



DEPARTMENT OF JUSTICE
GENERAL COUNSEL DIVISION

September 12, 2003

Brenda Rocklin, Director
Oregon State Lottery
P.O. Box 12649
Salem, OR 97309

Re: Opinion Request OP-2003-2

Dear Ms. Rocklin:

You ask whether ORS 461.030 preempts the City of Grants Pass Development Code Ordinance 14.640 as that ordinance relates to video lottery machines. We conclude that ORS 461.030 preempts the Grants Pass ordinance as it applies to sales and distribution of video lottery provided in establishments otherwise subject to the ordinance.

Discussion

The issue is whether ORS 461.030 preempts local regulation affecting the manufacture, transportation, distribution, advertising, possession or sale of any lottery tickets or shares within the State of Oregon.^{1/} Although your question focuses on section 14.640 of the Grants Pass Development Code, several provisions of that code are relevant.^{2/} Article 30 of the code defines “adult use” and “adult business.”^{3/} Article 14 of the code “establishes an overlay area where adult businesses are not permitted.” GRANTS PASS, OR., DEVELOPMENT CODE, section 14.610 (1994). Section 14.640^{4/} provides that an adult business that does not conform to the requirements of sections 14.600 to 14.650 cannot expand its adult uses.^{5/}

Video Lottery is an “adult use” in an “adult business” as those terms are defined in the Grants Pass Development Code.^{6/} Consequently, section 14.640 of that code purports to regulate placement of video lottery terminals and, hence, video lottery sales, within the City of Grants Pass.

The Oregon Supreme Court has articulated the framework for evaluating questions concerning state preemption of local regulation. See *LaGrande/Astoria v. PERB*, 281 Or 137, 576 P2d 1204 (1978). Under this framework, the determination of whether section 14.640 of the Grants Pass Development Code is preempted by ORS 461.030 requires analysis of two issues. They are, first, whether the enactment of section 14.640 is within the authority of the city under its charter and, second, whether that authority is preempted by state law. 281 Or at 142. Upon a determination that enactment of the local ordinance is authorized, the analysis turns to whether and to what extent the ordinance conflicts with state law.

[T]he first inquiry must be whether the local rule in truth is incompatible with the legislative policy, either because both cannot operate concurrently or because the legislature meant its law to be exclusive. It is reasonable to interpret local enactments, if possible, to be intended to function consistently with state laws, and equally reasonable to assume that the legislature does not mean to displace local civil or administrative regulation of local conditions by a statewide law unless that intention is apparent.

Id. at 148-49 (footnote omitted). Each issue is addressed in turn, below.

1. City Authority to Enact Ordinance

In general, under constitutional “home rule” provisions, cities are permitted to determine the organization and powers of local governments without the need to obtain authority from the state legislature. Or Const, Art IV, § 1(5) and Art XI, § 2; *Jarvill v. City of Eugene*, 289 Or 157, 168-69, 613 P2d 1, *cert den* 449 US 1013, 101 S Ct 572, 66 L Ed2d 472 (1980). Article XI, section 2 of the Oregon Constitution provides that “[t]he 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.” Additionally, Article IV, section 1(5) provides, in part:

The initiative and referendum powers reserved to the people * * * are further reserved to the qualified voters of each municipality and district as to all local, special and municipal legislation of every character in or for their municipality or district.

The “home rule” authority of local governments enables them to enact reasonable regulations to further local interests with respect to public health, safety, and welfare. *City of Eugene v. Miller*, 318 Or 480, 491 n 12, 871 P2d 454 (1994).

The City of Grants Pass Charter broadly confers on the city all powers consistent with constitutional home rule provisions:

The city shall have all powers which the constitutions, statutes, and common law of the United States and of this state expressly or impliedly grant or allow municipalities, as fully as though this charter specifically enumerated each of these powers. * * * The charter shall be broadly construed to the end that the city shall 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.

City of Grants Pass Charter, ch II, §§ 1-2 (1977). Enactments by local governments of reasonable regulations on matters of local health, safety, and welfare, are generally valid unless a court determines that the local regulation conflicts with state law or is clearly intended to be preempted. *Ashland Drilling, Inc. v. Jackson County*, 168 Or App 624, 634, 4 P3d 748, *rev den* 331 Or 429, 26 P3d 148 (2000). According to the Oregon Supreme Court:

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.

Burt v. Blumenaur, 299 Or 55, 61, 699 P2d 168 (1985). Here, the City of Grants Pass had the necessary authority to enact the ordinance in question, as the ordinance affects a matter generally within the City’s broad powers under its charter and pursuant to constitutional home rule provisions. Consequently, our inquiry turns to whether the exercise of that authority is preempted by ORS 461.030.^{7/}

2. State Preemption of Local Regulation

Under the framework prescribed by *LaGrande/Astoria*, the next question is whether the legislature intended to preempt the type of ordinance at issue, either by indicating intent that the state law be exclusive or by virtue of the fact that the local ordinance is incompatible with state law. 281 Or at 148-49. The intention to preempt is apparent if it is expressly stated or otherwise clearly manifested in the statutory language. *Ashland*, 168 Or App at 634. Although a statute need not use the word “preempt” to manifest an intention to preclude local regulation, it is generally required that the preemptive intent be clearly stated. *AT&T Communications of the Pacific Northwest, Inc. v. City of Eugene*, 177 Or App 379, 395, 35 P3d 1029 (2001), *rev den* 334 Or 491 52 P3d 1056 (2002). The extent of any preemption also is measured by the statutory language. *Boytano v. Fritz*, 321 Or 498, 505-07, 901 P2d 835 (1995). If the statutory language reveals an express or clearly manifested intention that the state law be exclusive, the analysis ends there. *LaGrande/Astoria*, 281 Or at 148. If, however, there is no such manifestation of intent to preempt, it is necessary to examine whether an ordinance can “operate concurrently” with state law. *Id.*

Here, we ask whether ORS 461.030 expressly or otherwise preempts the City of Grants Pass ordinance. To answer this question, we examine the text and context of ORS 461.030, because text and context is considered to be the best evidence of the legislature’s intent. *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610, 859 P2d 1143 (1993). As an aid to statutory interpretation, we also may consider rules of construction that bear directly on how to read the text, including that words of common usage typically should be given their plain, natural, and ordinary meaning. 317 Or at 611. If, after consideration of the text and context of a statute, the intent of the legislature is clear, the analysis is complete. *Id.*

ORS 461.030(1) provides that “chapter [461] shall be applicable and uniform throughout the state and all political subdivisions and municipalities therein, and no local authority shall enact any ordinances, rules or regulations in conflict with the provisions hereof.” The plain language of this provision evinces a legislative intent to preempt local law to some extent. *See AT&T Communications of the Pacific Northwest, Inc.*, 177 Or App at 395 (“ORS 461.030(1) * * * makes the legislature’s preemptive intentions quite clear”). The extent of preemption under ORS 461.030(1) is clearly expressed to extend to local laws “in conflict” with the provisions of

Chapter 461. ORS 461.030(2) extends the preemptive reach of this statute to “[a]ny other state or local law or regulation providing any penalty, disability or prohibition for the manufacture, transportation, distribution, advertising, possession or sale of any lottery tickets or shares.” Read in tandem, these two subsections express the intent for state lottery laws to be exclusive, insofar as those laws relate to the “manufacture, transportation, distribution, advertising, possession or sale of any lottery tickets or shares.” See *Ashland*, 168 Or App at 637 (legislature may reserve for its exclusive control certain aspects of a particular subject matter). Both subsections contain express language indicative of preemptive intent. See *AT&T Communications*, 177 Or App at 396 (the phrase “no local government shall” is a declaration of preemptive intent).

At issue here is a local regulation that purports to prohibit the sale of video lottery in certain “adult businesses,” as that term is defined in the Grants Pass ordinance. While the preemptive intent of ORS 461.030 is clear as it relates to local laws or regulations that, among other things, provide any penalty, disability or prohibition for the sale of any lottery tickets or shares, it is not clear on the face of the statute whether the sale of video lottery is included in the “sale of any lottery tickets or shares.” It is, therefore, necessary to determine whether video lottery games involve lottery tickets or shares.

ORS 461.030 was adopted by voter initiative in the 1984 general election as part of Ballot Measure 5. To interpret a statute adopted by initiative, we seek to determine the voters’ intent by applying the methodology set forth in *PGE v. Bureau of Labor and Industries*, 317 Or at 612, n. 4 (PGE methodology applies not only to statutes enacted by the legislature, but also to statutes adopted by initiative); *Ecumenical Ministries v. Oregon State Lottery Commission*, 318 Or 551, 560, 871 P2d 106 (1994). Under PGE, a review of the text and context may include other provisions of the same statute, and related statutes. *PGE*, 317 Or at 610-611; *Ecumenical Ministries*, 318 Or at 560. Because the voters adopted Ballot Measure 4, a companion ballot measure amending Article XV, Section 4 of the Oregon Constitution, at the same time as Measure 5, Measure 4 is part of the context of Measure 5. *Ecumenical Ministries*, 318 Or at 562.

The ordinary meaning of the word “lottery” is “a scheme for the distribution of prizes by lot or chance; esp: a scheme by which prizes are distributed to the winners among those persons who have paid for a chance to win them usu. as determined by the numbers on tickets as drawn at random (as from a lottery wheel)”. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY at 1338 (Unabridged 1993). ORS 461.010(5) contains a similar definition of “Lottery game”:

any procedure authorized by the commission whereby prizes are distributed among persons who have paid, or unconditionally agreed to pay, for tickets or shares which provide the opportunity to win such prizes.

Throughout chapter 461 the words “tickets” and “shares” are used in the same phrase, connected by the disjunctive “or”.⁸¹ The use of the word “or” in the phrase makes it clear that a ticket is not a share. See *Recovery House VI v. City of Eugene*, 156 Or App 509, 512, 965 P2d 488 (1998) (the words “and” and “or”, as used in statutes, are not interchangeable, but rather are strictly of a conjunctive or disjunctive nature). “Ticket” is commonly defined as “a certificate,

evidence, or token of a right (as of admission to a place of assembly, of passage in a public conveyance, of debt, or of a chance) * * * a lottery [ticket] * * *.” WEBSTER’S at 2389-2390. “Share” is defined as “a portion belonging to, due to, or contributed by an individual.” *Id.* at 2087. Read in conjunction, these definitions indicate that a lottery ticket and a lottery share each separately represent an opportunity or chance to win a prize that is purchased by a player. A ticket is a tangible item, “a certificate, evidence, or token,” while a share likely is intangible. Indeed, Lottery is required to print certain information on tickets, *see* ORS 461.210; 461.220(2), but no such requirements apply to shares. Moreover, Lottery is required to develop “security measures that are designed to prevent the redemption of fraudulent tickets,” *see* ORS 461.210(1), but is not required to do so with shares. Therefore, although video lottery games do not issue any form of receipt to the player at the time he or she places a wager, the player may be said to have an interest, or a share, in winning a prize.

This reading of the text is consistent with Ballot Measure 4 and related lottery statutes. Ballot Measure 4 authorized Lottery to operate

any game procedure authorized by the commission, except parimutuel racing, social games, and the games commonly known in Oregon as bingo or lotto, whereby prizes are distributed using any existing or future methods among adult persons who have paid for tickets or shares in that game; provided that in lottery games utilizing computer terminals or other devices, no coins or currency shall ever be dispensed directly to players from such computer terminals or devices.

Ballot Measure 4, § 4, codified at Or Const Art XV § 4(4)(c). The phrase providing that games involving video devices may not dispense coins or currency modifies the clause authorizing Lottery to operate games that sell tickets or shares. Moreover, this provision and ORS chapter 461 presuppose that *any* game operated by Lottery necessarily involves the sale of tickets or shares. *See* ORS 461.200 (“[T]he director shall begin public sales of tickets or shares.”); ORS 461.010(7) (lottery game retailer is “a person with whom the lottery commission has contracted for the purpose of selling tickets or shares in lottery games to the public.”); ORS 461.220(1) (Lottery must adopt rules that specify the number and value prizes of tickets or shares in each lottery game); ORS 461.310 (commission to determine compensation for retailers for sales of lottery tickets or shares).

We are permitted to rest on a “first level” text analysis only if the text permits a single construction and all other possible interpretations are “wholly implausible”. *State v. Allison*, 143 Or App 241, 247, 923 P2d 1224, *rev den* 324 Or 487, 930 P2d 852 (1996), citing *Owens v. MVD*, 319 Or 259, 268, 875 P2d 463 (1994) and *Carroll v. Boise Cascade Corp.*, 138 Or App 610, 616, 910 P2d 1111 (1996). The only plausible interpretation of “lottery tickets or shares” is that “shares” refers to video lottery. Lottery is authorized to operate any game procedure involving the purchase of tickets or shares, and at the same time has authority to operate games using video lottery terminals. *See* Or Const, Art XV, § 4(4)(c); ORS 461.010(5); ORS 461.215; ORS 461.230(2). If video lottery games do not involve the sale of a ticket or share, Lottery would not have constitutional authority to operate them. This result would be contrary to the voters’ intent as evidenced by their express condition that games using computer terminals shall

not directly dispense coins or currency. Or Const, Art XV, § 4(4)(c). Moreover, Ballot Measures 4 and 5 create a regulatory framework based on the assumption that all games involve the sale of tickets or shares. Lottery must pay all prizes and expenses from the sale of tickets or shares and turn the net proceeds over to the Legislative Assembly. Or Const Art XV, § 4(4)(d); ORS 461.510(5). At least 84 percent of the revenue from the sale of tickets or shares must be returned to the public as prizes or revenue benefiting the public purpose. Or Const Art XV, § 4(4)(d); ORS 461.500(1). Conversely, no more than 16 percent may be spent on Lottery's administrative expenses. If video lottery games do not use tickets or shares, these limits on expenditures would not apply to video lottery revenue.

Lottery has interpreted "share" to include the opportunity to win a prize in a video lottery game. By administrative rule, Lottery defines "share" as "an opportunity to win a prize in a Lottery game that does not use certificates or tokens, such as in video lottery games." OAR 177-010-0003(15). "Ticket" is defined as "a certificate or token of the opportunity to win a prize in a Lottery game." OAR 177-010-0003(16).

When an agency's interpretation of a provision of law is at issue, the standard of review depends upon whether the phrase at issue is an exact term, an inexact term, or a delegative term. *Springfield Education Assn. v. School District*, 290 Or 217, 223, 621 P2d 547 (1980); *Coast Security Mortgage Corp. v. Real Estate Agency*, 331 Or 348, 353-54, 15 P3d 29 (2000). "Exact terms," such as "rodent" and "30 days" have relatively precise meanings. *Springfield*, 290 Or at 223-24. "Inexact terms," such as "escrow agent" and "condition of employment" are less precise; they embody a complete expression of legislative meaning, but that meaning may not be obvious. *Springfield*, 290 Or at 224-228; *Coast Sec.*, 331 Or at 354. "Delegative terms" express incomplete legislative meaning that the agency is authorized to complete. *Springfield*, 290 Or at 228.

"Lottery tickets or shares" is an inexact phrase. The phrase embodies a complete expression of legislative policy, yet application of the phrase may be imprecise. With an "inexact term," we review the agency's interpretation for consistency with legislative intent. *Coast Sec.*, 331 Or at 354; *LegalClub.com v. DCBS*, 182 Or App 494, 504, 50 P3d 1196 (2002). Lottery expressly includes video lottery in its definition of "share", which is consistent with the text and context analysis of ORS 461.030 set forth above.

The only remaining question, then, is whether section 14.640 of the Grants Pass code falls within the limits of prohibited local regulation under ORS 461.030. In other words, does the Grants Pass ordinance provide a penalty for, disable, or prohibit the manufacture, transportation, distribution, advertising, possession or sale of any lottery tickets or shares.

To analyze whether section 14.640 of the Grants Pass code regulates an activity that is within the state's exclusive control under ORS 461.030, it is necessary to analyze the meaning and intent of that section. The same rules that govern the construction of statutes apply to the construction of municipal ordinances. *State v. Tschantre*, 182 Or App 313, 319, 50 P3d 1174 (2002); *State v. Moore*, 174 Or App 94, 98-100, 25 P3d 398 (2001); and *Lincoln Loan Co. v. City of Portland*, 317 Or 192, 199, 855 P2d 151 (1993). The analysis starts with the text of the

ordinance and also may consider the context in which it occurs. *See Moore*, 174 Or App at 98-99. If the legislative body's intent is clear based on the text and context of the ordinance, the analysis ends. *Lincoln Loan Co.*, 317 Or at 192.

To determine the meaning of section 14.640 of the Grants Pass ordinance, we examine its component parts. As discussed above, section 14.640 of the Grants Pass ordinance provides that an adult business that does not conform to the requirements contained in sections 14.600-14.650 of the code cannot expand its adult uses – those uses that are not accessible to persons under 21 years of age. GRANTS PASS, OR., DEVELOPMENT CODE, art. 14, § 14.640 (1994). An “adult business” is one that prohibits admission to persons less than 21 years of age and an “adult use” is any use conducted on the premises of an adult business in an area where persons under 21 years of age are not allowed. *Id.*, ARTICLE 30. Video lottery qualifies as an adult use. *See note 6.* Next, under its plain language, section 14.640 of the ordinance applies only to adult businesses that do not conform to the criteria in sections 14.600-14.650 of the code. Finally, those non-conforming businesses are prohibited from expanding the current adult uses in their businesses to include other types of adult uses.

The text of this ordinance is clear – non-conforming adult businesses may continue adult uses present at the time the ordinance was enacted, but cannot expand their businesses to include other adult uses. For example, at the time the ordinance was enacted, a tavern that does not have video lottery, but serves alcohol and is, thus, closed to minors, that is located 1000 feet or less from a public library, does not conform to section 14.630(2)c.2. *See note 5.* Under the ordinance, the tavern can continue to serve alcohol, but cannot obtain and sell video lottery. Because the ordinance prohibits video lottery sales in these circumstances, it regulates an area reserved exclusively to the state under ORS 461.030. Thus, we conclude that section 14.640 of the Grants Pass ordinance, as it relates to distribution and sales of video lottery, is preempted by ORS 461.030.

The legal opinions stated in this letter of advice are given solely for your use and benefit. The Department of Justice does not act as legal counsel to cities and counties. Those local governments are entitled to seek and rely upon advice from their own counsel.

Sincerely,

Donald C. Arnold
Chief Counsel
General Counsel Division

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^{1/} ORS 461.030 provides, in relevant part:

- (1) This chapter shall be applicable and uniform throughout the state and all political subdivisions and municipalities therein, and *no local authority shall enact any ordinances, rules or regulations in conflict with the provisions hereof.*

- (2) Any other state or local law or regulation providing any penalty, disability or prohibition for the manufacture, transportation, distribution, advertising, possession or sale of any lottery tickets or shares shall not apply to the tickets or shares of the state lottery. The gambling laws of the State of Oregon shall not apply to lottery tickets or shares, or to the operation of the state lottery established by the Constitution of the State of Oregon and this chapter.

(Emphasis added.)

^{2/} The City of Grants Pass initially adopted the amendments restricting the use and operation of adult businesses at issue here in 1994. Some of the provisions have since been revised, but the genesis of your question is the 1994 amendments.

^{3/} The definitions are:

ADULT BUSINESS. Any person, group, firm, business, or organization (except non-profit corporations which are not open to the general public) which prohibits admission to all or a portion of the premises to any persons younger than 21 years of age.

ADULT USE. A use of whatever character, conducted on the premises of an adult business, which use is conducted in the area in which any persons under 21 years of age are prohibited.

GRANTS PASS, OR., DEVELOPMENT CODE, art. 30 (1994).

^{4/} Section 14.640 provides:

MODIFICATION OF AN ADULT USE IN A NON-CONFORMING ADULT BUSINESS. An adult business which, at the time of adoption of 14.600-14.650, does not conform to the criteria contained therein, shall be governed by the provisions of Article 15 of the Development Code **except that** the current adult use may not be expanded to include other types of uses which by law are not accessible by persons of any age group under 21 years of age. Any such modification of the adult use shall result in automatic loss of the rights under Article 15 and shall cause the adult business to be in violation of Article 14.

GRANTS PASS, OR., DEVELOPMENT CODE, art. 14, § 14.640 (emphasis added).

^{5/} Section 14.620 creates specific permit requirements for adult business and section 14.630 sets forth additional criteria for permit approval, as follows:

- (1) a. The adult business is located in a Riverfront Tourist Commercial Zone and has 10,000 or more square feet of covered and enclosed building space open to the public; or
- b. The adult business is located more than 200 feet from any R-1, R-2, R-3, or R-4 residential zones (measured in a straight line from the closest edge of the property line on which the business is located to the closest edge of property in the residential zone); and

- (2) a. The adult business is located in a Riverfront Tourist Commercial Zone and has 10,000 or more square feet of covered and enclosed building space open to the public; or
- b. The adult business has 10,000 or more square feet of covered and enclosed building space open to the public, and contains restaurant accommodations that are not restricted at any time by age and which restaurant accommodations have a floor area equal to or greater in size than the portion of the premises where any persons younger than 21 years of age are prohibited; or
- c. The adult business has less than 10,000 square feet of covered and enclosed building space open to the public, and the adult business is located more than 1000 feet from all of the following facilities (measured in a straight line from the closest property line on which the adult business is located to the closest edge of the property line on which the facility is located):
1. A “school, public” as defined by Article 30, with an average weekday attendance (during any continuous 3 month period during the preceding 12 months) of not less than 50 children who are under 18 years of age.
 2. A public library.
 3. A public park which covers an area of not less than 20,000 square feet and has facilities such as a playground, baseball field, football field, soccer field, tennis court, basketball court, or volleyball court.
 4. A commercial or residential recreational facility, as defined in Article 30, which serves children under 18 years of age, and has a total area for indoor and outdoor recreation (not including parking) of not less than 20,000 square feet.

^{6/} ORS 461.217 permits video lottery terminals to be placed only in establishments closed to minors. Because the Grants Pass Development Code defines an “adult business” as one which prohibits admission to persons less than 21 years of age and “adult use” as a use conducted in an area where persons under 21 years of age are prohibited, by definition the Grants Pass ordinance applies to establishments where video lottery is available.

^{7/} We express no opinion regarding whether the ordinance may be subject to challenge or preempted by any other statutory or constitutional provision.

^{8/} See ORS 461.010, 461.030, 461.180, 461.200, 461.220, 461.240, 461.250, 461.260, 461.300, 461.310, 461.330, 461.500, 461.510, 461.560, 461.600 (using phrase “tickets or shares”).