IN THE SUPREME COURT OF THE STATE OF OREGON

NORTHWEST NATURAL GAS COMPANY, an Oregon corporation; and PORTLAND GENERAL ELECTRIC COMPANY, 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.	SC S062535 (Control) CA A150990 Multnomah County Circuit Court No. 1107-08422
NORTHWEST NATURAL GAS COMPANY, an Oregon corporation; and PORTLAND GENERAL ELECTRIC COMPANY, 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.	SC S062556 CA A150990 Multnomah County Circuit Court No. 1107-08422

BRIEF OF *AMICUS CURIAE* LEAGUE OF OREGON CITIES IN SUPPORT OF RESPONDENT CITY OF GRESHAM

On Review of the Decision of the Court of Appeals
on Appeal from a Judgment of the Circuit Court for Multnomah County,
the Honorable Stephen K. Bushong, Judge

Opinion Filed: July 2, 2014
Author of Opinion: Armstrong, P.J.
Concurring: Hadlock, J., Egan, J.

Katherine Thomas, OSB #124766
Sean E. O'Day, OSB #003387
League of Oregon Cities
1201 Court St. NE, Suite 200
Salem, OR 97301
(503) 588-6550
kthomas@orcities.org
soday@orcities.org
Attorneys for Amicus Curiae League of Oregon Cities

David R. Ris, OSB #833588
Gresham City Attorney's Office
1333 NW Eastman Parkway
Gresham, OR 97030
(503) 618-2507
david.ris@greshamoregon.gov
Attorney for Respondent on Review City of Gresham

Casey M. Nokes, OSB #076641
Tommy A. Brooks, OSB #076071
Cable Huston Benedict Haagensen & Lloyd LLP
1001 S.W. Fifth Avenue, Suite 2000
Portland, OR 97204
(503) 224-3092
cnokes@cablehuston.com
tbrooks@cablehuston.com
Attorneys for Petitioner on Review Rockwood Water People's Utility District

Jeffrey G. Condit, OSB #822238
Bruce L. Campbell, OSB #925377
Miller Nash LLP
3400 U.S. Bancorp Tower
111 S.W. Fifth Avenue
Portland, OR 97204
(503) 224-5858
jeff.condit@millernash.com
bruce.campbell@millernash.com
Attorneys for Petitioners on Review Northwest Natural Gas Company and Portland General Electric Company

Party information continued on next page

February 2015

Melinda J. Davison, OSB #930572
Jesse E. Cowell, OSB #082940
Davison Van Cleve, PC
300 SW Taylor, Suite 400
Portland, OR 97204
mjd@dvclaw.com
jec@dvclaw.com
Attorneys for Amici Curiae Industrial Customers of Northwest Utilities and Northwest Industrial Gas Users

Lisa Rackner, OSB #873844
McDowell Rackner & Gibson PC
419 SW Eleventh Ave., Suite 400
Portland, OR 97205
(503) 595-3922
lisa@mcd-law.com
Attorney for Amici Curiae Avista, Idaho Power, and PacifiCorp

Edward A. Finklea, OSB #842163
326 Fifth Street
Lake Oswego, OR 97034
(503) 303-4061
efinklea@nwigu.org
Attorney for Amici Curiae Industrial Customers of Northwest Utilities and Northwest Industrial Gas Users

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I. INTEREST OF *AMICUS CURIAE*

Originally founded in 1925, the League of Oregon Cities ("League") is an intergovernmental entity consisting of Oregon's 242 incorporated cities that was formed to be, among other things, the effective and collective voice of Oregon's cities before the legislative assembly and state courts. The League, on behalf of its members, has a substantial interest in the outcome of this case because it will impact the ability of Oregon's cities to manage rights-of-way, which are finite public resources that must be managed consistent with the public trust. As part of that fiduciary responsibility, and consistent with the home rule authority provided by the Oregon Constitution, Oregon's cities require compensation from revenue-generating utilities for their use of the public's rights-of-way. Moreover, the fees imposed for that use are a crucial source of general fund revenue used to provide essential services, such as police and fire protection, to the public. Because this case challenges a city's authority to collect fees for use of the public's rights-of-way, the League and its members have a substantial interest in the case.

II. SUMMARY OF ARGUMENT

The Court of Appeals correctly concluded that a franchise is a governmental grant of the privilege to occupy the public's rights-of-way, regardless of the instrument used, and the utilities in this case therefore were

not subject to ORS 221.450 because they were operating under a franchise.[1] As part of the franchise, the city could charge the utilities for the privilege of occupying the right-of-way, which is a finite resource that is in demand.

However, even if this Court concludes that the utilities were operating without a franchise, ORS 221.450 does not limit a home rule city's authority to obtain compensation for use of the public's rights-of-way. Put differently, ORS 221.450 does not describe the full extent of city authority to charge a fee for use of the right-of-way in the absence of a franchise. Rather, ORS 221.450 was intended as a "gap filling" grant of authority that would provide cities with one means of receiving compensation for use of the right-of-way.

Both the text and the history of the provision demonstrate that ORS 221.450 was not intended to limit cities' otherwise broad home rule authority to

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[1] ORS 221.450 provides, in part, that "the city council or other governing body of every incorporated city may levy and collect a privilege tax" from certain entities. ORS 221.450 goes on to state,

> "The privilege tax may be collected only if the entity is operating for a period of 30 days within the city without a franchise from the city and actually using the streets, alleys or highways, or all of them, in such city for other than travel on such streets or highways. The privilege tax shall be for the use of those public streets, alleys or highways, or all of them, in such city in an amount not exceeding five percent of the gross revenues of the cooperative, utility, district or company currently earned within the boundary of the city."

charge fees and taxes for use of city property, including the right-of-way. Rather, the intent of the statute, which was enacted not long after voters adopted Oregon's home rule constitutional provisions, was to affirm a city's ability to obtain compensation from utilities, not to provide utilities (as Petitioners on Review assert) with a means of limiting their payments for use of the public's right-of-way. Accordingly, Gresham, and other cities similarly situated, may charge a utility license fee under the authority of their home rule charters, independent of the authority granted in ORS 221.450. A preemptive interpretation of the statute would ignore the legislature's intent and limit an essential funding source that cities historically have relied on to supplement general fund revenues dedicated to providing critical public services.

III. ARGUMENT

This Court should affirm the Court of Appeals' conclusion that ORS 221.450 does not apply in this case because the utilities were operating pursuant to a franchise. *See Northwest Natural Gas Co. v. City of Gresham*, 264 Or App 34, 48, 330 P3d 65 (2014). ORS 221.450 provides, in relevant part, that "the city council or other governing body of every incorporated city may levy and collect a privilege tax" in an amount "not exceeding five percent of the gross revenues" of certain entities only when those entities are "operating for a period of 30 days within the city *without a franchise* from the city." (Emphasis added.) However, even if this Court concludes that the utilities were operating

without a franchise, ORS 221.450 does not limit a city to charging a five percent privilege tax for use of the public's rights-of-way. That is so because under a city's home rule authority, it can manage its property in the best interest and for the benefit of its residents, by seeking compensation for a utility's use of that property. Neither the text nor history of ORS 221.450 demonstrates legislative intent to preempt that authority.

A. Cities have extensive home rule authority to manage public property, which includes charging fees for use of the public right-of-way, except where expressly preempted by state or federal law.

A city's authority to enact ordinances and take other actions to manage the public right-of-way is governed by the provisions of the Oregon Constitution that provide home rule for cities and towns that adopt municipal charters. Oregon voters adopted those provisions in 1906 through an initiative amendment to the constitution. Under Article XI, section 2, of the Oregon Constitution,

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

The purpose of the home rule amendments was to "allow people of the locality to decide upon the organization of their government and the scope of its powers under its charter without having to obtain statutory authorization from the

legislature." *LaGrande/Astoria v. PERB*, 281 Or 137, 142, 576 P2d 1204, *adh'd to on recons*, 284 Or 173, 586 P2d 765 (1978). Therefore, to determine the validity of a local act, this Court must first examine whether that act is authorized by local charter, and then examine whether the act contravenes state or federal law. *Id.*

This Court will attempt to harmonize state statutes and local regulations whenever possible. *Id.* at 148-49 ("It is reasonable to interpret local enactments, if possible, to be intended to function consistently with state laws[.]"). Consequently, this Court has long held that a home rule city has authority to enact substantive policies, even in an area also regulated by state statute, unless the legislature's intent to preempt the local regulation is apparent or the state law and the local regulation cannot operate concurrently. *See, e.g.*, *id.* at 148-49 (so stating). That constitutional standard for preemption is exacting. Accordingly, the legislature cannot preempt city authority by negative implication. *See Gunderson, LLC v. City of Portland*, 352 Or 648, 662, 290 P3d 803 (2012) (explaining that even if a preemption based on a negative inference is plausible, if it is not the only inference that is plausible, it is "insufficient to constitute the unambiguous expression of preemptive intention" required under home rule cases).

For example, this Court previously held that a state statute regulating telecommunications privilege taxes for use of the right-of-way did not preempt

a city's authority to recover a separate tax or fee for the privilege of doing business within the city. *See US West Communications v. City of Eugene*, 336 Or 181, 189, 81 P3d 702 (2003) (concluding that statute authorizing seven percent privilege tax did not preempt city from charging additional two percent registration fee). At issue in *US West* was whether a statute that allowed a city to charge up to a seven percent privilege tax on telecommunications carriers preempted a city from imposing other taxes or fees on those carriers. The court found no such preemption. The court would not infer from the legislature's regulation of privilege taxes, and silence regarding other taxes and fees, that the legislature had intended to preempt all other taxes or fees. *Id.* at 187 ("The legislature said nothing about a city's ability to tax other business activities that a telecommunications carrier might undertake within the city limits."). Instead, the court properly held the legislature to the exacting constitutional standard set forth in *LaGrande/Astoria*: a local enactment is preempted only if there is an express preemption or a conflict between the state and local laws so that they cannot operate concurrently. The legislature's silence is not preemptive.

A contrary holding would render the home rule provisions of the Oregon Constitution meaningless. Home rule authority in Oregon is best understood when viewed in contrast to municipal authority as it exists in many other states

under Dillon's Rule.[2] Dillon's Rule holds that municipal governments may engage only in activities expressly allowed by the state because they derive their authority and existence from the state. John F. Dillon, 1 *The Law of Municipal Corporations* § 9b, 93 (2d ed 1873). Under Dillon's Rule, if there is a reasonable doubt about whether a power has been conferred to a local government, then the power has not been conferred. *Id.* §55, at 173. Stated differently, in a Dillon's Rule state, the legislature's silence regarding a city's authority to impose a tax renders the city without that authority. In contrast, in a home rule state, the legislature's silence regarding a city's authority to tax has no impact on that authority. The city does not require a grant of authority because the city has the powers accepted in its home rule charter, subject only to any limits imposed by the state or federal governments. If this Court treated the legislature's silence as preemptive, it would convert Oregon into a Dillon's Rule state. The home rule provisions of the Oregon Constitution prevent this Court from taking that path.

In fact, the home rule amendments signaled a shift away from Dillon's Rule in Oregon. Prior to 1906, the legislature incorporated Oregon cities or cities incorporated under the 1893 Incorporation Act. *See* ORS 221.901 –

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[2] The rule is named for a prominent Iowa Supreme Court Justice from the late 1800s, Justice John F. Dillon, who authored the then-leading treatise on municipal law.

221.928. Cities formed in those ways were subject to Dillon's Rule and had to point to specific authority under state law as affirmative authority for their actions. Only when a city's residents later adopted a home rule charter through a vote of the residents did cities assume home rule authority under the 1906 constitutional provisions. Therefore, even after the voters adopted the home rule amendments, some communities remained subject to the 1893 Incorporation Act or other state law. Indeed, according to League records, the last community to shift from being organized under state statute to adopting a home rule charter was Westfir in 1997. Consequently, at the time the legislature adopted ORS 221.450 in 1931, and as further discussed below, Oregon had a combination of both home rule and Dillon's Rule cities. In contrast, today, all 242 of Oregon's cities have adopted home rule charters.

Accordingly, if authorized by their charter, cities have home rule authority to charge franchise fees, license fees, privilege taxes, or other forms of compensation for use of the right-of-way, unless the state or federal government expressly has prohibited them from doing so. As the Court of Appeals recognized, there is no question that the city could impose the seven percent fee at issue in this case under the general powers granted to the city by its home rule charter. *Northwest Natural Gas Co.*, 264 Or App at 39, 39 n 3 (explaining that no party disputes city's authority to impose fees under charter, except for Rockwood's challenge regarding ability to impose fee on people's utility

districts). Therefore, if this Court determines that the utilities were operating "without a franchise," the issue is whether ORS 221.450 preempts a city from charging more than a five percent fee for use of the right-of-way. As discussed below, it does not. Cities retain their home rule authority to charge fees for use of the right-of-way independent of the authority set forth in ORS 221.450.

B. When viewed through the proper historical perspective, ORS 221.450 is not preemptive. Shortly after enactment of the home rule amendments, and long before this Court had developed its preemption analysis, the legislature enacted ORS 221.450 to eliminate ambiguities regarding a city's authority to charge a fee for the use of the public's rights-of-way when a utility lacked a franchise.

The legislature adopted ORS 221.450 just a few decades after voters approved Oregon's home rule amendments, and before this Court's tests for preemptive legislation had emerged. In that context, the history surrounding enactment of ORS 221.450 clarifies that the legislature did not intend to preempt cities from charging utilities more than five percent of gross revenues for use of city rights-of-way. Instead, the legislature intended to eliminate ambiguities regarding cities' authority to charge privilege taxes to utilities that were operating in the right-of-way without a franchise. As courts understand the home rule doctrine today, such a legislative act would be unnecessary because home rule cities have plenary authority unless preempted by the state or federal government. However, when the legislature enacted ORS 221.450 in 1931, Oregon's home rule experiment was in its early stages, and the legislature

lacked the benefit of this Court's learned opinions in *LaGrande/Astoria* and its progeny, up to and including *Gunderson*. Indeed, at the time the legislature enacted ORS 221.450, the courts had a different understanding of municipal authority than they do today. Consequently, when interpreting ORS 221.450, this Court should take into consideration the case law and other historical circumstances surrounding its adoption. *See Mastriano v. Board of Parole*, 342 Or 684, 693, 159 P3d 1151 (2007) (explaining that the court presumes that "the legislature enacts statutes in light of existing judicial decisions that have a direct bearing on those statutes").

There is very little direct legislative history of the enactment of ORS 221.450 in 1931. Other historical sources suggest, however, that the legislation may have arisen as the result of a dispute between the City of Portland and the Pacific Telephone and Telegraph Company ("Pacific"). In particular, Pacific, which had operated in the city's right-of-way under a franchise, continued to operate in the right-of-way after its franchise expired in 1927. *See City of Portland v. Pacific Telephone & Telegraph Co.*, 5 F Supp 79, 79 (1933) (describing dispute). Minutes from a Portland City Council meeting indicate that the council questioned whether it could impose a tax or fee on Pacific for continuing to occupy the right-of-way, despite not having a franchise. *See* App-1 (explaining, in city council minutes from February 1931, that "there does not

seem to be any method by which said utilities operating without a franchise may be taxed").

The council's doubt may have stemmed from cases at the time that suggested that, despite the constitutional home rule amendments, cities did not have inherent authority to tax absent a grant of authority from the state. *See* App-3 (citing, in annotated version of Portland's 1942 charter, a 1916 case stating that cities do not have inherent authority to tax); *City of Portland v. Portland Ry., Light & Power Co.*, 80 Or 271, 297, 156 P 1058 (1916) (explaining that "a city possesses no inherent power to tax"). In 1931, Oregon's home rule doctrine was still developing, and, at times, courts did not acknowledge the change brought about by the 1906 home rule amendments.

In particular, in cases decided after 1906, the court continued to cite an 1897 Dillon's Rule case, *Corbett v. City of Portland*, 31 Or 407, 418, 48 P 428 (1897), as support for the proposition that cities had no inherent authority to tax. *See, e.g.*, *Portland Ry., Light & Power Co.*, 80 Or at 297 (citing *Corbett* for the proposition that cities have no inherent authority to tax). Not only did *Corbett* predate the home rule amendments, it also quoted and relied on Justice Dillon's statement that cities could not levy taxes unless the power to do so had been "unmistakably conferred." *Corbett*, 31 Or at 425. By continuing to rely on *Corbett*, the courts failed to account for the transition away from Dillon's Rule signaled by the 1906 amendments. Undoubtedly adding to the confusion, at

the time those cases were decided and at the time ORS 221.450 was adopted, Oregon had a combination of cities that enjoyed home rule authority under a home rule charter and cities that were subject to Dillon's Rule because they incorporated and operated under the 1893 Incorporation Act or other state law.

This Court has since recognized that cities do, in fact, have inherent authority to tax if authorized by their charters. *See Jarvill v. City of Eugene*, 289 Or 157, 169, 613 P2d 1, *cert den*, 449 US 1013 (1980) (holding that, under the home rule provisions of the constitution, cities do not need legislative authorization to impose taxes). As noted, today, the residents of all of Oregon's 242 incorporated cities have adopted home rule charters. As a result, cities do not need to rely on ORS 221.450 for authority to impose fees and taxes on utilities using the right-of-way without a franchise. They can do so under their home rule charters.

Viewed in that historical context, ORS 221.450 was intended to facilitate cities' ability to receive compensation for use of the right-of-way, not to limit the ways in which cities can receive that compensation.[3] Therefore, ORS 221.450 offers one means, but not the only means, for a city to receive compensation for use of the right-of-way in the absence of a franchise. The text

[3] As Gresham notes, because some cities remained subject to Dillon's Rule in 1931, ORS 221.450 also operated as a gap-filling provision for cities that had not yet adopted home rule charters.

is consistent with that interpretation. ORS 221.450 provides that the city council "may levy and collect a privilege tax," and that it may be collected "*only if* the entity is operating for a period of 30 days within the city without a franchise from the city." The statute limits when a privilege tax may be collected – only when the entity is operating without a franchise – but it does not limit the types of compensation that may be collected when an entity is operating without a franchise. Stated differently, the statute does not provide that the city council may levy and collect *only* a privilege tax when an entity is operating without a franchise. Absent that limitation, cities may also levy and collect other taxes and fees authorized by their charters under their home rule authority. To hold otherwise and limit cities to the privilege taxes authorized in ORS 221.450 would ignore the 1906 home rule amendments and would instead impose Dillon's Rule. The constitution does not permit that result.

C. If ORS 221.450 prevents cities from charging fees like the one imposed in this case, utilities will have an unintended advantage in negotiating for use of the rights-of-way, resulting in decreased revenue for essential government services like police and fire protection.

If this Court concludes that franchises must be negotiated agreements, and that ORS 221.450 preempts cities from charging utility license fees like the one imposed by Gresham, utilities essentially will control the compensation that they pay for use of the right-of-way. Any utility could decline to enter into a negotiated franchise agreement and instead pay the five percent privilege tax

provided by ORS 221.450. Rather than functioning as a grant of authority to seek compensation for use of the right-of-way, as originally intended, ORS 221.450 would effectively limit the means through which cities could be compensated for that use. The legislature did not intend that result.

Moreover, that limitation would result in further burdening city general funds that already are struggling to match the demand for essential public services. Despite signs that the economy is improving, demands for city services continue to exceed available property tax revenue, which makes up more than half of unrestricted general fund revenue. *See* League of Oregon Cities, *2015 State of the Cities* 3, 5 (2015).[4] Property tax revenues cannot fill that funding gap because state caps limit available revenues. *Id.* at 4 (explaining property tax limitations). As a result, cities are turning to other sources of revenue, such as fee increases, to help fund critical services. *Id.* at 3. It is common for local governments to impose fees for use of their property, and fees like the one charged by the City of Gresham are an important means for compensating cities for use of the right-of-way, as well as a crucial funding source for essential city services, such as police and fire protection. Those fees

[4] The League's *2015 State of the Cities* report is available at http://www.orcities.org/Portals/17/Library/2015StateoftheCitiesReport-FINALweb.pdf.

may also ensure that the city is able to maintain the right-of-way for future users as well as its citizens.

IV. CONCLUSION

This Court should affirm the Court of Appeals' conclusion that Gresham's utility license ordinance granted the parties in this case a franchise, rendering ORS 221.450 inapplicable. Even if the parties in this case were operating without a franchise, however, this Court should affirm the Court of Appeals because cities have home rule authority to impose fees that compensate them for use of their rights-of-way. ORS 221.450 provides one means of seeking that compensation, but it does not do so to the exclusion of other forms of compensation, like that imposed by the City of Gresham in this case.

Respectfully submitted this 19th day of February, 2015.

By: *s/ Katherine Thomas*
Katherine Thomas, OSB #124766
Sean E. O'Day, OSB #003387
League of Oregon Cities
1201 Court St. NE, Suite 200
Salem, OR 97301
(503) 588-6550
kthomas@orcities.org
soday@orcities.org
Attorneys for Amicus Curiae
League of Oregon Cities

CERTIFICATE OF COMPLIANCE WITH BREIF LENGTH AND TYPE SIZE REQUIREMENTS

Brief Length

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word count of this brief (as described in ORAP 5.05(2)(a)) is 3620 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).

s/ Katherine Thomas
Katherine Thomas, OSB #124766
Attorney for Amicus Curiae
League of Oregon Cities

CERTIFICATE OF FILING AND SERVICE

I certify that on February 19, 2015, I electronically filed the foregoing **Brief of *Amicus Curiae* League of Oregon Cities in Support of Respondent City of Gresham** with the Appellate Court Administrator, Appellate Court Records Section, by using the Oregon Appellate eFiling System, and I served the following parties by using the electronic service function of the eFiling system:

David R. Ris, OSB #833588
Gresham City Attorney's Office
Gresham City Hall
1333 NW Eastman Parkway
Gresham, OR 97030
(503) 618-2507
david.ris@greshamoregon.gov
Attorney for Respondent on Review City of Gresham

Casey M. Nokes, OSB #076641
Cable Huston Benedict Haagensen & Lloyd LLP
1001 S.W. Fifth Avenue, Suite 2000
Portland, OR 97204
(503) 224-3092
cnokes@cablehuston.com
Attorney for Petitioner on Review Rockwood Water People's Utility District

Jeffrey G. Condit, OSB #822238
Bruce L. Campbell, OSB #925377
Miller Nash Graham & Dunn LLP
3400 U.S. Bancorp Tower
111 S.W. Fifth Avenue, Suite 3400
Portland, OR 97204
(503) 224-5858
jeff.condit@millernash.com
bruce.campbell@millernash.com
Attorneys for Petitioners on Review Northwest Natural Gas Company and Portland General Electric Company

Jesse E. Cowell, OSB #082940
Davison Van Cleve, PC
333 SW Taylor, Suite 400
Portland, OR 97204
cowell.jesse@gmail.com
Attorney for Amici Curiae Industrial Customers of Northwest Utilities and Northwest Industrial Gas Users

Service list continued on next page

Lisa Rackner, OSB #873844
McDowell Rackner & Gibson PC
419 SW Eleventh Ave., Suite 400
Portland, OR 97205
(503) 595-3922
lisa@mcd-law.com
Attorney for Amici Curiae Avista, Idaho Power, and PacifiCorp

s/Katherine Thomas
Katherine Thomas, OSB #124766
Attorney for Amicus Curiae League of Oregon Cities