



GUIDEBOOK

LEAGUE OF OREGON CITIES

**Legal Guide to Oregon's
Statutory Preemptions of
Home Rule**

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Table of Contents

	Page
Overview.....	1
Disclaimer.....	1
Introduction.....	2
Federal Preemption	2
Express versus Implied Preemption.....	3
Finance and Taxation.....	3
General Governance and City Services	4
Land Use and Development.....	5
Personnel.....	5
Regulatory Authority	5
Conclusion	6
Appendix A: Chart of Statutory Preemptions.....	7

Overview

This Guide to Oregon’s Statutory Preemption of Home Rule (“guidebook”) is designed to provide city leaders with general information regarding specific examples of how and when municipalities are preempted from taking certain actions or regulating particular conduct. This guidebook will provide cities with examples of statutory preemptions in the following areas:

- Finance and Taxation;
- General Governance and City Services;
- Land Use Development;
- Personnel; and
- Regulatory Authority.

Disclaimer

This guidebook is not intended as a substitute for legal advice. Many of the preemptions highlighted herein are complicated and nuanced; if a city believes an action it wishes to take may be preempted by state law, a conversation with a trusted legal advisor should be had.

Introduction

Under the Oregon Constitution, cities are free to adopt home rule charters. Cities operating under home rule charters possess substantial lawmaking authority independent of the state. However, Oregon cities do not have carte blanche lawmaking authority. As the Oregon Supreme Court articulated, “[T]he validity of local action depends, first, on whether it is authorized by the local charter or by a statute[, and] second, on whether it contravenes state or federal law.”¹ Assuming that a local action is authorized by a city’s charter, the courts will then ask whether the local action is “incompatible” with state law, either because the Legislature intended to preempt local lawmaking authority (i.e., “express preemption”) or because state and local law cannot operate concurrently (i.e., “implied preemption”).²

Federal Preemption

This guidebook provides an overview of state law preemption of municipal home rule. A detailed analysis of federal preemption is beyond the scope of this guidebook.

In brief, under the Supremacy Clause of the United States Constitution, federal constitutional guarantees and statutory rights preempt contrary state and local laws.³ For example, a city cannot operate a racially-segregated municipal transit system or require segregated seating at public restaurants, because doing so violates the Fourteenth Amendment of the U.S. Constitution.⁴ League members seeking additional information on federal law preemption are strongly encouraged to contact their city attorney.

WHAT IS HOME RULE?

Generally speaking, home rule is the right to local self-government. “Home rule cities” are free: to regulate for the protection of the public health, safety, welfare; to license; to tax; and to incur debt without legislative authorization.

To the contrary, “preemption is the use of state law to nullify a municipal ordinance or authority.”¹ If state law preempts local action, the local action is invalid.

For a more detailed discussion on municipal home rule, please see LOC’s online white paper entitled: *The Origins, Evolution and Future of Municipal Home Rule in Oregon* (June 2017), available at <http://www.orcities.org/Portals/17/Library/HomeRuleWhitePaper6-15-17.pdf>.

¹ National League of Cities, *City Rights in an Era of Preemption: A State-by-State Analysis*, (2017), p. 4, available at <http://www.nlc.org/sites/default/files/2017-03/NLC-SML%20Preemption%20Report%202017-pages.pdf>

¹ *La Grande/Astoria v. PERB*, 281 Or 137, 142, adh’d to on recons, 284 Or 173 (1978).

² *La Grande/Astoria*, 281 Or at 148.

³ See US Const, Art VI, cl 3; see also *Altria Group, Inc. v Good*, 555 US 70, 76 (2008) (explaining that state laws that conflict with federal laws are “without effect”).

⁴ See *Gayle v. Browder*, 352 US 903 (1956) (operating a segregated municipal bus system is unconstitutional); *Turner v. City of Memphis*, 369 US 350 (1962) (striking down local law that required segregation in public restaurants).

Express Versus Implied Preemption

A NOTE ABOUT CRIMINAL LAWS

Courts take the view that Article XI, section 2 of the Oregon Constitution imposes stricter limits on city lawmaking power in the criminal context. Courts presume that local legislation that imposes criminal penalties is preempted. Ambiguities are resolved in favor of preemption.

To overcome that preemption, a city must show that the local law does not criminalize conduct that state law allows, or permit conduct that state law prohibits.

In Oregon, express preemption occurs when the Legislature enacts a law that specifically prohibits or limits local policy choices on the same subject. Examples of express preemptions include denying cities the authority to tax tobacco products, tax alcohol, regulate pesticides and regulate the use of cell phones in motor vehicles.

Implied preemption occurs when the Legislature has not expressly preempted local policy authority, yet there exists a conflict between state and local law. Essentially, implied preemption occurs when the ability to comply with both the state and local law in that specific field is impossible. Examples of implied preemptions include the preemption of local laws inconsistent with the Adult and Medical Use of Cannabis Act⁵ and the Oregon Public Meetings Law.⁶

The following summary will provide an overview of Oregon home rule preemption and highlight various areas of preempted city authority.⁷ For convenience, the summary has been divided into four policy areas: (1) finance and taxation; (2) general governance and city services; (3) personnel; and (4) regulatory authority.

Finance and Taxation

Finance and taxation limitations hinder the ability of cities to raise revenue and spend money. These limitations typically prevent taxation all together or imposed maximum tax rates. Within the state of Oregon, cities are preempted from taxing:

- Insurance providers;
- Animal racing;
- Real property transfers;
- Cigarettes;
- Alcoholic beverages;
- Lottery tickets or lottery game retailers;
- Real estate broker business licenses; and

⁵ ORS 475B.020.

⁶ ORS 192.610-192.690.

⁷ A more extensive chart of statutory preemptions is included as Appendix A.

- Federal old age and survivors insurance and Railroad Retirement Act benefits.

In addition to preemption, the Legislature has enacted cap and/or time limitations on the municipal authority to tax:

- Property taxes;⁸
- Sale of marijuana items;⁹
- Local fuel taxes;
- System development charges;
- Lodging taxes;¹⁰ and
- Telecommunications carrier privilege tax;¹¹

Cities must comply to the following financial laws:

- Local budget law;¹²
- Municipal audit law;¹³ and
- Urban renewal law.

General Governance and City Services

Cities are free to choose their form of government. However, cities are subject to statewide sewer and sanitation laws and municipal utility laws. City officials remain subject to the public contracting code,¹⁴ statewide election laws,¹⁵ state ethics laws, and state public records

Mandates differ from preemptions and limitations in that they require some specified local government action, while preemptions prevent local government action, and limitations determine the extent or manner in which a local government may act on an otherwise discretionary manner. Some state mandates are necessary, because they deal with matters of statewide concern that require uniformity of treatment – for example, public health and safety.

Under Article XI, section 15 of the Oregon Constitution, local governments may not need to comply with “unfunded mandates” - those that require the expenditure of money for a new program or increases the level of service for an existing program until the state appropriates reimbursements for costs incurred. For more information on unfunded mandates, please see LOC’s guide on unfunded mandates: *Understanding Oregon’s Unfunded Mandate Law* (2016), available at <http://www.orcities.org/Portals/17/Library/Unfunded%20Mandate%20Memo%20FINAL.pdf>.

⁸ Further information on property taxes is available in LOC’s report on property tax measures 5 and 50: *Measures 5 & 50: A Primer* (2011) available at <http://www.orcities.org/Portals/17/Library/Measures%205%20and%2050%20A%20Primer%20for%20web%202-14-11cc.pdf>.

⁹ Further information on marijuana is available in LOC’s guidebook on local marijuana regulation: *Local Government Regulation of Marijuana in Oregon* (4th ed December 2016), available at <http://www.orcities.org/Portals/17/Library/2016LocalRegulationofMarijuanaInOregon12-09-16.pdf>.

¹⁰ Further information on lodging taxes is available in LOC’s guidebook on local transient lodging taxes: *Legal Guide to Collecting Transient Lodging Tax in Oregon* (April 2017), available at <http://www.orcities.org/Portals/17/Library/Model%20TLT%20Guide%20FINAL%204-13-17.pdf>.

¹¹ Further information on telecommunications and a sample telecommunications ordinance are available in LOC’s Telecommunications Tool Kit (2010), available at <http://www.orcities.org/Portals/17/Premium/20101018100014414.pdf>.

¹² Further information on local budget law is available in the Oregon Department of Revenue’s Local Budgeting Manual (2012), available at http://www.oregon.gov/DOR/forms/FormsPubs/local-budgeting-manual_504-420.pdf.

¹³ An overview of municipal audit law is provided in the September 2014 Local Focus Article: *The Municipal Audit – What the Law Says*, available at <http://www.orcities.org/Portals/17/A-Z/MunicipalAuditSept2014LF.pdf>.

¹⁴ A model policy for public contracting and purchasing is available in LOC’s *Model Policy for Public Contracting & Purchasing* (May 2017), available at <http://www.orcities.org/Portals/17/Library/ModelPurchasingRules5-26-17.pdf>

¹⁵ For further information see LOC’s *FAQ about Restrictions on Political Campaigning by Public Employees* (June 2017), available at <http://www.orcities.org/Portals/17/Library/FAQonPoliticalCampaigningFINAL6-2-17.pdf>

and meetings laws.¹⁶ Additionally, cities are subject to certain notice and hearing requirements when selling city-owned real property and are prohibited from becoming a stockholder of or otherwise assisting a joint company, corporation or association.

Land Use and Development

Oregon maintains a statewide land use planning program which includes a set of statewide planning goals. Cities, along with other local governments, special districts and state agencies are required to comply with these planning goals. Cities are limited in their ability to prohibit certain kinds of housing and may not establish housing sale prices or designate classes of purchasers. For example, cities may not prohibit government assisted housing or place additional approval standards on government assisted housing not otherwise placed on similar unassisted housing.¹⁷ Additionally, cities must approve applications for housing developments located within an urban growth boundary if the development complies with clear and objective standards.¹⁸ Cities are prohibited from establishing housing sale or rental prices for new multifamily structures or requiring affordable housing designations.

Personnel

The state has provided minimal preemption in regards to personnel policies. The Legislature has preempted the adoption of local minimum wage and sick leave requirements. In addition, limitations on city authority include compliance with collective bargaining and labor and employment laws. Cities with populations greater than 100,000 which choose to establish their own retirement plans must still provide PERS or equivalent retirement benefits for police and firefighters. Cities are required to provide accommodations for nursing mothers and are required to apply veterans' preferences during the hiring process.

Regulatory Authority

Local regulatory authority remains the largest area of home rule preemption. The following regulatory functions have been preempted by state legislation:

- Regulation of unmanned aircrafts;
- Regulation of private security services and personnel;
- Regulation of tobacco vending machines;
- Building codes;
- Exemptions of shooting ranges from certain local nuisance and trespass claims;
- Regulation of pesticides; and

¹⁶ Further information on public records and meetings law is available in the *Attorney General's Public Records and Meetings Manual (2014)*, available at <https://www.doj.state.or.us/oregon-department-of-justice/public-records/attorney-generals-public-records-and-meetings-manual-2014/>.

¹⁷ ORS197.312(1).

¹⁸ ORS 227.175, as amended by 2017 HB 2007.

- Regulation of vehicle code offenses.

In addition to complete preemption, limitations and mandates exists regarding the following:

- Firearms;¹⁹
- Abandoned shopping carts;
- Placement and height of radio antennas;
- Telecommunications;²⁰
- Utilities;
- Sewage treatment and disposal systems;
- Solid waste management;
- Building inspection programs;
- Air and water quality;
- Marijuana;²¹
- Alcohol;
- Fireworks;
- Liquid gas receptacles;
- Standards for clustered mailboxes;
- Business licenses for minors; and
- Photo red light cameras.

Conclusion

Though cities are free to pursue their own policy objectives without state approval, preemptive legislation will continue to affect Oregon cities. The League continues to advocate on behalf of all Oregon cities to preserve city autonomy and prevent the unnecessary preemption of local authority.

¹⁹ Further information on the regulation of firearms is available in LOC's guidebook on firearms: *A Guide to Local Government Regulation of Firearms in Oregon* (May 2017), available at <http://www.orcities.org/Portals/17/Library/FirearmRegulationattheLocalLevel5-18-17.pdf>.

²⁰ Further information on telecommunications and a sample telecommunications ordinance are available in LOC's Telecommunications Tool Kit (2010), available at <http://www.orcities.org/Portals/17/Premium/20101018100014414.pdf>.

²¹ Further information on marijuana is available in LOC's guidebook on local marijuana regulation: *Local Government Regulation of Marijuana in Oregon* (4th ed December 2016), available at <http://www.orcities.org/Portals/17/Library/2016LocalRegulationofMarijuanAinOregon12-09-16.pdf>.

Appendix A – Oregon Statutory Preemptions

Preemptions and Limitations on City Home Rule Authority

(Note: This is not a comprehensive list. Exemptions may apply. Where there is a question regarding cities’ authority to act, the League encourages its members to seek the legal opinion of their own city attorney.)

Reference	Preemption of Home Rule	Limitation on Home Rule
<i>Finance and Taxation</i>		
Oregon Const. Art IX, § 9	Taxation of certain federal benefits prohibited	
Oregon Const. Art XI, § 11		Property tax limitations
ORS 221.410		Limitations on city floating indebtedness
ORS 221.515		Maximum rate of privilege tax charged to telecommunications carriers
ORS 223.295		Limitations on city indebtedness
ORS 223.297 to 223.314		Cities must comply with uniform framework for the imposition of system development charges and revenues must be expended on capital improvements
ORS 287A.365 to 287A.380	Cities are subject to statewide laws on the issuance of advance refunding bonds.	
ORS 294.305 to 294.565		Cities must comply with the statewide local budget law
ORS 297.405 to 297.555		Cities are subject to the statewide municipal audit law
ORS Chapters 306 to 312		Property tax laws
ORS 306.815	Cities may not impose a tax or fee on transfer of real property	
ORS 319.950		Cities may not impose a new or increased local fuel tax unless referred to and approved by voters
ORS 320.170 & 2016 Or Laws ch. 59, §4	Cities may not impose a construction excise tax	
ORS 320.305		Percentage of transient lodging tax revenue must be used for tourism-related purposes.
ORS 323.030	The state has the exclusive right to tax tobacco products	
ORS Chapter 457		Urban renewal laws
ORS 461.560	Cities may not impose a tax on the sale of lottery tickets	

Reference	Preemption of Home Rule	Limitation on Home Rule
	or impose an excise tax on lottery game retailers	
<i>Finance and Taxation continued</i>		
ORS 462.100	Preemption of taxation on race meets	
ORS 471.045 and 473.190	The state has the exclusive right to tax alcoholic beverages.	
ORS 475B.345		Local taxes are limited to 3% of the production, processing or sale of recreational marijuana by a retail licensee.
ORS 673.715	Local governments may not regulate refund anticipation loans	
ORS 696.365	Cities may not impose or collect a business license tax from licensed real estate brokers	
ORS 731.840 & 731.841	Preemption of the fields of regulation and imposition of taxes, licenses and fees upon insurers and their insurance producers.	
ORS 801.040	Cities prohibited from enacting or enforcing any rule or regulation in conflict with provisions of the vehicle code relating to abandoned vehicles, vehicle equipment, vehicle size, weight and load, the operation of vehicles and use of roads by persons, animals and vehicles. Cities may not impose requirements and conditions governing towing inconsistent with the vehicle code.	
<i>General Governance and City Services</i>		
Oregon Const. Art. XI, §9		Cities may not become stockholder in; raise money for; or loan its credit to, or in aid of any joint company, corporation or association.
ORS 186.110		Requirement to display the Oregon State and POW/MIA flags with the United States flag upon which or near which it is

Reference	Preemption of Home Rule	Limitation on Home Rule
		customary and suitable to display the United States flag upon or near a public building.
<i>General Governance and City Services continued</i>		
ORS Chapter 192		Application of public records and meetings laws
ORS 221.725		Required procedures when selling city-owned property
ORS Chapter 224		City sewers and sanitation
ORS Chapter 225		Municipal utilities
ORS 244.010		Public officials must comply with the Oregon Ethics Code
ORS Chapters 246 to 260		Application of Oregon election law
ORS Chapters 279A-C		Application of the public contracting code
ORS 346.510 to 346.570		Cities must grant persons who are blind priority to establish and operate vending facilities in public buildings.
ORS 682.062		Coordination of ambulance services by county
<i>Land Use and Development</i>		
ORS 197.250		Compliance with statewide land use and development goals required.
ORS 197.309		Ordinances may not establish housing sale or rental price for new multifamily structures or require designation as affordable housing
ORS 197.312(1)		Cities may not prohibit certain kinds of housing
ORS 197.312(5)		Cities with population 2,500 or greater must allow at least one accessory dwelling unit for each detached single-family home in areas zoned in single-family.
ORS 221.032		A city may not commence annexation proceedings for any part of an area that is pending incorporation
Or Laws 2016, chapter 51, §2 ²²	Cities must vote to annex property into the city when certain conditions are met.	

²² The constitutionality of this provision is currently under appeal in the Oregon Court of Appeals. See *Corvallis v. State of Oregon*, Case No. A164595.

Reference	Preemption of Home Rule	Limitation on Home Rule
	Preempts contrary charter and code provisions.	
ORS 222.750		“Island” annexation restrictions
ORS Chapter 227		City planning and zoning
<i>Land Use and Development continued</i>		
ORS 227.175		Cities must approve applications for housing developments located within the UGB if the development complied with clear and objective standards.
2017 Or laws ch. 745, §1		Cities with population 5,000 or greater must review and make decisions on qualifying affordable housing permit applications within 100 days within UGB.
ORS 329A.440		Cities may not enact or enforce zoning ordinances prohibiting registered or certified family childcare homes located in a residential dwelling in an area zoned for residential or commercial use.
ORS 456.265		Local government authority to sanction property owner withdrawing from a federal housing program
<i>Personnel</i>		
ORS 237.620		Mandatory PERS retirement coverage for police and firefighters
ORS 243.650 to 243.782		Application of statewide collective bargaining provisions
ORS 279C.110		Application of qualified based selection procedures for selecting architectural and engineering consultants
ORS 279C.860		Public works contract specification on prevailing wage rate comparisons
ORS 408.225 to 408.237		Public employers must grant certain preferences in the hiring and promotion of veterans.
ORS Chapters 651 to 663		Application of statewide labor and employment laws
ORS 653.017	Preemption of local minimum wage requirements	

Reference	Preemption of Home Rule	Limitation on Home Rule
ORS 653.077		Requires employers to provide accommodations for the expression of breastmilk
ORS 653.661	Preemption of sick leave requirements	
ORS 659A.320		Restricts use of credit score reports for hiring purposes
<i>Personnel continued</i>		
ORS 731.036		Self-insurance requirements for public bodies
<i>Regulatory Authority</i>		
ORS 98.520		Requirements for city abandoned shopping cart regulation
ORS 166.170		Limitations on local firearms regulation
ORS 167.404	State preemption of vending machines that dispense tobacco or electronic cigarette systems regulation	
ORS 181A.895	Preemption of the regulation and licensing of private security services and personnel	
ORS 221.295		Ordinances regulating placement or height of radio antennas
ORS 221.420		Municipal regulation of utilities
ORS 221.510		Municipal regulation of telecommunications
ORS 227.455	Requirement for cities to adopt standards and specifications for clustered mailboxes that conform to the State of Oregon Structural Specialty Code	
ORS 430.402	Preemption of the adoption and enforcement of local laws concerning various liquor uses and consumption	
ORS Chapter 454		Sewage treatment and disposal system regulations
ORS 455.040	State building code preempts local ordinances	
ORS 455.148		Requirements for cities who assume the administration and enforcement of a building inspection program

Reference	Preemption of Home Rule	Limitation on Home Rule
ORS 455.500		Reach code impacts for city building inspection programs
ORS Chapter 459		Solid waste management regulations
ORS 467.136	Preemption of local ordinances that makes a shooting range a nuisance or trespass	
ORS Chapter 468A		Air quality regulations
<i>Regulatory Authority continued</i>		
ORS Chapter 468B		Water quality regulations
ORS 471.045	Preemption of local ordinances inconsistent with state liquor law	
ORS 475B.020	Preemption of local laws inconsistent with the Adult and Medical Use of Cannabis Act.	
ORS 475B.325 to 475B.345		City regulation of recreational marijuana use
ORS 475B.800		Requirements for local government prohibition of marijuana establishments
ORS 480.160		Local regulation and enforcement of fireworks
ORS 480.445		Local regulation of liquid gas receptacles
ORS 634.057	Preemption of pesticide regulation	
ORS 646A.555		Limits local governments from requiring business licenses for minors except where required for the purposes of protecting the environment or the public health, safety or welfare
ORS 714.310	Preemption of local regulation of customer safety at ATMs or night deposit facilities	
ORS 758.025		Requires public bodies to coordinate with utilities when planning highway projects
ORS 801.038	Preemption of vehicle cell phone use regulation	
ORS 801.040		Local government authority under the Oregon Vehicle Code
ORS 810.040		Designation of truck routes

Reference	Preemption of Home Rule	Limitation on Home Rule
ORS 810.434		Requires public information campaign and report from cities operating photo red light cameras
ORS 825.615	Preemption of authority to regulate the idling of primary engines in commercial vehicles	
ORS 836.600 to 836.630		Local regulation of airports
ORS 837.385	Preemption of unmanned aircraft ownership and operation regulation	