IN THE SUPREME COURT OF THE STATE OF OREGON

NORTHWEST NATURAL GAS COMPANY, an Oregon corporation, and PORTLAND GENERAL ELECTRIC, an Oregon corporation, Plaintiffs-Respondents, and ROCKWOOD WATER PEOPLE'S UTILITY DISTRICT, Intervenor-Respondent, Petitioner on Review v. CITY OF GRESHAM, a municipality and public body within the State of Oregon, Defendant-Appellant, Respondent on Review.	Supreme Court Case No. S062535 (Control) CA Case No. A150990 Multnomah County Circuit Court No. 1107-08422
NORTHWEST NATURAL GAS COMPANY, an Oregon corporation, and PORTLAND GENERAL ELECTRIC, an Oregon corporation, Plaintiffs-Respondents, Petitioners on Review and ROCKWOOD WATER PEOPLE'S UTILITY DISTRICT, Intervenor-Respondent, v. CITY OF GRESHAM, a municipality and public body within the State of Oregon, Defendant-Appellant, Respondent on Review.	Supreme Court Case No. S062556 CA Case No. A150990 Multnomah County Circuit Court No. 1107-08422 February 2015

RESPONDENT ON REVIEW CITY OF GRESHAM'S BRIEF ON THE MERITS

Date of Opinion: July 2, 2014
Author of Opinion: Armstrong, P.J.
Concurring: Hancock, J., Egan, J.

Petition to Review the Decision of the Court of Appeals on Appeal from the Judgment of the Multnomah County Circuit Court
The Honorable Stephen K. Bushong, Judge

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I. INTRODUCTION

The City of Gresham, a municipal corporation of the State of Oregon (Gresham), adopted Resolution No. 3056 in exercise of its home rule authority, and "to avoid further service disruptions in the police and fire departments." The Resolution increased the utility license fee paid by the Portland General Electric Company (PGE), Northwest Natural Gas Company (NW Natural), and Rockwood Water People's Utility District (Rockwood Water) (collectively "the Utilities") from five percent to seven percent effective July 1, 2011. This legal action followed.

The Oregon Court of Appeals ruled in favor of Gresham in *Northwest Natural Gas Co. v. City of Gresham*, 264 Or App 34, 330 P3d 65 (2014). PGE and NW Natural sought review by the Oregon Supreme Court (Case No. S062556) and Rockwood Water separately sought review (Case No. S062535). This court granted both petitions and consolidated these appeals for purposes of briefing, oral argument, and opinion. Separate applications to appear *Amici Curiae* in support of the Utilities were granted for Industrial Customers of Northwest Utilities and Northwest Industrial Gas Users (Industrial Customers), and Avista Corporation, Idaho Power Company, and Pacific Power (Joint Utilities). An application to appear *Amicus Curiae* in support of Gresham will be filed by the League of Oregon Cities (LOC). Gresham joins in, and incorporates by reference, LOC's *amicus* brief in this case.

II. STATEMENT OF THE CASE

A. *Legal questions presented on review*

Gresham accepts the Question Presented on Review submitted by PGE and NW Natural. Gresham also accepts the substance of the Legal Questions Presented on Review submitted by Rockwood Water. However, Gresham does not accept that Rockwood Water is a "fellow municipal entity" or that taxing another unit of government is "this Court's long-held view" as both issues are in dispute in this appeal.

Gresham presents two additional legal questions as alternative grounds to affirm the Court of Appeals decision.

1) Does ORS 221.450 preempt Gresham's home rule authority to establish a seven percent utility license fee?

2) Is Gresham's utility license fee a privilege tax subject to ORS 221.450?

B. *Rule of law to be established*

Gresham does not agree with the proposed rule of law offered by the Utilities. To paraphrase ORS 221.450 for the convenience of the court, a city may levy and collect a privilege tax from utilities using streets "without a franchise from the city" in an amount not exceeding five percent of gross revenues.[1] The rule of law to be affirmed in this case is that the Court of

[1] The full text of the statute is included in the appendix (APP 1).

Appeals correctly defined "franchise" for purposes of ORS 221.450 to mean a governmental grant to a utility to occupy the public rights-of-way. After noting that it is not the particular type of instrument that defines a franchise, the Court of Appeals correctly found that a franchise is not limited to a negotiated contract. Gresham's utility license was a franchise and, therefore, the five percent limit of ORS 221.450 did not apply to Gresham's utility license fee.

The Court of Appeals decision can also be affirmed on the following alternative rules of law: 1) ORS 221.450 does not preempt Gresham's home rule authority to establish a seven percent utility license fee; and 2) Gresham's utility license fee is not a privilege tax subject to ORS 221.450.

C. *Nature of the action, relief sought in the trial court, and nature of the judgment by the trial court*

Gresham accepts the Nature of the Action as set forth by PGE and NW Natural. Gresham also accepts the substance of Rockwood Water's Nature of Action, Relief Sought in the Trial Court, and Nature of the Judgment by the Trial Court. Gresham does not accept Rockwood Water's argumentative use of "license fee operates as a privilege tax" as that issue is in dispute in this appeal.

D. *Facts material to review*

Gresham accepts the Facts Material to Review as set forth by PGE and NW Natural and Rockwood Water's Statement of Material Facts.

III. SUMMARY OF ARGUMENT

The Court of Appeals decision should be affirmed. The five percent limit of ORS 221.450 only applies to utilities operating "without a franchise from the city." As demonstrated by the well-defined legal meaning of "franchise" in dictionaries and case law, a utility license issued by Gresham is a "franchise" as that term is used in ORS 221.450. Since the Utilities have a franchise, ORS 221.450 does not apply and no other law prevents the city from establishing a seven percent utility license fee.

In addition, there is no showing of a clear and unmistakable legislative intent to preempt the City of Gresham's home rule authority. At best, the Utilities have shown that the legislative intent of ORS 221.450 is unclear. ORS 221.450 filled a gap in charter authority; it did not limit home rule authority. ORS 221.450, together with ORS 221.415 and ORS 221.420, reaffirms a city's home rule authority for fees and charges without imposing any limit. While ORS 221.450 limits a privilege tax in some circumstances, the legislature did not intend for a privilege tax to include a regulatory license fee. In the absence of meeting the high standard required to show clear and unmistakable preemption of home rule authority, Gresham's utility license fee increase must be upheld.

Finally, Rockwood Water is subject to the utility license fee the same as other utilities even if it is a governmental entity. Even if the court concludes

there must be specific statutory authority to impose the utility license fee on a PUD, ORS 221.420 contains the specific statutory authority that Rockwood Water demands.

IV. ARGUMENT

A. *Gresham's utility license fee is not subject to the five-percent limit of ORS 221.450 because the utility license is a "franchise."*

In the proceedings below, the parties and trial court assumed that the term "franchise," as used in ORS 221.450, meant a negotiated contract between a utility and a city regarding the use of the public rights-of-way for utility purposes. The parties assumed that a Gresham utility license was not a "franchise" and therefore the utilities were operating "without a franchise from the city" for purposes of ORS 221.450. As a result, the arguments below focused on whether Gresham's utility license fee was a "privilege tax" limited to five percent of gross revenues by ORS 221.450 and whether that statute was a clear and unmistakable preemption of Gresham's home rule authority to establish a seven percent fee.

Notwithstanding this assumption, the Court of Appeals correctly exercised its independent duty to construe and apply statutes and considered what the legislature intended by the phrase "without a franchise from the city." As stated in *Stull v. Hoke*, 326 Or 72, 77, 948 P2d 722 (1997), "[i]n construing a statute,

[an Oregon] court is responsible for identifying the correct interpretation, whether or not asserted by the parties."

As this is a case of statutory interpretation, the court ascertains the intent of the legislature by examining the statute's text and context, along with any relevant legislative history and, if necessary, relevant cannons of statutory construction. *State v. Gaines*, 346 Or 160, 171-73, 206 P3d 1042-43 (2009); *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-12, 859 P2d 1143, 1145-147 (1993).

1. *The term "franchise" had a well-established legal meaning in 1931 as a governmental grant of a special privilege not available as a common right.*

The term "without a franchise from the city" was enacted in 1931 by Oregon Laws 1931, chapter 234, section 1, the predecessor of what is now ORS 221.450. Unfortunately, there is no legislative history from this 1931 legislation, presumably because a fire destroyed the Oregon State Capitol in 1935. No subsequent amendment to this law is relevant to the legislature's intent.[2]

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[2] Or Laws 1933, ch 466, §1 (changing the time period from one year to 30 days); Or Laws 1933 , ch 24, §1 (2nd Spec Sess) (changing "not less than five percent" to "not exceeding five per cent"); Or Laws 1987, ch 245 §3 (adding PUDs and electric co-ops); Or Laws 1987, ch 447 §115 (adding telecommunications utilities); Or Laws 1989, ch 999 §7, 8 (adding heating companies); Or Laws 1999, ch 865 §30 (referencing distribution utilities); Or Laws 1999, ch 1093 §7 (changed to telecommunication carrier); Or Laws 2007, ch 807 §41 (adding Oregon Community Power; grammar changes).

However, relevant cannons of statutory construction assist in determining legislative intent. "[I]n construing statutes that were enacted many years ago, we consult dictionaries that were in use at the time. Moreover, if a word has a well-defined legal meaning, we give the word that meaning in construing the statute." *Blachana, LLC v. Bureau of Labor and Industries*, 354 Or 676, 688, 318 P3d 735 (2014). (citations omitted). In addition, it is also presumed "that the legislature enacts statutes in light of existing judicial decisions that have a direct bearing upon those statutes." *Weber and Weber*, 337 Or 55, 67, 91 P2d 706 (2004).

The term "franchise" had a well-established legal meaning in 1931. As found by the Court of Appeals, dictionaries from that era described a franchise as "[a] special privilege conferred by government on individuals, and which does not belong to the citizens of the country generally by common right." *See* John Bouvier, 2 *Bouvier's Law Dictionary and Concise Encyclopedia* 1299 (3d ed 1914). In addition, *Black's Dictionary of Law* 515 (1891) used the same definition and added "[i]n this country, [a franchise] is a privilege of a public nature, which cannot be exercised without a legislative grant."

The Utilities offer additional dictionary definitions from that era. While the *Ballentine* definition does refer to “a contract,” that use is consistent with the concept that a contract is but one form that a franchise can take … it is not the exclusive form. As to the *Webster’s* definition, the quoted language from

1910 says nothing about a contract; the 2002 version does but that is consistent with a negotiated contract being but one form of a franchise. These additional definitions do not lead to a different result. If anything, because of the possibility of different meanings, the legislature would have been more precise in 1931 had it meant to limit "franchise" to just a negotiated contract.

Case law in Oregon before and after 1931 also provides a well-established legal meaning of “franchise.” The decisions described below applied “franchise” in terms of the type of governmental grant given -- whether it was a special privilege not available to the public generally (franchise) or a regulation of what could otherwise be done by common right (license).

Oregon v. Portland Gen. Elec. Co., 52 Or 502, 95 P 722, *reh'g den*, 98 P 160 (1908) analyzed several legislative acts relating to the construction and operation of the canal in Oregon City by the Willamette Falls Canal and Lock Co. and its successor, Portland General Electric. The legislation included payment of ten percent of the net profits to the State of Oregon. The case included the statement that "[a] franchise is *** a privilege or authority vested in certain persons by grant of the State to exercise powers to do and perform acts which, without such grant, they could not do or perform." *Id.* at 526.

Western Union Tel. Co. v. Hurlburt, 83 Or 633, 163 P 1170 (1917) considered whether a city could levy a tax related to the special franchise

granted to Western Union to occupy the public rights-of-way. Before it addressed the tax issue, the court first analyzed whether the grant to Western Union was a franchise or a license. The court stated the general rule that "a grant by a municipality to a corporation of the right to use the streets for water, gas, transportation, or other public service purpose * * * constitute[s] a franchise and not a mere license." *Id.* at 637. The court also announced the corollary principle that "permission given by municipal ordinance to a private corporation to exercise some special privilege within the city, pursuant to an express delegation of legislative authority, is a grant by the state whereby the right conferred becomes a franchise and not a license." *Id.* at 638.

Elliott v. City of Eugene, 135 Or 108, 294 P 358 (1930) reviewed a city contract for the exclusive right to collect and haul garbage. The question was whether that contract was a franchise. Just one year before the 1931 legislative session, the court concluded that "franchises are special privileges conferred by the government on individuals, and which do not belong to the citizens of the country generally of common right." *Id.* at 113. In addition, the contract was a franchise because "[t]he hauling of garbage is everywhere regarded as peculiarly subject to the police power of the state," *Id*. at 113, and "cannot be considered as a common right[.]" *Id*. at 115.

This principle continued in cases decided after 1931. "A franchise is a special privilege granted by the government to a person or corporation, which

privilege does not belong to the citizens of a country generally, of common right. * * * A franchise confers the right to exercise powers or to do and perform acts which, without such grant, the person to whom it is granted could not do or perform[.]" *Whitbeck v. Funk*, 140 Or 70, 73-74, 12 P2d 1019 (1932) citing *Portland Gen. Elec. Co.*, 52 Or at 526 and *Western Union Tel. Co.*, 83 Or at 636. The legislature is presumed to have been aware this 1932 case when it amended the predecessor of ORS 221.450 in 1933.

Also demonstrating this principle is *Anthony v. Veatch*, 189 Or 462, 220 P2d 493, *reh'g den*, 221 P2d 575 (1950). The court relied on *Elliot* to conclude that the state requirement to obtain a fixed-gear fishing license did not confer a franchise on the license holder because the right to fish is "one common to all citizens of Oregon." *Id.* at 478.

The Utilities recognize these cases found that a franchise is a special privilege without regard to its form but argue that because some of those cases related to contracts, the rule should not be applied in other circumstances. However, the underlying facts of those cases do not support such a narrowing of the principle. Instead, the potential for different meanings of the word "franchise" means the legislature would have been more precise in 1931 had it intended to limit "franchise" to a negotiated contract.

In sum, these judicial decisions provide the well-established legal meaning that a franchise depends on the nature of the rights granted and not the

means by which those rights were granted. The 1931 and 1933 legislatures would have understood that a governmental grant to a utility to occupy the public rights-of-way for utility purposes created a franchise, regardless of the form or label of that governmental grant.

This construction of the term “without a franchise from the city” is supported by the statutory context. Since 1911, ORS 221.420 and its predecessors have provided that cities have the power to "determine by contract, prescribe by ordinance or otherwise" the terms and conditions under which public utilities may occupy the streets, highways, and other public property within a city. *See* Or Laws 1911, ch 279 § 61; Or Laws 1931, ch 103, § 8; and ORS 221.420. If the legislature intended that a utility’s use of the public rights-of-way could only be granted by a negotiated contract, then ORS 221.420 would not include “ordinances or otherwise" as means by which a city could prescribe the terms and conditions of such use.

The legislature knew the difference between the term "franchise" and "contract" and if it meant for ORS 221.450 to apply to a city using something other than a contract to grant the special privilege of using the public rights-of-way, then that is what the legislature would have said. By using the well-established meaning of the term "franchise" -- the governmental grant of a special privilege regardless of its form or title -- ORS 221.420 and ORS 221.450 can be read together and all the words used can be given meaning.

A "franchise," as that term is used in ORS 221.450, is the governmental grant to a utility of the special privilege to occupy the public rights-of-way; it is not limited to a particular type of instrument. While a franchise can be created by a negotiated contract, it can also be created by other means such as a utility license issued by the City of Gresham.

2. *Modern Supreme Court decisions have not changed the well-established legal meaning of "franchise."*

The Utilities argue that this court's footnote in *US West Communications v. City of Eugene,* 336 Or 181, 81 P3d 702 (2003) requires a different result. That footnote said,

> If certain conditions are met, a city either may enter into a franchise agreement that determines the "charges and fees upon which any public utility * * * may be permitted to occupy the streets, highways or other public property within such city," ORS 221.420(2), or may impose a privilege tax "for the [utility's] use of [the] streets, alleys or highways" within the city, ORS 221.450.

Id. at 183 n 1 (alterations in original). The Utilities argue that this footnote means that a franchise can only be created by a "franchise contract," and any other grant of permission to use the public rights-of-way means that a utility is operating "without a franchise" and subject to the terms of ORS 221.450.

While *dicta* are not binding, Gresham acknowledges there are circumstances where it can be persuasive. However, this footnote is inapposite because the court in *US West* was not seeking to determine the meaning of the term "franchise" as used by ORS 221.450. Instead, the case dealt with the

construction of ORS 221.515 in the context of a telecommunications carrier that was operating under a negotiated franchise contract with the city. *See US West*, 336 Or at 183-84. Had the meaning of "franchise" been an issue in the *US West* case, further research and briefing would likely have brought to this court's attention the relevant decisions of *Western Union*, *Elliot*, and *Whitbeck* that are discussed above.

In *Northwest Natural Gas Co. v. City of Portland*, 300 Or 291, 711 P2d 119 (1985), this court recognized that the term "franchise" has the meaning described above – the special privilege to occupy the public rights-of-way regardless of form or title. Interpreting the language of an 1859 territorial grant, a 1932 revocable permit, a 1966 city ordinance, and a franchise contract, this court referred to all as "franchise." *Id*. at 295-96, 307-11. Thus, the Oregon Supreme Court has recognized that a franchise can come in many different forms. It is the nature of the grant that creates a franchise, not the form in which it is granted.

3. *Gresham's utility license is a franchise and therefore ORS 221.450 does not apply.*

Based on this correct interpretation of "franchise," the Utilities are operating with a franchise from the city. That makes ORS 221.450 inapplicable to Gresham's *Utility License Ordinance*[3] and seven percent utility license fee.

[3] Gresham Revised Code Article 6.30.

Each Utility has a utility license that grants permission to occupy the public rights-of-way in Gresham. The *Utility License Ordinance* sets the terms, conditions, charges, and fees which each utility is required to comply with in exchange for that governmental grant. Because the Utilities were operating with a franchise from the city, ORS 221.450 does not apply and Gresham's resolution increasing the utility license fee to seven percent is not prohibited by ORS 221.450.

B. *Gresham's utility license is not subject to the five-percent limit of ORS 221.450 because it was adopted pursuant to home rule authority and is not preempted by state law.*

Assuming, *arguendo*, that this court concludes that Gresham's utility license is not a franchise, the question becomes whether ORS 221.450 preempts Gresham's home rule authority to establish a seven percent utility license fee for the use of city streets. A review of the text and context of ORS 221.450, from the adoption of its predecessor in 1931 through subsequent legislative changes to this and other laws related to utilities, demonstrates that ORS 221.450 is not intended to preempt local home rule authority.

ORS 758.010[4] gives utilities "the right and privilege" to be in the rights-of-way of public roads in Oregon. However, that statute expressly excludes

[4] "Except within cities, any person or corporation has a right and privilege to construct, maintain and operate its water, gas, electric or communication service lines, fixtures and other facilities along the public roads in this state ***." ORS 758.010(1).

city streets. In the absence of this a right and privilege, utilities can occupy a city street only if granted permission to do so by that city.

1. *Gresham has home rule authority to enact the Utility Licensing Ordinance.*

The City of Gresham relied on its home rule Charter when it enacted its *Utility Licensing Ordinance*. The municipal home rule provisions of the Oregon Constitution broadly provide that the charter of a city can grant the power to enact ordinances without the express authority of the Oregon legislature. "These 'home rule' provisions permit the people of a city or town to decide upon the organization of their government and the scope of its powers under its charter, without the need to obtain statutory authorization from the *Jarvill v. City of Eugene*, 289 Or 157, 169, 613 P2d 1, 7-8 (1980).

Section 5 of the Gresham Charter states: "The City has all the powers which the constitution, statutes, and common law of the United States and this state expressly and impliedly grant or allow municipalities as fully as though this charter specifically enumerated each of those powers." This broad grant of power confers upon Gresham the sum total of intramural powers available to municipalities in Oregon. *See Idanha v. Consumers Power, Inc*., 8 Or App 551, 495 P2d 294 (1972). This grant of power includes the regulation of utilities and the establishment of fees and charges for the use of city streets.

2. *The analytical framework for preemption sets a high standard to find legislative intent to preempt.*

This broad home rule authority can be limited by the state legislature's plenary authority to preempt local laws. *LaGrande/Astoria v. PERB*, 281 Or 137, 142, 576 P2d 1204, 1208, *aff'd on reh'g*, 284 Or 173, 586 P2d 765 (1978).

The analytical framework to determine whether the state has preempted city regulations is set out in *LaGrande/Astoria*.

> [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 intent is apparent.

LaGrande/Astoria, 281 Or at 148-49 (footnote omitted).

The Court of Appeals summarized this analytical framework as follows.

> Within the area of civil regulation, then, a chartered city can enact substantive polices 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 P3d 650, 658 (2010) (alteration in original).

As in any case of statutory interpretation, the court ascertains the intent of the legislature by examining the statute's text and context, along with any relevant legislative history and, if necessary, relevant cannons of statutory construction. *State v. Gaines*, 346 Or at 171-73; *PGE v. Bureau of Labor and Industries*, 317 Or at 610-12.

This analytical framework requires the courts to start with the assumption that the legislature did not intend to preempt local law. The courts are to interpret local law as intended to function consistently with state law and that the legislature did not preempt local law unless that intent is apparent. The intent to preempt must be "clear and unmistakable." *See Portland Distributing Co. v. Dept. of Revenue*, 307 Or 94, 98, 763 P2d 1189, 1191 (1988) citing *City of Coos Bay v. Aerie No. 538 of Fraternal Order of Eagles*, 179 Or 83, 102, 170 P2d 389, 398 (1946).

Courts have held the legislature to this high standard when expressing the intent to preempt. In *Multnomah Kennel Club v. Dept. of Revenue*, 295 Or 279, 666 P2d 1327 (1983), this court found 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. The court stated that the statute did not preempt the county from imposing a business income tax because:

> The state is deemed to have exercised its power to preempt a field only where the intent to do so is apparent. *LaGrande*, 281 Or at 148-49. Had the legislature intended to foreclose local income taxation of pari-mutuel racing establishments, it could and should have given explicit direction to that effect.

Id. at 287.

Ashland Drilling, Inc. v. Jackson County, 168 Or App 624, 637, 4 P3d 748, 758 (2000) found no express preemption of the local regulation of ground water where ORS 537.769 stated "[n]o ordinance, order or regulation shall be adopted by a local government to regulate the inspection of wells, construction of wells or water well constructors subject to regulation by [state agencies]." In *AT & T Communications of the Pacific Northwest, Inc. v. City of Eugene*, 177 Or App 379, 396-97, 35 P3d 1029, 1040-41 (2001) *rev den*, 334 Or 491, 52 P3d 1056 (2002) the court found no express preemption of local regulation of telecommunications services where ORS 759.030(1)[5] stated "[t]he Public Utility Commission shall have the authority to determine the manner and extent of regulation of telecommunications services within the State of Oregon."

In each of these cases, the courts did not presume that the legislature intended to preempt local authority. Instead, the courts examined "whether the local rule in truth is incompatible with the legislative policy" *LaGrande/Astoria,* 281 Or at 148; interpreted the local enactment and state law to function

[5] This statute was subsequently repealed by Or Laws 2005, ch 232 § 6.

consistently with each other; and did not assume the legislature intended to displace the local regulation of local conditions.

The legislature knows how to preempt local government regulation when it wishes to do so. For example, ORS 731.840(4) declares, "[t]he State of Oregon hereby preempts the field of regulating or of imposing excise, privilege, franchise, income, license, permit, registration, and similar taxes, licenses and fees upon insurers and their insurance producers and other representatives * * * ." Other examples are found in ORS 203.090 ("The provisions of [the statute] preempt any laws of the political subdivisions of this state relating to the regulation of private security providers.") and ORS 467.136 ("Any local government or special district ordinance or regulation now in effect or subsequently adopted that makes a shooting range a nuisance or trespass or provides for its abatement * * * is invalid * * *.").

The text of ORS 221.450 does not meet the high standard necessary to be a clear and unmistakable preemption of local home rule authority. ORS 221.450 contains none of the language courts require the legislature to use when expressly preempting local home rule authority. To the contrary, the context of ORS 221.450 shows that the legislature did not intend to preempt local regulations at all.

3. *ORS 221.450 was intended to fill a gap in charter authority.*

ORS 221.450 dates back to 1931. *See* Or Laws 1931, ch 234, § 1. At that time, a city's inherent authority to impose a tax was not recognized. "It is an established rule of law that the power to tax is not inherent in a municipal corporation." *Eugene Theatre Co. v. City of Eugene*, 194 Or 603, 617, 243 P2d 1060, 1067 (1952). In *US West*, this court said that the description of the power to tax in *Eugene Theatre* was stated without reference to the home rule provisions of the Oregon Constitution but acknowledged that the older view was that the power to tax was a delegated authority from the legislature. *US West Communications, Inc. v. City of Eugene,* 336 Or 181, 186 n 8, 81 P3d 702 (2003). This older view was in place in 1931.

City of Portland v. Pacific Telephone & Telegraph Co., 5 F Supp 79 (D Or 1933)[6], sheds light on the context for the adoption of the predecessor of ORS 221.450. Pacific Telephone (today operating as CenturyLink) argued that home rule prohibited the legislature from adopting the predecessor of ORS 221.450. Portland alleged in its complaint that Pacific Telephone operated a telephone and telegraph service using Portland's streets without a franchise. Portland had to rely on the predecessor of ORS 221.450 to enact a privilege tax because "the city [had] no charter expressly authorizing it to levy a privilege tax for the use of its streets without a franchise * * *." *Id.* at 81. Because the older

[6] The full text of this case is included in the appendix (APP 3).

view in 1931 was that the power to tax was not inherent in a municipal corporation, Portland had to rely on legislative authority to impose a privilege tax because its charter did not authorize that type of tax.

The 1931 legislature intended the predecessor of ORS 221.450 to be a grant of authority to impose a privilege tax in the absence of charter authority to do so. It was not intended to grant authority to all cities but only to cities that needed statutory authority because their charter did not allow for a privilege tax. That grant of authority was not then, and should not be considered now, a limit on the home rule authority of a city to impose a privilege tax when doing so is within the authority of that city's home rule charter.

ORS 221.450 is not rendered meaningless by this interpretation. If a charter, like Portland's in 1931, does not grant authority to impose a privilege tax, then ORS 221.450 would be the authority for such a tax subject to the limits of that statute. While that scenario may not exist today, that scenario did exist in 1931.[7]

Gresham relied on its home rule Charter, not the legislative authority of ORS 221.450, to adopt its *Utility Licensing Ordinance* and therefore is not bound by the limits of that statute. Because ORS 221.450 only applies to cities without home rule authority to adopt a privilege tax, the utility license fee

[7] The LOC *amicus* brief in this case provides a thorough discussion of the historical context of ORS 221.450.

provision in *Utility License Ordinance* adopted pursuant to Gresham's home rule Charter can operate concurrently with ORS 221.450 and the utility license fee is not preempted.

4. *ORS 221.415 and ORS 221.420 reaffirm Gresham's home rule authority.*

ORS 221.420 can be traced back to 1911, a time when home rule was in its infancy. *See* Or Laws 1911, ch 279, § 61. ORS 221.420 provides that "cities may govern all conditions associated with the utilities' use of the public streets." *Northwest Natural Gas Co. v. City of Portland*, 300 Or 291, 305, 711 P2d 119, 128 (1985). Thus, even if a city is without independent home rule authority, the legislature long ago authorized local control of utilities using city streets. Having expressed its specific intent to allow local control, it would be inapposite to interpret the same statutory scheme as intending to displace local provisions.

ORS 221.415 was adopted by the legislature in 1987 along with amendments to ORS 221.420 and 221.450. *See* Or Laws 1987, ch 245, §§ 1-3. These changes show the legislature did not intend to limit a city's home rule authority to regulate utilities. ORS 221.415 states that the legislature "[r]ecogniz[es] the independent basis of legislative authority granted to cities in this state by municipal charters * * * " and that ORS 221.420 and 221.450 "reaffirm the authority of cities to regulate use of municipally owned rights of

way and impose charges * * * for the use of such rights of way." ORS 221.420(2)(a) was amended in 1987 to specifically include the "payment of charges and fees" so it now explicitly states that a city may "[d]etermine by contract or prescribe by ordinance or otherwise, the terms and conditions, including payment of charges and fees, upon which [a utility] * * * may be permitted to occupy [city streets] * * * ." ORS 221.420 contains no limits on that authority.

Whatever intent might be attributed to the legislature when it adopted the predecessor to ORS 221.450 in 1931, the 1987 legislative amendments reaffirmed the right of cities under their home rule charter to regulate the use of city streets, including the payment of charges and fees. In that context, ORS 221.450 cannot be a "clear and unmistakable" preemption of local authority when the legislative intent with the current statutory scheme related to utilities is to reaffirm, not limit, home rule authority.

5. *In contrast, the legislature provided clear and unmistakable intent to preempt charges and fees for telecommunications carriers.*

Context is also provided by the 1989 legislative enactment relating to telecommunications and codified at ORS 221.505 to ORS 221.515. These statutes were adopted at the legislative session following the 1987 amendments reaffirming local home rule authority over utilities in the public rights-of-way. However, the telecommunication amendments clearly preempt local home rule

authority over taxes and fees charged to telecommunication carriers. If the legislature intended ORS 221.450 to have the same preemptive effect, the legislature knew how to do it.

These differences in statutory provisions are significant. As stated by this court:

> "Ordinarily, when the legislature includes an express provision in one statute but omits such a provision in another statute, it may be inferred that such an omission was deliberate." *Oregon Business Planning Council v. LCDC*, 290 Or 741, 749, 626 P2d 350 (1981). It is not our role to do what the legislature, for whatever reason, has not seen fit to do. Plaintiff's claim that PUDs should be included within the coverage of ORS 543.610 should be directed to the legislature, not this court. (footnote omitted)

Emerald People's Utility Dist. v. Pacific Power & Light Co., 302 Or 256, 269, 729 P2d 552, 560 (1986).

The statutory scheme of ORS 221.415, ORS 221.420 and ORS 221.450 stands in sharp contrast to ORS 221.505 to 221.515 relating to telecommunication carriers. ORS 221.505 states the legislative intent to "[establish] a uniform base for municipal charges for street use by telecommunications carriers." ORS 221.510 limits a city to charging a privilege tax and ORS 221.515(3) prohibits a city from collecting "any additional fee, compensation or consideration" The legislature expressly limited cities to charging telecommunication carriers a privilege tax for the use of city streets. Clearly, the legislature knew how to preempt local authority for the use of city streets. Had the legislature intended ORS 221.415, ORS 221.420 and ORS 221.450 to preempt local authority to

charge other types of utilities for the use of city streets, the legislature would have included the preemptive language it used in ORS 221.505 to ORS 221.515.

6. *US West does not require a different result.*

The Utilities argue that ORS 221.420 and ORS 221.450 allow only two options for compensation for the use of the right-of-way . . . a negotiated franchise contract or a privilege tax. *US West Communication v. City of Eugene*, 336 Or 181, 183, n 1, 81 P3d 702 (2003) is cited in support of that argument. However, that argument and citation are unavailing. First, as discussed in Section A above, this argument does not recognize that a franchise is not limited to a negotiated contract. Second, the argument does not address the city's home rule authority to exercise its police powers to regulate utilities or demonstrate any legislative intent to preempt the exercise of such home rule authority. Indeed, such an argument must fail in light of the reaffirmation of home rule authority in ORS 221.415[8]. Third, the argument ignores other statutes that recognize methods other than a negotiated franchise contractor privilege tax to collect compensation for the use of the right-of-way. Finally, *US West* dealt with ORS 221.505 to ORS 221.515 relating to telecommunications, statutes that specifically state a clear and unmistakable intent to preempt how a city charges telecommunication carriers for the use of the right-of-way such that the *dicta* in

[8] The Utilities also do not explain how the legislature intended to preempt home rule authority when ORS 221.415 specifically reaffirms home rule authority.

the footnote is not persuasive. *US West* does not support the Utilities' reading of ORS 221.420 and ORS 221.450.

Gresham's *Utility License Ordinance* was adopted pursuant to Gresham's home rule authority. That authority was not clearly and unmistakably preempted by ORS 221.450. Therefore, Gresham's utility license fee is not subject to the five percent limit of ORS 221.450.

C. *Gresham's utility license fee is not subject to the five-percent limit of ORS 221.450 because it is a regulatory fee and not a privilege tax.*

Assuming, *arguendo,* that this court decides that 1) Gresham's Utility License is not a franchise and 2) the legislature intended ORS 221.450 to preempt Gresham's home rule authority, ORS 221.450 still does not apply because Gresham's utility license fee is not a privilege tax.

1. *A regulatory license fee is not a privilege tax.*

The Utilities argue that the utility license fee shares the characteristics of a privilege tax because it raises revenue for general municipal purposes such as police and fire[9] and therefore is subject to ORS 221.450. However, Gresham's utility license is functionally different from a tax to raise revenue. Compensation for the use of the public rights-of-way is only one component of

[9] As described the Stipulated Facts, Paragraph 10 and Exhibit 16, 36 FTE positions, including 15.5 in public safety, had already been eliminated in the fiscal year 2011-2012 budget and the utility license fee was raised "to avoid further service reductions in the police and fire departments."

the regulatory structure Gresham established pursuant to its home rule authority. Contrary to the argument of the Utilities, it is more than the name "utility license fee" that distinguishes the fee from a privilege tax. "It is a well-established rule of law that, notwithstanding revenue may result from the exercise of the police power, this alone does not strip the law of its police character and make of it an exercise of the taxing power." *State v. McFall*, 112 Or 183, 191, 229 P 79, 82 (1924).

Gresham's *Utility Licensing Ordinance* is regulatory in nature. Its purposes include paying the cost of regulating city streets; assuring that utilities comply with city ordinances; protecting the public health, safety and welfare; and managing access to the limited physical capacity of city streets on a competitively neutral basis. GRC 6.30.020. The ordinance requires a utility that occupies city streets in Gresham to comply with substantive regulations including: obtaining a license to occupy city streets (GRC 6.30.070); providing maps of underground facilities and information about its utilities (GRC 6.30.100); maintaining insurance and indemnifying the city (GRC 6.30.100); locating and relocating utilities in city streets as directed by the city (GRC 6.30.120); and coordinating construction activities (GRC 6.30.130). The *Utility Licensing Ordinance* is much more than just a revenue raising scheme.

When possible, courts interpret local enactments to function consistently with state law. *LaGrande/Astoria*, 281 Or at 148. Gresham's *Utility License*

Ordinance is functionally different from a privilege tax to raise revenue because it is a comprehensive municipal code that regulates the use of city streets by utilities. Gresham's code can operate concurrently with ORS 221.450 by applying ORS 221.450 only to a privilege tax and not Gresham's regulatory *Utility Licensing Ordinance*.

2. *The legislature has recognized that license fees and privilege taxes are separate methods to charge for the use of the public rights-of-way.*

Subsequent amendments to legislation can impact the legislative intent. "[T]he wording changes adopted from session to session are a part of context of the present version of the statute being construed." *Krieger v. Just*, 319 Or 328, 336, 876 P2d 754, 758 (1994).

When adopting both direct access regulations and then creating Oregon Community Power, the legislature recognized various means, including both license fees and privilege taxes, as separate methods to collect charges for the use of city streets[10]. Each of these legislative enactments also amended ORS 221.450[11] but neither changed the statute's reference solely to a privilege tax. The legislature recognized both license fees and privilege taxes as methods to collect for use of the right-of-way but chose to continue to limit the applicability of ORS 221.450 to a privilege tax and not include other methods.

[10] Or Laws 1999, ch 865, § 17 and Or Laws 2007, ch 807, § 42.
[11] Or Laws 1999, ch 865, § 30 and Or Laws 2007, ch 807, § 41.

D. *The amici curiae policy arguments do not support a different result.*

Two separate *amici curiae* briefs were filed: 1) Avista Corporation d/b/a Avista Utilities, Idaho Power Company, and PacificCorp d/b/a Pacific Power (Joint Utilities); and 2) the Industrial Customers of Northwest Utilities, and the Northwest Industrial Gas Users (Industrial Customers). These policy arguments are better directed to the legislature than to this court.

1. *State law was not intended to protect utilities or utility customers from municipal charges.*

The Joint Utilities provide an accurate description of how the Oregon Public Utilities Commission (OPUC) addresses municipal charges for the use of the public rights-of-way. *See Joint Utilities Brief*, pages 7 to 9. For the OPUC rate setting process, utilities only include a portion of the municipal fees for the use of the public rights-of-way in their operating expenses. That portion, 3.0% for gas and 3.5% for electric, is considered by OPUC to be reasonable compensation for the use of the public rights-of-way. When the municipal fee for the use of the public rights-of-way exceeds the OPUC threshold, the balance is separately stated as a city surcharge on customer bills. *See* OAR 860-022-0040.

The structure of this rule recognizes that municipal fees for the use of the public rights-of-way may exceed the OPUC amounts for reasonable compensation. However, OPUC does not deem those fees as "excessive,"

"unjust," or "unreasonable," as characterized by the Joint Utilities. Nor is there any indication that the legislature or the OPUC intended to limit a municipality's charge for the use of the public rights-of-way to utility purposes as suggested by the Industrial Customers. Indeed, OPUC takes no position at all on the amount a municipality may charge for the use of the public rights-of-way … it only requires that the amount exceeding what OPUC allows as reasonable compensation be separately stated on the utility bill.

The Joint Utilities, as well as PGE and NW Natural, suggest that it would be bad policy for cities to have "unbounded" authority to establish utility license fees. The irony of this argument is that it does not apply if the utilities simply agree to a higher municipal fee as part of a negotiated franchise contract, presumably in exchange for the utility receiving an "offsetting benefit." In other words, if the utilities agree that the city should have a higher municipal fee in exchange for some benefit for the utility, then how that impacts the customers is no longer a factor.

The Joint Utilities suggest that Gresham's Utility License Fee is a "stealth tax" for which customers will blame the utility. However, even putting aside the public meeting requirements for any decision, PGE has already demonstrated that changes to the municipal fee will not be under the radar. Shortly after the increase in the utility license fee in this case, PGE sent a letter to all of its Gresham customers referring any questions about the increase to the

City of Gresham. *See* APP 5. Gresham, a city of 107,596 in 2011, received less than 100 contacts in response. Perhaps a better explanation is that Gresham residents recognized that the increase was important "to avoid further service disruptions in the police and fire departments."

What if a city raised the utility license fee to 25% or even higher? The Utilities and Joint Utilities claim that if ORS 221.450 does not apply, cities will no longer be constrained in imposing charges on utilities for the use of the public rights-of-way. However, Gresham will be no more or less constrained in the setting of utility license fees than when making any other decision.

The utility customers that will pay these fees are also constituents of Gresham. To the extent Gresham constituents believe that the utility license fee is "excessive," "unjust," "unreasonable" or just bad policy, they can avail themselves of the political process to change the amount of the charge. That includes lobbying, choosing different councilors at the next election, or filing petitions for initiative, referendum, or recall.

Indeed, constituents would have even less opportunity to use the political process if the charge is established in the form of a municipal fee in a negotiated franchise contract because such a contract is not a legislative action subject to referendum. In addition, if any charge over five percent must be negotiated with the utility, then utilities, not Gresham constituents, would control the ultimate policy decision of how much the city should charge for the

use of the public rights-of-way. Simply put, the constituents of Gresham do not need utilities to determine what is in their best interest.

2. *A municipal fee for the use of the public rights-of-way has no impact on utility rates set by the OPUC.*

The Industrial Customer's argument regarding utility rates is based on the fundamental flaw of equating Gresham's charge for the use of the public rights-of-way to utility rates set by the OPUC. That position is refuted by the brief of the Joint Utilities as discussed in Section D.1 above. Except for the amount determined by the OPUC as reasonable compensation, which is taken into consideration in the OPUC utility rate setting process, Gresham's utility license fee has no impacts on utility rates.[12] Because Gresham's previous utility license fee was five percent, the two percent increase to a total of seven percent had absolutely no impact on utility rates.

E. *Pursuant to Gresham's Home Rule Charter, Rockwood Water PUD must have a utility license and pay a utility license fee; specific statutory authority exists to charge a people's utility district for use of the public rights-of-way.*

Rockwood Water argues that there must be specific legislative authority for one government entity to tax another. This argument was rejected by the Court of Appeals in *Rogue Valley Sewer Services v. City of Phoenix*, 262 Or

[12] Gresham recognizes that an unsophisticated customer may not understand the difference between utility rates and the total amount of a utility bill. However, the Industrial Customers are anything but unsophisticated and to suggest that the OPUC set utility rates are impacted by Gresham's utility license fee increase is disingenuous at best.

App 183; 329 P3d 1 (2014). In that case, both the Jackson County Circuit Court and the Court of Appeals found that the City of Phoenix had the authority under its home rule charter to impose a franchise fee on Rogue Valley Sewer Services, a sanitary authority organized under ORS Chapter 450. *Rogue Valley* is currently before this court and oral arguments were held on February 4, 2015.

1. *Authority of the city to tax another branch of government*

Gresham incorporates the *Rogue Valley* briefs of the City of Phoenix (Sections B at pp. 9-12 and C(2) at pp. 16-18) and *amicus curiae* League of Oregon Cities (Sections C at pp. 13-24 and E at pp. 26-30) by this reference.

Rockwood Water's taxation argument relies on *City of Portland v. Multnomah County*, 135 Or 469, 296 P 48 (1931) and *Central Lincoln People's Utility District v. State Tax Commission*, 221 Or 398, 351 P2d 294 (1960). Those cases do not support that position. The first case related to ad valorem taxes on property owned by a governmental entity; not a charge or fee for the use of the public rights-of-way. No cases are cited to support extending how governmental property is treated under property tax law to a completely different type of charge or fee.

The second case addressed whether the state could tax people's utility districts and found that even though the legislature did not specifically include PUDs in the applicable statute, the legislature intended the word "corporation" to be broad enough to include PUDs. *Central Lincoln*, 221 Or at 406. The case

also noted that PUDs were required to pay ad valorem taxes. *Central Lincoln,* 221 Or at 402.

Rockwood Water argues that it is on the same governmental footing as a city and therefore is not subject to a city's home rule authority. To the contrary, as stated in *Central Lincoln*, "[a] people's utility district is a quasi-municipal corporation. (citation omitted). For '[w]hile they have some of the attributes of a true municipal corporation, they have no specific charter and are created by a general legislative enactment as an agency of the state for some particular purpose.'" *Central Lincoln*, 221 Or at 405 and citing *Wasco County PUD. v. Kelly*, 171 Or 691, 137 P2d 295 (1943). Rockwood Water is not on the same governmental footing as Gresham.

2. *Rockwood Water's statutory authority to use public rights-of-way is limited.*

ORAP 9.17 provides that while the questions presented in the Petitioner's brief need not be identical to the questions presented in the petition for review, "the brief may not raise additional questions or change the substance of the questions already presented." ORAP 9.17 (2)(b)(i).

In its brief, and for the very first time in this litigation, Rockwood Water argues that it has the statutory right to occupy the city's public rights-of-way and cites ORS 261.305 for that authority. However, that issue was not previously raised as demonstrated by the complete lack of any reference to that

statute in Rockwood Water's Answering Brief before the Court of Appeals. In addition, the substance of the question presented in Rockwood Water's Petition for Review made no reference to ORS Chapter 261. Rockwood Water should not now be allowed to expand its argument to include issues not previously before any of the courts that have been involved with this litigation. Rockwood Water sought to have this court "provide needed guidance on the power of cities to tax other local governments" and that is what this court should address.

However, even if the court did consider ORS 261.305, that grant of authority does not prevail over Gresham's home rule authority. As thoroughly described in LOC's *amicus* brief in this case, there is no negative preemption of home rule authority. (LOC brief, Section A at pp. 4-9.) Listing some of the methods a PUD can pay for the use of the public rights-of-way in ORS 261.305does not preempt the city from using its home rule authority to establish alternative methods of charging for the use of the public rights-of-way.

3. *Specific statutory authority exists to require a PUD to pay for the use of the public rights-of-way.*

Assuming, *arguendo,* that this court reverses the Court of Appeal's *Rogue Valley* decision, that outcome does not determine the outcome of this case. Simply put, the specific statutory authority Rockwood Water believes is necessary already exists in the law.

Rockwood Water cites the almost 30 year old opinion of the trial court in

Columbia River People's Utility District v. City of St. Helens, Columbia County Circuit Court Case No 85-2236 (July 1986). However, that court's ruling that St. Helens could not tax the PUD in the absence of express statutory authority triggered the 1987 legislature to add ORS 221.415 and to amend ORS 221.420 and ORS 221.450. *See* Or Laws 1987, ch 245, §§ 1-3.

ORS 221.415 recognizes the authority granted to cities by municipal charter and reaffirms the home rule authority of cities to regulate the use of the public rights-of-way and to impose charges. It also states that several statutes, including ORS 261.305 (granting powers to a people's utility district), are subject to this Home Rule authority. In other words, ORS 221.415 specifically recognizes that people's utility districts are subject to the home rule authority of cities related to utilities.

With the amendments to ORS 221.420 and ORS 221.450 in 1987, made in response to the *Columbia River PUD* decision, the legislature also specifically added people's utility districts to be within the scope of these statutes. Again, the specific statutory authority Rockwood Water seeks already exists in the law.

A people's utility district is subject to the utility license fee the same as any other utility. ORS 221.420 specifically include people's utility districts within its scope. Even if the specific authority did not exist in those statutes, ORS 221.415 references ORS 261.305 (granting powers to a people's utility

district) thereby reaffirming the home rule authority of cities to regulate the use of public rights-of-way by people's utility districts and to impose charges and fees.

All that remains of Rockwood Water's arguments is the same incorrect argument made by the other utilities. As argued above, ORS 221.450 does not limit the amount of Gresham's utility license fee.

V. CONCLUSION

For the reasons set forth above, the City of Gresham respectfully requests the Oregon Supreme Court affirm the decision of the Oregon Court of Appeals and remand this case back to the Multnomah County Circuit Court to enter a judgment in favor of the City of Gresham.

DATED this 19th day of February, 2015.

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CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS

I certify that (1) this brief complies with the word-count limitation in ORAP 9.17(3)(c) and 5.05(2)(b), and (2) the word count of this brief (as described in ORAP 5.05(2)(b)) is 9037 words.

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)(g).

Dated this 19th day of February, 2015.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on February 19, 2015, I caused a true copy of

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