

August 26, 1998

No. 8260

This opinion is issued in response to a question from Elizabeth Harchenko, Director, Department of Revenue, concerning the effect of the possible annexation of Wheeler County to Gilliam County on the use of "host fees" received by Gilliam County from a regional solid waste landfill and a hazardous waste disposal site located in Gilliam County. Gilliam County uses the host fees to fund a number of economic development programs.

QUESTION PRESENTED

If Wheeler County is dissolved and some or all of its territory is added to Gilliam County, could Gilliam County lawfully provide the economic development programs funded by "host fees" only to citizens and businesses located in Gilliam County's original area, and not to citizens or businesses located in areas that were formerly part of Wheeler County?

ANSWER GIVEN

Based on the facts provided to us, there is no apparent justification for treating the two classes of citizens and businesses differently solely on the basis of location. Therefore, the proposed action probably would be unconstitutional.

DISCUSSION

I. Background⁽¹⁾

In 1987, Gilliam County (the County) issued a conditional land use permit authorizing Waste Management of Oregon, Inc. (Waste Management) to operate a solid waste sanitary landfill on a tract of land located in the northeast corner of the County, approximately ten miles south of Arlington.⁽²⁾ At that time, the property was privately owned, and Waste Management had an option to purchase it. The landfill was designed to be a regional landfill that receives more than 75,000 tons of solid waste each year from outside the County.

In connection with the permit application, the parties agreed that Waste Management would pay a "host fee" to the County based on the number of tons of solid waste deposited in the landfill. The host fee was to be paid into an Economic Mitigation Fund, which was to be used "only for functions and activities that will enhance the county's economic development opportunities, thereby mitigating the negative economic impacts of having a regional landfill located in the county."

Chem-Security Systems, Inc. (Chem-Security) operates a hazardous waste disposal site on property adjacent to the landfill site.⁽³⁾ On February 3, 1988, the Gilliam County Court adopted an ordinance indicating that Chem-Security had agreed to pay an annual host fee of \$50,000. The ordinance provided that this host fee, pursuant to a prior agreement between the County, Chem-Security and Waste Management, would be used primarily for maintaining a county road that connected Chem-Security's property to a state highway. Any fees not used for that purpose were to be used "for any purposes that will enhance Gilliam County's economic development opportunities, as determined by the Gilliam County Court."

The 1988 ordinance also established an Economic Enhancement Fund (the Fund) which was the successor to the Economic Mitigation Fund referred to above. The host fees paid by Chem-Security and Waste Management were to be deposited in the Fund each year on January 15.

In 1991, the County and Chem-Security entered into an agreement under which Chem-Security agreed to pay an additional host fee based on the number of tons of waste deposited at the hazardous waste disposal site. This fee is also deposited in the Fund.

By ordinance, the Fund assets currently are allocated among several different programs. Gilliam County Court Ordinance No. 96-01. Each year, 25 percent of the Fund assets are transferred to the County's general fund. Most of the remaining funds are allocated to the following eight economic development programs:

1. General economic development. Specific percentages of Fund assets are allocated to the cities of Arlington, Condon and Lonerock, and to the County's unincorporated area, to be used for economic development purposes.
2. A Homestead Tax Rebate Program under which the County assessor pays an annual cash tax rebate to qualified

homeowners. For each year, the rebate is based on a percentage of the property taxes assessed during that year. The Homestead Rebate Program was established in 1993 to address recent population declines in the County. The County Court specifically found that the decrease in the number of residents and homeowners threatened the County's economic climate and prospects for economic development and that residence and home ownership in the County lent stability and therefore should be encouraged. Gilliam County Court Ordinance No. 93-4.

3. A Revolving Loan Fund which provides supplemental loans to businesses located in the County. The interest rate is the prime rate when the loan is made. This program was established because the County found that conventional lenders often would not approve the full amount requested in businesses' loan applications.
4. A Special Projects Grant Fund which provides grants that can be used as match money for other funding sources. These grants are available only to qualifying entities located in or near the cities of Arlington and Condon.
5. A Development Staff Fund to provide technically sophisticated, experienced County staff to carry out projects and development activities that volunteers do not have time or experience to do.
6. A Law Enforcement Fund which was established in response to recent legislation shifting responsibility for community corrections programs, juvenile capital offense incarceration and certain adult incarceration from the state to the counties. This fund may be used to pay increased transport costs to a regional jail, unexpected regional jail costs that are not covered by the state, and capital crime unbudgeted expenses.
7. A County Capital Projects/Maintenance and Improvement Fund which pays for maintenance and improvement of County property such as the County Courthouse.
8. A County Bridge Fund for the repair and maintenance of the County's 16 bridges.

II. Legality of Restricting Programs to Gilliam County's Original Area

We are asked to consider the possibility that some or all of Wheeler County might be added to the County at some point in the future. In that event, we are asked whether the County could amend its ordinances to provide that the economic development programs listed above would benefit only those citizens and businesses located in the County's original territory and would not benefit any citizens or businesses located in portions of Wheeler County that are later added to the County.

The programs in question are funded solely through host fees paid by Waste Management and Chem-Security for operating the landfill and hazardous waste disposal site in the County. In a letter dated May 8, 1997, Gilliam County Judge Laura M. Pryor explained the rationale for using those fees for the sole benefit of the citizens and businesses of the County's current territory:

[The programs] are all part of a program for the residents of Gilliam County to offset the disadvantages of accepting the millions of tons of trash exported to the County by Portland Metro and the City of Seattle.

The citizens of Gilliam County accepted the waste flow with conditions * * * . The down side of accepting the waste was the onerous designation of being the "Waste County" and the reputation, right or wrong, that went with it.

Thus, the apparent rationale for the proposed limitation is that the citizens and businesses of the County were disadvantaged by having the landfill and hazardous waste disposal site located in the County. The host fees were intended to offset those disadvantages. The implication is that citizens and businesses in neighboring counties, such as Wheeler County, do not share those disadvantages and therefore should not benefit from the host fees.

A. County Authority

Because state legislative power is plenary subject only to limitations imposed by the Oregon Constitution, preemptive federal statutes and regulations or the United States Constitution, our review of the legality of state legislative action is confined to determining whether it violates a limitation found in one of those authorities. *See, e.g., Latourette v. Clackamas Co. et al*, 131 Or 168, 170, 281 P 182 (1929) (legislative power of the state, except as restricted and limited by the constitution, is vested in the legislature). Our review of the legality of local government legislation is more complicated, however, because local government power is not plenary subject only to limitations. A local government's authority to enact a particular ordinance must first be granted by statute or by Article VI, section 10, of the Oregon

Constitution and in the charter, if extant, of the particular unit of local government. *See* 48 Op Atty Gen (No. 8239, April 3, 1996) (slip op at 3). Only if we first conclude that the legislative action of the local government is authorized, do we consider whether it violates a limitation found in the Oregon Constitution or in federal law, including the United States Constitution. *See Brummell v. Clark*, 31 Or App 405, 411, 570 P2d 671, *rev den* (1977) ("county ordinance may not conflict with its county authorizing charter"); 38 Op Atty Gen 2045, 2046 (1978) (legislative power delegated to counties is subject to limitations of the state and federal constitutions).

We turn first to the issue of the County's authority to enact the ordinance in question. We understand that the County has not adopted a charter pursuant to Article VI, section 10, of the Oregon Constitution. Consequently, the County's power to adopt ordinances is governed by statute. *See* 48 Op Atty Gen (No. 8239) (slip op at 3) (non-home rule counties' authority to adopt ordinances derived from ORS 203.035); 36 Op Atty Gen 1070, 1072 (1974) (governing bodies of all counties without "home rule" charters have the powers delegated by, inter alia, ORS 203.035). ORS 203.035 provides in part:

(1) Subject to subsection (3) of this section [relating to ordinances that change the number or mode of selection of elective county officers], the governing body or the electors of a county may by ordinance exercise authority within the county over matters of county concern, to the fullest extent allowed by Constitutions and laws of the United States and of this state, as fully as if each particular power comprised in that general authority were specifically listed in ORS 203.030 to 203.075.

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

This statute gives the County authority to adopt ordinances relating to "matters of county concern," subject only to state or federal statutory and constitutional limitations. The use of host fees paid to the County is unquestionably a "matter of county concern" and therefore is a permissible subject for a County ordinance.

B. Statutory and Constitutional Limitations on County Authority

The remaining question is whether the proposed ordinance would violate any state or federal statute or constitutional provision. In answering this question, we first consider whether any statutory restrictions apply. *Tharalson v. Dept. of Revenue*, 281 Or 9, 13, 573 P2d 298 (1978). Second, we consider whether the proposed ordinance contravenes any provision of the Oregon Constitution. Finally, we consider whether the proposed ordinance violates the United States Constitution. *See, e.g., Sterling v. Cupp*, 290 Or 611, 614, 625 P2d 123 (1981), *Cooper v. OSAA*, 52 Or App 425, 432, 629 P2d 386 (1981), *rev den* 291 Or 504, 634 P2d 1347 (1981) (citing *State v. Spada*, 286 Or 305, 594 P2d 815 (1979)). *See also* Linde, "First Things First, Rediscovering the State's Bill of Rights," 9 Bal L Rev 379 (1980).

1. Statutory Restrictions on Use of Host Fees.

The narrow question asked of us is whether the County is prohibited from using the host fees to benefit only those residents and businesses located in the County's original area, or whether the County must also use the fees to benefit those residents and businesses located in territory that may be added. There are no state or federal statutes requiring a political subdivision such as the County to use landfill or hazardous waste disposal site fees to benefit its entire territory.⁽⁴⁾ Therefore, we conclude that the County's proposal would not violate any applicable statutory restriction.

2. Oregon Constitutional Restrictions on Use of Host Fees

The exclusion of some County residents and businesses from County-funded economic development programs raises issues of discriminatory treatment under Article I, section 20, of the Oregon Constitution and of non-uniformity of taxation under Article I, section 32, of the Oregon Constitution. We discuss each of these constitutional provisions below.

a. Article I, Section 20 -- Equal Privileges and Immunities

Article I, section 20, of the Oregon Constitution provides:

No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens.

A violation of this constitutional provision requires there to be (a) a privilege or immunity, (b) which is denied to an

individual or class of citizens, (c) without a rational foundation in light of the purposes of the law or program at issue.

i. Privilege or Immunity

To establish a violation of Article I, section 20, a plaintiff must first show that there is a privilege or immunity that someone else is receiving. *State v. Scott*, 96 Or App 451, 455, 773 P2d 394 (1989). The Homestead Rebate program, the Revolving Loan Fund and the Special Projects Grant Fund clearly provide certain "privileges," i.e., property tax rebates, business loans and grants, respectively, to residents of the County. In addition, it would be reasonable to conclude that the general economic development fund and the Staff Development Fund provide direct or indirect benefits to individuals and businesses located in Arlington, Condon, Lonerock and the unincorporated area of the County's original territory. Individuals and businesses located in what is now Wheeler County probably could argue successfully that the staffing and economic development funds provided to cities and unincorporated areas in the County's original territory are "privileges" for purposes of Article I, section 20.

The remaining economic development programs are the Law Enforcement Fund, the County Capital Projects/Maintenance and Improvement Fund and the County Bridge Fund. It is not clear exactly how the County would limit the benefits of these programs to residents and businesses in its original territory. Logically, however, there appear to be two possible methods of accomplishing such a limitation. First, the County might decide to provide the underlying law enforcement, capital improvement and maintenance and bridge maintenance services to annexed areas of Wheeler County, but not to provide any funding through the above-listed funds. Under this approach, the services presumably would be funded by increasing taxes for residents and businesses in those areas. If so, the individuals and businesses in the County's original territory clearly would be receiving a privilege or immunity (i.e., relief from a tax burden) for purposes of Article I, section 20. In addition, the different tax treatment would implicate the tax uniformity requirement of Article I, section 32, which is discussed below.

The second approach would be for the County not to provide the underlying law enforcement, capital improvement and maintenance or bridge maintenance services to annexed areas of Wheeler County or to provide those services at a reduced level. We note that, based on the County's description, the Law Enforcement Fund pays for law enforcement services that the County is legally required to provide. Thus, it appears that the County could not refuse to provide those services to annexed areas of Wheeler County. The remaining question, therefore, is whether the receipt of greater services in improving or maintaining County property and bridges located in the County's original area is a "privilege" or "immunity."

The appellate courts have not clearly defined what constitutes a "privilege" for purposes of Article I, section 20. The Oregon Supreme Court has indicated that the denial of "some advantage" to which a person otherwise would be entitled is sufficient to implicate Article I, section 20. *City of Salem v. Bruner*, 299 Or 262, 702 P2d 70 (1985). That language suggests that even a slight advantage might constitute a "privilege" or "immunity" for this purpose.

Considering the geographical classification inherent in the location of a light rail extension, the Supreme Court held that the classification had a reasonable basis and therefore did not violate Article I, section 20. *Seto v. Tri-County Metro. Transportation Dist.*, 311 Or 456, 466-67, 814 P2d 1060 (1991). Implicit in the court's analysis is the assumption that the location of a light rail extension in a particular geographical area creates a "privilege" or "immunity" within the meaning of Article I, section 20.

In this case, it is reasonable to conclude that the expenditure of County funds for maintaining and improving County property and bridges indirectly benefits neighboring individuals and businesses by making those areas more attractive to visitors and prospective residents and by ensuring the safety and utility of those structures. This indirect advantage that residents derive from the location of a public project is not dissimilar to that of having light rail extended into a particular neighborhood. Therefore, although the issue is not entirely free from doubt, we believe it likely a court would conclude that residents and businesses in the County's original area would be receiving a "privilege" in the form of funds for improving or maintaining County property and bridges located in that area, which is not being made available to the annexed areas that were formerly Wheeler County.

In summary, we conclude that economic development programs funded by the host fees are "privileges" for purposes of Article I, section 20, of the Oregon Constitution.

ii. Discrimination Against a Class

We next consider whether a County ordinance denying the benefits of the economic development programs to residents and businesses in annexed areas of Wheeler County would be a denial of those privileges to individuals or a "class" of

citizens within the meaning of Article I, section 20. Article I, section 20, contains two branches. The first branch prohibits the government from granting or denying privileges or immunities "to an individual person without legitimate reasons related to that person's individual situation." *State v. Clark*, 291 Or 231, 239, 630 P2d 810 (1981). The second branch "forbids laws granting or denying a privilege or immunity to a class of citizens." *Id.*

In this case, the County proposes to extend the "privilege" of County-funded economic development programs to one class of its citizens - those individuals and businesses located in the County's original area. The privilege would be denied to another class of County citizens - individuals and businesses located in areas of the County that formerly were part of Wheeler County. Thus, the County's proposal implicates the second branch of the equal privileges and immunities clause.

In analyzing a class discrimination issue, we first must determine whether the disfavored group is a cognizable class under Article I, section 20. The Supreme Court has consistently held that laws establishing classifications do not automatically violate Article I, section 20:

[T]his court will not invalidate a law on the simple grounds that the law classifies individuals or groups of individuals. "[E]very law itself can be said to 'classify' what it covers from what it excludes." *State v. Clark, supra*, 291 Or at 240. Article I, section 20, prohibits those schemes that classify "persons or groups by virtue of characteristics which they have apart from the law in question."

Wilson v. Dept. of Rev., 302 Or 128, 131-32, 727 P2d 614 (1986).

Generally, to be cognizable under Article I, section 20, a class must be identifiable by virtue of social or personal characteristics that exist apart from the classification created by the challenged government action; classes that are created merely by the challenged law itself "are entitled to no special protection and, in fact, are not even considered to be classes for the purposes of Article I, section 20." *Sealey v. Hicks*, 309 Or 387, 397, 788 P2d 435 (1990); *see also Greist v. Phillips*, 322 Or 281, 292, 906 P2d 789 (1995); *Hale v. Port of Portland*, 308 Or 508, 524-26, 783 P2d 506 (1989).

In this case, the disfavored class would be comprised of individuals and businesses residing or located in portions of the County that were once part of Wheeler County. Thus, the disfavored and favored classes are both identifiable by virtue of social or personal characteristics - residence and location - that exist apart from the proposed governmental action. We therefore conclude that the disfavored class would be identifiable based on characteristics that exist apart from the County's proposed action.

Even when an identifiable class exists, however, courts generally have rejected attacks on class legislation "whenever the law leaves it open to anyone to bring himself or herself within the favored class on equal terms." *State v. Clark*, 291 Or at 240-41; *see also Wilson v. Dept. of Rev.*, 302 Or at 132. Accordingly, we have considered whether the disfavored class members could bring themselves within the favored class by moving their homes or businesses to locations within the County's original territory. Although it is possible to relocate one's business or home, we do not believe that Oregon courts would refuse to treat Wheeler County residents as a cognizable "class" under Article I, section 20, solely because of this possibility. For one thing, if such an argument could succeed, it would be impossible to challenge any geographical classification, because the disfavored class could always relocate. The Oregon Supreme Court has clearly indicated that geographical classifications are subject to challenge under Article I, section 20. *State v. Clark*, 291 Or at 241 (different treatment of comparable facts at different locations within the state may violate Article I, section 20); *see also Seto v. Tri-County Metro. Transportation Dist.*, 311 Or at 466-67 (analyzing a challenge to geographical classification without mentioning possibility of relocation). In addition, the decision where to live or operate one's business is a major decision that takes into account many factors besides the subject of the challenged classification. We believe that a court would not consider it reasonable to deny a privilege or immunity to residents of one geographic location merely because they may obtain the privilege or immunity by relocating.

iii. Rational Basis Test

We next consider whether anything about the source of funding for the economic development programs would justify the proposed discriminatory treatment.

A discriminatory classification violates Article I, section 20, if it "either is impermissibly based on persons' immutable characteristics and reflects 'invidious' social or political premises or has no rational foundation in light of the enabling statute's purposes." *Northwest Advancement v. Bureau of Labor*, 96 Or App 133, 142, 772 P2d 943, *rev den* 308 Or 315 (1989). The County's proposal is based solely on geographic location and therefore does not constitute "invidious" discrimination based on immutable personal characteristics of the disfavored class. *See Seto v. Tri-County Metro.*

Transportation Dist., 311 Or at 466-67 (applying rational basis test to geographical classification). The issue, therefore, is whether the County's proposed ordinance would lack a rational foundation in light of its purpose.

When a local government establishes different laws for different geographic locations within its jurisdiction, it must comply with Article I, section 20.⁽⁵⁾ Geographic classifications will withstand challenge under Article I, section 20, only if there is a rational basis for the classification. See *Seto v. Tri-County Metro. Transportation Dist.*, 311 Or at 466-67 (upholding geographical classification inherent in legislation for Portland metropolitan region's light rail extension); *Bock v. Bend School Dist. No. 1*, 252 Or 53, 57, 448 P2d 519 (1968) (legislature had rational and substantive basis for extending tenure to teachers in larger districts while withholding tenure in smaller districts); *State v. Kincaid*, 133 Or 95, 105-8, 285 P 1105, 288 P 1015 (1930) (finding reasonable basis for license requirement for dance halls located outside populous cities); *Cooper v. OSAA*, 52 Or App at 433 (question under Article I, section 20, is whether rule extends privilege to some while denying it to others "who are not in a sufficiently dissimilar situation in terms of the purpose of the rule" to justify the different treatment).

iv. Application of Rational Basis Test

Under the case law discussed above, the County cannot exclude annexed portions of Wheeler County from County-funded economic development programs unless the exclusion is rationally related to the programs' purposes. There has been no suggestion that the proposed classification would be based on any relevant physical, economic or political differences between the original County territory and any portions of Wheeler County that might be added to the County. The only proffered justification for this blanket exclusion is that the programs in question are funded through fees paid by a landfill and hazardous waste disposal site, both of which were established before any annexation of Wheeler County territory. We believe that the source of funding for those programs, standing alone, would not constitute sufficient justification unless (1) the programs were designed to ameliorate the negative impact of the landfill and hazardous waste disposal site, and (2) the County could reasonably conclude that those facilities affect only the County's original territory and do not affect any annexed portions of Wheeler County.

We first determine the purpose for the programs in question. The programs are designed to encourage residency and home ownership, assist local businesses, promote general economic development and provide funding for a number of public projects throughout the County. Although some of the programs target residents and businesses in certain cities, only one of those cities - Arlington - is located near the waste facilities. The other two cities - Condon and Lonerock - are located at substantial distances from the waste facilities.⁽⁶⁾ It therefore appears that the programs are not designed to ameliorate the negative *physical* impacts of the landfill and hazardous waste disposal site on surrounding County territory. Rather, to the extent that the programs relate to the waste facilities at all, they appear to be designed to help alleviate or compensate for the social stigma and negative economic consequences resulting from having waste facilities located in the County. As explained to us by County Judge Pryor, "[t]he down side of accepting the waste was the onerous designation of being the 'Waste County' and the reputation, right or wrong, that went with it." We therefore conclude that the programs in question were designed to ameliorate or compensate for the negative social and economic consequences of having waste facilities located within the County.⁽⁷⁾

The second step is to determine whether the County reasonably could conclude that the problems addressed by these economic development programs would not also exist in any annexed portions of Wheeler County. Based on the facts presented to us, we believe there would be no reasonable basis for such a conclusion.

Only one distinguishing feature has been advanced to support the proposed disparate treatment - that the programs' funding derives from waste facilities located in the County's original territory. That distinction probably would justify the use of host fees to ameliorate problems caused by direct physical proximity to the waste facilities. But the programs in question are not limited or otherwise concentrated on areas surrounding the waste facilities; rather, they currently operate throughout the County. Moreover, as discussed above, the programs do not appear to have been designed to ameliorate the waste facilities' physical impact on surrounding territory. The apparent premise for these programs is that the presence of waste facilities in a county creates adverse social and economic consequences for all individuals and businesses located within that county, regardless of physical proximity to the facilities themselves. The logical extension of that premise is that any territory incorporated into the County would also become associated with the "Waste County" image and, thus, would suffer the same adverse social and economic consequences.

To sum up, the programs in question apparently are designed to ameliorate social and economic problems caused by the location of waste facilities within the County. Based on the facts provided to us, however, we do not believe a court would find that those problems would be limited to the County's original territory and not extend to new territory added through annexation. We therefore believe that the blanket denial of County-funded economic development programs for residents

and businesses in annexed portions of Wheeler County, based solely on the funding source for those programs, would violate Article I, section 20, of the Oregon Constitution.⁽⁸⁾

b. Uniformity of taxation

Article I, section 32, of the Oregon Constitution provides:

all taxation shall be uniform on the same class of subjects within the territorial limits of the authority levying the tax.

This provision generally requires uniform taxation, by property class, throughout a taxing authority's territory.⁽⁹⁾ 46 Op Atty Gen 388, 434 (1990). It was intended to permit "the reasonable classification of subjects of taxation, exemption of certain property from taxation and the imposition of different rates of taxation upon different classes of property." *Knight v. Dept. of Revenue*, 293 Or 267, 271, 646 P2d 1343 (1982); *Jarvill v. City of Eugene*, 289 Or 157, 613 P2d 1 (1980).

One of the programs funded through the waste facility "host fees" is the Homestead Tax Rebate Program. As noted above, this program authorizes the County assessor to pay an annual property tax rebate to qualified homeowners who reside in the County. If some or all of Wheeler County is added to the County, the proposal we are asked to consider would limit the Homestead Tax Rebate Program to eligible homeowners who reside in the County's original territory.

The threshold question is whether providing a tax rebate to some, but not all, of the County's homeowners implicates Article I, section 32. We believe it does. The Rebate Program's net effect is to reduce the property tax burden for some homeowners. We see no substantive difference between providing a subsequent property tax rebate and reducing the taxpayer's property taxes at the time of assessment. Moreover, the Oregon Supreme Court has indicated that Article I, section 32 is implicated whenever there is a disparity in *tax treatment* - either taxation or exemption. *Jarvill*, 289 Or at 180. We therefore conclude that the Homestead Tax Rebate Program implicates Article I, section 32, by creating non-uniform net property taxes for homeowners.

The next step is to determine whether this non-uniformity is permissible under Article I, section 32. As noted above, a taxing authority may differentiate between different classifications of tax subjects as long as the classifications are reasonable. Here, the proposal would be to distinguish between otherwise similarly situated homeowners based solely on their geographic location within the County.

The Oregon Supreme Court addressed tax classifications based solely on geographic location in *Jarvill*, as follows:

Recognizing the broad freedom a taxing authority has to classify subjects for taxation, we conclude that a classification based on or defined by geographical location is nevertheless constitutionally permissible if it is also based upon qualitative differences that distinguish the geographical area from other areas within the territorial limits of the authority levying the tax. In other words, a taxing authority may not single out a subterritory for exclusive tax treatment (either taxation or exemption) if that subterritory is indistinguishable from the rest of the territory. But if the subterritory is different in quality compared to the rest of the territory, then article I, section 32, does not prohibit a taxing authority from defining the subterritory as a separate class. * * * In addition, if the taxing authority selects a subterritory for taxation and that subterritory is the only area so taxed, then the subterritory must not only be qualitatively different but must also be unique.

Id. at 180 (citations omitted). The court further noted that the "qualitative differences" justifying disparate tax treatment could be based on the "natural qualities" of the area in question or on "politically imposed" qualities:

There may be two types of qualitative differences that might justify singling out a geographical area for tax treatment. One type might be described as natural qualities. These would be qualities that exist in the land by reason of nature, for example, swamp land, or land with less than 20 inches rainfall, or a flood plain. The second type might be described as politically imposed qualities. These would be qualities that exist in the subterritory by political decision, commitment and action, and they may well result because of economic factors or human conditions. Thus the wider significance of the present analysis is that article I, section 32, does not prevent tax classifications from reflecting qualitative differences that result from land use planning decisions. Such planning decisions are almost inevitably stated in territorial terms; but this does not mean that a tax classification which reflects a land use classification is based only on location and therefore invalid, rather than being validly based on the qualitative difference in land use characteristics.

Id. at 180-81.

As discussed above, the proposed classification is not based on any relevant physical, political, economic or social differences between the current County territory and any areas that may be annexed in the future. Therefore, we believe the County cannot justify the denial of Homestead Tax Rebate Program payments to citizens located in annexed areas of the County.

3. Restrictions Under the United States Constitution

Because we conclude that any proposal to limit the economic development programs in question to residents of the County's original territory violates Article I, sections 20 and 32, of the Oregon Constitution, we need not address whether the proposed action would also violate the United States Constitution. We note, however, that a federal equal protection analysis probably would yield the same result as our Article I, section 20, analysis.⁽¹⁰⁾ See, e.g., *State v. Freeland*, 295 Or 367, 370, 667 P2d 509 (1983) ("The test of unequal treatment under Or Const art I, § 20, is not always the same as the tests articulated from time to time under the federal equal protection clause, although the clauses are sufficiently similar that compliance with article I, section 20 usually will also satisfy the 14th amendment"); *State v. Clark*, 291 Or at 243 ("for most purposes analysis under Article I, section 20 and under the federal equal protection clause will coincide"); *Cooper v. OSAA*, 52 Or App at 432 (scope of Article I, section 20, and the federal equal protection clause are generally the same).

III. Role of Attorney General

The Oregon Department of Justice does not act as legal counsel to the counties of this state. Counties are entitled to seek and rely upon advice from their own attorneys. The legal opinions stated herein are given solely for your use and benefit.

HARDY MYERS
Attorney General

1. The facts described in this opinion are derived from documents provided to us by Gilliam County Judge Laura M. Pryor. These include the referenced agreements and ordinances and the transcript of the proceedings of Waste Management of Oregon's 1987 application to Gilliam County for a conditional use permit to construct and operate a sanitary landfill.

Return to [previous location](#).

2. Gilliam County Ordinance 91-2 refers to the landfill operator as "Oregon Waste Systems, Inc." For convenience, we refer to the landfill operator as "Waste Management" throughout this opinion.

Return to [previous location](#).

3. One of the County's "host fee" agreements refers to the hazardous waste disposal site operator as "Chemical Waste Management of the Northwest, Inc." For convenience, we refer to the operator of that site as Chem-Security throughout this opinion.

Return to [previous location](#).

4. ORS 459.310 requires certain surcharges on regional disposal sites to be expended to mitigate "adverse impacts on the area in and around the regional disposal site and related transfer stations." From the information provided to us,

we do not believe such requirements apply to the host fees at issue here. Because the fee arrangement was negotiated between the County and Waste Management and not imposed unilaterally under ORS 459.310(2), the fees would not be subject to the use restrictions in ORS 459.310(3). We also assume that the landfill site continues to be privately owned and therefore is not subject to the use restrictions in ORS 459.310(1).

If ORS 459.310 did apply to the host fees at issue here, that statute would mandate certain priorities for use of the fees, which would, in turn, affect our constitutional analysis, below, because it would provide a rational basis for discrimination based on geographic location. Nevertheless, the uses mandated by that statute are significantly narrower and more tailored to the adverse physical effects of a disposal site than are the economic development programs for which the host fees are used by the County.

Return to [previous location](#).

5. Disparate treatment *between* counties is not necessarily a violation of Article I, section 20.

[D]ifferent treatment of comparable facts at different geographic locations within the state is not necessarily a denial of equal privileges or immunities under Article I, section 20. It may or may not be. The answer depends in part on the level of government that makes the law. When local governments make and administer their own policies, obviously these policies legitimately may produce different privileges or immunities from those available elsewhere, as long as the guarantees of Article I, section 20, are observed within the reach of the local law.

State v. Clark, 291 Or at 241.

Return to [previous location](#).

6. The waste facilities are located in the northeast corner of the County. Condon is located in the south-central portion of the County. Lonerock is in the southeast corner of the County near the border between Gilliam and Wheeler Counties.

Return to [previous location](#).

7. See note 4, above.

Return to [previous location](#).

8. This opinion addresses only whether the County may rely solely on the funding source to deny economic development program benefits to residents and business located in annexed portions of Wheeler County. Generally, in funding economic development projects, the County may distinguish among different geographic locations within the County, including any annexed territories, if it has a rational or reasonable basis for doing so. For example, the County may provide more economic development funds to specific areas within its territory if it finds that those areas have a higher need for those funds.

Return to [previous location](#).

9. Article IX, section 1, of the Oregon Constitution also requires uniformity of taxation. However, that provision appears to apply only to taxes that operate throughout the state. See *Jarvill v. City of Eugene*, 289 Or 157, 171 n 15, 613 P2d 1 (1980). Because the Homestead Tax Rebate Program does not operate statewide, it does not implicate Article IX, section 1.

Return to [previous location](#).

10. The equal protection clause of the Fourteenth Amendment to the United States Constitution provides that "No State shall * * * deny to any person within its jurisdiction the equal protection of the laws."

Return to [previous location](#).

Go to:

[Top of page.](#)

[AG Opinions home page.](#)



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