

Script for SB 1051 Code Amendments

Mayor: We will now begin the agenda item concerning Ordinance No. 4, Series 2018.

I will now turn it over to our City Project Manager Megan Messmer to review the items required for a land use public hearing and officiate the public hearing procedures.

City Recorder: Thank you Mayor Henry. This evening we will be holding a public hearing concerning Ordinance 4, Series 2018.

These proceedings will be recorded.

This hearing will be held in accordance with the land use procedures required by the City and the State of Oregon. This is a legislative land use action involving proposed changes to the City's zoning regulations under Title 10 of the Florence City Code.

Staff has identified the applicable substantive criteria from the City's Zoning Regulations, Florence Comprehensive Plan, and State Law. These criteria have also been listed in the staff report.

For anyone wishing to speak, we are asking you complete a speaker's card which is available on the City of Florence website with additional copies as you walked in the room . Is there anyone in the room who would like to speak at this public hearing who has not yet completed a speakers card? ***[if yes, then distribute]***

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Written testimony may also be offered and will be considered and made part of the record. To do that, either before or after you speak, please leave the material with me. I will then make sure your evidence is identified and placed in the record.

With those instructions about the public hearing out of the way, I will ask if any Councilor wishes to disclose an actual or a potential conflict of interest in this matter.

Councilors: Makes Declarations *(if any)*

[If Declarations are Made]

City Recorder: Councilor _____, do you believe that you can make a decision on this issue in an impartial manner?

Councilors: *(Councilor replies, if yes continue; If no, Councilor may recuse him/herself)*

City Recorder: Any person, during his or her testimony, has the right to rebut the substance of the ex-parte communications just disclosed.

Does any member of the public wish to challenge a Councilor's impartiality?

(If none, move on; If some, Councilor has the opportunity to rebut statement and makes a decision whether or not to continue or to recuse him/herself)

[actual conflict of interest – Councilor must announce the conflict and step down]

[potential conflict of interest - Councilor must announce the conflict & state whether (s)he is able to be impartial. If so, Councilor may participate; if not, decision-maker must step down]

[ex parte contacts - Councilor must announce the substance and context of the communication, then may participate.]

[Return to Script]

City Recorder: I now open the public hearing for Ordinances No. 4, Series 2018, it is _____ o'clock.

[Staff Report]

City Recorder: May we please have the staff report

Planning Staff: Presents Staff report

[Staff introduces the topic, staff report, and presents background information, and states list of criteria for approval]

City Recorder: Does any Councilor have questions of the staff?

[Council Questions of Staff – No Deliberations]

[PUBLIC HEARING PROCEDURE]

City Recorder: We will now begin the taking public testimony. Testimony will be received from the applicant, proponents, opponents, and those that are neutral.

[Applicants]

City Recorder: We will now begin the public hearing starting with the applicant, Mr. / Ms. _____. Please feel free to come up to the table to speak.

Applicant: Gives Testimony **[if any]**

City Recorder: Councilors, do you have any questions of the applicant?

Councilors: Ask Questions **[if any]**

[Proponents]

City Recorder: We will now take testimony from proponents, Mr. / Ms. _____. Please feel free to come up to the table to speak.

[OR]

There have been no proponents who have signed up to speak.

Proponents: [if any]

City Recorder: [After each speaker] Councilors, do you have any questions of Mr. / Ms. _____.

[Opponents]

City Recorder: We will now take testimony from opponents, Mr. / Ms. _____. Please feel free to come up to the table to speak.

[OR]

There have been no opponents who have signed up to speak.

Proponents: [if any]

City Recorder: [After each speaker] Councilors, do you have any questions of Mr. / Ms. _____.

[Neutral Parties]

City Recorder: We will now take testimony from neutral parties, Mr. / Ms. _____. Please feel free to come up to the table to speak.

[OR]

There have been no neutral parties who have signed up to speak.

Proponents: [if any]

City Recorder: [After each speaker] Councilors, do you have any questions of Mr. / Ms. _____.

[Staff Response]

City Recorder: Does the staff wish to respond to any of the testimony received?

Staff: Offers response [if chooses]

City Recorder: [if staff responds] – Councilors, do you have any questions of the staff?

[Applicant Rebuttal]

City Recorder: Does the applicant wish to respond to any of the testimony received?

Applicant: Responds [if chooses]

City Recorder: [if applicant responds] – Councilors, do you have any questions of the applicant?

[DECISION TO CLOSE OR LEAVE OPEN PUBLIC HEARING SUBJECT MATTER]

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[If Public Hearing is left open or hearing is continued]

Mayor: The City Council will continue discussions on Ordinance No. 4, Series 2018 at the June 4, 2018 City Council meeting. – [DONE WITH AGENDA ITEM - MOVE ON TO NEXT ITEM ON AGENDA]

[If Public Hearing is Closed –

[City Council Deliberations / Decision]

City Recorder: Mayor Henry, will you please facilitate the deliberation on this agenda item, making sure to allow each Councilor an opportunity to speak.

(Council Deliberates)

City Recorder: Hearing no further deliberations, Mayor Henry, will you please facilitate the City Council's decision on each of the ordinances.

(MOVE TO ORDINANCE PROCEDURES)

Script for Lookout Street Annexation & Zone Assignment

Mayor: We will now begin the agenda item concerning Ordinance No. 5 & 6, Series 2018.

I will now turn it over to our City Project Manager Megan Messmer to review the items required for a land use public hearing and officiate the public hearing procedures.

City Recorder: Thank you Mayor Henry. This evening we will be holding a public hearing concerning Ordinance 5 & 6, Series 2018.

These proceedings will be recorded.

This hearing will be held in accordance with the land use procedures required by the City and the State of Oregon. This is a legislative land use action involving proposed changes to the City's zoning regulations under Title 10 of the Florence City Code.

Staff has identified the applicable substantive criteria from the City's Zoning Regulations, Florence Comprehensive Plan, and State Law. These criteria have also been listed in the staff report.

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Planning Staff: Presents Staff report

[Staff introduces the topic, staff report, and presents background information, and states list of criteria for approval]

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City Recorder: Councilors, do you have any questions of the applicant?

Councilors: Ask Questions [if any]

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[OR]

There have been no proponents who have signed up to speak.

Proponents: [if any]

City Recorder: [After each speaker] Councilors, do you have any questions of Mr. / Ms. _____.

[Opponents]

City Recorder: We will now take testimony from opponents, Mr. / Ms. _____. Please feel free to come up to the table to speak.

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City Recorder: [After each speaker] Councilors, do you have any questions of Mr. / Ms. _____.

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[Applicant Rebuttal]

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(MOVE TO ORDINANCE PROCEDURES)

Script for 4th Avenue Annexation & Zone Assignment

Mayor: We will now begin the agenda item concerning Ordinance No. 7 & 8, Series 2018.

I will now turn it over to our City Project Manager Megan Messmer to review the items required for a land use public hearing and officiate the public hearing procedures.

City Recorder: Thank you Mayor Henry. This evening we will be holding a public hearing concerning Ordinance 7 & 8, Series 2018.

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(MOVE TO ORDINANCE PROCEDURES)

Ordinance No. 4, Series 2018 CC 18 01 TA 01 – ADU/SB 1051 Code Changes



Background

- Senate Bill 1051 signed by Governor Brown on August 15, 2017.
- SB 1051 becomes operative on July 1, 2018.
- Requirements for all cities over 5,000 (2,500 for ADUs)

Timeline

Action	Date
City Council Initiation	January 8, 2018
City Council Work Session	February 7, 2018
PC Work Session	February 13, 2018
Joint PC/CC Work Session	February 26, 2018
Joint PC/CC Work Session	March 26, 2018
PC Work Session	April 10, 2018
PC Public Hearing	May 8, 2018
CC Public Hearing	May 21, 2018

Criteria

Florence City Code, Title 10:

Chapter 1: Zoning Administration, Section 1-3-C

Realization 2020 Florence Comprehensive Plan:

Chapter 1: Citizen Involvement, Policies 4 through 6

Chapter 2: Land Use, Policies 1 through 3

Residential, Policies 2 and 8 & Recommendation 4

Chapter 9: Economic Development, Policy 1

Chapter 10: Housing Opportunities, Policies 1 through 3,
Recommendation 1 and 3

Oregon Revised Statutes:

ORS 197.610(1) through 197.610(6)

ORS 227.186(4)

Summary of Proposal

- Add code to address Senate Bill 1051
- Add Accessory Dwellings to Permitted Uses
- Add Affordable Housing to Place of Worship code
- Add faster timeline for affordable housing projects
- Add housing definitions to code
- Add code for parking for Accessory Dwellings
- Add site, construction, and safety code for ADUs

• Ord. No. 4, 2018 – CC 18 01 TA 01

5/21/18 •5

Exhibits

A summary of proposed changes by Chapter:

Exhibit:

- B. **FCC 10-1: Zoning Administration: FCC 10-1-1-5.**
- C. **FCC 10-2: General Zoning: FCC 10-2-13**
- D. **FCC 10-3: Off-Street Parking and Loading.**
- E. **FCC 10-4: Conditional Uses: FCC 10-4-12-A.**
- F. **FCC 10-10: Restricted Residential District: FCC 10-10-7-2.**

• Ord. No. 4, 2018 – CC 18 01 TA 01

5/21/18 •6

FCC 10-1 (Exhibit B)

Housing Application Processing Timeline

10-1-1-5: General Provisions (Page 6)

A. [...]

1. The City shall take final action on housing applications meeting the criteria of ORS 197.311 within 100 days.

FCC 10-2 (Exhibit C)

Housing Definitions

Addition of Definitions:

Page 3: "Accessory Dwelling Units"

Page 7: "Cottage", "Cottage Cluster", "Density",
"Develop"

Page 8: (Modification) "Dwelling",
"Secondary Dwelling" (Reference)

FCC 10-3 (Exhibit D)

Parking

Addition:

Page 2: "for non-residential uses," ADUs in table

Page 7: "Parking for A[DUs] may be covered or uncovered."

Page 8: M.1. Covered or uncovered.

M.2. Hard-surfaced.

M.3. On-street where available.

FCC 10-4 (Exhibit E)

Church Housing

Addition of:

Page 4: Places of Worship

2.a Housing – 50% affordable

2.b Meets land use regulations

3. 60-Year Covenant

FCC 10-10 (Exhibit F)

ADU and Residential Summary Table

For all residential zones:

Page 3-4: 10-10-6 Accessory Dwelling Units

- o Site
- o Construction
- o Safety

Page 5: 10-10-7 Residential Zone General Development Stds.

- o Setbacks
- o Lot Coverage

Res. Standards Table

10-10-7: Residential Zone General Development Standards

TABLE 10-10-2 Residential Zone General Development Standards				
<u>Standard</u>	<u>District</u>			
	<u>Restricted Residential</u>	<u>Single-Family Residential</u>	<u>Multi-Family Residential</u>	<u>Coast Village</u>
Minimum Building Setbacks				
Front Setback				
<u>Primary Building (excluding garages and carports)</u>	10'	10'	5/10'	20'
<u>Garages and Carports</u>	20'	20'	20'	20'
Side Setback				
<u>Primary Building</u>	10'	5'	5'	8'
<u>Accessory Buildings, Patio Structures, and Pools</u>	5'	5'	5'	5'
<u>Accessory Dwellings</u>	10'	5'	5'	8'
Rear Setback				
<u>Primary Building</u>	10'	5'	5'	10'
<u>Accessory Buildings, Patio Structures, and Pools</u>	5'	5'	5'	5'
<u>Accessory Dwellings</u>	10'	5'	5'	8'
Maximum Lot Coverage (in percent)				
<u>All Lots, Impervious Surface, except where specifically addressed below</u>	65	65	75	65
<u>Enclosed Building Area, All Lots</u>	35	35	50	35
<u>Enclosed Building Area, Lots with Accessory Dwellings</u>	55	55	70	55
<u>Enclosed Building Area, Multi-Family Dwellings and Other Uses</u>	-	-	50	-

Questions?

● Ord. No. 4, 2018 – CC 18 01 TA 01

5/21/18 ● 13

Ordinance Nos. 5 & 6, Series 2018

Armstrong Annexation and Zoning Assignment

CC 18 04 ANN 02 & CC 18 05 ZC 02



Introduction

- **Feb. 12, 2018** – Petition/Application received
- **April 4, 2018** – Application deemed complete
- **April 24, 2018** – First evidentiary hearing (PC)
- **May 21, 2018** – Ordinance hearing (CC)

Applicable Criteria

Annexation

Oregon Revised Statutes (ORS)

222.111; 222.120; 222.125; and 222.170 (2)

Florence Realization 2020 Comp Plan

Chapter 14: Urbanization, Policies 1, and 3 through 7; Recommendation 3

Applicable Criteria (con't.)

Zone Assignment

Florence Realization 2020 Comprehensive Plan

Chapter 2: Land Use, Policy 5; Residential Policies 7, 8 & 10; and Section on Residential Plan Designations

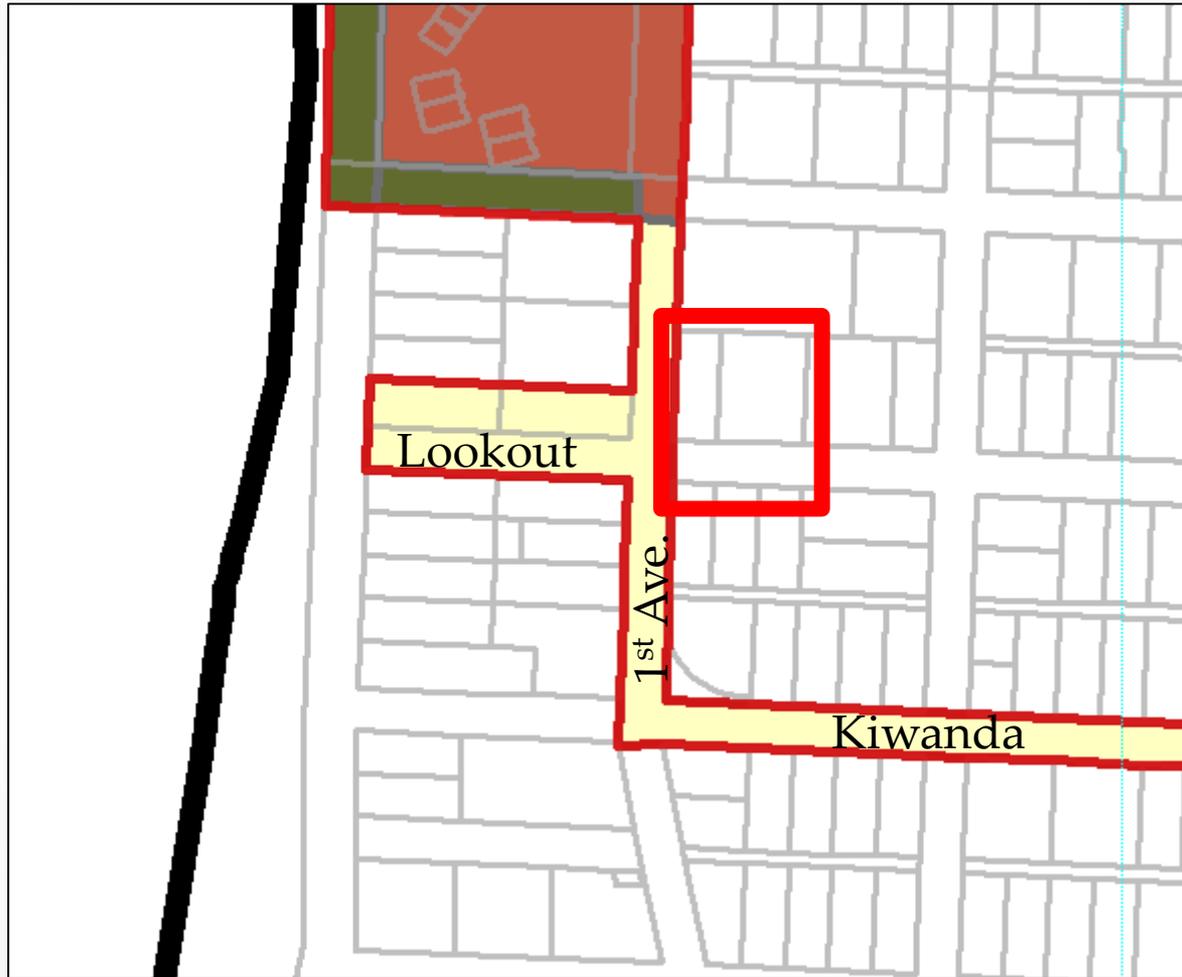
Florence City Code (FCC)

Title 10, Chapter 1: Zoning Regulations, Sections 10-1-1-6-4, 10-1-2-3, and 10-1-3

Title 11, Chapter 11: Single-Family Residential District, Sections 1 through 5

CC 18 04 ANN 02

Area Proposed for Annexation



CC 18 05 ZC 02

Current/Proposed Zoning



Utilities and Access

- Vacant properties
- Addition of sewer, other City services
- Water provided by Heceta Water PUD

Testimony/Referrals

Testimony:

- None Received

Referral Comments (Exhibit C):

- Florence Police Department

Staff Recommendation

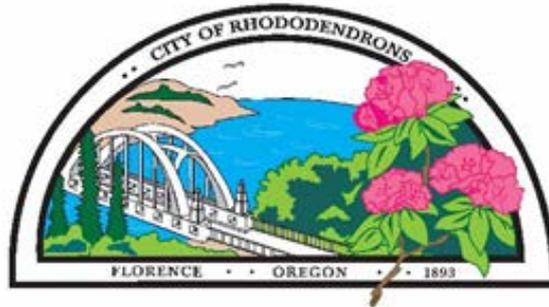
Approve Ordinance Nos. 5 and 6, Series 2018 for the annexation and zoning of the petitioner's property to the City of Florence and the corresponding Single- Family Residential District.

Questions?



4th Ave. Annexation

Ord. 7 & 8 Series 2018



Annexation Criteria

Oregon Revised Statutes:

ORS 222.111, 222.120, 222.125, and 222.170(2)

Florence Realization 2020 Comprehensive Plan:

Chapter 14: Urbanization, Policies 1 & 3 through 7

Zone Assignment Criteria

Florence City Code:

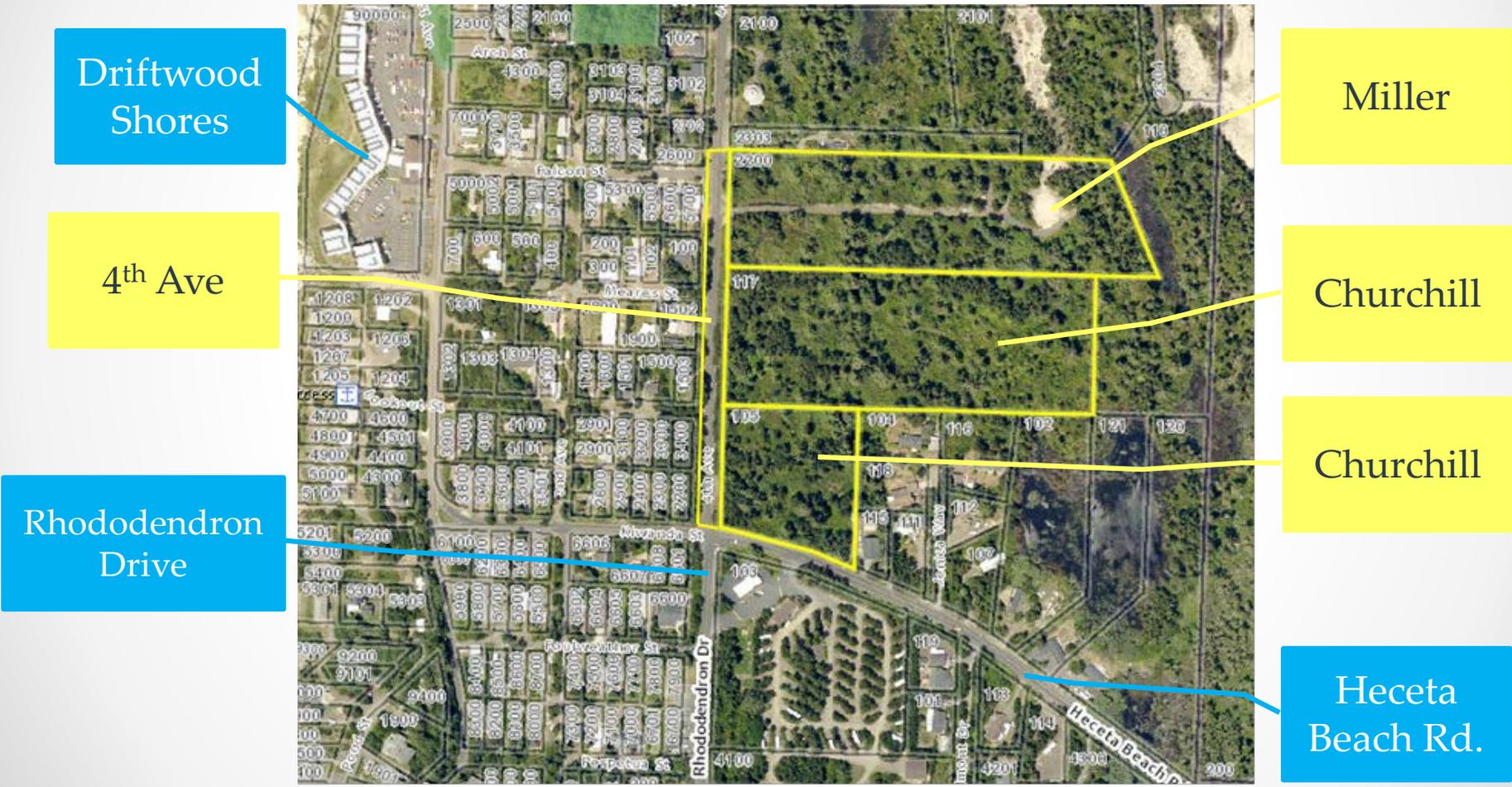
Chapter 1: Zoning Regulations, Sections 10-1-1-6-4, 10-1-2-3, and 10-1-3

Title 10, Chapter 10 – Restricted Residential

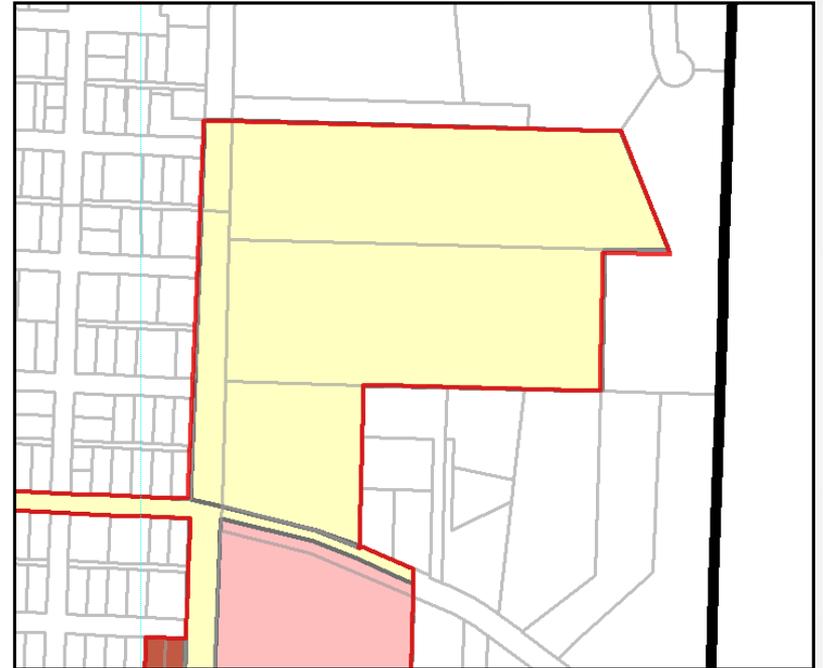
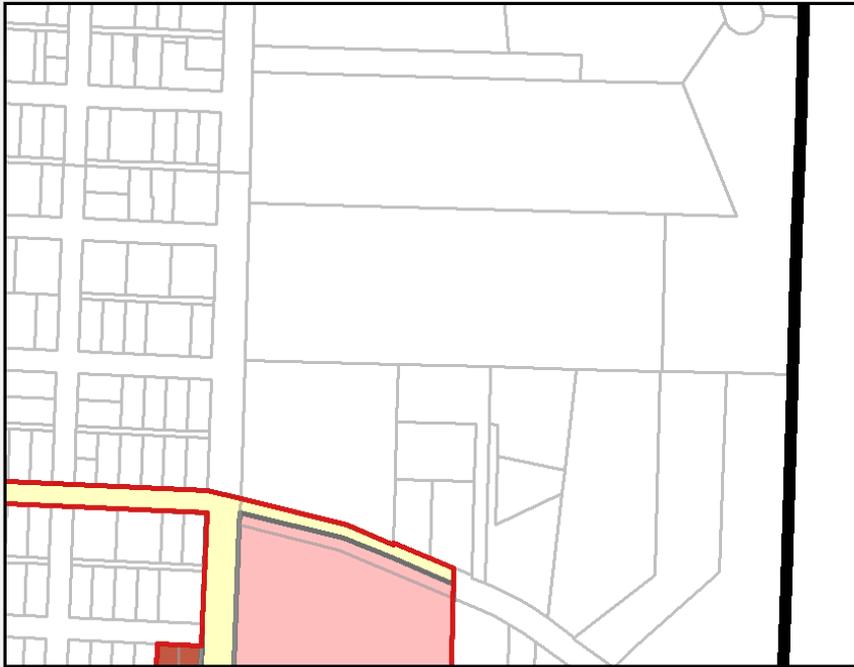
Florence Realization 2020 Comprehensive Plan:

- Chapter 2: Land Use, Policy 5; Residential Policies 7, 8 & 10; and Section on Residential Plan Designations

Aerial of Annexation Area



Zoning Map



- Restricted Residential

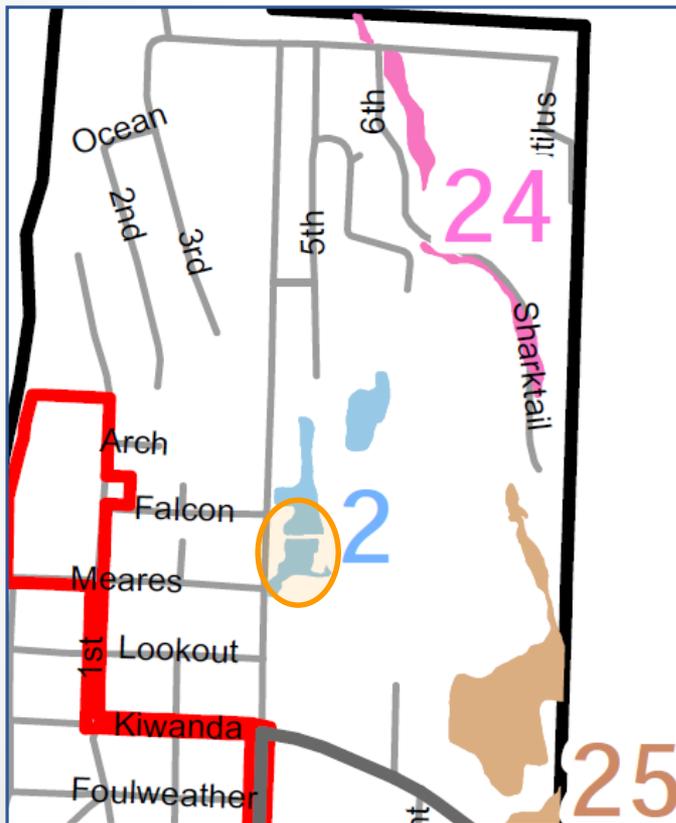
Public Comments

Clavel, Leo, Sturdivan, Anderson, O'Dell,
Springer, Williamson, Gambill

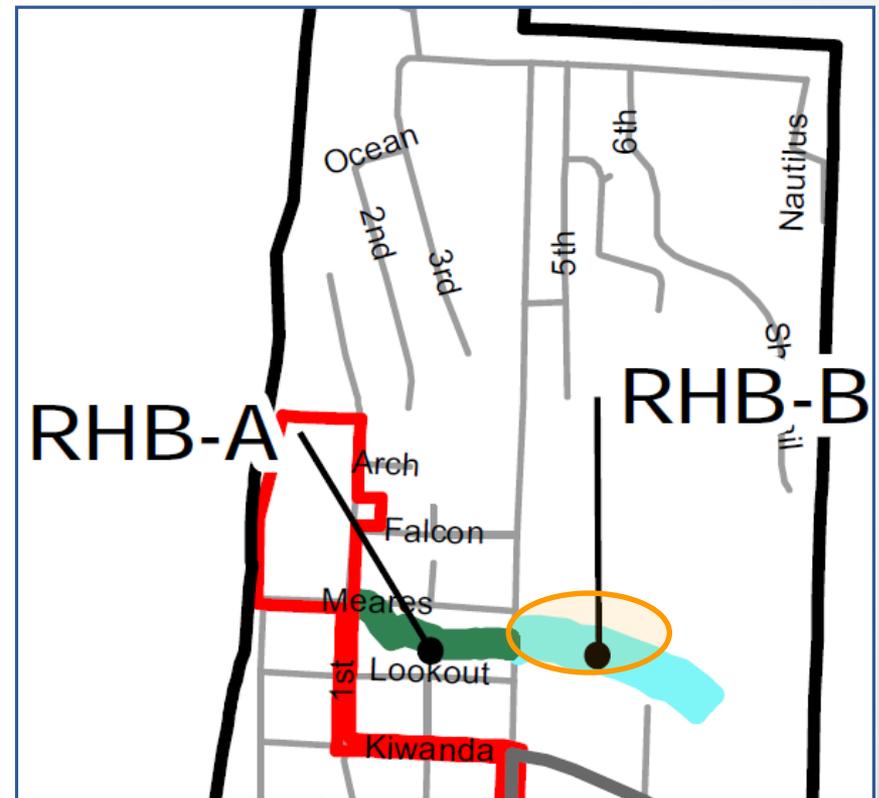
- Transportation-Traffic on Meares, 4th & intersection at Heceta Beach Rd., Improvements
- Wetlands & Creek, Flood Control Area Development, Retention of green areas
- General development concerns
- Increase in utility costs
- Tsunami Area

Heceta Beach Drainage Basin

Significant Wetlands



Significant Riparian

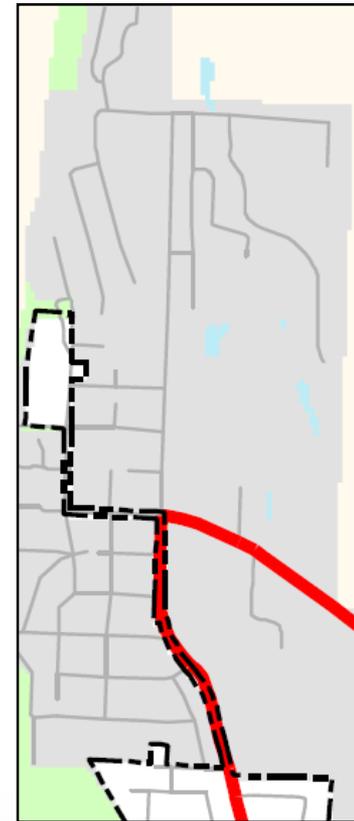


Transportation

Heceta Beach Area
Dependent on 4th Ave.



TSP Road Classification



Referral Comments

Exhibit C:

- Public Works Dept.:
 - .555 mgd excess sewer capacity
- Police Dept.:
 - Has capacity to expand police response from current emergency response levels.

Utilities & Access

- Water: Remain on Heceta Water
- Sewer: Connecting to existing pressure sewer in Rhody via 4th Ave. & Heceta Beach Road.
- Access: Existing street system, with needed improvements at development

Consents

- Meet Both Double & Triple Majority Methods

Planning Commission Recommendation

- Approve Ord. 7, Series 2018 Annexing property as identified in Ord. & described in Exhibits A1 & 2
- Approve Ord. 8, Series 2018 Assigning zoning as identified in Ord. & illustrated in Exhibit A

Alternatives

1. Approve annexation and zone assignment, or
2. Deny the petition for annexation and zone assignment with reasons for the denial, or
3. Modify the findings or conditions and approve the annexation and zone assignment, or
4. Continue the Public Hearing to a date certain if more information is needed.

Questions?



Presented at
5.21.18 City
Council Meeting -
Agenda Item #6

Solid Waste Rate Review

Council Hearing
May 21, 2018

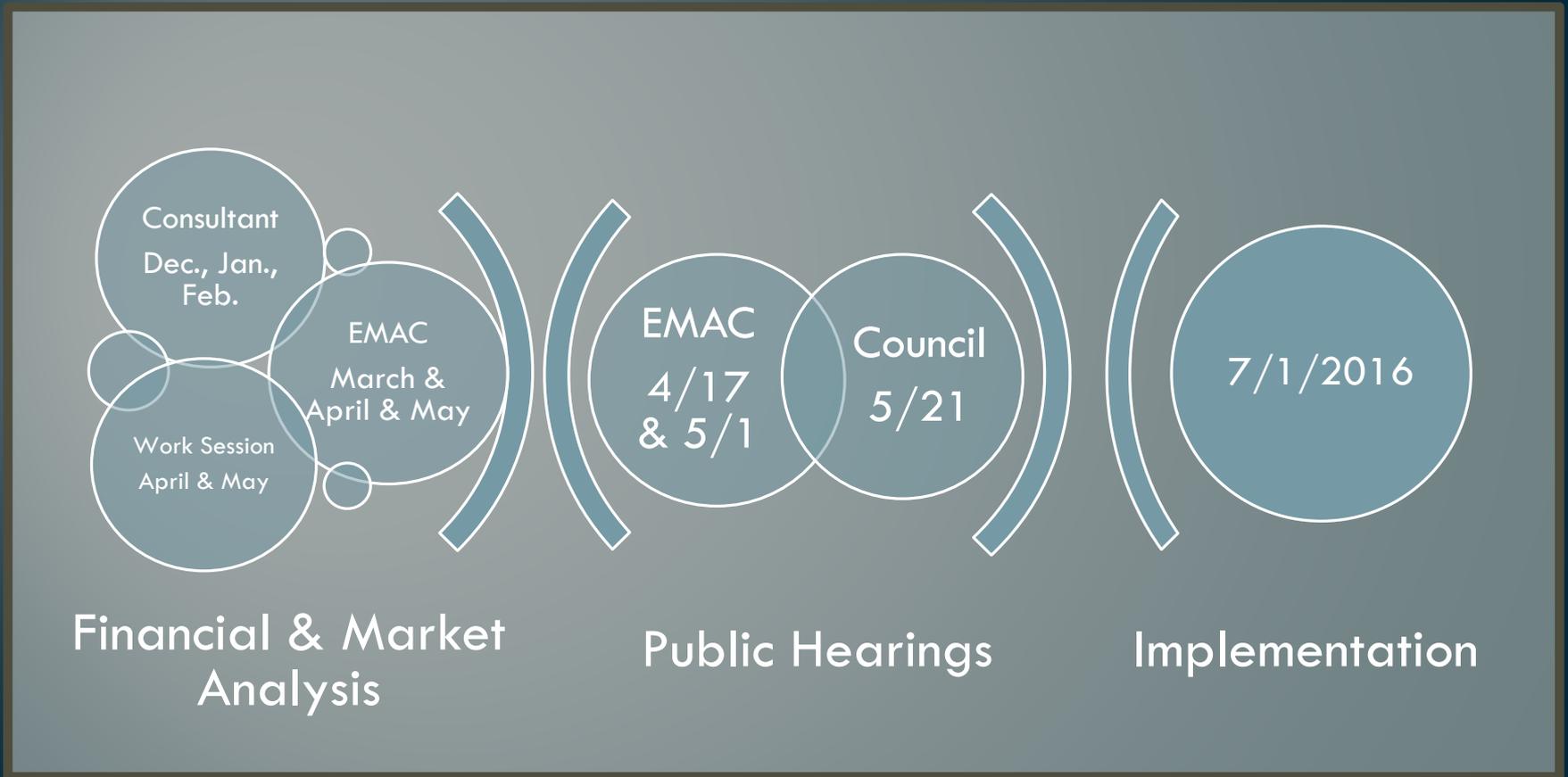


City of Florence
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Rate Review Process





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Bell & Associates Findings

- Composite Profit Margin
 - 2016/2017 = 12.10%
 - 2017/2018 Estimated = 3.89%
 - Negative Margin for roll-off services
 - Disparity between haulers
- Other Factors
 - Recycling Disposal to increase 69%
 - Tipping Fee to increase \$2.08 at ton
 - License Fee to increase .5% (4%)





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Recommendations

Rates

- 4% can/cart/bin services
- Increase Drop Box avg. 30%, \$4 per mile, \$70 delivery fee
- Recycling Surcharge .75 carts, .65 p/yd bins.
- Single Bill Multiple Cust. Pay full price on first container.



Other

- Monitor Non-regulated Services
- Surcharge Temporary
- Change License Fee Method
- Review Vacancy Counts
- Make annual CPI Adjustments
- Pass on costs to revise
- Contract for new forms



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Decision Points

1. Temporary Recycle Surcharge: When does City reevaluate?

- 6 mos. or a 30% change in costs
- 1 year
- and/or at hauler request

2. Which Category of CPI should be used?

- CPI-W U.S. City Average consistent with other rate increases
- CPI-U West Market Size B/C (better reflect market size)



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Decision Points cont'

3. What should base can/cart/bin rates increase by?

- 4%
- Reduce one or more costs to reduce needed revenue
- Reduce EOW recycling

4. Should City adjust recycling pick-up frequency?

- Every other week
- Keep Weekly
- And/or Add #1 and/or #2 plastics back into recyclables list



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Other Recommendations

- Require Vehicle Replacement & Maintenance
- Create Zones of Service
- Change code limiting time for financial submissions
- Consider how to ensure DEQ reporting is accurate....
- Ensure mechanism & capacity are in place to enforce terms of license agreements
- Use reporting from hauler with most customers



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Questions



RESOLUTION NO. 8, SERIES 2018

A RESOLUTION GOVERNING RATES FOR SOLID WASTE SERVICES AND REPEALING RESOLUTION NO. 16, SERIES 2017

The City Council of the City of Florence hereby resolves to amend the solid waste licensee fees and solid waste collection service fees for residential and commercial customers:

Section 1.

- A. The following fees are hereby established for applicants and licenses for solid waste services:

Nonrefundable application fee	\$350.00
Nonrefundable reapplication fee	\$80.00

Provided reapplication was made within one month of expiration date of the original application and the cause requiring reapplication was no fault of the applicant.

The license fee shall be calculated as follows:

Three percent of the gross receipts (excluding Lane County disposal fees collected for drop box service) collected each year by the licensee from its operations in the provision of solid waste collection and management services beginning July 1, 2016. The license fee shall be increased annually 0.5 percent each July 1, beginning July 1, 2017 until the license fee is 5.0 percent of gross receipts.

- B. The license fee shall be paid quarterly, within thirty days of the end of each quarter; (quarters are July 1 - September 30, October 1 - December 31, January 1 - March 31, and April 1 - June 30. Licensee shall provide support for the calculation of the license fee amount due from a qualified consultant within thirty days of request by the City. If the quarterly payment is not paid within 30 days of the due date, license revocation proceedings (re: FCC 9-4-7-1) will be initiated by the City Manager. Such proceedings may be discontinued only when the licensee pays the unpaid amount.
- C. The City may inspect the financial records of a licensee or the licensee's agents or assigns at all reasonable times for any purpose relevant to the performance or enforcement of the licensee. The City may require an audit of a licensee's financial records to determine compliance with the payment of the licensee fee pursuant to this section, or if there is a public need therefor.

Section 2.

- A. Rates are listed in attached *Schedule 1, 2018 to FCC 9-4 Solid Waste Management*. Can/Cart/Bin rates are changed to increase by 3% and also includes a recycling surcharge of .75 on can/cart services and .65 per yard on bin services. Drop Box rates increase an average of 30%, add a mileage rate of \$4 per mile for disposal outside of 15 miles of service

location, and add a \$70 delivery fee. These new rates will take effect July 1, 2018 in accordance with Florence City Code Title 9 Chapter 4 Section 5-1-A.

- B. The rates adopted under this resolution are designed to permit the licensee to ultimately collect the cost of service + 10%. After review of the financials during a base year review the rates will not increase if the returns fall within the range of 2% above or below 10% and may decrease if they exceed 12%. During interim years after reviewing financials if profit margin exceeds 12% the rates may decrease.

Section 3.

After July 2018 rates shall be increased annually on July 1st by 80.6% of the Consumer Price Index published by the Bureau of Labor. The following Consumer Price Index categories shall be used: CPI-W U.S. City Average. These adjustments shall be made by resolution.

Section 4.

All contractual arrangements for solid waste services within city limits must be submitted by the hauler to the city for its review of compliance with city code and resolutions. The contracts shall include the number of dwellings and/or businesses served, types and frequency of service, and cost of service. The city's review must be completed within 30 days of receipt.

Section 5.

Haulers will monitor seasonal costs and revenues associated with non-regulated services (yard debris, electronics, antifreeze, biohazard, etc.) for one year to clarify impacts on solid waste rates and provide data for potential future programs. Recycling Surcharge is temporary and to be reviewed again in 1 year or with a hauler submitted request for rate review in accordance with Title 9 Chapter 4 with any changes effective 30 days from the date of review and approval. EMAC will provide direction on reviewing vacancy counts in multiple customer developments and revise with any changes effective July 1, 2019. Contract with Bell & Associates to provide an updated and improved financial reporting template. Costs for revising financial summaries, analysis, reporting and additional meeting related expenses due to late financial reporting and submission error shall be passed through to the haulers. Recycling service frequency shall be weekly with #1 and #2 plastics to be accepted within three months (October 1, 2018).

Passed By the Florence City Council this 21st day of May, 2018

Joe Henry, Mayor

ATTEST:

Kelli Weese, City Recorder

Schedule 1 to FCC Solid Waste Management

City of Florence--Solid Waste Collection Rates

May 21, 2018

(RATES BELOW IN TABLES IA, IB, IC, 2A, & 2B are to increase X%, additionally IA, IB, IC, & 2A are to have a .75 surcharge added, 2B rates are to have a .65 surcharge per yard added.)

I. CONTAINER/CAN BASE RATE—RESIDENTIAL

A. Basic Residential Curbside Service-Voluntary Yard Debris:

The rates in this section include collection charges for garbage and recycling. **Voluntary yard debris collection, when available, is negotiated by the hauler.** These rates are for curbside service only. The customer places the container(s) at the curbside for collection and the customer retrieves the container after collection.

Basic Residential Curbside				
RATE PER MONTH				
Container Size	Monthly ¹	Every Other Week	Weekly	Each Additional Container ⁵
21 Gallon or less ²	11.60	15.30	21.05	21.25
30-32 Gallon ³	12.80	16.70	21.95	22.15
32-35 Gallon ⁴	n/a	19.20	25.70	26.00
48 Gallon	n/a	21.35	28.95	29.35
60-65 Gallon	n/a	22.75	31.50	31.90
90-95 Gallon	n/a	28.60	40.85	41.35
¹ Only available for non-putrescible (non-food) solid waste				
² Rate applies to capacity of 21 gallons or less in a customer provided container				
³ Rate applies to a capacity of 30-32 gallons in a customer provided container				
⁴ Rate applies to a capacity of 32-35 gallons in a hauler provided container				
⁵ Rate applies to every container over basic subscription, except where indicated below. The largest container shall be the primary rate, smaller containers are assessed the additional container rate.				

ADDITIONAL SERVICES

Occasional extra bag..... \$3.10/bag

Occasional extra container..... \$5.40/container

Pack Out Service (up to 30 feet from curbside- haulers may provide a disability discount for service).....\$3.10/month/container

Recyclable yard debris service, when available, is negotiated by the hauler.

B. Inside a Mobile Home Park, Condominium or Apartment Complex (Multi- Residential-Single Bill-Single Stop—Monthly:

The rates in this section include collection charges for solid waste and recycling. These rates apply when the mobile home park, condominium or apartment complex management is billed for solid waste removal within the mobile home park, condominium or apartment complex on a single bill and there is one stop for all cans or carts or for larger complexes for each trash enclosure storage area (up to three). Basic residential collection rates shall apply when residents of such complexes are billed individually. Service of any type more frequently than once a week shall be chargeable at the monthly rate multiplied by the number of times that service is provided during the week. **Any level of service within Schedule 1 not outlined on Table 1B table is available to Multi-Resident-Single Stop customers at 65% of the listed cost, excepting Table 1C.** All users of Tables 1B of Schedule 1 shall use either 100% or 80% occupancy rates for determining rates. First container picked up shall be at full rate on source Table.

Residential Multi-Resident—Single Bill—Single Stop	
RATE PER MONTH	
Container Size	Weekly
32-35 Gallon ¹	17.75
48 Gallon	21.65
60-65 Gallon	24.00
90-95 Gallon	27.45
¹ Rate Applies to a capacity of 32-35 gallons in a hauler provided container	

ADDITIONAL SERVICES:

Occasional extra bag..... \$3.10/bag
 Occasional extra container..... \$5.40/container **Recyclable yard debris service, when available, is negotiated by the hauler.**

**C. Inside a Gated or non-gated Community with Single-Family Dwellings
(Multi-Residential—Single Bill—Multiple Stops)—Monthly;**

The rates in this section include collection charges for solid waste and recycling. These rates apply when the gated or non-gated single-family dwelling community is billed for solid waste removal within the gated or non-gated single-family dwelling community on a single bill and there are multiple curbside stops for cans and/or carts. The customer places the container at the curbside for collection and the customer retrieves the container after collection. Basic residential collection rates shall apply when residents of such complexes are billed individually. Service of any type more frequently than once a week shall be chargeable at the monthly rate multiplied by the number of times that service is provided during the week. There is no monthly collection rate available. Any level of service within Schedule 1 not outlined on Table 1C table is available to Multi-Resident-Multiple Stop customers at 86% of the listed cost, excepting Table 1B. All users of Tables 1C of Schedule 1 shall use either 100% or 80% occupancy rates for determining rates. First container picked up shall be at full rate on source Table.

Residential Multi-Resident—Single Bill—Multiple Stops	
RATE PER MONTH	
Container Size	Weekly
30-32 Gallon ¹	20.45
32-35 Gallon ²	22.35
48 Gallon	23.90
60-65 Gallon	26.35
90-95 Gallon	35.30
¹ Rate applies to a capacity of 30-32 gallons in a customer provided container	
² Rate applies to a capacity of 32-35 gallons in a hauler provided container	

ADDITIONAL SERVICES:

Occasional extra bag..... \$3.10/bag

Occasional extra container..... \$5.40/container **Recyclable yard debris service, when available, is negotiated by the hauler.**

II. COMMERCIAL RATES

A. Roll Cart Rates—Commercial:

The rates in this section include collection charges for garbage and recycling. These rates are for curbside service only. The customer places the cart at the curbside for collection and the customer retrieves the cart after collection. Recyclable yard debris service, when available, is negotiated by the hauler.

Roll Cart Rates—Commercial			
RATE PER MONTH			
Container Size	Weekly¹	Every Other Week	Each Additional Cart²
32-35 Gallon	25.70	19.20	26.00
48 Gallon	28.95	21.35	29.35
60-65 Gallon	31.50	22.75	31.90
90-95 Gallon	40.85	28.60	41.35
¹ Rates are for weekly pick-up. More than weekly pick-ups of an additional container uses "2 X Weekly" rate as indicated.			
² Rates apply to every cart over basic weekly subscription. The largest cart shall be the primary rate, smaller carts are assessed the additional cart rate.			

- B. Container Rates—Commercial Bins & Rear and Front Load Compactor:**
 The rates in this section include collection charges for garbage and recycling.
Compactor rates are 2.5 times the rates below. **Recyclable yard debris service, when available, is negotiated by the hauler.**

Container Rates — Commercial									
RATE PER MONTH									
Bin Size¹ (cu yds.)	Weekly	2 x Week	3 x Week	4 x Week	5x Week	6x Week	EOW	Monthly	Will Call
1	112.85	222.45	333.70	444.85	556.05	667.30	74.70	44.65	43.95
1.5	150.40	299.00	448.55	598.00	747.55	897.05	103.50	61.15	58.30
2	188.50	381.90	572.95	763.90	954.85	1145.80	125.85	77.15	75.30
3	271.15	539.80	809.70	1079.60	1349.50	1619.40	177.80	109.75	106.35
4	355.80	595.65	1051.05	1401.40	1751.70	2102.10	230.75	142.15	137.95
6	486.55	931.70	1444.85	1926.50	2408.10	2889.70	316.80	195.00	189.40
8	522.30	1044.55	1566.80	2089.15	2611.40	3133.65	342.55	210.65	204.55
¹ If equipment is not available at the time service is requested then the combined yardage is used to determine bin size rate: (ex: no 6 yd. available then two 3 yds. = 6 yd. rate)									

C. Roll-Off and Drop Box Rates:

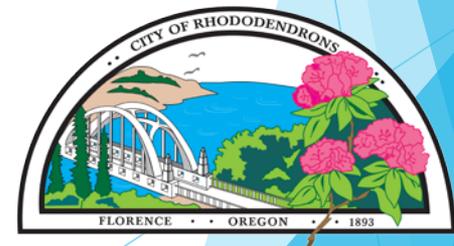
The rates in this section include collection charges for garbage and recycling for both commercial and residential customers. These rates do not include yard debris service. **Recyclable yard debris service, when available, is negotiated by the hauler.**

Roll Off and Drop Box Base Rates	
RATE PER WEEK	
1 Week of Service	
Service Level¹	
9-10 yard	143.00
11-30 yard	143.00
31-40 yard	148.00
Relocation/Delivery	70.00
Disposal Fee²	County's Rate
Box Rental³	
9-20 yards	10.00
21-40 yards	14.00
Mileage to Disposal Site	\$4 per mile on disposal leg of haul if mileage greater than 15 miles from pick-up to disposal site
¹ Covers the delivery day plus 4 days. Does not include the County's disposal fee, relocation fee or additional rental days.	
² Actual fee charged by the disposal facility (transfer station, county/private dump)	
³ Per day after 5 th day, excluding Sunday and Holidays	

System Development Charge Waiver & Deferral

New Housing Construction Incentive Program

Presented at
5.21.18 City
Council Meeting -
Agenda Item #8



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City Goals

City Council goal to promote and support affordable housing in the community.

The City Council has discussed the potential alternatives and options for temporarily amending System Development Charge (SDC) fees at various City meetings

City of Florence
Oregon's Premier Coastal Community

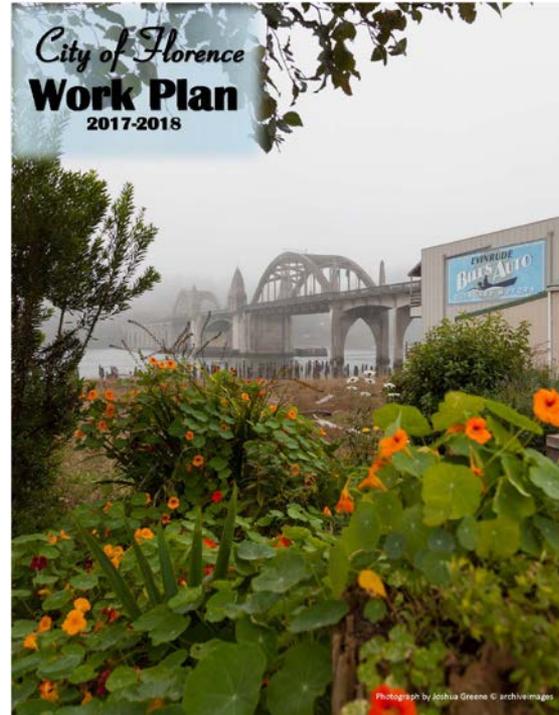
- 1 City Service Delivery**
Sustain and improve the delivery of cost effective and efficient services, including public safety, to the citizens of Florence and our visitors.
- 2 Livability & Quality of Life**
Sustain and improve the City's livability and quality of life for Florence residents and visitors.
- 3 Economic Development**
Create a strategy and actions aimed towards sustaining and expanding the Florence economy.
- 4 Communication & Trust**
Sustain and improve the City's communication program and strengthen citizen trust.
- 5 Financial & Organizational Sustainability**
Sustain and improve the City's financial position, City-wide policies, and the infrastructure networks to support current and future needs.



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City Efforts to Address Housing shortage

- ▶ The City is experiencing a shortage of affordable housing
- ▶ This impacts our businesses by limiting the supply of available workers that are able to call Florence home
- ▶ Lack of affordable housing is holding back our community's economic growth and limiting the potential of our local businesses
- ▶ ADU's are now a legal housing unit
- ▶ City wishes to provide incentives for homebuilders to construct affordable housing in Florence



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1. SDC Waivers: The proposed ordinance includes amendments to current processes for SDCs to allow for partial exemptions for dwelling units based on square footage:

Square Footage Classification	Amount of Partial Exemption
Less than 1,000 sq. ft.	60% exemption
1,000-1,199 sq. ft.	50% exemption
1,200-1,399 sq. ft.	40% exemption
1,400-1,599 sq. ft.	30% exemption
1,600-1,799 sq. ft.	20% exemption
Accessory Dwelling Units	100% exemption



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SDC's Exemption Calculation

- ▶ Current method applies “flat” rate of SDC per unit for one to three single family dwelling units
- ▶ Exemption would apply discount to dwelling unit(s)
- ▶ Four or more units to continue to pay the Multi-Family SDC rates



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Example of SDC's Exemption Calculations

Square Footage Classification	Amount of Partial Exemption	Example of SDC at Exempted Rate at time of Proposal
Less than 1,000 sq. ft.	60% exemption	\$ 4,789
1,000-1,199 sq. ft.	50% exemption	\$ 5,986
1,200-1,399 sq. ft.	40% exemption	\$ 7,183
1,400-1,599 sq. ft.	30% exemption	\$ 8,380
1,600-1,799 sq. ft.	20% exemption	\$ 9,578
Accessory Dwelling Units	100% exemption	\$ -



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2. SDC Collection Deferral:

The proposed ordinance includes amendments to current processes for SDCs to allow for an option for developers to defer the assessment of SDCs until final building occupancy. This option is proposed in order to allow developers more flexibility with their payment timelines.



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Financial Impact

Square Footage Classification	Amount of Partial Exemption	SDC revenue forgone per unit
Less than 1,000 sq. ft.	60% exemption	\$ 7,183
1,000-1,199 sq. ft.	50% exemption	\$ 5,986
1,200-1,399 sq. ft.	40% exemption	\$ 4,789
1,400-1,599 sq. ft.	30% exemption	\$ 3,592
1,600-1,799 sq. ft.	20% exemption	\$ 2,394
Accessory Dwelling Units	100% exemption	\$ 11,972

- ▶ Approximate 35 units per year
- ▶ Desire to double to approximately 70 units per year
- ▶ Currently 3,900 residential utility accounts
- ▶ Recover forgone SDC's (\$335,000)*
 - ▶ \$84/unit
 - ▶ \$4.20/year for 20 years

*Assumes all 70 units built receive 40% discount



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Current SDC Charges

SDC by Utility	Amount
Water	\$ 3,898
Sewer	\$ 4,883
Street	\$ 945
Storm	\$ 2,246
Total	\$ 11,972

Single Family Dwelling - 1.0 dwelling unit equivalent (DUE)



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Ordinance No. 9, Series 2018

- ▶ Exemption of SDC's
 - ▶ to apply to dwelling units for single family (includes duplex and tri-plex) following current methodology
 - ▶ Sliding scale discount less 1,000 sq. ft. up to 1,799 sq. ft. per unit
 - ▶ ADU's = 100% exemption
- ▶ Payment Deferral Option
 - ▶ Until final building occupancy or Sold/Conveyed
 - ▶ Deferred charges will be a lien
- ▶ Sunset clause - one year from effective date 7/1/2019
- ▶ Schedule to review effectiveness of exemption and waiver within 12 months to determine if the incentive is to be continued



QUESTIONS?



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City Council Decision options:

1. Approve Ordinance No. 9, Series 2018 as proposed
2. Amend Ordinance No. 9, Series 2018 and approve as amended
3. Request additional information and postpone decision on Ordinance No. 9, Series 2018
4. Do not approve Ordinance No. 9, Series 2018



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Oregon

Kate Brown, Governor

Department of Consumer and Business Services
Building Codes Division
1535 Edgewater Street NW
P.O. Box 14470
Salem, OR 97309-0404
503-378-4133
Fax: 503-378-2322
bcd.oregon.gov

May 18, 2018

Delivered by Regular Mail and email

Distributed at
5.21.18 City
Council Meeting -
Agenda Item #10

RE: Withdrawal of April 24, 2018 Letter

The division has taken the following actions today:

- Rescinded all of the temporary rules adopted on April 23, 2018 related to program delegation.
- Adopted new rules requiring all municipalities appoint a building official who is employed by a jurisdiction. New temporary rule, enclosed effective immediately.
- Changed your program renewal date to July 1, 2019.
- Requested a formal Attorney General opinion in the matter of third party building inspection programs and minimum standards for state delegated building inspection programs.

Based on these actions, the division formally withdraws its letter to you regarding a potential investigation and rescinds any other related guidance provided to you from April 24, 2018, to date. Based on newly adopted rules, your current program will remain delegated to your municipality through June 30, 2019. Your renewal date has been extended. In order for the program to be renewed next year, your municipality will need to employ or contract with a municipality that directly employs a building official and meet all other legal requirements. You will receive a reminder towards the end of the year to submit a new renewal application by January 1, 2019, for the four year period beginning July 1, 2019.

We will notify you when we receive the formal Attorney General opinion and of any subsequent rules adopted based on the that opinion.

In the mean time, we are providing you a copy of the Department of Justice (DOJ) advice memorandum and our new temporary rules. While we await new advice, there may be program and permit validity risks. We recommend you review those risks, the new rules, and the DOJ advice memorandum, and obtain advice from your counsel.

Andrea Simmons
Enforcement Manager
Building Codes Division
(503) 373-2160



DEPARTMENT OF JUSTICE
GENERAL COUNSEL DIVISION

MEMORANDUM

DATE: February 16, 2018

TO: Mark Long, Administrator
Department of Consumer and Business Services,
Building Codes Division

Heather Miller, Chair
Electrical and Elevator Board

FROM: Katharine M. Lozano, Assistant Attorney General
Business Activities Section

SUBJECT: Private Third Party Building Departments - Unconstitutional
Delegation
File No. 440918-GB0681-15

You have asked a number of questions related to the delegation of full building programs, including full electrical programs, to private parties. Your questions include whether those delegations are consistent with the Oregon Constitution and agency authority, and whether those delegations and certifications run afoul of any Oregon statutes. We conclude that while it is permissible to delegate certain “ministerial” components of the programs to private parties (as long as constitutional and statutory requirements are appropriately addressed) the delegation of full programs – comprising both “ministerial” and “discretionary” functions - is not within agency authority, and would not be consistent with the Oregon Constitution if such authority was provided. We further conclude that delegating full building or electrical programs to private parties, as well as renewing those types of delegated programs, violate a number of Oregon statutes. We provide a summary of our analysis in the Executive Summary below, followed by a detailed explanation of our analysis and conclusions.¹

¹ The cities (and counties, if any) that have delegated their full building or full electrical programs to private parties may also appear to be acting outside of their legal authority, violating several statutes, and creating risk for themselves and the state, but we do not address those issues here except to the extent that we determine them necessary to this analysis of your questions.

EXECUTIVE SUMMARY

Neither the Director of the Department of Consumer and Business Services, nor the Department through its Building Codes Division, has statutory authority to delegate (or renew delegation of) building or electrical programs to municipalities that use private third-parties to carry out the full programs, or that appoint private third-parties as building officials. The Director and the Department do, however, appear to have statutory authority to delegate building and electrical programs to municipalities that contract with private third-parties for plan review and inspection services, as long as other statutory and constitutional requirements are met.

Even if the Director or the Department had statutory authority to delegate building or electrical programs to municipalities that use private third-parties to carry out the full programs, or that appoint private third-parties as building officials, those delegations would be unconstitutional. The state has ultimate responsibility for the delegations made, including if those delegations merely purport to be to a municipality, but are in fact to a private party because of sub-delegation. These delegations are unconstitutional for two primary reasons. They are unconstitutional because they necessarily involve giving discretionary governmental powers to private entities (rather than giving private entities only the government's ministerial powers). They are also unconstitutional because adequate procedural safeguards to provide government accountability do not exist. Additionally, because some of the third-parties providing building services also have private, financial interests in the decisions made by the building departments they serve, the adequacy of procedural safeguards would receive heightened scrutiny, which the programs would not survive.

In addition, these delegations as they currently exist appear to conflict with multiple statutes. The most serious conflicts involve: (1) the requirement that a municipality demonstrate it has the adequate resources to run a building program (including the electrical program component) for at least two years before the state may delegate or renew the programs; and, (2) the requirement that the state oversee and administer these programs, including whether municipality is carrying out its legal duty to verify trade and business licensure during permitting and inspection. The state is, for example, required to rescind a delegation if a municipality is not verifying electrical licensure.

Remedies are, however, available. Although the Director or Department cannot lawfully delegate (or renew the delegation of) building or electrical programs to municipalities that use private third-parties to carry out the full programs, or that appoint private third-parties as building officials, those delegations can be made to municipalities who contract with private third-parties for merely ministerial duties. Additionally, some of the several possibilities for remedying current issues include:

- Strengthen building official certification requirements, to ensure building officials possess the necessary technical qualifications to genuinely carry out discretionary powers for all of the program components in a building department, and to provide government accountability for decisions;
- Electrical and Elevator Board adopts a rule requiring municipalities to employ a person (or share a government employee) who holds an A-Level Electrical Inspector certification, to ensure municipalities are genuinely carrying out their discretionary powers for their electrical programs, and to provide government accountability for those decisions;
- Require municipal contracts with third-parties to include provisions ensuring license checks; and,
- Require municipalities contracting with third-parties to also enter contingency contracts with another government entity, such contingency contracts providing for government employee services if a third-party does not or cannot carry out its ministerial duties for the municipality.

ANALYSIS

I. BACKGROUND

The state building code and programs delegated to municipalities

We provide this background for context and to help the reader understand our analysis of several complex issues.

A. Overview

The Department of Consumer and Business Services and its Director are an administrative body and public official within the Executive branch of Oregon State government.² Under ORS chapter 455, the Department and Director, through its

² ORS 705.105

Building Codes Division (BCD³) have been granted authority to create, promulgate, interpret, administer, and enforce the uniform state building code. The state building code is a combination of all of the state's uniform specialty codes (*e.g.*, structural, mechanical, electrical, plumbing, etc.). BCD has also been given the statutory authority to: determine qualifications; license; regulate; and enforce the licensing laws for building officials, plan reviewers, inspectors, and (with its advisory boards) the trades that operate under the specialty codes (*e.g.*, licensed electricians, plumbers, electrical and plumbing contractors, manufactured dwelling installers, etc.). In turn, ORS 455.148 and ORS 455.150, allow BCD to delegate⁴ the administration and enforcement of a building program to a county or city (collectively referred to as "municipalities"⁵) it deems qualified. The delegations are valid for four years at a time, within the boundaries of that municipality, and must be affirmatively renewed every four years to continue. Administration and enforcement of a building program includes:

- Plan review
- Permitting
- Inspection for compliance with the building code⁶
- Verifying compliance with state licensing requirements
- All other administrative and judicial aspects of enforcement of the code⁷

B. Building Officials

Building officials function as the top of the chain of command in every building program. Under ORS chapter 455, BCD's administrative rules, and the various specialty codes:

- The building official is by law the person who attends to all aspects of code enforcement, including the issuance of all building permits.
- Building officials provide authoritative interpretations of the state building code at the local level; building officials have the authority to waive select

³ They carry out their duties under this chapter through their Building Codes Division. ORS 705.115

⁴ A municipality may assume or renew the administration of a building program and the uniform state building code only with the approval of BCD.

⁵ ORS 455.010(5). "Municipality" includes cities, counties, and other units of local government authorized by statute to administer a building program. Other local government may also include such entities as special utility districts, etc., but they are not relevant to this analysis.

⁶ *See, e.g.*, ORS 455.148, 455.150, 455.156, 455.158

⁷ ORS 455.153(2).

requirements; building officials have discretionary authority to resolve disputes between plan reviewers or inspectors and builders, owners, specialty contractors, and tradespeople;

- Additionally, building officials and -- subject to the building official's ultimate authority -- plan reviewers review construction design plans by engineers, architects, supervising electricians, etc., and approve them or require them to be corrected;
- Likewise, building officials as well as -- again, subject to the building official's ultimate authority -- plan reviewers, and staff issue or deny permits to build according to submitted plans;
- Subject to the authority of the building official, inspectors inspect the work done and approve it or require corrections and re-inspection; and,
- Building officials issue or refuse certificates of occupancy once the structure is completed in conformance with the building code.

C. Electrical program within the building program

Under the larger building code umbrella, BCD and the Electrical and Elevator Board -- another administrative body within Oregon's Executive branch and an advisory board to BCD -- have broad authority over the development of the Oregon electrical specialty code within the state building code. Under ORS chapter 479, they also have authority to approve electrical products, license electricians and electrical contractors, and enforce those licensing laws.

Similar to BCD's authority to delegate full building programs, BCD and the Electrical and Elevator Board are authorized by ORS 479.855 to delegate the administration and enforcement electrical programs to these same cities or counties⁸, if deemed qualified under the Electrical and Elevator Board's various rules. Electrical programs are also valid for four years and must affirmatively be renewed to continue.

- The Electrical and Elevator Board has extremely broad rulemaking authority in this area, including the authority to set qualifications for individuals providing services for delegated electrical programs.⁹
- A local electrical program must provide verify licensure of electricians and electrical contractors.¹⁰

⁸ There is, however, no authority to delegate an electrical program to a special utility district.

⁹ ORS 479.855.

- A city or county must receive and renew an electrical program in order to be allowed to assume a full building program (structural, residential, mechanical, and plumbing included).¹¹
- BCD *must* revoke a city or county's electrical program – which will result in revocation of its full building program -- if the municipality fails to comply with the Electrical and Elevator Board's standards or is otherwise not effectively carrying out its electrical program duties. ORS 479.855.

D. Ultimate authority belongs to the state

Although municipalities may administer building code regulations under the programs delegated to them, BCD retains supervisory authority over the municipalities' administration. ORS 455.100. Ordinarily, if a city is no longer able to run its delegated building program, delegation of that program reverts to the county in which the city is located. If a county is no longer able to run its delegated building program, the program reverts back to the BCD.¹²

If BCD is investigating a municipality, a municipality abandons any part of its program, or fails to comply with one of four specific statutes, BCD can take back administration of that local building program.¹³ BCD can order a municipality to take corrective action with regard to the state building code and the municipality's running of its program. ORS 455.770. Finally, there are multiple statutory provisions demonstrating that the administration and enforcement of the building code and licensing laws are ultimately the responsibility of the state, irrespective of any temporary delegation to a municipality.¹⁴

E. Current municipal program delegations

¹⁰ Unless that city or county has been delegated an electrical program for manufactured dwelling utility connections only.

¹¹ Unless it was a municipality that assumed only a partial building program before 2000, did not assume an electrical program at that time, and has not acquired an electrical program subsequently.

¹² ORS 455.148(5), (6) and 455.150(5), (6).

¹³ ORS 455.148, 455.150

¹⁴ No municipality may "enact or enforce any ordinance, rule or regulation relating to the same matters encompassed by the state building code but which provides different requirements unless authorized by" BCD, ORS 455.040(1); BCD retains the ability to carry out administration and enforcement of the building code and work under the agency's statutes and rules throughout the state, general oversight authority, code interpretation authority, and general, ad hoc dispute resolution authority statewide; and BCD with its advisory boards retain concurrent enforcement jurisdiction in municipalities, ORS 455.153.

We understand that approximately 25 to 26 cities, to which BCD has delegated building programs, have sub-delegated their full building programs, including electrical programs if they have them, to private companies. We also understand that some of these cities indicated that they would do so in the applications, operating plans, or renewal applications submitted to BCD and the Electrical and Elevator Board. We further understand that these cities' sub-delegation includes appointing building officials, plan reviewers, and lead inspectors who are officers, employees, or independent contractors of the private companies. Therefore, particularly because these delegations include private, third-party building official's final decision making at these cities on building code matters.¹⁵ We understand that the contracts between these cities and the private companies running their building departments are based on permit revenue generated by the private companies' work, with permit fees from the builders and homeowners all paid to the city, but generally with 75% of the permit revenue collected passed back to the private company.¹⁶

F. Private financial interests of third-parties

Finally, some of the third-party, private building code inspection businesses also provide commercial engineering services, are owned by individuals who also own private engineering firms, or serve as consultants for engineering firms, architecture firms, contractors, and developers.¹⁷ These third-party businesses have a financial or business interest in promoting or approving plans and work performed by their employees, sister companies, and clients. Conversely, they have a private business or financial interest in delaying or denying their competitors.

II. STATUTORY AUTHORITY

A. Express authority

¹⁵ ORS 455.148(3) and 455.150(3), no government employee carrying out final decision-making verified by Erin Doyle of the League of Oregon Cities at Representative Paul Holvey's December 20, 2017 meeting on third-party inspection businesses.

¹⁶ Also verified by Erin Doyle, at the October 31, 2017 meeting at BCD offices with the League of Oregon Cities and its counsel, Association of Oregon Counties and its counsel, Ms. Jan Nordlund, and Sr. Deputy Legislative Counsel Charles Taylor.

¹⁷ For example, according to its website, the Clair Company – one of the larger third party building program service providers – also has clients who are engineers, architects, contractors and developers. Similarly, on its website, Northwest Code Pros" (a.k.a., The Building Department, LLC, and Northwest Code Professionals, LLC) – another large, third party building program service provider - advertises that it also "serve[s] as a code consultant and plan reviewer for multiple architects and developers."

It is a long-standing legal principle in Oregon that an agency has only those powers that the legislature grants and cannot exercise authority that it does not have.¹⁸ We have frequently addressed questions regarding the ability of state officers and entities to delegate authority conferred to them by statute. For example, we concluded that the Workers' Compensation Board could not delegate to another agency or officer the duty to review orders that are appealed to the board.¹⁹ In nearly all of the situations we have considered, the pertinent statutes have either been silent with regard to delegation or have – as ORS 455.148, 455.150, and 479.855 do -- expressly allowed specific and limited delegation.

ORS 455.148 and 455.150 authorize the delegation of building inspection programs (with deadlines) -- but only for municipalities. They provide parameters for what is included in a local building program – but only for municipalities. Only municipalities are authorized to seek BCD's approval of the assumption of a local building program. The qualifications BCD must set for assumption of a building program are only to be set forth for municipalities. There are similar statutory provisions, restricting delegation and operation of delegated electrical programs specifically to cities and counties. There is no provision in any relevant chapter of the Oregon Revised Statutes authorizing BCD or the Electrical and Elevator Board to delegate full building or full electrical programs to private parties. The general rule for statutory construction in Oregon obliges us "not to insert what has been omitted, or to omit what has been inserted." ORS 174.010. The legislature was specific about who could receive building and electrical programs; private entities were omitted.²⁰

To the extent that BCD knows from the application or application for renewal that a municipality proposes to use, or is using, a private party to run its full building or electrical program a building program, any delegation or renewal of those programs BCD purported to make to the municipality may be vulnerable to challenge as unlawful or sham delegations. In other words, they would be lawful delegations to municipalities in name only; the authority would, in fact, be knowingly delegated to a private party without any basis in law to do so.

B. Implied authority

Although it seems clear that there is no express authority for BCD to delegate full building programs to private entities, our office has also long advised that, even

¹⁸ See *Ore. Newspaper Pub. v. Peterson*, 244 Or 116, 123, 415 P2d 21 (1966).

¹⁹ Letter of Advice dated June 9, 1994, to Rudolph Westerband, Workers' Compensation Board (OP-6511)

²⁰ Similarly, the legislature has inserted no statutory authority for municipalities to delegate the programs they receive to private parties, but that is not the subject of this advice.

without express authority, some delegative authority for state agencies is implied. Specifically, we have advised:

Generally, state officers and agencies may delegate ministerial but not discretionary functions. This office has analyzed delegations to persons outside of the agency in the same way as delegations to persons within the agency. Thus, we said that the State Fair Commission could not delegate to private parties its discretionary powers and duties.²¹

Likewise, we also advised that the Director of the Department of Energy may delegate ministerial functions, such as execution of loan contracts, but not discretionary functions, such as approval of loans or the terms thereof.²²

This same analysis would apply to BCD's delegation of full building programs and full electrical programs. There is no express authority to delegate those programs to private entities, but there appears to be implied authority to delegate the ministerial, non-discretionary elements of those programs to municipalities will use or are using private, third-party building inspections companies to provide purely ministerial services. For example, the role of the building official is clearly and expressly one of discretionary authority. There is, therefore, no implied authority to delegate that function to a private party or, for BCD, to delegate a program to a municipality that intends to use or is using a private party for that role. On the other hand, specialty field inspectors, particularly if provided checklists and inspection parameters to remove discretionary power, and with decisions reviewable by and subject to the authority of government employees, appear to be exercising ministerial authority. There is, therefore, implied authority to delegate the field inspector functions to private parties.

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²¹ Letter of Advice dated October 16, 1984, to Maynard Hammer, Administrator, Housing Division (OP-5745) (referencing 28 Op Atty Gen 208 (1958)) (Emphasis added).. See also 29 Op Atty Gen 253 (1959).

²²Letter of Advice dated May 25, 1984, to Lynn Frank, Director, Department of Energy (OP-5627). In an earlier formal opinion, 39 Op Atty Gen 560, 565 (1979), we concluded that an "acting" Energy Director, who had been appointed by the Governor but who had not received Senate confirmation, could exercise only those non-discretionary "functions which the Director of Energy could and ordinarily would delegate to subordinates in the department such as an Assistant Director, Administrative Assistance, etc., such as those responsibilities which would be exercised during a vacation or other temporary absence of the director." We did not offer a detailed analysis of the statutory bases of the Director's authority to delegate. OP-5627, however, appears to proceed from the premise that the Energy Director lacked *express* statutory authority to delegate discretionary functions, and reasons that the statutory scheme does not provide a reasonable basis for *implying* such authority.

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III. UNCONSTITUTIONAL DELEGATION OF AUTHORITY

A. State responsibility for sub-delegations

Even if BCD or the Electrical and Elevator Board had the *statutory* authority to delegate full building and electrical programs to private entities, such delegation would raise *constitutional* issues. As a rule, the delegation of governmental authority to private entities, it is not consistent with the Oregon Constitution. It is a “fundamental principle that a delegated power cannot be delegated.” *Voth v. Fisher*, 241 Or 590, 595, 407 P2d 848, 850 (1965). Because the building and electrical programs remain under the ultimate authority of the state, and because the state conducts the original delegations and then renews them, the state is responsible for ensuring original delegations are – in fact – made lawfully. Likewise, the state is responsible for ensuring municipalities’ programs are allowed to continue and be renewed only if they are lawful.

There are two lines of appellate cases in Oregon addressing delegation of government authority that are relevant to this inquiry: (1) Discretionary authority versus ministerial authority; and (2) existence of adequate procedural safeguards.²³ We address issues of discretionary authority versus ministerial authority, and the more contemporary line of cases related to adequacy of procedural safeguards below.

B. Discretionary or ministerial authority

Like the analysis of implied delegative authority, one branch of Oregon constitutional analysis also contrasts the delegation of discretionary power with the delegation of ministerial power. Article III, section I, of the Oregon Constitution provides, in relevant part: “The powers of the Government shall be divided into three separate branches, the Legislative, the Executive, including the administrative, and the Judicial.” The power of Executive/administrative branch includes taking care that the laws are faithfully executed, and transacting all necessary government business *with the*

²³ There is also a third line of cases, focusing on the existence of adequately expressed legislative policy. However, because there is no statute allowing BCD or the Electrical and Elevator Board to delegate a full building or full electrical program to private entities, the appellate court cases that examine the expression of legislative policy in government delegation inquiries are not relevant to this analysis.

*officers of government.*²⁴ There is no provision in the Oregon Constitution for the powers of the Government, including those of the Executive/administrative branch, to be divided with private entities. Article V, section 13, specifically requires that government business be conducted with officers of government – not private parties.

However, the Oregon Supreme Court has long recognized the distinction between the impermissible delegation of discretionary authority (constitutionally or statutorily derived), and the permissible delegation of the ministerial authority to carry out those discretionary policies and decisions. The *Van Winkle* court recognized that there is a:

***constitutional principle which denies to the Legislature the authority to delegate the power of making laws and authorizes it to delegate purely administrative functions *** “[t]he true distinction, therefore, is to be made between the delegation of power *** which necessarily involves a discretion ** and conferring an authority *** as to its execution ***. The first cannot be done; to the latter no valid objection can be made.”²⁵

The principle of non-delegation is most often used in the Legislative or Judicial context, but also “is applied *** generally, to administrative officials when exercising discretionary or quasi judicial functions.”²⁶ Our office has also long advised against delegation of discretionary or quasi judicial authority, with respect to the administrative agencies of the Executive Branch:

In general administrative officers and bodies cannot alienate, surrender, or abridge their powers and duties *** Although mere ministerial functions may be delegated, in the absence of permissive constitutional or statutory provision, administrative officers and agencies cannot delegate to a subordinate or another powers and functions which are discretionary or quasi-judicial in character, or which require the exercise of judgment ***.²⁷

We noted that our courts have, in fact, defined the distinction between discretionary and ministerial duties. Ministerial duties are performed “in a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to, or

²⁴Article V, sections 10 and 13.

²⁵ *Van Winkle v. Fred Meyer, Inc.*, 151 Or 455, 465–66, 49 P2d 1140, 1144 (1935) (internal citations omitted).

²⁶ *Voth v. Fisher*, 241 Or 590, 595, 407 P2d 848 (1965).

²⁷ *Id.*

the exercise of, his own judgment upon the propriety of the act being done.” In contrast, discretionary duties, “require the exercise of reason in the adaptation of means to an end, and discretion in determining how or whether the act shall be done or the course pursued.”^{28,29, 30}

It should be noted, that the actual reviewing of plans and conducting of inspections, as well as verifying licensure, using the criteria and under the circumstances prescribed by government decision-makers, and only to the extent that it is done without final decision-making or dispute-resolution authority, appear to be merely ministerial acts which may be delegated to private individuals and entities.

However, if we apply the courts’ definition of discretionary authority to the present inquiry, it is clear that running a building department, particularly carrying out the duties of a building official, necessarily involves discretionary and quasi-judicial duties. The building department exercises discretion deciding the circumstances in which:

- plans are reviewed;
- permits are granted or denied;
- inspections are conducted;
- corrections are required;
- re-inspections are conducted;
- disputes are resolved;
- licensure for work performed is verified;
- unlicensed tradespeople are penalized;
- specialty codes are interpreted;

²⁸ 29 Op Atty Gen 323 (1960) (Insurance Commissioner cannot delegate duty to conduct examinations to third persons, but can employ third persons to monitor the examinations under appropriate employment procedures)

²⁹ Also quoting 73 C.J.S., Public Administrative Bodies and Procedure, § 57, p. 381, and internal citations retained.

³⁰ See also 28 Op Atty Gen 208 (1958) (State Fair Commission could not delegate to private parties its powers and duties to exercise its discretion in determining the personal and physical qualifications of lessees); 29 Op Atty Gen 253 (1959) (Real Estate Board may not delegate duty to conduct and grade examinations for real estate broker's or salesman's licenses); 39 Op Atty Gen 560, 565 (1979) (acting Director of Department of Energy may not exercise substantive discretionary functions of director); 40 Op Atty Gen 111 (1979) (State Land Board and Marine Board may not delegate duties for siting of boat launch and tie-up facilities to the Port of Portland); Letter of Advice dated May 25, 1984, to Lynn Frank, Director, Department of Energy (OP-5627) (Director of Department of Energy may delegate ministerial functions, such as execution of loan contracts, but not discretionary functions, such as approval of loans or terms thereof).

- certificates of occupancy are granted or denied; and
- building officials make determinations.

These are all discretionary matters.³¹

Therefore, if the analysis for delegation of authority to run a full building or full electrical program is based on whether that authority is discretionary or ministerial, then delegating a full building program or electrical program to a private party, particularly including delegation of building official duties, will not survive scrutiny. It is, therefore, contrary to the Oregon Constitution for BCD or the Electrical and Elevator Board to delegate a full building or electrical program to a private party, including as a sham delegation to municipality when the municipality's application demonstrates that a private party will actually assume the discretionary functions. Likewise, if BCD renews a municipality's delegation when it knows the program's discretionary functions have been delegated to a private party, then BCD is not acting in conformity with the state constitution.³²

C. Adequate procedural safeguards

Three of Oregon's constitutional provisions³³ underpin the majority of cases that have developed our courts' non-delegation doctrine. Under these Oregon appellate cases, an unconstitutional delegation of authority can arise when governmental authority is delegated to a non-governmental person or group. The Oregon Court of Appeals in the *Corvallis Lodge* case³⁴ concluded that as a general matter,

³¹ It should be noted, however, that the actual reviewing of plans, conducting of inspections, and verifying licensure, using the criteria and under the circumstances prescribed by government decision-makers, and only to the extent that it is done without final decision-making or dispute-resolution authority, appear to be merely ministerial acts which may be delegated to private individuals and entities.

³³ Article I, section 21, of the Oregon Constitution, which reads, in relevant part: " * * * nor shall any law be passed, the taking effect of which shall be made to depend upon any authority, except as provided in this Constitution * * * ." Article III, section I, of the Oregon Constitution, which provides, in relevant part: " The powers of the Government shall be divided into three separate branches, the Legislative, the Executive, including the administrative." And, Article V, sections 1, 10, and 13, which describe portions of Oregon's gubernatorial authority, including the carrying out of the laws enacted by the legislature.

³⁴ *Corvallis Lodge No. 1411 Loyal Order of the Moose v. Oregon Liquor Control Comm'n*, 67 Or App 15, 677 P2d 76 (1984)

“[a]ccountability of government is the central principle running through the delegation cases.”³⁵ Consistently with that principle, the Oregon Supreme Court recognized that even the Legislative Assembly’s “broad delegation of policymaking [i]s least vulnerable when it is given ‘to an elected * * * government that itself has political accountability for lawmaking as well as administration.’”³⁶

Over time, Oregon appellate courts have developed two tests for government accountability. Earlier cases centered on adequate expression of standards, while more recent cases have focused on procedural safeguards that protect against arbitrariness: “the important consideration is not whether the statute delegating the power expresses *standards*, but whether the procedure established for the exercise of the power furnishes adequate *safeguards* to those who are affected by the administrative action.”³⁷ The procedural safeguards allow persons aggrieved by the actions of the contractor to seek redress from the government entity.

While there are some procedural safeguards for all locally run building programs, and another safeguard for electrical inspection programs, under our courts’ standards the existing safeguards do not appear to adequately protect against the unaccountable exercise of power delegated to private third-parties. The statutory procedural safeguards available include:³⁸ (1) the right to petition a court for a writ of mandamus when a municipality or BCD engages in “a pattern of conduct” of failing to provide timely plan reviews or inspections;³⁹ (2) applicants for building permits may appeal any decision of a building official to BCD and then seek judicial review, and (3) may appeal an individual code interpretation or code application to the appropriate specialty code chief and advisory board, but without judicial review;⁴⁰ and (4) any aggrieved person may appeal a municipality’s decision on an electrical product or electrical inspection to the Chief Electrical Inspector, then the Electrical and Elevator Board, then in certain instances to BCD, and finally may petition for judicial review.⁴¹

³⁵ *Corvallis Lodge*, 67 Or App at 20.

³⁶ *State v. “NMN” Long*, 315 Or 95, 102, 843 P2d 420 (1992) (quoting *Megdal v. Board of Dental Examiners*, 288 Or 293, 298 n 3, 605 P2d 273 (1980)).

³⁷ *Id.* at 441 (citing *Warren v. Marion County et al.*, 222 Or 307, 314, 353 P2d 257 (1960); internal quotation marks omitted; emphasis in original).

³⁸ Aside from more sweeping measures that are not targeted to resolve individual disputes, such as revoking a municipality’s building or electrical program.

³⁹ ORS 455.160.

⁴⁰ ORS 455.475.

⁴¹ ORS 479.853.

However, aggrieved parties have almost no right to government review at the municipality level. Decisions of building officials may be reviewed by municipal appeals boards under ORS 455.070 and ORS 455.695. However:

- There is no statutory requirement for a municipality to have an appeals board;
- There is no statutory provision specifically authorizing, describing, etc., municipal appeals boards. The only authority for or description of them is found in select Oregon Specialty Codes (e.g., the Oregon Specialty Plumbing Code, the Oregon Specialty Mechanical Code);
- The matters under the jurisdiction of a municipal appeals board according to these specific specialty codes are limited to:
 - Failure to take action on a public life, health, safety complaint;
 - Whether a particular code provision from that specialty code was misinterpreted or did not apply; or

Allowing an alternative material or method provided for in the applicable state code or, potentially, seeking a request from the appeals board to BCD to authorize alternate materials or construction methods. Further, private parties' rights to obtain government review, even at the state level are not ensured, nor do they even exist for all aggrieved parties. For example, third-party contractors are not specifically obligated under the law to notify a municipality at the time a plan or permit application is submitted, and those same third parties can simply refuse or decline to provide a city with inspection program documentation of, or supporting, their decisions, including for work completed as well as work in progress, as has occurred in the city of Creswell.⁴² There is no possibility of government review at all if the private contractors' decisions or reasoning are provided verbally. There is no law or mechanism ensuring that third-parties notify persons aggrieved by their decisions of the possibility of government review when it does exist, and those third-parties do not typically provide that notice or offer no due process at all.⁴³

The only right for inspection decision review by the government under the law, when the building official does not make the decision, is in electrical

⁴² See January 2018 correspondence between the City of Creswell and third party Northwest Code Professionals. *Attachment A*.

⁴³ As Erin Doyle conceded in Representative Holvey's December 20, 2017 meeting, there is no ultimate city review of decisions that are made by third-party inspection companies running full building programs, and disputes with licensed tradespeople and contractors are settled informally in the field or at ad hoc private meetings, without due process.

program. There is no such right to government review, for example, for journeyman plumbers aggrieved by an inspection decision. Similarly, the right to appeal a decision by the building official only exists for permit applicants; when an engineer, architect, licensed plumber, licensed electrician, etc. is not the actual permit applicant, a private building official's decision cannot be reviewed. This paradigm is particularly troubling when the third-party providing the building official has financial interests contrary to those of an aggrieved person or entity who is not the permit applicant.

The Oregon Court of Appeals in *City of Damascus v. Brown*⁴⁴ applied the test of sufficient procedural safeguards to proposed legislation (legislation delegating government authority to private citizens⁴⁵), not to administrative action. However, the *Damascus* court's analysis may indicate how our courts are likely to assess the validity of an administrative delegation of government authority as well.

The court in *Damascus* determined that 2014 legislation (allowing homeowners to determine whether their properties fell within a particular political boundary) failed to provide sufficient procedural safeguards to protect against arbitrary action. In that case, the arbitrary action the court foresaw was that of homeowners acting in their own interest.⁴⁶ Nothing in the law ensured that homeowners would follow the legal criteria when withdrawing their property.⁴⁷ The court noted the importance of having adequate safeguards where a delegation is made to interested individuals:

Even if governmental authority can in theory be delegated to interested, private individuals, that type of delegation further heightens the need for adequate safeguards to protect against arbitrary action, *viz.*, action contrary to the legislative scheme.⁴⁸

Similarly, in the case of delegating full building or electrical programs to private third-parties with business and financial interests in the field they are regulating, adequate procedural safeguards are especially important and will be given close scrutiny. The *Damascus* court set forth three tests for procedural adequacy: (1) whether the initial

⁴⁴ *City of Damascus v. Brown*, 266 Or App 416, 337 P3d 1019 (2014).

⁴⁵ *Damascus*, 266 Or App at 443.

⁴⁶ *Id.* at 451.

⁴⁷ *Id.*

⁴⁸ *Id.* at 450. Other Oregon cases have found a delegation to private persons with a stake in the decision particularly problematic. For example, in *Corvallis Lodge v. OLCC*, 67 Or App 15, 677 P2d 76 (1984), the Court held that an OLCC rule where one class of licensees were permitted to sell liquor to the public only if another class of licensees in the area were unwilling to host the event was an unlawful delegation of government power.

decision -- including whether facts exist to meet standards or qualifications -- is solely within the province of the private entity, particularly if the decision's effect is automatic; (2) whether all aggrieved parties may obtain government review of the private party's decision; and (3) whether the government may, on review, engage in fact finding. The court determined that sufficient government accountability did not exist in the *Damascus* case because: the initial decision, including fact finding, was solely in the province of the private entity and was effective immediately; only some aggrieved parties could obtain government review: and the government (Oregon Court of Appeals) was limited to the record on review.⁴⁹

When the three *Damascus* tests are applied to the present inquiry, the results are largely the same. If a private, third-party is delegated a full building or full electrical program, all of the initial decisions and final decisions belong solely to the third-party. These decisions include all fact finding. Moreover, these decisions, particularly the plan rejections and permit denials, are automatic. As soon as the plans and applications are rejected or denied, that element of the project comes to an immediate halt. Next, as noted above, aggrieved parties have no ability to obtain government review at the local level, and only some of the aggrieved parties can obtain government review at the state level. Last, BCD and its advisory boards have the ability to conduct fact finding upon review, but the Oregon Court of Appeals generally does not.⁵⁰ Under the *Damascus* tests, the delegation of full building or electrical programs to municipalities that use private parties to run those programs would not survive scrutiny.

If, the Oregon appellate courts did *not* elect to apply the same analysis to administrative delegation that they have to legislative delegation, our office has previously advised on administrative delegation and formulated a test. Our office concluded that administrative "accountability in government," which the *Corvallis Lodge* court held was the central principle running through delegation cases, "means that the government entity must retain the authority necessary to exert control over the private entity's execution of delegated governmental functions[,]" and that the delegating government entity must provide safeguards to be invoked by persons affected by the private entity's actions." 49 Op Atty Gen 254, 261-262 (2000). Specifically, we found that the government entity would have to demonstrate (1) it retains final decision-making authority over the contractor's actions, at least by retaining the right to

⁴⁹ *Id.* at 447-448 (practical effect of law gave interested landowners sole ability, including fact-finding function, to determine whether their properties qualified for withdrawal, procedural safeguards were not meaningful because only members of "the public" who testified at the public hearing could seek judicial review, and court was not permitted to take on a fact-finding role and was limited to only the record).

⁵⁰ See ORS chapter 183.

review the actions of the contractor, and (2) if the government entity concurs in the contractor's decisions, that it independently considered those decisions rather than “rubberstamping” them. 49 Op Atty Gen at 263-64.

When a private third-party has been delegated a full building or full electrical program, the municipality it covers does not retain final decision-making authority over the contractor’s actions because that municipality has no government employee appointed as building official, and only the building official has the right of review decisions of inspectors and plan reviewers at the local level. Similarly, if the municipality were to concur in the contractor’s decisions, it would necessarily be reduced to rubberstamping them – municipalities have delegated full building and electrical programs to third parties precisely because those municipalities do not have employees who are qualified to make program decisions.⁵¹ Under the tests provided by our office, the delegation of full building or electrical programs to municipalities that use private parties to run those programs would not survive scrutiny.

D. Heightened Scrutiny

Some of the third-party entities or owners have private, financial interests in the decision made by local building departments. Although, “[a] person shall not inspect or review any project or installation in which the person, employer of the person or relative of the person has any financial interest or business affiliation,” third-party building inspection companies may and do contract with outside plan reviewers and inspectors⁵², as long as those outside plan reviewers and inspectors hold inspection plan business licenses themselves or are employed by an entity that does. Those contracted plan reviewers and inspectors are not employees of the third party business entity. Therefore, as long as those same plan reviewers and inspectors do not *personally* have one of the prohibited conflicts of interest, they may conduct plan reviews and inspections, as well as grant and deny building permits, on behalf of the third-party, even when those decisions financially benefit the third-party’s clients, sister-companies, and colleagues, or are to the detriment of the third-party’s competitors.

⁵¹ Likewise, even if a municipality has a building official who is a municipal employee, if that building official or other municipal employees do not possess the technical expertise to provide meaningful review of the third-party’s decisions, any concurrence with those decisions would be mere “rubberstamping” by the municipality. If you would like additional advice on requirements for building official certification, or requirements for some combination of municipal employee certifications, that would provide adequate government accountability, please do not hesitate to contact us.

⁵² Verified, e.g., by Jack Applegate of Northwest Code Professionals at Representative Holvey’s December 20, 2017 meeting on third party building departments.

This private financial interest does not, in and of itself, create any new legal or constitutional concerns. Nor does it, by itself prevent BCD from delegating building programs to third-parties. What it does do, however, is ensure that the model of delegating full building or full electrical programs to third-parties will receive heightened scrutiny. The *Damascus* court noted the importance of having adequate safeguards where a delegation is made to interested individuals:

Even if governmental authority can in theory be delegated to interested, private individuals, that type of delegation further heightens the need for adequate safeguards to protect against arbitrary action, *viz.*, action contrary to the legislative scheme.⁵³

As there do not appear to be adequate procedural safeguards for full building programs or full electrical programs delegated to private parties, those same safeguards are even less likely to survive the scrutiny that would be applied when the private parties have private, financial interests in the programs' determinations.

IV. OTHER STATUTORY ISSUES

We found numerous statutes inconsistent or potentially inconsistent with delegating a full building or full electrical program to a private third-party. However, we address only two of the most serious conflicts here. If you would like an analysis of every patent or potential statutory conflict, we will be happy to provide one.

A. BCD's delegation qualifications

Under ORS 455.148(11)(c)(B), in order for BCD to lawfully delegate a building program to a city or renew a delegation,⁵⁴ the city must demonstrate that it is able to provide services for at least two years of that cycle. Currently, it would be extremely difficult for a city delegating its full program to a private third-party to meet this qualification. The city has no control over whether third-party will actually provide the promised services for those two years. A third-party may declare bankruptcy and dissolve. A third-party may breach its contract with the city for any number of reasons

⁵³ *Id.* at 450. Other Oregon cases have found a delegation to private persons with a stake in the decision particularly problematic. For example, in *Corvallis Lodge v. OLCC*, 67 Or App 15, 677 P2d 76 (1984), the Court held that an OLCC rule where one class of licensees were permitted to sell liquor to the public only if another class of licensees in the area were unwilling to host the event was an unlawful delegation of government power.

⁵⁴ This requirement applies to municipalities allowed to assume building programs on January 1, 2002 or later.

and discontinue providing services.⁵⁵ A third-party and a city may simply disagree about the correct interpretation of their contract and leave the city without services it presumed would be provided.⁵⁶ By extension, it therefore appears to be unlawful for BCD to delegate or renew such a program under those circumstances.

To remedy this issue, one possibility would be for BCD to require municipalities using third-party inspectors or plan reviewers for their core workload to enter contingency contracts, in order to be allowed to assume or renew a program. The contingency contracts would be entered with: one or more municipalities that do use government employee inspectors and plan reviewers; or, with BCD. Such contracts could include terms providing, in the case of a third-party ceasing to provide contracted services (or failing to provide services the municipality incorrectly presumed were included in its contract), for the municipality's contingency contract partner to provide the services no longer (or never) provided by the third-party.

B. Enforcement of licensing laws

ORS 455.153(2) provides, in pertinent part, "[a]dministration of any specialty code or building requirement includes establishing a program intended to verify compliance with state licensing requirements * * * *." Similarly, ORS 479.855(5) requires, "[a] city or county that performs electrical installation inspections shall perform license enforcement inspections as a part of routine installation inspections." However, cities' contracts with private third-party building programs do not generally include provisions for the third-party to conduct license checks during inspections or enforce licensing laws. Typically, cities submit 75% of all permit fees collected to the private third-party in exchange for building and installation inspections, permit issuance, and reports and answers to questions on permits.⁵⁷ The contracts leave all building department duties to the third-parties, but do not require the third-parties to check, or verify that they have checked, the licenses of the tradespeople and businesses on the job sites.⁵⁸

If BCD delegates a full building program or a full electrical program to a city that is, in turn, delegating that full program to a private party, BCD generally does so by ignoring ORS 455.153(2) and ORS 479.855(5). To remedy this issue, one possibility is for

⁵⁵ In which case, the city may be able to obtain a financial remedy for the breach by, for example, discontinuing payment to the third-party. However, that remedy does not force the third-party to actually provide the city's building department services.

⁵⁶ See, e.g., Attachments A and B from the City of Creswell's program.

⁵⁷ See, e.g., January 11, 2018 letter from City of Creswell, Attachment B.

⁵⁸ See, e.g., Attachments A and B.

BCD to require municipalities using third-party inspectors to demonstrate, via the municipality's contract with the third-party, that the third-party's inspectors will conduct and document regular license checks for the municipality.

VI. RECOMMENDATIONS

Considering the number and seriousness of vulnerabilities presented by delegating and renewing full building and electrical programs to municipalities that sub-delegate their full programs or building official duties to private entities, as well as by promulgating electrical program rules that allow for such delegation and renewal, we recommend that BCD discontinue authorizing such delegations, and discontinue renewing programs run in entirety by private third parties. We also recommend the Electrical and Elevator Board promulgate rules that ensure government review and accountability in delegated electrical programs.

Further, we recommend that BCD and the Electrical and Elevator Board take additional steps to ensure that discretionary and quasi-judicial powers are delegated to government employees, rather than to private parties, even if the full program or building official are not being delegated to third-parties. To accomplish this task, one possibility is for BCD to substantially strengthen the required technical qualifications for building official certification, to ensure that municipalities whose only building department employee is their building official still have the necessary expertise to exercise their own discretionary powers. Another possibility would be for the Electrical and Elevator Board adopt a rule requiring a municipality to employ, or for a group of municipalities to share an employee who is, an individual certified as an A-level electrical inspector. Such a rule is within the Board's authority, would help ensure that the municipality's discretionary electrical program powers are carried out by the government, and would give BCD more flexibility to refrain from requiring building officials to also hold A-level electrical inspector certification, even if BCD strengthens the requirements for building official certification. Finally, with respect to municipalities using only private inspectors and plan reviewers, we recommend that BCD require proof of license verification services, and also that BCD require those municipalities to demonstrate they have a building services "safety net," in case the private company does not provide services the municipality anticipated. One possibility for a safety net is a contingency contract with a government entity that uses employees to provide building services.

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Thank you for the opportunity to work with you. If you have any additional questions or concerns, or would like more in-depth analysis on any of the issues addressed in this memorandum, please do not hesitate to contact us.

918-020-0090

Program Standards

Every municipality that administers and enforces an approved building inspection program must establish and maintain the minimum standards, policies, and procedures set forth in this section.

(1) Administrative Standards. A building inspection program must:

(a) Provide adequate funds, equipment, and other resources necessary to administer and enforce the building inspection program in conformance with an approved operating plan;

(b) Document in writing the authority and responsibilities of the building official, plan reviewers, and inspectors based on an ordinance or resolution that authorizes the building official on behalf of the municipality to administer and enforce a building inspection program;

(c) Establish a local process to review appeals of technical and scientific determinations made by the building official regarding any provision of the specialty codes the municipality administers and enforces, to include a method to identify the local building official or designee and notify the aggrieved persons of the provisions of ORS 455.475;

(d) Account for all revenues collected and expenditures made relating to administration and enforcement of the building inspection program, and account for the electrical program revenues and expenditures separately when administered by the municipality.

(A) Prepare income and expense projections for each code program it will administer and enforce during the reporting period; and

(B) Describe how general administrative overhead costs and losses or surpluses, if any, will be allocated.

(e) Establish policies and procedures for the retention and retrieval of records relating to the administration and enforcement of the specialty codes it administers and enforces;

(f) Make its operating plan available to the public;

(g) Establish a process to receive public inquiries, comments, and complaints;

(h) Adopt a process to receive and respond to customers' questions regarding permitting, plan review, and inspections;

(i) Set reasonable time periods between 7 a.m. and 6 p.m. on days its permit office is open, weekends and holidays excluded, when it will receive and respond to customers' questions;

(j) Post its jurisdictional boundary, types of permits sold and hours of operation at each permit office it operates;

(k) Identify all persons in addition to the building official to whom notices issued pursuant to these rules should be sent;

(l) Return a completed data request form to and as provided by the division annually; and

(m) Execute a memorandum of agreement with and as approved by the division for initial building inspection program approval and assumption, for building program expansion approval and assumption, and thereafter when seeking approval to renew a program under OAR 918-020-0105.

(n) Directly employ the individual appointed as the building official pursuant to ORS 455.148(3) or 455.150(3) as follows:

(A) The individual employed pursuant to this section must be certified by the division as a building official under OAR chapter 918, division 98; and

(B) For the purposes of this section, to be directly employed the person must be subject to the provisions of ORS 316.162 to 316.221 and have completed a withholding exemptions certificate required by ORS 316.162 to 316.221.

(o) Notwithstanding section (1)(n) of this rule, two or more municipalities may combine in the appointment of a single building official for the purposes of administering a building inspection program within their communities.

(2) Permitting Standards. A building inspection program must:

(a) Provide at least one office within its jurisdictional boundary where permits may be purchased;

(b) Set reasonable time periods between 7 a.m. and 6 p.m. on days its permit office is open, weekends and holidays excluded, when it will make permits available for purchase;

(c) Establish policies and procedures for receiving permit applications, determining whether permit applications are complete and notifying applicants what information, if any, is required to complete an application;

(d) Set reasonable time periods within which the municipality will:

(A) Advise permit applicants whether an application is complete or requires additional information; and

(B) Generally issue a permit after an application has been submitted and approved.

(e) Establish policies and procedure for issuing permits not requiring plan review, emergency permits, temporary permits, master permits, and minor labels;

(f) Provide a means to receive permit applications via facsimile; and

(g) Require proof of licensing, registration, and certification of any person who proposes to engage in any activity regulated by ORS chapters 446, 447, 455, 479, 693, and 701 prior to issuing any permit.

(3) Plan Review Standards. A building inspection program must:

(a) Establish policies and procedures for its plan review process to:

(A) Assure compliance with the specialty codes it is responsible for administering and enforcing, including any current interpretive rulings adopted pursuant to ORS 455.060 or 455.475;

(B) Make available checklists or other materials at each permitting office it operates that reasonably appraises persons of the information required to constitute a complete permit application or set of plans;

(C) Inform applicants within three working days of receiving an application, whether or not the application is complete and if it is for a simple residential plan. For the purposes of this rule and ORS 455.467, a "complete application" is defined by the division, taking into consideration the regional procedures in OAR chapter 918, division 50. If deemed a simple residential plan, the jurisdiction must also inform the applicant of the time period in which the plan review will generally be completed;

(D) Establish a process that includes phased permitting and deferred submittals for plan review of commercial projects for all assumed specialty codes, taking into consideration the regional procedures in OAR chapter 918, division 50. The process may not allow a project to proceed beyond the level of approval authorized by the building official. The process must:

(i) Require the building official to issue permits in accordance with the state building code as defined in ORS 455.010 provided that adequate information and detailed statements have been submitted and approved with pertinent requirements of the appropriate code. Permits may include, but not be limited to: excavation, shoring, grading and site utilities, construction of foundations, structural frame, shell, or any other part of a building or structure.

(ii) Allow deferred submittals to be permitted within each phase with the approval of the building official; and

(iii) Require the applicant to be notified of the estimated timelines for phased plan reviews and that the applicant is proceeding without assurance that a permit for the entire structure will be granted when a phased permit is issued.

(E) Verify that all plans have been stamped by a registered design professional and licensed plan reviewer where required;

(F) Verify for those architects and engineers requesting the use of alternative one and two family dwelling plan review program that all plans have been stamped by a registered professional who is also a residential plans examiner. This process must require the building official to:

(i) Establish policies and procedures in their operating plan for this process;

(ii) Waive building inspection program plan review requirements for conventional light frame construction for detached one and two family dwellings; and

(iii) Establish an appropriate fee for processing plans submitted under this rule.

(G) Establish a process for plan review if non-certified individuals review permit applications under OAR 918-098-1010.

(b) Employ or contract with a person licensed, registered, or certified to provide consultation and advice on plan reviews as deemed necessary by the building official based on the complexity and scope of its customers' needs;

(c) Maintain a list of all persons it employs or contracts with to provide plan review services including licenses, registrations, and certifications held by each plan reviewer and evidence of compliance with all applicable statutory or professional continuing education requirements;

(d) Designate at least three licensed plan reviewers from whom the municipality will accept plan reviews when the time periods in subsection (e) of this section cannot be met; and

(e) Allow an applicant to use a plan reviewer licensed under OAR 918-090-0210 and approved by the building official when the time period for review of "simple one- or two-family dwelling plans" exceeds 10 days where the population served is less than 300,000, or 15 days where the population served is 300,000 or greater.

(4) For the purposes of these rules, "simple one- or two-family dwelling plans" must:

(a) Comply with the requirements for prescriptive construction under the Oregon Residential Specialty Code; or

(b) Comply with the Oregon Manufactured Dwelling Installation Specialty Code and the requirements in OAR chapter 918, division 500; and

(c) Be a structure of three stories or less with an enclosed total floor space of 4,500 square feet or less, inclusive of multiple stories and garage(s).

(5) "Simple one- or two-family dwelling plans" may:

(a) Include pre-engineered systems listed and approved by nationally accredited agencies in accordance with the appropriate specialty code, or by state interpretive rulings approved by the appropriate specialty board, that require no additional analysis; and

(b) Be designed by an architect or engineer and be considered a simple one- and two-family dwelling if all other criteria in this rule are met.

(6) The following are considered "simple one- or two-family dwelling plans":

(a) Master plans approved by the division or municipality or under ORS 455.685, which require no additional analysis; and

(b) Plans that include an engineering soil report if the report allows prescriptive building construction and requires no special systems or additional analysis.

(7) A plan that does not meet the definition of "simple" in this rule is deemed "complex". In order to provide timely customer service, a building official may accept a plan review performed by a licensed plan reviewer for a complex one- or two-family dwelling.

(8) Inspection Standards. A building inspection program must:

(a) Set reasonable time periods between 7 a.m. and 6 p.m. on days its permit office is open, weekends and holidays excluded, when it will provide inspection services or alternative inspection schedules agreed to by the municipality and permittee;

(b) Unless otherwise specified by statute or specialty code, establish reasonable time periods when inspection services will be provided following requests for inspections;

(c) Establish policies and procedures for inspection services;

(d) Leave a written copy of the inspection report on site;

(e) Make available any inspection checklists;

(f) Maintain a list of all persons it employs or contracts with to provide inspection services including licenses, registrations, and certifications held by persons performing inspection services and evidence of compliance with all applicable statutory or professional continuing education requirements;

(g) Vest the building official with authority to issue stop work orders for failure to comply with the specialty codes the municipality is responsible for administering and enforcing; and

(h) Require inspectors to perform license enforcement inspections as part of routine installation inspections.

(i) Where a municipality investigates and enforces violations under ORS 455.156 or in accordance with the municipality's local compliance program, the municipality's inspectors must require proof of compliance with the licensing, permitting, registration, and certification requirements of persons engaged in any activity regulated by ORS Chapters 446, 447, 455, 479, 693, and 701. Inspectors must report any violation of a licensing, permitting, registration, or certification requirement to the appropriate enforcement agency.

(9) Compliance Programs. A municipality administering a building inspection program may enact local regulations to create its own enforcement program with local procedures and penalties; utilize the division's compliance program by submitting compliance reports to the division; elect to act as an agent of a division board pursuant to ORS 455.156; or develop a program that may include, but not be limited to, a combination thereof. A building inspection program must establish in its operating plan:

(a) Procedures to respond to public complaints regarding work performed without a license or permit or in violation of the specialty codes the municipality is responsible for administering and enforcing;

(b) Procedures requiring proof of licensure for work being performed under the state building code utilizing the approved citation process and procedures in OAR 918-020-0091.

(c) Policies and procedures to implement their compliance program;

(d) Policies and procedures regarding investigation of complaints, where the municipality chooses to investigate and enforce violations pursuant to ORS 455.156; and

(e) Policies and procedures regarding issuance of notices of proposed assessments of civil penalties, where the municipality chooses to act as an agent of a board pursuant to ORS 455.156. Penalties under such a program are subject to the limitations set in 455.156 and 455.895.

(10) Electrical Programs. Municipalities that administer and enforce an electrical program must demonstrate compliance with all applicable electrical rules adopted pursuant to ORS 479.855.

[Publications: Publications referenced are available from the agency.]

Stat. Auth.: ORS 183.355, 455.030, 455.062, 455.148, 455.150, 455.156, 455.467 & 455.469

Stats. Implemented: ORS 455.062, 455.148, 455.150, 455.156, 455.467 & 455.469

Hist.: BCD 9-1996, f. 7-1-96, cert. ef. 10-1-96; BCD 14-1998, f. 9-30-98, cert. ef. 10-1-98; BCD 11-2000, f. 6-23-00, cert. ef. 7-1-00; BCD 10-2002(Temp), f. 5-14-02, cert. ef. 5-15-02 thru 11-10-02; BCD 16-2002, f. & cert. ef. 7-1-02; BCD 27-2002, f. & cert. ef. 10-1-02; BCD 6-2004, f. 5-21-04, cert. ef. 7-1-04; BCD 11-2004, f. 8-13-04, cert. ef. 10-1-04; BCD 16-2005(Temp), f. & cert. ef. 7-7-05 thru 12-31-05; BCD 24-2005, f. 9-30-05, cert. ef. 10-1-05; BCD 31-2005, f. 12-30-05, cert. ef. 1-1-06; BCD 1-2010, f. 3-1-10, cert. ef. 4-1-10; BCD 7-2013(Temp), f. 7-26-13, cert. ef. 8-1-13 thru 12-31-13; BCD 9-2013, f. 12-16-13, cert. ef. 1-1-14; BCD 13-2014(Temp), f. & cert. ef. 11-14-14 thru 5-12-15; BCD 4-2015(Temp), f. & cert. ef. 5-12-15 thru 11-1-15; BCD 9-2015(Temp), f. 10-30-15, cert. ef. 11-1-15 thru 1-1-16; BCD 11-2015, f. 12-11-15, cert. ef. 1-1-16; BCD 8-2018(Temp), f. & cert. ef. 4-23-18 thru 10-19-18

918-020-0095

Program Assumption Procedures

(1) Assumption of building inspection programs shall be approved only under ORS Chapters 455 and 479 and these rules, for municipalities meeting the following minimum standards. Municipalities requesting to assume new programs or additional parts of a program must provide a full-service program as described in ORS Chapter 455. The municipality shall prepare an assumption plan demonstrating its ability to:

(a) Administer the program for at least four years;

(b) Maintain or improve upon service levels presently provided to the area, including identifying proposed staffing, service contracts and intergovernmental agreements for at least the first two years;

(c) Operate a program that is financially feasible for at least two years without unduly increasing short-term and long-term costs of services to the public, in the areas administered by the municipality. Information showing how the program will be financially feasible shall include an estimate of anticipated revenues and expenditures, the assumptions on which the estimates are based, and an explanation of how losses, if any, will be funded; and

(d) Transition the program from the previous service provider including developing a method for:

(A) Transferring responsibility for existing buildings, open plan reviews, permits and inspections and corresponding revenues for completion of outstanding work;

(B) Transferring any pending enforcement actions;

(C) Informing contractors and others of the change of inspecting jurisdictions, jurisdictional boundaries and requirements for plan review, permits and inspections; and

(D) Transferring any affected employees consistent with ORS 236.605.

(e) Directly employ the individual appointed as the building official pursuant to ORS 455.148(3) or 455.150(3) as follows:

(A) The individual employed pursuant to this section must be certified by the division as a building official under OAR chapter 918, division 98; and

(B) For the purposes of this section, to be directly employed the person must be subject

to the provisions of ORS 316.162 to 316.221 and have completed a withholding exemptions certificate required by ORS 316.162 to 316.221.

(f) Notwithstanding section (1)(e) of this rule, two or more municipalities may combine in the appointment of a single building official for the purposes of administering a building inspection program within their communities.

(2) A municipality requesting to administer and enforce a new full-service building inspection program under ORS 455.148, or part of a building inspection program to become full-service under ORS 455.148 and 455.150 shall, by October 1:

(a) Submit a completed division program request form describing the specialty codes the municipality intends to administer effective July 1 of the following year, and provide the following:

(A) An assumption plan as required in ORS 455.148 and Section (1) of this rule;

(B) An operating plan as described in OAR 918-020-0090;

(C) A schedule, including the date, time, place and subject matter, of any proposed meetings of public or advisory bodies, where public comments will be received concerning their proposal to assume a full-service program or part of a program;

(D) Evidence of compliance with the notice and consultation requirements of this section; and

(E) When a municipality reapplies to assume administration of a program that was previously revoked, the application shall include an explanation of how past deficiencies were corrected and how they will be prevented in the future, and it shall meet the requirements of ORS 455.148 and 455.150 including timelines and full-service coverage.

(b) Consult with the jurisdiction from whom the program will be assumed, to:

(A) Notify them of the intent to assume the program;

(B) Discuss with them any impacts on their existing program;

(C) Attempt to resolve any negative impacts; and

(D) Attempt to reach agreement on the method of providing services in the area.

(3) Upon receipt of an application for program assumption from a municipality, the division shall, by October 15, notify in writing all persons on the division maintained interested party mailing list.

(4) Objections to proposed program assumptions, including or related to, claims of economic impairment by the division or the municipality potentially losing the program, shall be received within 30 days of notice and shall include:

(a) An explanation of the objection to the proposed program assumption;

(b) Identification of the required program standard that is believed not to be met; and

(c) When related to economic impairment, the information provided shall include projected impact on the existing building inspection program revenues, expenses, and staffing levels and the ability to continue carrying out remaining portions of the affected program.

(5) When reviewing the objections, the division shall consider the criteria established in ORS 455.152 and whether the objections relate to the ability of the municipality to effectively carry out the program and meet the required standards of applicable statutes and rules.

(6) The municipality requesting administration of a program shall confirm its intent to proceed with its application and submit final information to the division by January 1.

(7) By April 1 the division shall approve or deny the request. A request may be denied when the municipality failed to meet any of the standards and timelines for assumption set forth in ORS Chapters 455 and 479 and the rules adopted thereunder, or when a claim of economic impairment is not resolved to the satisfaction of the director.

(8) Municipalities approved to assume programs may do so effective July 1.

(9) By September 1, the municipality shall submit a final approved copy of all applicable ordinances and fee schedules.

Stat. Auth.: ORS 455.148, 455.150, 455.152 & 479.855

Stats. Implemented: ORS 455.148, 455.150, 455.152 & 479.855

Hist.: BCD 16-2002, f. & cert. ef. 7-1-02; BCD 12-2016(Temp), f. & cert. ef. 9-29-16 thru 3-27-17; Administrative correction, 6-5-17; BCD 8-2018(Temp), f. & cert. ef. 4-23-18 thru 10-19-18

918-020-0105

Renewal of Existing Programs

(1) Existing programs may continue to administer full-service or partial programs as permitted by ORS Chapter 455. Any municipality requesting to assume an additional program shall do so in accordance with ORS Chapter 455 and these rules.

(2) Depending on the respective reporting period outlined in OAR 918-020-0180 municipalities administering existing programs upon notification shall submit the following to the division by January 1:

(a) A completed division form describing the specialty codes the municipality will continue to administer and enforce beginning July 1 of the next reporting period;

(b) A list of current staff, including contract providers, and their applicable certifications;

(c) An updated copy of the municipality's operating plan as described in OAR 918-020-0090; and

(d) A narrative describing any changes to the plan.

(3) Requests to extend the January 1 date as authorized in ORS 455.148(4) and 455.150(4) shall be filed with the division no later than December 21.

(4) Notwithstanding OAR 918-020-0180, all building programs shall apply for renewal of their building program for a new reporting period beginning July 1, 2019.

(a) Municipalities that submitted applications for a reporting period that would have begun July 1, 2018 will have their reporting period extended and shall apply for renewal for the reporting period beginning July 1, 2019;

(b) All municipalities shall follow the schedule under this rule to apply for renewal of their building program by January 1, 2019, for renewal effective July 1, 2019.

(c) Renewal applications submitted pursuant to this section shall identify how the municipality complies with OAR 918-020-0090(1)(n) and OAR 918-020-0095(1)(e).

Stat. Auth.: ORS 455.148 & 455.150

Stats. Implemented: ORS 455.148 & 455.150

Hist.: BCD 16-2002, f. & cert. ef. 7-1-02; BCD 8-2018(Temp), f. & cert. ef. 4-23-18 thru 10-19-18