FILED November 7, 2014 10:05 AM
Appellate Court Records

IN THE SUPREME COURT OF THE STATE OF OREGON

ROGUE VALLEY SEWER SERVICES, an Oregon municipality, Plaintiff-Appellant, Petitioner on Review, v. **CITY OF PHOENIX**, an Oregon municipality, Defendant-Respondent, Respondent on Review.	Jackson County Circuit Court Case No. 103450-E-2 CA A148968 SC S062277

BRIEF OF AMICUS CURIAE LEAGUE OF OREGON CITIES IN SUPPORT OF RESPONDENT ON REVIEW

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On Review of the Decision of the Court of Appeals on Appeal from a Judgment of the Circuit Court for Jackson County, Hon. G. Philip Arnold, Judge

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Opinion Filed: April 9, 2014
Author of Opinion: Armstrong, P. J.
Before Judges: Armstrong, Duncan and Brewer

November 2014

Chad A. Jacobs, OSB #083694
Beery, Elsner & Hammond, LLP
1750 SW Harbor Way Ste 380
Portland OR 97201-5106
(503) 226-7191
chad@gov-law.com
Attorney for Amicus Curiae
League of Oregon Cities

Harry Auerbach, OSB #821830
Chief Deputy City Attorney
Portland Office of City Attorney
1221 SW 4th Ave Room 430
Portland OR 97204
(503) 823-4047
Harry.Auerbach@portlandoregon.gov
Attorney for Amicus Curiae
League of Oregon Cities

Sean E O'Day, OSB #003387
League of Oregon Cities
1201 Court St NE Ste 200
Salem OR 97301
(503) 588-6550
soday@orcities.org
Attorney for Amicus Curiae
League of Oregon Cities

Tommy A. Brooks, OSB #076071
Case M. Nokes, OBS #076641
Clark I. Balfour, OSB #791529
Cable Huston LLP
1001 SW 5th Ave Ste 2000
Portland OR 97204-1136
(503) 224-3092
tbrooks@cablehuston.com
cnokes@cablehuston.com
cbalfour@cablehuston.com
Attorneys for Petitioner on Review
Rogue Valley Sewer Services

Kurt H. Knudsen, OSB #920776
PO Box 126
Jacksonville OR 97530-0126
(541) 778-4375
knudsen@mind.net
Attorney for Respondent on Review
City of Phoenix

James R. Kirchoff, OSB #081879
James Holmbeck Kirchoff LLC
130 NW D St
PO Box 578
Grants Pass OR 97528
(541) 476-6677
ryan@dstreetlaw.com
Attorney for Respondent on Review
City of Phoenix

C. Robert Steringer, OSB #983514
Harrang Long Gary Rudnick PC
1001 SW 5th Ave 16th Fl
Portland OR 97204
(503) 242-0000
bob.steringer@harrang.com
Attorney for Amici Curiae Clackamas River Water and Special Districts Association of Oregon

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I. INTEREST OF AMICUS LOC

The League of Oregon Cities ("LOC"), founded in 1925, is a statewide association representing all of Oregon's 242 incorporated cities. Its mission is to be "the effective and collective voice of Oregon's cities and their authoritative and best source of information and training." The LOC advocates for improved quality of municipal services through technical assistance, research, and education.

The LOC, on behalf of its members, has an interest in the outcome of this case because the Court's decision will impact the ability of each of Oregon's 242 cities to receive just compensation from third parties for the use of city owned property.

II. QUESTIONS PRESENTED FOR REVIEW

Amicus LOC joins in the statement of questions presented for review and accompanying proposed rules of law of the respondent, City of Phoenix ("City").

In addition to the questions for review set forth by respondent, *Amicus* LOC identifies an alternative question presented and proposed rule of law.

Additional Question:

May a home rule city receive compensation from another local government when that other local government uses city property?

Proposed Rule:

So long as authorized by its charter and not expressly preempted by the Legislature, a home rule city may receive compensation from another local government for the other local government's use of city property.

III. NATURE OF THE PROCEEDINGS, RELIEF SOUGHT AND JUDGMENT

Amicus LOC joins in respondent's statement of the nature of the proceedings.

IV. STATEMENT OF FACTS

Amicus LOC joins in respondent's statement of the facts of the case.

V. SUMMARY OF ARGUMENT

Amicus LOC joins in respondent's summary of argument as to the questions petitioner, Rogue Valley Sewer Services ("petitioner"), has identified as presented for review.

In addition, *Amicus* LOC makes an alternative argument, summarized here: This case is about a City's ability to manage its property—a property rights case. It is not about intergovernmental taxation as argued by petitioner. In fact, because the franchise fee charged by the City is not a tax, petitioner's argument alleging a limitation on the City's ability to tax another local government, even if it were a correct statement of law, is not applicable here.

Given the magnitude of the constitutional authority granted to a home rule city, its civil enactments are presumed valid, unless it can be shown that the Legislature meant a state law to be exclusive or that the local enactment cannot operate concurrently with a state law. Because the state has not preempted home rule cities from charging a franchise fee for the use of city property, the City's fee is valid and must be paid by petitioner.

Furthermore, petitioner's use of the City's property without providing just compensation violates the takings clause of Article XI, section 4 of the Oregon Constitution as well as the requirement in ORS 450.815(7), which obligates petitioner to receive the City's consent and comply with any conditions of such consent before laying its sewers and drains in the City's rights of way. Finally, even if the City's fee was a tax, which it is not, petitioner misconstrues this Court's previous holdings regarding the required legislative authority to impose a tax on a local government. Under a correct interpretation of this Court's previous holdings, the City, using its home rule authority, may impose a tax on petitioner.

VI. ARGUMENT

Despite petitioner's arguments, this case is not about intergovernmental taxation. Rather, this is a case about property rights. At issue in this case is a city's ability to charge a fee to another local government for the second

government's use of city property. This would hardly be a question if, for example, a park and recreation district charged a school district for the use of an aquatic center. This case is truly no different—the City is merely attempting to charge a fee for petitioner's use of its property—in this case, the City owned rights of way.

Petitioner attempts to conflate two separate and distinct powers of the City—its ability to impose taxes as a regulator and its ability to charge fees for the use of its property. *See, e.g.,* Frederick E. Ellrod III and Nicholas P. Miller, *Property Rights, Federalism, And The Public Rights-Of-Way*, 26 Seattle U. L. Rev. 475, 484 (2003) (explaining, "a local community's right to obtain compensation for the use and occupancy of its property is distinct from its governmental power to tax, though the two are often confused (or deliberately conflated under the rubric of 'revenue-raising measures')."). *Amicus* LOC respectfully urges this Court not to make the same mistake. There is no doubt that the City may charge petitioner a reasonable fee to reimburse the City for its expenses related to petitioner's use of the City's property. Analyzing the case in this way allows the City to protect a vital government asset that it holds in trust for its citizens.

A. Receiving Compensation For The Use Of A City's Rights Of Way Is Important To The Health Of Oregon's Economy.

It is a common practice for governments at all levels to impose fees for the use of their property by private citizens and outside entities. Often, such fees are charged as a funding mechanism to ensure that the government is able to maintain the property for future users as well as the public at large. Publicly owned rights of way are not an exception to this general practice, and in fact, applying this practice to publicly owned rights of way may be critically important to the state's economy.

Oregon's road system, which is quickly deteriorating, is a key pillar of the state's economy. As explained in the LOC's report, *City Streets: Investing in a Neglected Asset*:

> Streets, roads, and highways literally keep the state's economy moving. The Portland Metro Area's economy is "transportation dependent, especially on its roads and highways, for the movement of freight." In fact, 60 percent of jobs statewide are transportation dependent. Transportation and logistics are 20 to 25 percent of today's production costs. For industries that transport goods, the condition of the road infrastructure is a key factor in deciding where to locate an office, warehouse, or production plant.

LOC, *City Streets: Investing in a Neglected Asset* (March, 2007), p.2, (internal citations omitted).[1]

[1] http://www.orcities.org/Portals/17/Publications/SpecialPubs/City_Streets_report_2007.pdf (last visited October 26, 2014)

The efficient movement of people and goods depends on a well maintained road system. According to the Oregon Department of Transportation's 2012 State of the System report, "goods-dependent industries like manufacturing, agriculture, construction and retail provided nearly 600,000 jobs and generated $26 billion of personal income in 2011 alone." LOC, *City Streets Needs Survey* (Summer 2014), p. 1.[2]

Yet, cities are facing a funding gap of more than $300 million for street maintenance and preservation. *See id.* To close this funding gap, cities have looked beyond traditional sources of funding by enacting programs such as transportation utility fees and local gas taxes. *See id.* In addition, cities use franchise fees to ensure that those entities that receive a special benefit through their use of rights of way provide reimbursement for the use of this publicly owned property. *See* LOC, *Utility and Franchise Fee Survey* (March, 2012), p. 1.[3] Franchise fees are a substantial source of general fund revenue for cities. *See generally id*. (discussing franchise fee revenues).

Cities charge franchise fees both to private companies and government owned and operated utilities in exchange for the special benefit of using city owned rights of way. *See id.* Importantly, charges to government owned and

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[2] http://www.orcities.org/Portals/17/Library/StreetNeedsSurveyJuly2014Final.pdf, (last visited October 26, 2014).
[3] http://www.orcities.org/Portals/17/Premium/2012FranchiseFeeSurveyFinal.pdf (last visited October 26, 2014).

operated utilities cut across the board to virtually every type of utility and every level of government. *See, e.g., id.* at p. 12 (City of Monmouth charging fees to MINET), p. 35 (City of Ashland charging fees to City's electric company), p. 36 (City of Manzanita charging fees to Tillamook People's Utility District), p. 48 (various cities charging fees to government owned and operated water and wastewater utilities, including the City of Sherwood against Clean Water Services), and pp. 50-52 (various cities charging fees in-lieu of franchise fees to various government owned and operated utilities). In fact, even the state has agreed to compensate a local jurisdiction for its use of a city's rights of way. *See id.* at p. 52 (City of Eugene waiving fees for the University of Oregon in exchange for tech services).

Petitioner seeks to challenge this common and necessary practice by claiming such fees are an unlawful tax imposed by one local government against another local government. The fundamental flaw in this argument, however, is that the fee the City seeks to charge petitioner is not a tax. Rather, it is a fee imposed by the City, against a single user, in exchange for the special benefit of using the City's property. As a fee, the charge collected by the City is not subject to the alleged limitation on intergovernmental taxation relied upon by petitioner and as such, the foundation upon which petitioner's argument is built falls apart.

B. Fees Imposed For The Use Of City Owned Property Are Not Taxes.

In Oregon, whether a government charge is a fee or a tax generally depends upon the context in which the question is raised and the underlying law to which the term is being applied. *See, e.g., Scappoose Sand & Gravel, Inc. v. Columbia Cnty*., 161 Or. App. 325, 336, 984 P.2d 876, 882 (1999) (explaining that the "import and application of the terms [tax or fee] vary from one context to another and that their meaning in any particular context is ascertainable largely by reference to the purposes of the provisions in which they are used or to which they are applied."), *citing Automobile Club v. State of Oregon,* 314 Or. 479, 485, 840 P.2d 674 (1992).[4]

This Court recently clarified, however, that there is a basic difference between a tax and a fee. In *McCann v. Rosenblum*, this Court explained that a "tax is 'any contribution imposed by government upon individuals, for the use and service of the state' . . . [and] a fee, by contrast, is imposed on persons who apply for or receive a government service that directly benefits them." 355 Or.

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[4] For example, in *Automobile Club*, this Court examined the intent of Article IX, section 3a of the Oregon Constitution to determine that underground storage tank assessments and emission fees imposed by the state were taxes or excises rather than fees. *See* 314 Or at 490-91. Conversely, in *Roseburg School Dist. v. City of Roseburg*, this Court used the language from of Article XI, section 11b of the Oregon Constitution to determine that a storm drainage utility fee is not a tax on property subject to constitutional limitations on property taxes. *See* 316 Or. 374, 851 P.2d 595 (1993).

256, 261-62, 323 P.3d 955, 958 (2014), *quoting Automobile Club*, 314 Or. at 485–86 (internal citations omitted).

This explanation is similar to and consistent with the distinction drawn between a tax and fee by the United States Supreme Court. As that Court explained:

> Taxation is a legislative function, and Congress, which is the sole organ for levying taxes, may act arbitrarily and disregard the benefits bestowed by the Government on a taxpayer and go solely on ability to pay, based on property or income. A fee, however, is incident to a voluntary act, e.g., a request that a public agency permit an applicant to practice law or medicine or construct a house or run a broadcast station. The public agency performing those services normally may exact a fee for a grant which, presumably, bestows a benefit on the applicant, not shared by other members of society.

National Cable Television Association v. United States, 415 U.S. 336, 340-41, 94 S.Ct. 1146, 1148-49, 39 L.Ed.2d 370 (1974).

This Court has previously used this basic distinction to determine if a charge is a tax or a fee. In *Sproul v. State Tax Com*., this Court held that a fire protection assessment on forest land was not subject to the uniformity of taxation provision in Article I, section 32 of the Oregon Constitution. *See* 234 Or. 579, 383 P.2d 754 (1963). In *Sproul*, this Court noted:

> . . . when certain property necessitates or makes it desirable for the state to exercise its police power, that property can be required to pay for the cost of that exercise of the police power and the constitutional limitations upon the power of taxation are not applicable. If all the people of the state, or all the property in it,

> are required to pay the costs of the state's exercise of the police power, the constitutional limitations on taxation must be satisfied. ***When the cost is to be paid only by the persons or property causing the exercise of the police power, such limitations are irrelevant***.

Id. at 592-93, 383 P.2d 754 (emphasis added). Thus, because the fee was applied to only those who caused the government to exercise its police power it was not a tax. In other words, it was a fee because it was "imposed on persons who . . . receive a government service that directly benefits them." *McCann,* 355 Or. at 261-62.

Likewise, in *Dennehy v. Dept. of Rev*., this Court rejected an argument that the tax limitations of Article XI, section 11 of the Oregon Constitution were contravened by a statutory "tax increment" scheme for financing urban renewal programs with tax revenues that would exceed the amounts that the levying bodies could permissibly collect for general governmental purposes. *See* 305 Or. 595, 756 P.2d 13 (1988). The Court reasoned that "[t]ax increment financing places the cost of urban renewal ***on the property that benefits from the expenditure of the funds so raised***" and as such was not a tax subject to the limitations in Article XI, section 11. *See id.* at 605-06 (emphasis added).

In *Scappoose Sand & Gravel,* the Court of Appeals followed this Court's reasoning from *Sproul* and *Dennehy.* There, the court held that a surface mining regulatory fee was not a "tax" for the purposes of ORS 203.055, which

requires voter approval of any county tax. *See* 161 Or. App. at 336-337. The court explained that special assessments are not taxes when they serve "the peculiar needs of or [are] responsive to regulatory needs that are occasioned by those on whom [the fee] falls." *Id.* at 334. The imposition of the fee was occasioned by a particular regulatory need, it funded the regulatory purpose related to that need, and it was charged against those whose activities gave rise to the need. As such, it was a fee rather than a tax. *See id.* at 336. Stated somewhat differently, it was a fee because it was "imposed on persons who . . . receive a government service that directly benefits them." *McCann,* 355 Or. at 261-62.

In each of these cases, the charge in question was determined to be a fee rather than a tax because the charge was collected to provide for a government service that directly benefitted the person or entity obligated to pay the fee. Here, the City enacted the fee in question to cover the costs and impacts that occur in connection with petitioner's use the City's rights of way. Likewise, the fee is collected to reimburse the City for its costs associated with petitioner's activities and not to raise revenue. (Petitioner's ER-8). Thus, the charge in question here, like those in *Sproul, Dennehy and Scappoose Sand & Gravel,* is one that: (1) is occasioned by petitioner's use of the City's rights of way; (2) funds the City's activities necessitated by such use; and (3) is charged against

the user rather than the general public. In other words, the fee in question is a charge for petitioner's receipt of a government service, the use of the City's rights of way, which directly benefits petitioner and as such satisfies the common definition of a fee used by this Court. *See McCann,* 355 Or. at 261-62. For this reason, the City's charge to petitioner for petitioner's use of the City's property is not a tax, but a fee.

Because the charge in question is a fee, rather than a tax, the basic premise of petitioner's argument falls apart and should be rejected by this Court. Petitioner relies upon cases that deal with taxation—not fees. *See City of Portland v. Multnomah County*, 135 Or 469, 471, 296 P 48 (1931); *City of Portland v. Welch*, 126 Or 293, 269 P 868 (1928); and *Central Lincoln People's Utility District v. Stewart*, 221 Or 3998, 351 P 2d 694 (1960). None of those cases address or provide support for the premise that a city may not charge a fee to another local government for that government's use of city property or that a city needs express authority from the state to do so. To that end, these cases supply little to no support to petitioner's claims in this matter.[5]

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[5]Petitioner makes a great deal of and relies heavily upon the dicta in these cases, which question the wisdom of one government entity taxing another government entity. Such decisions, however, are policy determinations that should be left to the legislative bodies of this state rather than the courts, and *Amicus* LOC respectfully urges this Court to leave the wisdom of such decisions to the state's legislative bodies. *See, e.g., Reilley v. Sec'y of State*, 41 Or. App. 293, 309-10, 598 P.2d 323, 331 (1979), *aff'd sub nom. Reilley v.*

Interestingly, petitioner fails to provide any analysis whatsoever about whether the fee in question is a tax. Instead, petitioner just switches the words "fee" and "tax" in an attempt to make this case about intergovernmental taxation rather than property rights. Petitioner simply assumes, incorrectly and contrary to this Court's precedents, that a fee and a tax are the same and relies upon taxation related cases to support its argument. This Court should reject this sleight of hand and focus on the actual issue presented—whether a home rule city may charge another government a fee for the use of city property.

Provided that such fees are authorized by the city's charter and they are not preempted by state or federal law, the answer to this question must be yes.

C. A Home Rule City May Impose Fees Against Another Government For The Use Of City Property.

A home rule city may charge other governments fees for the use of city property as long as the city's charter authorizes such fees and such fees are not preempted by state or federal law.

A city charter may grant all powers to a city that are not otherwise specifically denied by state or federal statute or constitution. *See, e.g., Jarvill v. City of Eugene*, 289 Or. 157, 169, 613 P.2d 1, 7-8 (1980) (explaining "…'home rule' provisions permit the people of a city or town to decide upon the

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Paulus, 288 Or. 573, 607 P.2d 162 (1980) (explaining a county assessment for services "is simply another obligation mandated on counties by state law, the wisdom of which is not [the court's] concern.").

organization of their government and the scope of its powers under its charter, without the need to obtain statutory authorization from the legislature."). When a charter grants such authority to a city, the city may exercise any power that is not otherwise denied by the state or federal governments. Contrary to petitioner's claims otherwise, there is no need for specific authority from the state for a city to act. *See id.* In fact, this Court presumes the validity of local civil enactments, unless the Legislature's intent to preempt those enactments is apparent. *See LaGrande/Astoria v. PERB*, 281 Or. 137, 148-49, 576 P2d 1204, *adh'd to on recons*, 284 Or 173 (1978), 586 P.2d 765.

The City's charter contains a general grant of authority, which provides the City with the power to impose the fee in question. *See, e.g., AT & T Commc'ns of the Pac. Nw., Inc. v. City of Eugene*, 177 Or. App. 379, 389, 35 P.3d 1029, 1037 (2001) (upholding city's ability to impose a tax under the general grant of authority found in its charter). Consequently, the fee in question is a valid exercise of the City's powers unless it is preempted by state or federal law.[6]

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[6] Although this issue was not directly addressed by this Court *in Roseburg School Dist. v. City of Roseburg*, it is important to note that the plaintiff in that case was another government entity, a local school district, which was required to pay a fee charged by the city—a decision that further demonstrates a city's ability to charge a fee against another government entity falls under the umbrella of home rule authority. *See* 316 Or. 374, 851 P.2d 595 (1993).

Petitioner does not argue that federal law preempts the City from imposing the fee in question. The only question, then, is whether state law preempts the City from charging petitioner a fee for the use of the City's property. As explained below, no such preemption exists.

This Court recently explained that home rule cities have authority "to enact substantive policies, even in areas also regulated by state law, so long as they local enactment is not 'incompatible' with state law." *Gunderson , LLC v. City of Portland*, 352 Or 648, 659, 290 P3d 803 (2012) (*citing LaGrande/Astoria*, 281 Or at 148-49). In *LaGrande/Astoria,* this Court established the analytical framework for determining whether preemption of a city ordinance has occurred by the state:

> [B]oth municipalities and the state legislature in many cases have enacted laws in pursuit of substantive objectives, each well within its respective authority that were arguably inconsistent with one another. In such cases, the 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.

281 Or. 148-149 (footnote omitted).

The Court of Appeals recently summarized the holding in *LaGrande/Astoria* as follows:

> Within the area of civil regulation, then, a chartered city can enact substantive policies in an area also regulated by state statute unless the local regulation is "incompatible" with state law either in the sense of being "clearly" preempted by express state law or because "both [state law and local law] cannot operate concurrently."

Thunderbird Motor Club, LLC v. City of Wilsonville, 234 Or. App. 457, 471, 228 P.3d 650 (2010), *review denied by* 348 Or. 524 (2010).

Oregon courts have repeatedly noted that the intent to preempt must be "clear and unmistakable." *See Portland Distributing Co. v. Dept. of Revenue*, 307 Or. 94, 98, 763 P.2d 1189 (1988) (*citing City of Coos Bay v. Aerie No. 538 of Fraternal Order of Eagles*, 179 Or. 83, 102, 170 P.2d 389 (1946)); *Gunderson*, 352 Or at 662 (explaining that state law must contain an "unambiguous expression of preemptive intention" and not just a plausible inference of that intention). In fact, a court begins its preemptive review with a presumption against preemption. *See LaGrande/Astoria*, 281 Or at 148 ("It is reasonable to interpret local enactments, if possible, to be intended to function consistently with state laws[.]"); *Thunderbird Motor Club*, 234 Or. App. at 271. This is especially true in the area of local taxation and finance. *See LaGrande/Astoria*, 281 Or. at 143. As stated in *Thunderbird*: "*LaGrande/Astoria* and its progeny require an expressly stated intent to preempt particular municipal enactments in order for a state statute to have that effect." *Thunderbird Motor Club*, 234 Or. App. at 471 (finding no express

preemption where the state statute "does not expressly limit the applicability of municipal law").

Here, petitioner fails to point to any statute that expressly states an intent to preempt a city's ability to charge a fee against another government for the use of the city's property. Petitioner relies upon ORS 221.420 and ORS 221.450 to support its argument that the state has expressly stated an intent to preempt cities from imposing fees upon other governments that are using city property. But neither of these statutes contains any of the express language necessary to show legislative intent to preempt a city's authority. *See, e.g., Multnomah Kennel Club v. Dept. of Rev.,* 295 Or. 279, 666 P.2d 1327 (1983) (finding no express preemption where the statute prescribed license fees and privilege taxes and declared that those fees and taxes "shall be in lieu of all other licenses and privilege taxes" imposed by a county, city or other municipality for the privilege of conducting race meets).

ORS 221.420 and ORS 221.450 do not contain text stating an express preemption (*e.g.*, "The State of Oregon hereby preempts cities from imposing fees on a sanitary authority") or a clearly manifested intention that the operation of state law be exclusive (*e.g.*, "A city may impose only the fees provided by statute and shall not adopt or enforce any ordinance imposing its own fees"). Although the statutes recognize city authority to impose fees on certain entities

for use of city rights of way, they do not limit a city's authority to impose fees to *only* those entities. As the Court of Appeals rightly held, nothing in the text of either statute forecloses the city's ability to impose a fee on other entities not listed in the statute.[7]

Likewise, petitioner fails to demonstrate that the City's charge for the use of its property cannot operate concurrently with ORS 221.420 and ORS 221.450. Petitioner argues that the Legislature's failure to include sanitary districts within the scope of these statutes demonstrates that a franchise fee charged against such districts for the use of city property is inconsistent with and preempted by state law. However, Petitioner misconstrues the standard

[7] In *Springfield Utility Board v. Emerald PUD*, 339 Or 631, 125 P3d 740 (2005), this court in *dicta* suggested that ORS 221.450 limited the city's authority to regulate certain utilities not provided for in that statute. However, that case was about whether a home rule city's desire to provide utility service to a particular area was preempted by state law that gave authority to the Public Utility Commission (PUC) to determine exclusive service territories for certain utilities, including Public Utility Districts. In that case, the city argued that it had home rule authority to supplant a Public Utility District otherwise designated by the PUC as the exclusive utility provider. The city pointed to ORS 221.415 and its "reaffirm" wording to demonstrate that state law recognized a city's home rule authority to assert its utility service over that of the provider designated by the PUC. In rejecting that argument, this court pointed out that the city's argument went too far, and in applying a conflict-of-laws analysis noted the absence of public utility districts from various statutes, including prior versions of ORS 221.450. As such, *Springfield Utility Board* does not stand for the proposition that cities are preempted from regulating or taxing entities not listed in the statute, but rather that case stands for the proposition that ORS Chapter 221 does not provide a basis for a city utility to supplant a utility otherwise lawfully designated by the PUC as having exclusive territory within the corporate boundaries of that city.

used by Oregon courts to determine whether a local law may operate concurrently with a state law.

The second test for preemption—implied preemption where the local law cannot act concurrently with state law—requires a basic inquiry into "whether the local rule in truth is incompatible with the legislative policy." *LaGrande/Astoria*, 281 Or. at 148-49. In analyzing whether a local ordinance is compatible with state law, Oregon courts compare the substance of the state and local regulations to determine if the two regulations can operate concurrently. *See, e.g., Thunderbird Mobile Club*, 234 Or. App. at 474-75; *Oregon Restaurant Assn. v. City of Corvallis*, 166 Or. App. 506, 508-09, 999 P.2d 518 (2000); *State ex rel. Haley v. City of Troutdale*, 281 Or. 203, 210-11, 576 P.2d 1238 (1978).

The fact that a city has imposed a stricter requirement than what state law provides does not mean that the local ordinance is incompatible with state law. *See State ex rel Haley*, 281 Or at 211 (concluding that state building code allowing single wall construction did not preempt more stringent city regulation requiring double wall construction); *Springfield Utility Board v. Emerald PUD*, 191 Or. App. at 541–42 (explaining that "[a] local ordinance is not incompatible with state law simply because it imposes greater requirements than does the state . . . Rather, we generally assume that the legislature did not

mean to displace local regulation of a local condition unless its intent to do so is apparent.").

Here, ORS 221.420and ORS 221.450 are silent with regard to sanitary districts. In fact, ORS 221.420 and ORS 221.450 originally were enacted in response to certain utilities that had failed to acknowledge city home rule authority to require franchises and impose franchise fees. The Legislature intended to prevent further arguments by these utilities over home rule authority by providing an additional statutory basis for regulating uncooperative utilities; the Legislature intended to "reaffirm" home rule authority, not to limit it. Consequently, when the Legislature enacted those provisions, it made clear that it had done so to "reaffirm the authority of cities to regulate use of municipally owned rights of way * * *." ORS 221.415.

To that end, the substance of these state statutes, when compared with the City's ordinance charging petitioner for the use of the City's property, demonstrate that the two regulations can operate concurrently. ORS 221.420 and ORS 221.450 simply do not address in any way whatsoever a city's ability to charge a sanitary district a fee for the use of city property. The City's charge is simply a greater requirement than what state law requires and can act concurrently with ORS 221.420 and ORS 221.450.

In addition, unlike its federal law counterpart, Oregon's preemption doctrine does not recognize implied field preemption. *See LaGrande/Astoria*, 281 Or. at 148-49 (recognizing that cities and the state may enact substantive laws on the same subject and that local law should be interpreted to function consistently with state law unless legislative intent to displace the local law is "apparent"); *Thunderbird Mobile Club*, 234 Or. App. at 474 ("[T]he occupation of a field of regulation by the state has no necessary preemptive effect on the civil or administrative laws of a chartered city."). Although the Legislature may preempt the field through an unambiguous statement of its intent, it cannot do so by implication. *See State ex rel Haley*, 281 Or. at 211. This Court appropriately has held the Legislature to a high standard when it chooses to displace the constitutionally sanctioned home rule authority of cities.[8]

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[8] The Legislature knows how to meet that high standard and has done so by unambiguously stating its intent to preempt home rule cities in multiple statutes. *See, e.g.*, ORS 731.840(4) (providing that "[t]he State of Oregon hereby preempts the field of regulating or imposing" various types of taxes); ORS 203.090 (providing that various statutes "preempt any laws of the political subdivisions of this state relating to the regulation of private security officers, employers and security services); ORS 288.610(2) (providing that certain statutory section "preempts all statutory or charter authority to issue advance refunding bonds or to effect a forward current refunding"). The Legislature likewise has adopted a number of state statutes that explicitly displace local regulation. *See, e.g.*, ORS 461.030(1) (providing that "no local authority shall enact any ordinances, rules or regulations in conflict with the provisions hereof" relating to the state lottery); ORS 634.057 ("No city, town, county or other political subdivision of this state shall adopt or enforce any ordinance, rule or regulation regarding pesticide sale or use.").

For this Court to hold otherwise would undo the very fabric of Oregon's home rule amendments. The concept of home rule is best understood by an examination of its corollary principle known as Dillon's Rule. Dillon's Rule is a judicial concept that gained wide acceptance throughout many state courts in the 1800's and holds that because municipal governments derive their authority and existence from the state, they are only allowed to engage in such activities as expressly allowed by the state. John F. Dillon, 1 *The Law of Municipal Corporations* § 9b, 93 (2d ed 1873). Through judicial interpretation of that rule, the following tenets have become a cornerstone of American municipal law and have been applied to municipal powers in most states:

- A municipal corporation can exercise only the powers explicitly granted to it;
- Those necessarily or fairly implied in or incident to the powers expressly granted; and
- Those essential to the declared objects and purposes of the corporation, not simply convenient, but indispensable.

Consequently, in states that follow Dillon's Rule, the state legislature controls local government structure, methods of financing its activities, its procedures, and the authority to undertake functions. Additionally, under Dillon's Rule, if there is a reasonable doubt whether a power has been

conferred to a local government, then the power has not been conferred. *Id.* § 55 at 173. Put simply, under Dillon's Rule, a local government must point to a state statute that affirmatively grants authority for that local government to act.

In contrast, and as noted already, a home rule local government is empowered to act unless a state statute expressly states that the local government is preempted from doing so. Consequently, for this Court to hold that ORS 221.420 or ORS 221.450 preempt by implication—that is, to say cities may not impose a fee on an entity not listed in those statutes, which by their express terms are permissive, not restrictive—would turn Oregon from a home rule state, into a Dillon's Rule state.[9] Put differently, if this Court were to accept petitioner's arguments, it would mean local governments could not impose a fee on petitioner to compensate the city for use of its rights of way because the state did not provide the city authority to do so. Such a conclusion

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[9] Even in the context of local criminal enactments, which do not enjoy the same presumption of validity as civil enactments, this Court has held it will not displace a local enactment based upon what a statute does not say, unless the legislative history clearly indicates otherwise. *See City of Portland v. Dollarhide,* 300 Or 490, 502 n 9, 714 P2 220 (1986) ("[T]he assumption . . . that the legislature intended to displace conflicting local criminal ordinances, absent apparent legislative intent to the contrary, does not apply when there is no state criminal law on the subject."); *City of Portland v. Lodi*, 308 Or 468, 782 P2d 415 (1989) (local government criminal act could not criminalize carrying of a concealed pocketknife where state legislature had amended a bill to remove a similar prohibition); *City of Portland v. Jackson*, 316 Or 143, 850 P2d 1093 (1993) (upholding a Portland ordinance that criminalized indecent exposure committed without intent to arouse, whereas state law criminalized only exposure with such intent.)

is contrary to Oregon's constitutional home rule provision and this Court's cases interpreting it.[10]

For these reasons, the City may charge petitioner the fees in question as they are authorized by the City's charter and not preempted by state law.

D. Petitioner's Use Of The City's Property Without Providing Just Compensation Violates The Takings Clause Of Article XI, Section 4 Of The Oregon Constitution As Well As The Requirement In ORS 450.815(7).

Petitioner's use of the City's property without the City's consent and/or providing the City with its required fees violates both Article XI, section 4 of the Oregon Constitution and the requirements of ORS 450.815(7). To avoid these constitutional and statutory concerns, this Court should reject petitioner's arguments and validate the City's franchise fee.

Article XI, section 4, of the Oregon constitution provides that "[n]o person's property shall be taken by any corporation under authority of law,

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[10] *Amici* CRW and SDAO make a similar type of argument in claiming that the fee in question is an "extramural" or "extramunicipal" activity that is not within the scope of the City's home rule powers and therefore must be expressly authorized by state statute. This argument is misguided for three reasons. First, it makes the same mistake as petitioner in simply assuming the fee in question is a tax rather than a fee, which it is not. Second, the City is charging the fee in question as part of the City's management of its property, within its own boundaries, and as such, the basic premise of the extramunicipal argument fails. Finally, even if the extramunicipal argument were applicable, ORS 450.815(7), which expressly requires petitioner to receive the City's consent to use City rights of way, provides the legislative authority that *Amici* CRW and SDAO claim is needed.

without compensation being first made, or secured in such manner as may be prescribed by law." As interpreted by the Court of Appeals, this provision of the Oregon constitution applies to a special district, such as petitioner, taking a city's property without providing just compensation. *See City of Keizer v. Lake Labish Water Control Dist.,* 185 Or. App. 425, 442, 60 P.3d 557 (2002), *review denied by,* 336 Or. 60, 77 P.3d 635 (2003).

Here, petitioner argues it can use the City's property as it desires without providing compensation for such use. Petitioner ignores the fact that such use creates impacts to the City, costing City staff time and money. The fee charged by the City is intended to reimburse the City for these impacts, which if not paid by petitioner would constitute a taking under the reasoning of *Lake Labish Water Control*. *Amicus* LOC respectfully urges this Court to avoid creating this constitutional claim and uphold the City's ability to charge the fee in question.

Likewise, *Amicus* LOC respectfully urges this Court to avoid creating a statutory concern, which would likely arise should this Court invalidate the City's fee. ORS 450.815(7) grants petitioner the right to use the City's rights of way for its sewers and drains provided that petitioner does so with the City's consent ***and*** complies with any conditions of such consent. Petitioner's refusal to pay the fee being charged by the City violates the requirements of ORS 450.815(7) as the fee the City seeks to charge is clearly a condition of the City's

consent to use its rights of way. As a special service district, petitioner may exercise only those powers that the Legislature grants to it. By failing to adhere to the requirements of ORS 450.815(7), petitioner's use of the City's rights of way is an *ultra vires* action that should not be condoned by this Court.

To avoid these constitutional and statutory concerns, *Amicus* LOC respectfully urges this Court to reject petitioner's arguments and validate the City's ability to charge a fee for the use of its property.

E. Even if such Fees Were Taxes, Nothing in this Court's Jurisprudence Precludes Home Rule Cities from Imposing such Taxes.

Assuming, arguendo, that the City's charge for the use of its rights of way is a tax rather than a fee, which it is not, this Court should apply the same home rule analysis set out above. This Court has not adopted a different test when municipalities exercise their home rule authority to tax other public entities; nor should this court adopt a different standard here. Taxation is a form of regulation. The home rule amendments to the Oregon Constitution do not distinguish local regulations as they apply to private entities versus public entities.

Petitioner claims that the City is not permitted to impose a tax on another local government body without express authority from the Legislature to do so. As explained above, petitioner relies upon *City of Portland v. Multnomah*

County, 135 Or 469; *City of Portland v. Welch*, 126 Or 293; and *Central Lincoln People's Utility District v. Stewart*, 221 Or 398 to support this position. However, a closer reading of these cases demonstrates that this Court did not actually hold that a city must receive permission from the Legislature to impose a tax on another local government.

For example, in *City of Portland v. Welch,* this Court analyzed the application of a state statute that exempted city real property from taxation to a portion of a city park that had been platted into lots and offered for sale. *See* 126 Or at 294-296. This Court held that it would not presume that these lots were subject to the state's general property taxes while they were still in the city's possession "in the absence of an express legislative declaration to that effect . . ." *Id.* at 296. In other words, this Court merely applied the general exemption that existed in state law to the city's property to conclude that the city was not required to pay property taxes on the lots for sale. This Court did not reach any decision whatsoever regarding one local government's ability to tax another local government without having first received permission to do so from the Legislature. Rather, this Court simply stated that "[t]here is nothing ***in the language of our statute*** to indicate that the Legislature intended for the property in question to be taxed." *Id.* at 297 (emphasis added).

Likewise, in *City of Portland v. Multnomah County*, this Court was asked to consider whether three parcels of property purchased by Portland after taxes had been assessed on March 1st, but before any levy had been made were subject to taxation. *See* 135 Or at 470. Again, relying upon the state statute that exempted the city's real property from taxation, this Court held that the three parcels were exempt from taxation as soon as they were acquired by the city, and any lien imposed by the March 1 assessment had no force or effect. *See id.* at 473. As in the *City of Portland v. Welch* decision, this Court simply did not consider or even reach the question of whether one local government could impose a tax on another local government without first receiving authority from the Legislature to do so. Rather, this Court's decision was limited to a determination of the application of a state statute to a specific factual situation.

Finally, in *Central Lincoln*, this Court examined whether a state excise tax applied to a people's utility district. *See* 221 Or at 400-401. This Court again reiterated that the Legislature's intention to tax government property may not be inferred, but "must be clearly manifested by an affirmative legislative declaration." *Id.* at 406. Because the Legislature had affirmatively expressed its intention to impose the excise tax against people's utility districts, this Court upheld the tax in question. *See id.* Again, this case did not consider or even

reach the question of whether one local government could impose a tax on another local government without first receiving authority from the Legislature to do so. It simply stands for the proposition that a tax on government property will not be inferred without an express legislative intent to do so. In *Central Lincoln*, such an express legislative intent existed.

Like *Central Lincoln*, there is an express legislative intent to impose a fee upon petitioner for its use of the City's rights of way. The City adopted Ordinance 928, which unmistakably expresses a clear legislative intent to impose the fee upon petitioner. This "affirmative legislative declaration" is all that is required by the cases relied upon by petitioner to support its argument. As such, to the extent that the City's fee adopted by Ordinance 928 is a tax rather than a fee, the Ordinance satisfies the requirements of *Central Lincoln, City of Portland v. Multnomah County,* and *City of Portland v. Welch.*

Petitioner's claims that the City may not act under its home rule authority to impose this fee, even if it is a tax, ignores this Court's holdings related to a city's home rule authority. As explained above in greater detail, a City may exercise whatever power is granted to it by its charter without having to first receive additional permission from the Legislature. *See, e.g., Jarvill*, 289 Or. at 169 (explaining "…'home rule' provisions permit the people of a city or town to decide upon . . . the scope of its powers under its charter, without the need to

obtain statutory authorization from the legislature."). Petitioner offers no support for its claims that this home rule authority does not apply here other than the cases which it misconstrues and are discussed above.[11]

For this reason, even if the fee in question is deemed a tax, the imposition of such tax upon petitioner is a valid exercise of the City's home rule authority.

VII. CONCLUSION

City rights of way are valuable assets that are important to the health and well-being of our state's economy. These assets, however, are quickly deteriorating, and cities are being forced to figure out how to maintain rights of way for all who need and want to use them. It is not unfair, improper or unlawful for cities to require third parties that receive a special benefit for using the rights of way to pay a fee for doing so.

This case is merely about a city's right to impose a fee upon a third party that is using city property. Oregon courts have been clear that it is proper to charge a fee against a party that receives a special benefit from government services, and that such fees are not taxes. To that end, any entity, whether a privately owned company or a government owned and operated utility, which

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[11] *Amicus* LOC recognizes that the policy reasons discussed by this Court when reaching its decisions in the cases relied upon by petitioner may very well be valid policy concerns. However, as discussed in footnote 5, supra, *Amicus* LOC respectfully urges this Court to leave such policy determinations to the legislative bodies of this state and to the voters that elect such legislative bodies.

receives a unique benefit from its use of a city's rights of way, should be expected to pay a fee to cover its fair share of the costs associated with its use if the City so desires.

Petitioner's attempt to make this case about intergovernmental taxation is an incorrect application of this Court's jurisprudence and should be rejected. Rather, this Court should uphold the City's ability to impose a fee for the use of its property and affirm the decision of the Court of Appeals.

DATED this 6th day of November, 2014.

Respectfully submitted:

s/ Chad A. Jacobs

Chad A. Jacobs, OSB #083694
Beery, Elsner & Hammond, LLP
1750 SW Harbor Way Ste 380
Portland OR 97201-5106
(503) 226-7191
chad@gov-law.com
Attorney for Amicus Curiae
League of Oregon Cities

Harry Auerbach, OSB #821830
Chief Deputy City Attorney
Portland Office of City Attorney
1221 SW 4th Ave Room 430
Portland OR 97204
(503) 823-4047
Harry.Auerbach@portlandoregon.gov
Attorney for Amicus Curiae
League of Oregon Cities

Sean E O'Day, OSB #003387
League of Oregon Cities
1201 Court St NE Ste 200
Salem OR 97301
(503) 588-6550
soday@orcities.org
Attorney for Amicus Curiae
League of Oregon Cities

CERTIFICATE OF COMPLIANCE
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I certify that (1) this brief complies with the word-count limitation of ORAP 5.05(2)(b) and (2) the word count of this brief (as described in ORAP 5.05(2)(a)) is 7,798 words.

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I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

DATED this 6th day of November, 2014.

s/ Chad A. Jacobs

Chad A. Jacobs, OSB #083694
Beery, Elsner & Hammond, LLP
Attorney for Amicus Curiae
League of Oregon Citites

CERTIFICATE OF FILING AND SERVICE

I certify that on November 6, 2013, I directed the foregoing **Brief of Amicus Curiae League of Oregon Cities in Support of Respondents on Review** to be electronically filed with the Appellate Court Administrator, Appellate Court Records Section, by using the Oregon Appellate eFiling System and to be electronically served upon the following parties by using the electronic service function of the eFiling system or by First-Class Mail:

Tommy A. Brooks
Case M. Nokes
Clark I. Balfour (by First-Class Mail)
Cable Huston LLP
1001 SW 5th Ave Ste 2000
Portland OR 97204-1136
(503) 224-3092
tbrooks@cablehuston.com
cnokes@cablehuston.com
cbalfour@cablehuston.com
Attorneys for Petitioner on Review
Rogue Valley Sewer Services

C. Robert Steringer
Harrang Long Gary Rudnick PC
1001 SW 5th Ave 16th Fl
Portland OR 97204
(503) 242-0000
bob.steringer@harrang.com
Attorney for Amici Curiae
Clackamas River Water and
Special Districts Association of Oregon

Kurt H. Knudsen
PO Box 126
Jacksonville OR 97530-0126
(541) 778-4375
knudsen@mind.net
Attorney for Respondent on Review
City of Phoenix

James R. Kirchoff
James Holmbeck Kirchoff LLC
130 NW D St
PO Box 578
Grants Pass OR 97528
(541) 476-6677
ryan@dstreetlaw.com
Attorney for Respondent on Review
City of Phoenix

s/ Chad A. Jacobs
Chad A. Jacobs, OSB #083694
Attorney for Amicus Curiae
League of Oregon Cities