inspection at the offices of the commission, and that the commission must review the proposal for incorporation before it is submitted at an election;
- A statement that the undersigned voters of the area proposed to be incorporated petition the county court to form the city named on the petition and described by the map attached to the petition;
- The signature, printed name, date of signing, residence address, city or post office and zip code for each person who signs the petition;
- Statement of circulator that each person who signed the petition did so in his presence and that circulator believes that each individual is a qualified voter in the area proposed to be incorporated; and
- No more than twenty (20) signatures per page.

Completing Secretary of State Form SEL 702a instead of Form 702 fulfills these requirements.

<http://sos.oregon.gov/elections/Documents/SEL702a.pdf>

Rural Unincorporated Territory

If proposed city is **within three miles of an existing city, but outside the urban growth boundary**, the petition must be accompanied by an affidavit stating that:

- 10 percent of the electors registered in the area proposed for incorporation favor the incorporation; and
- The chief petitioners have discussed the effects of the proposed incorporation with neighboring cities, including discussions about how those cities and the proposed city will allow for expansion of urban growth boundaries, and, where applicable, also urban reserve areas.

In addition to the above requirements regarding the Statement of Economic Feasibility, the Statement must also:

- Indicate that the proposed city must plan for and provide urban services in a cost-effective manner at the minimum level adequate to meet current needs and projected growth;
- Contain a proposed permanent rate limit for operating taxes to provide revenues for urban services; and
- Indicate that the proposed city must plan for residential development at or above the same urban density planned for an existing city, within the county, that has a similar geographic area within the existing city's urban growth boundary or, for a proposed city within three miles of Metro's boundary, a minimum urban residential density in accordance with a statewide planning goal and rules pertaining to needed housing for cities within Metro's urban growth boundary.

If the proposed city will be required to complete a public facility plan and a transportation systems plan, the proposed city must demonstrate the ability to provide urban services to meet current needs and projected growth. The proposed city may meet this requirement, in whole or in part, by establishing an agreement in principle with a city or a district, as defined in ORS 195.060, to provide the urban services.