

# OREGON

## CONSTITUTIONAL AND STATUTORY PROVISIONS

### **Oregon Constitution**

- OR. CONST. art. VI, § 10. County home rule under county charter.

The Legislative Assembly shall provide by law a method whereby the legal voters of any county, by majority vote of such voters voting thereon at any legally called election, may adopt, amend, revise or repeal a county charter. A county charter may provide for the exercise by the county of authority over matters of county concern. Local improvements shall be financed only by taxes, assessments or charges imposed on benefited property, unless otherwise provided by law or charter. A county charter shall prescribe the organization of the county government and shall provide directly, or by its authority, for the number, election or appointment, qualifications, tenure, compensation, powers and duties of such officers as the county deems necessary. Such officers shall among them exercise all the powers and perform all the duties, as distributed by the county charter or by its authority, now or hereafter, by the Constitution or laws of this state, granted to or imposed upon any county officer. Except as expressly provided by general law, a county charter shall not affect the selection, tenure, compensation, powers or duties prescribed by law for judges in their judicial capacity, for justices of the peace or for district attorneys.

- OR. CONST. art. XI, §2. Formation of corporations; municipal powers regarding charter and regulation of intoxicating liquor.

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 . . . .

### **Oregon Statutes**

- OR. REV. STAT. § 203.035 (2016). Power of county governing body or electors over matters of county concern.

(1) [T]he governing body or the electors of a county may by ordinance exercise authority within the county over matters of county concern, to the fullest extent allowed by Constitutions and laws of the United States and of this state, as fully as if each particular power comprised in that general authority were specifically listed in ORS 203.030 to 203.075.

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

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## CITY HOME RULE STRUCTURE, INCLUDING A SLIVER OF IMMUNITY FROM STATE PREEMPTION

Oregon voters added article XI, § 2—now known as the municipal home rule amendment—to the state constitution in 1906.<sup>1</sup> The language of article XI, § 2 does not include the term “home rule”; rather, the amendment is phrased in terms of municipal charters and the legislature’s inability to amend or repeal such charters.<sup>2</sup> The power conferred by the amendment, therefore, is defined for each city by its charter; if a charter only grants limited powers, a municipality does not have authority to act beyond those powers.<sup>3</sup> In actuality, Oregon cities have generally adopted charter language that allows them to exercise the maximum amount of power permitted under federal and state law.<sup>4</sup>

Article XI, Section 2 requires that charters be subject to the constitution and criminal laws of the state. The judiciary has interpreted this specific mentioning of criminal law to create a rebuttable presumption that local criminal laws are preempted while civil laws are not.<sup>5</sup> The state may also expressly grant power to cities to regulate a certain area of criminal law.<sup>6</sup>

For almost the last forty years, local government law in Oregon has been governed by the state supreme court’s landmark decision in *City of La Grande v. Public Employes Retirement Board*.<sup>7</sup> In *La Grande*, the court largely abandoned the prior, imperio-like regime of distinguishing between municipal ordinances that govern “local” matters, which were often considered immune from preemption, and those that governed “statewide” matters, which were not.<sup>8</sup> Rather, the *La Grande* court articulated a new test whereby the state was permitted to preempt local governments on any “substantive social, economic or regulatory objective, unless the law is shown to be irreconcilable with the local community’s freedom to choose its own political form.”<sup>9</sup> The Oregon legislature—or the state’s voters, acting through the initiative process—have used this power to preempt expressly numerous areas of regulation, including rent control,<sup>10</sup>

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<sup>1</sup> *City of Portland v. Jackson*, 850 P.2d 1093, 1097 (Or. 1993).

<sup>2</sup> *Jackson*, 850 P.2d at 1097; *City of La Grande v. Pub. Employes Ret. Bd.*, 576 P.2d 1204, 1207 (Or. 1978), *aff’d on reh’g*, 586 P.2d 765.

<sup>3</sup> *Adams v. Toledo*, 96 P.2d 1078, 1080 (Or. 1939)

<sup>4</sup> See Paul A. Diller, *The Partly Fulfilled Promise of Home Rule in Oregon*, 87 Or. L. Rev. 939, 944-45 (2008) (discussing city charters and citing examples of their broad claims to power).

<sup>5</sup> *City of Portland v. Dollarhide*, 714 P.2d 220, 227 (Or. 1986).

<sup>6</sup> *Id.* at 228.

<sup>7</sup> 576 P.2d 1204, 1207 (Or. 1978), *aff’d on reh’g*, 586 P.2d 765

<sup>8</sup> More specifically, matters of local concern could not be preempted unless there was a “pervading state interest”; *id.* at 1215; *State ex rel. Heinig v. City of Milwaukie*, 373 P.2d 680, 684 (Or. 1962) (holding that state concern over operation of local fire departments was not substantial enough to predominate the interests of the city).

<sup>9</sup> *City of La Grande*, 576 P.2d at 1211.

<sup>10</sup> OR. REV. STAT. § 91.225 (2016).

minimum wage,<sup>11</sup> cell phone use while driving,<sup>12</sup> mobile home closure restrictions,<sup>13</sup> impact fees,<sup>14</sup> and drones.<sup>15</sup> Moreover, Oregon contains no “generality” or “uniformity” requirement for preemption, as has been demonstrated by the state legislature making special exceptions when preempting fields like smoking regulation and paid sick leave.<sup>16</sup>

Even within the realm of substantive social, economic, and regulatory matters, there is a presumption against implied preemption, at least in the civil realm.<sup>17</sup> Field occupation is rare, and a local law will ordinarily be preempted only if it “cannot operate concurrently” with state law or, in other words, when complying with the local law would make it impossible also to comply with state law.<sup>18</sup>

In *La Grande*, the Oregon Supreme Court focused on the text of Article XI, § 2, in largely disavowing the statewide-versus-local typology. The court noted that the text’s specific reference to charter meant that the goal of the amendment was to protect cities from statewide interference with their form of government. Hence, according to the *La Grande* court, only local enactments that relate to “the structure and procedures” of local governments would be protected, or at least more protected, from state override by the judiciary.<sup>19</sup> The Oregon courts have not defined the contours of this protected sphere in detail,<sup>20</sup> but commentators have speculated that it includes matters like the number of city councilors, whether councilors are elected by district or at-large, and their terms of office.<sup>21</sup>

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<sup>11</sup> *Id.* §§ 91.225, 100.305, 100.315 & 653.017.

<sup>12</sup> *Id.* § 801.038.

<sup>13</sup> *Id.* § 90.660.

<sup>14</sup> *Id.* §§ 223.297-223.314.

<sup>15</sup> *Id.* § 837.385.

<sup>16</sup> For smoking-related exemptions, see Diller, *supra* note 4, at 963-64. With respect to paid sick leave, the state law that established paid sick leave statewide left in place Portland’s pre-existing lower employee threshold for applicability. See OR. REV. STAT. § 653.606(13) (2016) (applying special rules to an “employer located in a city with a population exceeding 500,000”).

<sup>17</sup> *E.g.*, Or. Rest. Ass’n v. City of Corvallis, 999 P.2d 518, 520 (2000) (upholding local smoking ban and noting that, “it [is] reasonable to assume that the legislature did not, by adopting a statewide law, mean to displace local regulation of local conditions unless its intention to do so was apparent”); Haley v. City of Troutdale, 576 P.2d 1238, 1242-43 (Or. 1978) (upholding city ordinance requiring double wall construction of buildings within city).

<sup>18</sup> Thunderbird Mobile Club, LLC v. City of Wilsonville, 228 P.3d 650, 660 (Or. Ct. App. 2010).

<sup>19</sup> *La Grande*, 576 P.2d at 1215. In the next breath, the court noted that if a state statute were motivated by “a need to safeguard the interests of persons or entities affected by the procedures of local government,” that might be sufficient to permit preemption. *Id.*

<sup>20</sup> In a case subsequent to *La Grande*, the court held that further state regulation of local employees did not amount to meddling with the “structure and procedures” of local government. *City of Roseburg v. Roseburg City Firefighters*, 639 P.2d 90, 95-101 (Or. 1981).

<sup>21</sup> *E.g.*, Paul A. Diller, *The Brief History of ‘Voter-Owned Elections’ in Portland, Oregon: If Public Financing Can’t Make It There, Can It Make It Anywhere?*, 49 Willam. L. Rev. 637, 643-44 (2013).

## COUNTY HOME RULE

In 1958 the Oregon voters approved Article VI, § 10, allowing for counties to adopt home rule. Since then, nine of Oregon's thirty-six counties have adopted home-rule charters.<sup>22</sup> In 1973, however, state law granted all counties statutory home-rule authority that is nearly as broad as constitutional home-rule authority.<sup>23</sup> The primary exception is that charter counties have significantly more freedom to choose their own structure.<sup>24</sup> Despite the different constitutional and statutory foundations for county home rule, the Oregon courts have largely approached preemption questions to county home rule in the same manner as they do municipal.<sup>25</sup>

Whether counties have the authority to trump cities within their jurisdiction is a question that is not clear under Oregon law and has not yet been answered by the courts.<sup>26</sup> Finally, it should be noted that in 1996 the state's voters added an unfunded mandate provision to the state constitution.<sup>27</sup> While this provision applies to all "local governments," including cities,<sup>28</sup> it has only recently been invoked successfully by counties in opposition to the state's paid sick-leave law.<sup>29</sup>

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<sup>22</sup> See Ass'n of Or. Counties, Home Rule, *available at* <http://oregoncounties.org/news/publications/home-rule/>.

<sup>23</sup> See 1973 Or. Laws c. 282 (codified as amended in part at OR. REV. STAT. § 203.035 (2016)).

<sup>24</sup> *Id.*; see also Ass'n of Or. Ctys., County Home Rule in Oregon 55 (June 2005) (noting that "[r]eorganization has been the central focus of movements to adopt county charters in Oregon").

<sup>25</sup> See Diller, *supra* note 4, at 962 n. 119.

<sup>26</sup> Aleida Fernandez, *County vs. City Laws*, OPB, Think Out Loud, July 29, 2014, *available at* <http://www.opb.org/radio/programs/thinkoutloud/segment/county-versus-city-law/>.

<sup>27</sup> Or. Const. Art. XI, § 15 (requiring state to allocate money to local government when the former "requires any local government to establish a new program or provide an increased level of service for an existing program").

<sup>28</sup> *Id.* (defining "local government" to mean "a city, county, municipal corporation or municipal utility operated by a board or commission").

<sup>29</sup> Linn County v. Brown, No. 16CV17209 (Or. Cir. Ct. Dec. 8, 2016) (granting summary judgment to plaintiff counties), *available at* <https://www.documentcloud.org/documents/3248842-Linn-County-v-Brown-16CV17209-SUM-JUDGMENT.html>.