



DEPARTMENT OF JUSTICE
GENERAL COUNSEL DIVISION

March 9, 2011

Edwin I. Caleb, Klamath County District Attorney
Klamath County Courthouse
316 Main Street
Klamath Falls, OR 97601

Re: Opinion Request OP-2011-1

Dear Mr. Caleb:

This opinion concerns whether a county may lawfully provide a city with county road funds for use on city roads in exchange for the city providing the county with city general funds to help pay for operation of the county correctional facility.

We understand the following. The City of Klamath Falls (city) is located wholly within Klamath County (county) and is the county seat. The county correctional facility is located on the edge of the city. Due to declining revenue in the county general fund, the county sheriff's office has closed two of the three prisoner pods at the county correctional facility, reducing inmate capacity from 152 to 64.

The city has proposed a 2010-2011 budget that includes paying for city streets from funds that are not restricted to particular uses (unrestricted funds), rather than from restricted road funds. The county has funds in its county road fund that are not presently allocated, but those funds are restricted to road uses and cannot be used to operate the county correctional facility.

The city and the county propose to enter into intergovernmental agreements under which the county would provide county road funds to the city to construct, maintain, and repair city roads and bridges, and the city would provide the same amount of unrestricted city funds to the county to operate portions of the county correctional facility that are now closed. The net financial gain or loss under these agreements would be zero, both to the city and the county.

FIRST QUESTION PRESENTED

Is the county authorized to provide county road funds derived from state gas tax revenue and federal forest reserves to the city to be used to construct, maintain and repair city roads and bridges?

SHORT ANSWER

Yes, but those funds must be provided and used both in accordance with the statutes that authorize their use on city roads and bridges and the procedural requirements of the Local Budget Law, ORS 294.305 to 294.565.

SECOND QUESTION PRESENTED

Does the city have authority to provide unrestricted funds to the county to be used for partial operation of the county correctional facility?

SHORT ANSWER

Yes, either pursuant to the City of Klamath Falls' Revised Charter of 1972 (charter), if the city determines that the expenditure complies with section 48 and otherwise serves the city's legitimate purposes, or pursuant to the authority of the pertinent statutes in ORS chapter 169. The city also must ensure that, in making the expenditure, it complies with the procedural requirements of the Local Budget Law, ORS 294.305 to 294.565.

DISCUSSION

1. Authority to exchange funds

We have located no authority that authorizes a city and county to agree to "swap" funds. But if the city has authority to provide unrestricted funds to the county to use to operate a county correctional facility, and if the county has authority to provide county road funds for use on city roads, they may accomplish the same objective pursuant to their respective authorities. We, therefore, examine whether they have those authorities.

2. County road funds

a. Generally

ORS chapter 368 addresses county roads. ORS 368.011 provides that counties generally may supersede the provisions of chapter 368 by enacting ordinances, but lists several chapter 368 provisions that may not be superseded by adoption of a county ordinance, which include all the provisions concerning the use of county road funds that are pertinent to this opinion.

ORS 368.705 through 368.722 define and govern the use of the county road fund. The "county road fund" is "a separate fund in the county treasury designated to receive deposit of revenues that are dedicated to roads or road improvements." ORS 368.705(1). ORS 368.001(1) defines "county roads" as public roads under the jurisdiction of a county that have been designated as county roads under ORS 368.016. Revenues in the county road fund generally must be used on "county roads and bridges on county roads" rather than on city roads and bridges. ORS 368.705(2).

But there are exceptions. You ask us to assume that the county road funds provided to the city would be derived from “forest reserves” and state gas tax revenues. There are statutes that allow the county to expend both of those types of revenues on city roads and bridges.

b. Forest reserves in county road fund

Under federal law, Oregon counties in which a national forest is located receive a portion of the revenue generated by the forest (forest reserves). 16 USC § 500 (1908). Forest reserves must be used “for the benefit of the public schools and public roads” of the county. *Id.*^{1/} Pursuant to ORS 294.060(1), counties generally must apportion 75 percent of their forest reserves to the road fund and 25 percent to the school fund and must expend those funds, subject to exceptions that do not pertain here, “as other moneys in those funds are expended.”

However, ORS 368.722 authorizes counties to “expend funds received by the general road fund pursuant to ORS 294.060 on city streets and bridges under such terms and conditions as the county may determine pursuant to the provisions of ORS 373.260.” ORS 373.260(1) authorizes the county court or county commissioners and the authorities of any city within the county to “enter into an agreement for the construction, improvement, or repair of, and the acquisition of right of way for * * * [a]ny county road or city street within the corporate limits of the city[.]” ORS 373.260(2) requires those agreements to include “the proportion which each shall contribute” and “the method and kind of acquisition, construction, improvement or repair to be made.”

Therefore, the county may provide the city with county road funds derived from forest reserves pursuant to an agreement that specifies: (1) that the funds will be used for the construction, improvement, repair, or acquisition of right of way for a city street within the corporate limits of the city or, pursuant to ORS 368.722, for a city bridge; (2) the amount that the county will contribute and the amount that the city will contribute; and, (3) the method and kind of acquisition, construction, improvement or repair to be made.

c. State gas tax revenues in the county road fund

We turn to county road funds derived from state gas tax revenues. Article IX, section 3a, of the Oregon Constitution, among other things, requires state gas tax revenues to be used exclusively “for the construction, reconstruction, improvement, repair, maintenance, operation and use of public highways, roads, streets and roadside rest areas in this state[.]”

ORS 294.950(2) authorizes a county to “share the proceeds of any tax or excise described in section 3a, Article IX of the Oregon Constitution, with any city situated in whole or in part within the county for the purposes stated in that section” subject to the limitation contained in ORS 294.950(3). Subsection (3) provides that “[i]n any fiscal year, moneys given to a city under this section shall not exceed the amount of revenue raised in any manner by the county within the boundaries of that city.”

The city is “situated in whole” within the county. Accordingly, the county may provide the city with state gas tax revenues in the county road fund up to the amount of revenue raised by the county in any manner within the boundaries of the city as long as the city uses the revenue exclusively for the purposes specified under Article IX, section 3a.

3. Expenditure of city unrestricted funds on partial operation of county correctional facility

We next consider whether the city has authority to provide unrestricted city moneys to the county to fund partial operation of the county correctional facility. It is unlawful for any public official to “expend any moneys in excess of the amounts provided by law, or for any other or different purpose than provided by law.” ORS 294.100(1).^{2/} We recognize that, under the proposed arrangement, funds used to pay for operation of the county correctional facility will be provided at no net cost to the city taxpayers because those funds, which originally were to be used to fund city streets, will be replaced with county road funds. But that makes no difference under ORS 294.100, which requires all expenditures to be authorized.

a. City charter

Although ORS 294.100(1) requires expenditures to be authorized, the Oregon Supreme Court has stated that the authority need not be explicit:

In recent times, the judicial demand for explicit expressions of authority and a recognition of only attendant authorities “necessarily implied” by those expressed has given way to an interpretation that local governments have broad powers subject only to constitutional or preemptive statutory prohibitions. Thus, it is more often possible to find some source of authority for a government * * * expenditure. As the first inquiry-whether a particular expenditure is authorized-is more often answered in the affirmative, courts have proceeded to consider whether the government action, even though authorized, conflicted with some other law or constitutional provision.

* * * * *

[B]road grants of authority were intended to be broadly construed. In this way, activities which further a government’s or agency’s delegated responsibility may be pursued without undue limitation.

* * * * *

On the other hand, broad grants of authority cannot save expenditures illegal under other laws.

Burt v. Blumenauer, 299 Or 55, 61-62, 72, 699 P2d 168 (1985).

Article XI, section 2, of the Oregon Constitution gives cities the “home rule” power to adopt municipal charters:

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

Pursuant to that authority, the city’s voters enacted a municipal charter that confers the broadest possible powers on the city:

Section 4. POWERS OF THE CITY. The city shall have all powers which the constitutions, statutes, and common law of the United States and The State of Oregon expressly or impliedly grant or allow municipalities, as fully as though this Charter specifically enumerated each of those powers.

Section 5. CONSTRUCTION OF CHARTS. In this Charter no mention of a particular power shall be construed to be exclusive or to restrict the scope of the powers which the City would have if the particular power were not mentioned. The Charter shall be liberally construed to the end that the City may have all powers necessary or convenient for the conduct of its municipal affairs, including all powers that cities may assume pursuant to state laws and to the municipal home rule provisions of the state constitution.

The Revised Charter of 1972 (City of Klamath Falls), §§ 4 & 5.

The municipal home rule provisions of the Oregon Constitution have been interpreted to authorize local governments to enact reasonable regulations to further local interests such as public safety, health and welfare. *City of Eugene v. Miller*, 318 Or 480, 491 n 12, 871 P2d 454 (1994). That authority also appears to include the power to make expenditures reasonably designed to further those interests.

City officials might reasonably conclude that providing funds to the county to help operate the county correctional facility will further the public safety of the city’s inhabitants. Closure of large portions of the county correctional facility, which is located in on the edge of the city, is likely to result in the routine release of prisoners into the community where they may subsequently commit crimes, particularly when they are aware that they are unlikely to risk incarceration because jail space is limited. Oregon courts have refused to second guess a government body’s decision that an expenditure served a public or municipal purpose, concluding that expenditures should be invalidated only when the decision was clearly unreasonable.^{3/}

While section 4 of the city’s charter gives the city authority to expend city funds for city purposes, another section of the city’s charter places limitations on certain expenditures. Specifically, section 48 requires expenditures that are deemed to be “nonessential” under the

provision to be made only through specified funding mechanisms.^{4/} This opinion does not address the effect of that provision on the proposed expenditure, but the city will have to address that issue prior to making any expenditure.

Having concluded that section 4 of the city's charter provides authority for the expenditure, we next consider whether any state law either provides independent authority for the expenditure or conflicts with, and is clearly intended to preempt, the local authority. *See Burt v. Blumenauer*, 299 Or at 62, 72 (courts will consider whether an expenditure authorized under local law conflicts with some other law or constitutional provision).

b. Statutes

(1) Statutes imposing liability for prisoner expenses

Several statutes impose liability for payment of the expenses of prisoners incarcerated in county correctional facilities. ORS 169.150(1) provides that "[t]he charges and expenses for safekeeping and maintaining all persons duly committed to the local correctional facility of the county * * * shall, unless otherwise provided by law, be paid out of the treasury of the county." *See also* ORS 169.140 (the "keeper of each local correctional facility" shall supply bedding, clothing, food, and necessary medical aid to "all prisoners in the custody of the keeper"), ORS 169.220 ("[a]ll persons lawfully confined in a county local correctional facility * * * shall be fed and maintained at actual cost to the county"). ORS 169.152 provides that "[n]otwithstanding ORS 169.140, 169.150 and 169.220" the city is liable to the county for the costs of medical care provided to a person confined in a county correctional facility when the person is confined "for violation of a city ordinance * * * [or] for nonpayment of a fine imposed by a municipal court."^{5/} Other statutes allow the county and city to recover costs from inmates in certain circumstances. ORS 169.150(2), 169.151

Under those statutes, the county generally is liable to pay the expenses associated with housing inmates in the county jail, but the city is required to pay the medical costs for city ordinance violators and those who have failed to pay fines imposed by the municipal court. The question arises whether those statutes were intended to preclude a city from voluntarily agreeing to pay other costs to operate the county correctional facility. That is not their clear intent. *See Thunderbird Mobile Club, LLC v. City of Wilsonville*, 234 Or App 457, 470, 228 P3d 650 (2010) (a state law will not prevail over contrary policies preferred by home rule local governments unless it was clearly intended to do so, citing *LaGrande/Astoria v. PERB*, 281 Or 137, 148-49, 576 P2d 1204, *aff'd on reh'g*, 284 Or 173, 586 P2d 765 (1978)). The intent of those provisions is to ensure that prisoners incarcerated in county facilities are provided with the necessary services. *See Sisters of Charity of Providence in Or v. Washington County*, 244 Or 499, 502, 419 P2d 36 (1966) (considering the payment of medical costs and stating that the "obvious" purpose of ORS 169.150 and 169.140 was to assure that medical services were provided to persons imprisoned by the county). They accomplish that objective by placing responsibility for payment primarily on the county. If the county were to adopt an ordinance *requiring* cities to assume that liability, that ordinance likely would conflict with the statutes. But the statutes do not clearly preclude a city from *voluntarily* assuming some of those costs.

(2) Agreements under ORS 169.030

Another statute, ORS 169.030, requires cities to “provide, keep and maintain” a local correctional facility and further authorizes them to enter into agreements with counties to “provide, maintain, and use for their separate requirements, such a local correctional facility” or for the county “to furnish local correctional facility accommodations for the imprisonment of prisoners of the * * *city.” That provision impliedly authorizes cities to pay the county for the costs of incarcerating city prisoners under such agreements.^{6/} See 43 Op Atty Gen 136 (1983) (so concluding).

(3) Agreements under ORS 169.630

ORS 169.630 authorizes two or more cities and counties “by agreement entered into pursuant to ORS 190.003 to 190.620” to, among other things, “operate a regional correctional facility.” A “regional correctional facility” means a correctional facility operated pursuant to such an agreement, which is used to house prisoners of the parties to the agreement either pre or post-trial. ORS 169.620.

ORS 190.003 to 190.130 authorize local governments to enter into intergovernmental agreements with each other “for the performance of any or all functions and activities that a party to the agreement, its officers or agencies, have authority to perform.” ORS 190.010. Those agreements “may provide for the performance of a function or activity” by, among other things, “means of facilities or equipment jointly constructed, owned, leased or operated[,]” or “[b]y one of the parties for any other party[,]” or “[b]y a combination of methods described in this section.” *Id.* ORS 190.020(1)(a) requires, “[w]here applicable,” the agreement provide for “[t]he apportionment among the parties to the agreement of the responsibility for providing funds to pay for expenses incurred in the performance of the functions or activities.”

Pursuant to ORS 169.630, an agreement made under ORS 190.003 to 190.130 to operate a regional consolidate local correctional facility must specify, among other things, the party or parties who will operate and administer the facility, the amount of funding that each party will contribute towards the operation of the facility and, “[t]he number of beds to be reserved to the use of each party to the agreement.” ORS 169.640 provides that “[f]or purposes of sentencing and custody of a misdemeanant a regional correctional facility shall be considered a county local correctional facility” and “[f]or purposes of sentencing and custody of a person for violating a city ordinance” the facility shall be considered a “city local correctional facility.” Read together, those statutes allow cities to pay the operational costs of those facilities pursuant to the agreements they authorize, but the statutes also appear to envision that the city will only pay for its share of the costs.

(4) Agreements under ORS 190.010 to 190.130

We next consider whether ORS 190.010 to 190.130, independent of ORS 169.630, authorize the city to enter into an agreement with the county in which the county would agree to

house more prisoners than it currently does – regardless of whether they are the city’s prisoners – in return for city funding to do so. While we have concluded that ORS 190.010 to 190.130 authorize local governments to enter into intergovernmental agreements in which one agrees to pay the other for performance of a function that only one has authority to do, we have also admonished that ORS 190.010 to 190.130:

do not expand the authority of either government to spend funds for purposes beyond their respective “governmental interests.” If one government pays another government to perform a function, the paying government must be authorized to expend funds for the functions performed by the agreement.

Letter of Advice dated March 31, 1992, to Representative Josi (OP-6444). As discussed, the city has authority, pursuant to its charter, to expend city funds on operation of the county correctional facility if it reasonably concludes that doing so serves a legitimate city interest.

(5) Local Budget Law

Finally, we note that the city and county must ensure that their proposed expenditures are made in compliance with those procedures specified in the Local Budget Law, ORS 294.305 to 294.565.

CONCLUSION

We conclude that the county may provide county road funds derived from forest reserves and state gas tax revenue to the city as specified in ORS 368.722 and ORS 294.950(2), respectively. And the city may provide city unrestricted funds to the county for use to fund operation of the county correctional facility or pursuant to its municipal charter if the city determines that the expenditure complies with section 48 of its charter and furthers a legitimate city purpose or as specified by the relevant statutes in ORS chapter 169. In addition, the city and county both must ensure that their proposed expenditures are made in compliance with the procedural requirements set out in the Local Budget Law, ORS 294.305 to 294.565.

Sincerely,

David E. Leith
Chief General Counsel
General Counsel Division

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^{1/} There have been several amendments to the federal law concerning how forest reserves may be used, but none of those amendments are relevant to this opinion.

^{2/} A public official who makes an unauthorized expenditure is subject to civil liability. ORS 294.100(2).

^{3/} See *Churchill v. City of Grants Pass*, 70 Or 283, 289, 141 P 164 (1914) (“great weight should be given by the courts to the legislative determination [that an action serves a municipal purpose], and its action should not be annulled unless the purpose appears clearly to be one not authorized [and] [i]f the purpose designed by the Legislature lies so near the border line that it may be doubtful on which side of it is domiciled, the courts may not set their judgment against that of the law makers.”); *Carruthers v. Port of Astoria*, 249 Or 329, 341, 438 P2d 725 (1968) (“The judiciary should invalidate expenditures only where reasonable men could not differ as to their lack of social utility.”); 40 Op Atty Gen 11, 13 (1979) (whether an expenditure on a private entity would promote a public purpose is ultimately a matter for the governing body to decide and courts will not question the public body's *reasonable* exercise of discretion in designating a “public purpose”). (Emphasis in original.)

^{4/} Section 48 provides:

NONESSENTIAL SERVICES FUNDING. All services not deemed to be essential by this section shall only be supplied by the City upon providing some combination of self-supporting funding or funding from federal, state or private grants or serial levies. When a request is made for a levy for such a nonessential service, the matter may be referred by the City Council to the City voters at a statutorily timed City-wide election. For purposes of this section essential services are limited to: police, fire, finance, City Manager, City Council, Mayor, Municipal Court, City Attorney, engineering, planning, building, streets, sewer and water. (Added May 20, 1980)

The Revised Charter of 1972 (City of Klamath Falls), §§ 48.

^{5/} ORS 137.308 and 137.309 require municipal courts to transfer certain assessment amounts to the county treasury partially for use on operation of the county jail, but that statute does not involve the use of city general funds.

^{6/} ORS 221.914 requires cities to pay counties for the expense of imprisoning city ordinance violators in the county jail when the county has agreed to house those prisoners, but that law applies only to cities incorporated under the 1893 Incorporation Act, which the city was not.