



DEPARTMENT OF JUSTICE
GENERAL COUNSEL DIVISION

MEMORANDUM

DATE: February 16, 2018

TO: Mark Long, Administrator
Department of Consumer and Business Services,
Building Codes Division

Heather Miller, Chair
Electrical and Elevator Board

FROM: Katharine M. Lozano, Assistant Attorney General
Business Activities Section

SUBJECT: Private Third Party Building Departments - Unconstitutional
Delegation
File No. 440918-GB0681-15

You have asked a number of questions related to the delegation of full building programs, including full electrical programs, to private parties. Your questions include whether those delegations are consistent with the Oregon Constitution and agency authority, whether those delegations and certifications run afoul of any Oregon statutes. We conclude that while it is permissible to delegate certain "ministerial" components of the programs to private parties (as long as constitutional and statutory requirements are appropriately addressed) the delegation of full programs - comprising both "ministerial" and "discretionary" functions - is not within agency authority, and would not be consistent with the Oregon Constitution if such authority was provided. We further conclude that delegating full building or electrical programs to private parties, as well as renewing those types of delegated programs, violate a number of Oregon statutes. We provide a summary of our analysis in the Executive Summary below, followed by a detailed explanation of our analysis and conclusions.¹

¹ The cities (and counties, if any) that have delegated their full building or full electrical programs to private parties may also appear to be acting outside of their legal authority, violating several statutes, and creating risk for themselves and the state, but we do not address those issues here except to the extent that we determine them necessary to this analysis of your questions.

EXECUTIVE SUMMARY

Neither the Director of the Department of Consumer and Business Services, nor the Department through its Building Codes Division, has statutory authority to delegate (or renew delegation of) building or electrical programs to municipalities that use private third-parties to carry out the full programs, or that appoint private third-parties as building officials. The Director and the Department do, however, appear to have statutory authority to delegate building and electrical programs to municipalities that contract with private third-parties for plan review and inspection services, as long as other statutory and constitutional requirements are met.

Even if the Director or the Department had statutory authority to delegate building or electrical programs to municipalities that use private third-parties to carry out the full programs, or that appoint private third-parties as building officials, those delegations would be unconstitutional. The state has ultimate responsibility for the delegations made, including if those delegations merely purport to be to a municipality, but are in fact to a private party because of sub-delegation. These delegations are unconstitutional for two primary reasons. They are unconstitutional because they necessarily involve giving discretionary governmental powers to private entities (rather than giving private entities only the government's ministerial powers). They are also unconstitutional because adequate procedural safeguards to provide government accountability do not exist. Additionally, because some of the third-parties providing building services also have private, financial interests in the decisions made by the building departments they serve, the adequacy of procedural safeguards would receive heightened scrutiny, which the programs would not survive.

In addition, these delegations as they currently exist appear to conflict with multiple statutes. The most serious conflicts involve: (1) the requirement that a municipality demonstrate it has the adequate resources to run a building program (including the electrical program component) for at least two years before the state may delegate or renew the programs; and, (2) the requirement that the state oversee and administer these programs, including whether municipality is carrying out its legal duty to verify trade and business licensure during permitting and inspection. The state is, for example, required to rescind a delegation if a municipality is not verifying electrical licensure.

Remedies are, however, available. Although the Director or Department cannot lawfully delegate (or renew the delegation of) building or electrical programs to municipalities that use private third-parties to carry out the full programs, or that appoint private third-parties as building officials, those delegations can be made to municipalities who contract with private third-parties for merely ministerial duties. Additionally, some of the several possibilities for remedying current issues include:

- Strengthen building official certification requirements, to ensure building officials possess the necessary technical qualifications to genuinely carry out discretionary powers for all of the program components in a building department, and to provide government accountability for decisions;
- Electrical and Elevator Board adopts a rule requiring municipalities to employ a person (or share a government employee) who holds an A-Level Electrical Inspector certification, to ensure municipalities are genuinely carrying out their discretionary powers for their electrical programs, and to provide government accountability for those decisions;
- Require municipal contracts with third-parties to include provisions ensuring license checks; and,
- Require municipalities contracting with third-parties to also enter contingency contracts with another government entity, such contingency contracts providing for government employee services if a third-party does not or cannot carry out its ministerial duties for the municipality.

ANALYSIS

I. BACKGROUND

The state building code and programs delegated to municipalities

We provide this background for context and to help the reader understand our analysis of several complex issues.

A. Overview

The Department of Consumer and Business Services and its Director are an administrative body and public official within the Executive branch of Oregon State government.² Under ORS chapter 455, the Department and Director, through its

² ORS 705.105

Building Codes Division (BCD³) have been granted authority to create, promulgate, interpret, administer, and enforce the uniform state building code. The state building code is a combination of all of the state's uniform specialty codes (e.g., structural, mechanical, electrical, plumbing, etc.). BCD has also been given the statutory authority to: determine qualifications; license; regulate; and enforce the licensing laws for building officials, plan reviewers, inspectors, and (with its advisory boards) the trades that operate under the specialty codes (e.g., licensed electricians, plumbers, electrical and plumbing contractors, manufactured dwelling installers, etc.). In turn, ORS 455.148 and ORS 455.150, allow BCD to delegate⁴ the administration and enforcement of a building program to a county or city (collectively referred to as "municipalities"⁵) it deems qualified. The delegations are valid for four years at a time, within the boundaries of that municipality, and must be affirmatively renewed every four years to continue. Administration and enforcement of a building program includes:

- Plan review
- Permitting
- Inspection for compliance with the building code⁶
- Verifying compliance with state licensing requirements
- All other administrative and judicial aspects of enforcement of the code⁷

B. Building Officials

Building officials function as the top of the chain of command in every building program. Under ORS chapter 455, BCD's administrative rules, and the various specialty codes:

- The building official is by law the person who attends to all aspects of code enforcement, including the issuance of all building permits.
- Building officials provide authoritative interpretations of the state building code at the local level; building officials have the authority to waive select

³ They carry out their duties under this chapter through their Building Codes Division, ORS 705.115

⁴ A municipality may assume or renew the administration of a building program and the uniform state building code only with the approval of BCD.

⁵ ORS 455.010(5). "Municipality" includes cities, counties, and other units of local government authorized by statute to administer a building program. Other local government may also include such entities as special utility districts, etc., but they are not relevant to this analysis.

⁶ See, e.g., ORS 455.148, 455.150, 455.156, 455.158

⁷ ORS 455.153(2).

requirements; building officials have discretionary authority to resolve disputes between plan reviewers or inspectors and builders, owners, specialty contractors, and tradespeople;

- Additionally, building officials and -- subject to the building official's ultimate authority -- plan reviewers review construction design plans by engineers, architects, supervising electricians, etc., and approve them or require them to be corrected;
- Likewise, building officials as well as -- again, subject to the building official's ultimate authority -- plan reviewers, and staff issue or deny permits to build according to submitted plans;
- Subject to the authority of the building official, inspectors inspect the work done and approve it or require corrections and re-inspection; and,
- Building officials issue or refuse certificates of occupancy once the structure is completed in conformance with the building code.

C. Electrical program within the building program

Under the larger building code umbrella, BCD and the Electrical and Elevator Board -- another administrative body within Oregon's Executive branch and an advisory board to BCD -- have broad authority over the development of the Oregon electrical specialty code within the state building code. Under ORS chapter 479, they also have authority to approve electrical products, license electricians and electrical contractors, and enforce those licensing laws.

Similar to BCD's authority to delegate full building programs, BCD and the Electrical and Elevator Board are authorized by ORS 479.855 to delegate the administration and enforcement electrical programs to these same cities or counties⁸, if deemed qualified under the Electrical and Elevator Board's various rules. Electrical programs are also valid for four years and must affirmatively be renewed to continue.

- The Electrical and Elevator Board has extremely broad rulemaking authority in this area, including the authority to set qualifications for individuals providing services for delegated electrical programs.⁹
- A local electrical program must provide verify licensure of electricians and electrical contractors.¹⁰

⁸ There is, however, no authority to delegate an electrical program to a special utility district.

⁹ ORS 479.855.

- A city or county must receive and renew an electrical program in order to be allowed to assume a full building program (structural, residential, mechanical, and plumbing included).¹¹
- BCD *must* revoke a city or county's electrical program -- which will result in revocation of its full building program -- if the municipality fails to comply with the Electrical and Elevator Board's standards or is otherwise not effectively carrying out its electrical program duties. ORS 479.855.

D. Ultimate authority belongs to the state

Although municipalities may administer building code regulations under the programs delegated to them, BCD retains supervisory authority over the municipalities' administration. ORS 455.100. Ordinarily, if a city is no longer able to run its delegated building program, delegation of that program reverts to the county in which the city is located. If a county is no longer is able to run its delegated building program, the program reverts back to the BCD.¹²

If BCD is investigating a municipality, a municipality abandons any part of its program, or fails to comply with one of four specific statutes, BCD can take back administration of that local building program.¹³ BCD can order a municipality to take corrective action with regard to the state building code and the municipality's running of its program. ORS 455.770. Finally, there are multiple statutory provisions demonstrating that the administration and enforcement of the building code and licensing laws are ultimately the responsibility of the state, irrespective of any temporary delegation to a municipality.¹⁴

E. Current municipal program delegations

¹⁰ Unless that city or county has been delegated an electrical program for manufactured dwelling utility connections only.

¹¹ Unless it was a municipality that assumed only a partial building program before 2000, did not assume an electrical program at that time, and has not acquired an electrical program subsequently.

¹² ORS 455.148(5), (6) and 455.150(5), (6).

¹³ ORS 455.148, 455.150

¹⁴ No municipality may "enact or enforce any ordinance, rule or regulation relating to the same matters encompassed by the state building code but which provides different requirements unless authorized by" BCD, ORS 455.040(1); BCD retains the ability to carry out administration and enforcement of the building code and work under the agency's statutes and rules throughout the state, general oversight authority, code interpretation authority, and general, ad hoc dispute resolution authority statewide; and BCD with its advisory boards retain concurrent enforcement jurisdiction in municipalities, ORS 455.153.

We understand that approximately 25 to 26 cities, to which BCD has delegated building programs, have sub-delegated their full building programs, including electrical programs if they have them, to private companies. We also understand that some of these cities indicated that they would do so in the applications, operating plans, or renewal applications submitted to BCD and the Electrical and Elevator Board. We further understand that these cities' sub-delegation includes appointing building officials, plan reviewers, and lead inspectors who are officers, employees, or independent contractors of the private companies. Therefore, particularly because these delegations include private, third-party building official's final decision making at these cities on building code matters.¹⁵ We understand that the contracts between these cities and the private companies running their building departments are based on permit revenue generated by the private companies' work, with permit fees from the builders and homeowners all paid to the city, but generally with 75% of the permit revenue collected passed back to the private company.¹⁶

F. Private financial interests of third-parties

Finally, some of the third-party, private building code inspection businesses also provide commercial engineering services, are owned by individuals who also own private engineering firms, or serve as consultants for engineering firms, architecture firms, contractors, and developers.¹⁷ These third-party businesses have a financial or business interest in promoting or approving plans and work performed by their employees, sister companies, and clients. Conversely, they have a private business or financial interest in delaying or denying their competitors.

II. STATUTORY AUTHORITY

A. Express authority

¹⁵ ORS 455.148(3) and 455.150(3), no government employee carrying out final decision-making verified by Erin Doyle of the League of Oregon Cities at Representative Paul Holvey's December 20, 2017 meeting on third-party inspection businesses.

¹⁶ Also verified by Erin Doyle, at the October 31, 2017 meeting at BCD offices with the League of Oregon Cities and its counsel, Association of Oregon Counties and its counsel, Ms. Jan Nordlund, and Sr. Deputy Legislative Counsel Charles Taylor.

¹⁷ For example, according to its website, the Clair Company – one of the larger third party building program service providers – also has clients who are engineers, architects, contractors and developers. Similarly, on its website, Northwest Code Pros" (a.k.a., The Building Department, LLC, and Northwest Code Professionals, LLC) – another large, third party building program service provider - advertises that it also "serve[s] as a code consultant and plan reviewer for multiple architects and developers."

It is a long-standing legal principle in Oregon that an agency has only those powers that the legislature grants and cannot exercise authority that it does not have.¹⁸ We have frequently addressed questions regarding the ability of state officers and entities to delegate authority conferred to them by statute. For example, we concluded that the Workers' Compensation Board could not delegate to another agency or officer the duty to review orders that are appealed to the board.¹⁹ In nearly all of the situations we have considered, the pertinent statutes have either been silent with regard to delegation or have – as ORS 455.148, 455.150, and 479.855 do -- expressly allowed specific and limited delegation.

ORS 455.148 and 455.150 authorize the delegation of building inspection programs (with deadlines) – but only for municipalities. They provide parameters for what is included in a local building program – but only for municipalities. Only municipalities are authorized to seek BCD's approval of the assumption of a local building program. The qualifications BCD must set for assumption of a building program are only to be set forth for municipalities. There are similar statutory provisions, restricting delegation and operation of delegated electrical programs specifically to cities and counties. There is no provision in any relevant chapter of the Oregon Revised Statutes authorizing BCD or the Electrical and Elevator Board to delegate full building or full electrical programs to private parties. The general rule for statutory construction in Oregon obliges us "not to insert what has been omitted, or to omit what has been inserted." ORS 174.010. The legislature was specific about who could receive building and electrical programs; private entities were omitted.²⁰

To the extent that BCD knows from the application or application for renewal that a municipality proposes to use, or is using, a private party to run its full building or electrical program a building program, any delegation or renewal of those programs BCD purported to make to the municipality may be vulnerable to challenge as unlawful or sham delegations. In other words, they would be lawful delegations to municipalities in name only; the authority would, in fact, be knowingly delegated to a private party without any basis in law to do so.

B. Implied authority

Although it seems clear that there is no express authority for BCD to delegate full building programs to private entities, our office has also long advised that, even

¹⁸ See *Ore. Newspaper Pub. v. Peterson*, 244 Or 116, 123, 415 P2d 21 (1966).

¹⁹ Letter of Advice dated June 9, 1994, to Rudolph Westerband, Workers' Compensation Board (OP-6511)

²⁰ Similarly, the legislature has inserted no statutory authority for municipalities to delegate the programs they receive to private parties, but that is not the subject of this advice.

without express authority, some delegative authority for state agencies is implied. Specifically, we have advised:

Generally, state officers and agencies may delegate ministerial but not discretionary functions. This office has analyzed delegations to persons outside of the agency in the same way as delegations to persons within the agency. Thus, we said that the State Fair Commission could not delegate to private parties its discretionary powers and duties.²¹

Likewise, we also advised that the Director of the Department of Energy may delegate ministerial functions, such as execution of loan contracts, but not discretionary functions, such as approval of loans or the terms thereof.²²

This same analysis would apply to BCD's delegation of full building programs and full electrical programs. There is no express authority to delegate those programs to private entities, but there appears to be implied authority to delegate the ministerial, non-discretionary elements of those programs to municipalities will use or are using private, third-party building inspections companies to provide purely ministerial services. For example, the role of the building official is clearly and expressly one of discretionary authority. There is, therefore, no implied authority to delegate that function to a private party or, for BCD, to delegate a program to a municipality that intends to use or is using a private party for that role. On the other hand, specialty field inspectors, particularly if provided checklists and inspection parameters to remove discretionary power, and with decisions reviewable by and subject to the authority of government employees, appear to be exercising ministerial authority. There is, therefore, implied authority to delegate the field inspector functions to private parties.

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²¹ Letter of Advice dated October 16, 1984, to Maynard Hammer, Administrator, Housing Division (OP-5745) (referencing 28 Op Atty Gen 208 (1958)) (Emphasis added).. See also 29 Op Atty Gen 253 (1959).

²²Letter of Advice dated May 25, 1984, to Lynn Frank, Director, Department of Energy (OP-5627). In an earlier formal opinion, 39 Op Atty Gen 560, 565 (1979), we concluded that an "acting" Energy Director, who had been appointed by the Governor but who had not received Senate confirmation, could exercise only those non-discretionary "functions which the Director of Energy could and ordinarily would delegate to subordinates in the department such as an Assistant Director, Administrative Assistance, etc., such as those responsibilities which would be exercised during a vacation or other temporary absence of the director." We did not offer a detailed analysis of the statutory bases of the Director's authority to delegate. OP-5627, however, appears to proceed from the premise that the Energy Director lacked *express* statutory authority to delegate discretionary functions, and reasons that the statutory scheme does not provide a reasonable basis for *implying* such authority.

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III. UNCONSTITUTIONAL DELEGATION OF AUTHORITY

A. State responsibility for sub-delegations

Even if BCD or the Electrical and Elevator Board had the *statutory* authority to delegate full building and electrical programs to private entities, such delegation would raise *constitutional* issues. As a rule, the delegation of governmental authority to private entities, it is not consistent with the Oregon Constitution. It is a “fundamental principle that a delegated power cannot be delegated.” *Voth v. Fisher*, 241 Or 590, 595, 407 P2d 848, 850 (1965). Because the building and electrical programs remain under the ultimate authority of the state, and because the state conducts the original delegations and then renews them, the state is responsible for ensuring original delegations are – in fact – made lawfully. Likewise, the state is responsible for ensuring municipalities’ programs are allowed to continue and be renewed only if they are lawful.

There are two lines of appellate cases in Oregon addressing delegation of government authority that are relevant to this inquiry: (1) Discretionary authority versus ministerial authority; and (2) existence of adequate procedural safeguards.²³ We address issues of discretionary authority versus ministerial authority, and the more contemporary line of cases related to adequacy of procedural safeguards below.

B. Discretionary or ministerial authority

Like the analysis of implied delegative authority, one branch of Oregon constitutional analysis also contrasts the delegation of discretionary power with the delegation of ministerial power. Article III, section I, of the Oregon Constitution provides, in relevant part: “The powers of the Government shall be divided into three separate branches, the Legislative, the Executive, including the administrative, and the Judicial.” The power of Executive/administrative branch includes taking care that the laws are faithfully executed, and transacting all necessary government business *with the*

²³ There is also a third line of cases, focusing on the existence of adequately expressed legislative policy. However, because there is no statute allowing BCD or the Electrical and Elevator Board to delegate a full building or full electrical program to private entities, the appellate court cases that examine the expression of legislative policy in government delegation inquiries are not relevant to this analysis.

*officers of government.*²⁴ There is no provision in the Oregon Constitution for the powers of the Government, including those of the Executive/administrative branch, to be divided with private entities. Article V, section 13, specifically requires that government business be conducted with officers of government – not private parties.

However, the Oregon Supreme Court has long recognized the distinction between the impermissible delegation of discretionary authority (constitutionally or statutorily derived), and the permissible delegation of the ministerial authority to carry out those discretionary policies and decisions. The *Van Winkle* court recognized that there is a:

***constitutional principle which denies to the Legislature the authority to delegate the power of making laws and authorizes it to delegate purely administrative functions *** “[t]he true distinction, therefore, is to be made between the delegation of power *** which necessarily involves a discretion ** and conferring an authority *** as to its execution ***. The first cannot be done; to the latter no valid objection can be made.”²⁵

The principle of non-delegation is most often used in the Legislative or Judicial context, but also “is applied *** generally, to administrative officials when exercising discretionary or quasi judicial functions.”²⁶ Our office has also long advised against delegation of discretionary or quasi judicial authority, with respect to the administrative agencies of the Executive Branch:

In general administrative officers and bodies cannot alienate, surrender, or abridge their powers and duties *** Although mere ministerial functions may be delegated, in the absence of permissive constitutional or statutory provision, administrative officers and agencies cannot delegate to a subordinate or another powers and functions which are discretionary or quasi-judicial in character, or which require the exercise of judgment ***.²⁷

We noted that our courts have, in fact, defined the distinction between discretionary and ministerial duties. Ministerial duties are performed “in a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to, or

²⁴ Article V, sections 10 and 13.

²⁵ *Van Winkle v. Fred Meyer, Inc.*, 151 Or 455, 465–66, 49 P2d 1140, 1144 (1935) (internal citations omitted).

²⁶ *Voth v. Fisher*, 241 Or 590, 595, 407 P2d 848 (1965).

²⁷ *Id.*

the exercise of, his own judgment upon the propriety of the act being done." In contrast, discretionary duties, "require the exercise of reason in the adaptation of means to an end, and discretion in determining how or whether the act shall be done or the course pursued."^{28,29, 30}

It should be noted, that the actual reviewing of plans and conducting of inspections, as well as verifying licensure, using the criteria and under the circumstances prescribed by government decision-makers, and only to the extent that it is done without final decision-making or dispute-resolution authority, appear to be merely ministerial acts which may be delegated to private individuals and entities.

However, if we apply the courts' definition of discretionary authority to the present inquiry, it is clear that running a building department, particularly carrying out the duties of a building official, necessarily involves discretionary and quasi-judicial duties. The building department exercises discretion deciding the circumstances in which:

- plans are reviewed;
- permits are granted or denied;
- inspections are conducted;
- corrections are required;
- re-inspections are conducted;
- disputes are resolved;
- licensure for work performed is verified;
- unlicensed tradespeople are penalized;
- specialty codes are interpreted;

²⁸ 29 Op Atty Gen 323 (1960) (Insurance Commissioner cannot delegate duty to conduct examinations to third persons, but can employ third persons to monitor the examinations under appropriate employment procedures)

²⁹ Also quoting 73 C.J.S., Public Administrative Bodies and Procedure, § 57, p. 381, and internal citations retained.

³⁰ See also 28 Op Atty Gen 208 (1958) (State Fair Commission could not delegate to private parties its powers and duties to exercise its discretion in determining the personal and physical qualifications of lessees); 29 Op Atty Gen 253 (1959) (Real Estate Board may not delegate duty to conduct and grade examinations for real estate broker's or salesman's licenses); 39 Op Atty Gen 560, 565 (1979) (acting Director of Department of Energy may not exercise substantive discretionary functions of director); 40 Op Atty Gen 111 (1979) (State Land Board and Marine Board may not delegate duties for siting of boat launch and tie-up facilities to the Port of Portland); Letter of Advice dated May 25, 1984, to Lynn Frank, Director, Department of Energy (OP-5627) (Director of Department of Energy may delegate ministerial functions, such as execution of loan contracts, but not discretionary functions, such as approval of loans or terms thereof).

- certificates of occupancy are granted or denied; and
- building officials make determinations.

These are all discretionary matters.³¹

Therefore, if the analysis for delegation of authority to run a full building or full electrical program is based on whether that authority is discretionary or ministerial, then delegating a full building program or electrical program to a private party, particularly including delegation of building official duties, will not survive scrutiny. It is, therefore, contrary to the Oregon Constitution for BCD or the Electrical and Elevator Board to delegate a full building or electrical program to a private party, including as a sham delegation to municipality when the municipality's application demonstrates that a private party will actually assume the discretionary functions. Likewise, if BCD renews a municipality's delegation when it knows the program's discretionary functions have been delegated to a private party, then BCD is not acting in conformity with the state constitution.³²

C. Adequate procedural safeguards

Three of Oregon's constitutional provisions³³ underpin the majority of cases that have developed our courts' non-delegation doctrine. Under these Oregon appellate cases, an unconstitutional delegation of authority can arise when governmental authority is delegated to a non-governmental person or group. The Oregon Court of Appeals in the *Corvallis Lodge* case³⁴ concluded that as a general matter,

³¹ It should be noted, however, that the actual reviewing of plans, conducting of inspections, and verifying licensure, using the criteria and under the circumstances prescribed by government decision-makers, and only to the extent that it is done without final decision-making or dispute-resolution authority, appear to be merely ministerial acts which may be delegated to private individuals and entities.

³³ Article I, section 21, of the Oregon Constitution, which reads, in relevant part: "*** nor shall any law be passed, the taking effect of which shall be made to depend upon any authority, except as provided in this Constitution ***." Article III, section I, of the Oregon Constitution, which provides, in relevant part: "The powers of the Government shall be divided into three separate branches, the Legislative, the Executive, including the administrative." And, Article V, sections 1, 10, and 13, which describe portions of Oregon's gubernatorial authority, including the carrying out of the laws enacted by the legislature.

³⁴ *Corvallis Lodge No. 1411 Loyal Order of the Moose v. Oregon Liquor Control Comm'n*, 67 Or App 15, 677 P2d 76 (1984)

"[a]ccountability of government is the central principle running through the delegation cases."³⁵ Consistently with that principle, the Oregon Supreme Court recognized that even the Legislative Assembly's "broad delegation of policymaking [i]s least vulnerable when it is given 'to an elected * * * government that itself has political accountability for lawmaking as well as administration.'"³⁶

Over time, Oregon appellate courts have developed two tests for government accountability. Earlier cases centered on adequate expression of standards, while more recent cases have focused on procedural safeguards that protect against arbitrariness: "the important consideration is not whether the statute delegating the power expresses *standards*, but whether the procedure established for the exercise of the power furnishes adequate *safeguards* to those who are affected by the administrative action."³⁷ The procedural safeguards allow persons aggrieved by the actions of the contractor to seek redress from the government entity.

While there are some procedural safeguards for all locally run building programs, and another safeguard for electrical inspection programs, under our courts' standards the existing safeguards do not appear to adequately protect against the unaccountable exercise of power delegated to private third-parties. The statutory procedural safeguards available include:³⁸ (1) the right to petition a court for a writ of mandamus when a municipality or BCD engages in "a pattern of conduct" of failing to provide timely plan reviews or inspections;³⁹ (2) applicants for building permits may appeal any decision of a building official to BCD and then seek judicial review, and (3) may appeal an individual code interpretation or code application to the appropriate specialty code chief and advisory board, but without judicial review;⁴⁰ and (4) any aggrieved person may appeal a municipality's decision on an electrical product or electrical inspection to the Chief Electrical Inspector, then the Electrical and Elevator Board, then in certain instances to BCD, and finally may petition for judicial review.⁴¹

³⁵ *Corvallis Lodge*, 67 Or App at 20.

³⁶ *State v. "NMN" Long*, 315 Or 95, 102, 843 P2d 420 (1992) (quoting *Megdal v. Board of Dental Examiners*, 288 Or 293, 298 n 3, 605 P2d 273 (1980)).

³⁷ *Id.* at 441 (citing *Warren v. Marion County et al.*, 222 Or 307, 314, 353 P2d 257 (1960); internal quotation marks omitted; emphasis in original).

³⁸ Aside from more sweeping measures that are not targeted to resolve individual disputes, such as revoking a municipality's building or electrical program.

³⁹ ORS 455.160.

⁴⁰ ORS 455.475.

⁴¹ ORS 479.853.

However, aggrieved parties have almost no right to government review at the municipality level. Decisions of building officials may be reviewed by municipal appeals boards under ORS 455.070 and ORS 455.695. However:

- There is no statutory requirement for a municipality to have an appeals board;
- There is no statutory provision specifically authorizing, describing, etc., municipal appeals boards. The only authority for or description of them is found in select Oregon Specialty Codes (e.g., the Oregon Specialty Plumbing Code, the Oregon Specialty Mechanical Code);
- The matters under the jurisdiction of a municipal appeals board according to these specific specialty codes are limited to:
 - Failure to take action on a public life, health, safety complaint;
 - Whether a particular code provision from that specialty code was misinterpreted or did not apply; or

Allowing an alternative material or method provided for in the applicable state code or, potentially, seeking a request from the appeals board to BCD to authorize alternate materials or construction methods. Further, private parties' rights to obtain government review, even at the state level are not ensured, nor do they even exist for all aggrieved parties. For example, third-party contractors are not specifically obligated under the law to notify a municipality at the time a plan or permit application is submitted, and those same third parties can simply refuse or decline to provide a city with inspection program documentation of, or supporting, their decisions, including for work completed as well as work in progress, as has occurred in the city of Creswell.⁴² There is no possibility of government review at all if the private contractors' decisions or reasoning are provided verbally. There is no law or mechanism ensuring that third-parties notify persons aggrieved by their decisions of the possibility of government review when it does exist, and those third-parties do not typically provide that notice or offer no due process at all.⁴³

The only right for inspection decision review by the government under the law, when the building official does not make the decision, is in electrical

⁴² See January 2018 correspondence between the City of Creswell and third party Northwest Code Professionals. *Attachment A.*

⁴³ As Erin Doyle conceded in Representative Holvey's December 20, 2017 meeting, there is no ultimate city review of decisions that are made by third-party inspection companies running full building programs, and disputes with licensed tradespeople and contractors are settled informally in the field or at ad hoc private meetings, without due process.

program. There is no such right to government review, for example, for journeyman plumbers aggrieved by an inspection decision. Similarly, the right to appeal a decision by the building official only exists for permit applicants; when an engineer, architect, licensed plumber, licensed electrician, etc. is not the actual permit applicant, a private building official's decision cannot be reviewed. This paradigm is particularly troubling when the third-party providing the building official has financial interests contrary to those of an aggrieved person or entity who is not the permit applicant.

The Oregon Court of Appeals in *City of Damascus v. Brown*⁴⁴ applied the test of sufficient procedural safeguards to proposed legislation (legislation delegating government authority to private citizens⁴⁵), not to administrative action. However, the *Damascus* court's analysis may indicate how our courts are likely to assess the validity of an administrative delegation of government authority as well.

The court in *Damascus* determined that 2014 legislation (allowing homeowners to determine whether their properties fell within a particular political boundary) failed to provide sufficient procedural safeguards to protect against arbitrary action. In that case, the arbitrary action the court foresaw was that of homeowners acting in their own interest.⁴⁶ Nothing in the law ensured that homeowners would follow the legal criteria when withdrawing their property.⁴⁷ The court noted the importance of having adequate safeguards where a delegation is made to interested individuals:

Even if governmental authority can in theory be delegated to interested, private individuals, that type of delegation further heightens the need for adequate safeguards to protect against arbitrary action, *viz.*, action contrary to the legislative scheme.⁴⁸

Similarly, in the case of delegating full building or electrical programs to private third-parties with business and financial interests in the field they are regulating, adequate procedural safeguards are especially important and will be given close scrutiny. The *Damascus* court set forth three tests for procedural adequacy: (1) whether the initial

⁴⁴ *City of Damascus v. Brown*, 266 Or App 416, 337 P3d 1019 (2014).

⁴⁵ *Damascus*, 266 Or App at 443.

⁴⁶ *Id.* at 451.

⁴⁷ *Id.*

⁴⁸ *Id.* at 450. Other Oregon cases have found a delegation to private persons with a stake in the decision particularly problematic. For example, in *Corvallis Lodge v. OLCC*, 67 Or App 15, 677 P2d 76 (1984), the Court held that an OLCC rule where one class of licensees were permitted to sell liquor to the public only if another class of licensees in the area were unwilling to host the event was an unlawful delegation of government power.

decision – including whether facts exist to meet standards or qualifications – is solely within the province of the private entity, particularly if the decision's effect is automatic; (2) whether all aggrieved parties may obtain government review of the private party's decision; and (3) whether the government may, on review, engage in fact finding. The court determined that sufficient government accountability did not exist in the *Damascus* case because: the initial decision, including fact finding, was solely in the province of the private entity and was effective immediately; only some aggrieved parties could obtain government review; and the government (Oregon Court of Appeals) was limited to the record on review.⁴⁹

When the three *Damascus* tests are applied to the present inquiry, the results are largely the same. If a private, third-party is delegated a full building or full electrical program, all of the initial decisions and final decisions belong solely to the third-party. These decisions include all fact finding. Moreover, these decisions, particularly the plan rejections and permit denials, are automatic. As soon as the plans and applications are rejected or denied, that element of the project comes to an immediate halt. Next, as noted above, aggrieved parties have no ability to obtain government review at the local level, and only some of the aggrieved parties can obtain government review at the state level. Last, BCD and its advisory boards have the ability to conduct fact finding upon review, but the Oregon Court of Appeals generally does not.⁵⁰ Under the *Damascus* tests, the delegation of full building or electrical programs to municipalities that use private parties to run those programs would not survive scrutiny.

If, the Oregon appellate courts did *not* elect to apply the same analysis to administrative delegation that they have to legislative delegation, our office has previously advised on administrative delegation and formulated a test. Our office concluded that administrative "accountability in government," which the *Corvallis Lodge* court held was the central principle running through delegation cases, "means that the government entity must retain the authority necessary to exert control over the private entity's execution of delegated governmental functions[,] and that the delegating government entity must provide safeguards to be invoked by persons affected by the private entity's actions." 49 Op Atty Gen 254, 261-262 (2000). Specifically, we found that the government entity would have to demonstrate (1) it retains final decision-making authority over the contractor's actions, at least by retaining the right to

⁴⁹ *Id.* at 447-448 (practical effect of law gave interested landowners sole ability, including fact-finding function, to determine whether their properties qualified for withdrawal, procedural safeguards were not meaningful because only members of "the public" who testified at the public hearing could seek judicial review, and court was not permitted to take on a fact-finding role and was limited to only the record).

⁵⁰ See ORS chapter 183.

review the actions of the contractor, and (2) if the government entity concurs in the contractor's decisions, that it independently considered those decisions rather than "rubberstamping" them. 49 Op Atty Gen at 263-64.

When a private third-party has been delegated a full building or full electrical program, the municipality it covers does not retain final decision-making authority over the contractor's actions because that municipality has no government employee appointed as building official, and only the building official has the right of review decisions of inspectors and plan reviewers at the local level. Similarly, if the municipality were to concur in the contractor's decisions, it would necessarily be reduced to rubberstamping them – municipalities have delegated full building and electrical programs to third parties precisely because those municipalities do not have employees who are qualified to make program decisions.⁵¹ Under the tests provided by our office, the delegation of full building or electrical programs to municipalities that use private parties to run those programs would not survive scrutiny.

D. Heightened Scrutiny

Some of the third-party entities or owners have private, financial interests in the decision made by local building departments. Although, "[a] person shall not inspect or review any project or installation in which the person, employer of the person or relative of the person has any financial interest or business affiliation," third-party building inspection companies may and do contract with outside plan reviewers and inspectors⁵², as long as those outside plan reviewers and inspectors hold inspection plan business licenses themselves or are employed by an entity that does. Those contracted plan reviewers and inspectors are not employees of the third party business entity. Therefore, as long as those same plan reviewers and inspectors do not *personally* have one of the prohibited conflicts of interest, they may conduct plan reviews and inspections, as well as grant and deny building permits, on behalf of the third-party, even when those decisions financially benefit the third-party's clients, sister-companies, and colleagues, or are to the detriment of the third-party's competitors.

⁵¹ Likewise, even if a municipality has a building official who is a municipal employee, if that building official or other municipal employees do not possess the technical expertise to provide meaningful review of the third-party's decisions, any concurrence with those decisions would be mere "rubberstamping" by the municipality. If you would like additional advice on requirements for building official certification, or requirements for some combination of municipal employee certifications, that would provide adequate government accountability, please do not hesitate to contact us.

⁵² Verified, e.g., by Jack Applegate of Northwest Code Professionals at Representative Holvey's December 20, 2017 meeting on third party building departments.

This private financial interest does not, in and of itself, create any new legal or constitutional concerns. Nor does it, by itself prevent BCD from delegating building programs to third-parties. What it does do, however, is ensure that the model of delegating full building or full electrical programs to third-parties will receive heightened scrutiny. The *Damascus* court noted the importance of having adequate safeguards where a delegation is made to interested individuals:

Even if governmental authority can in theory be delegated to interested, private individuals, that type of delegation further heightens the need for adequate safeguards to protect against arbitrary action, *viz.*, action contrary to the legislative scheme.⁵³

As there do not appear to be adequate procedural safeguards for full building programs or full electrical programs delegated to private parties, those same safeguards are even less likely to survive the scrutiny that would be applied when the private parties have private, financial interests in the programs' determinations.

IV. OTHER STATUTORY ISSUES

We found numerous statutes inconsistent or potentially inconsistent with delegating a full building or full electrical program to a private third-party. However, we address only two of the most serious conflicts here. If you would like an analysis of every patent or potential statutory conflict, we will be happy to provide one.

A. BCD's delegation qualifications

Under ORS 455.148(11)(c)(B), in order for BCD to lawfully delegate a building program to a city or renew a delegation,⁵⁴ the city must demonstrate that it is able to provide services for at least two years of that cycle. Currently, it would be extremely difficult for a city delegating its full program to a private third-party to meet this qualification. The city has no control over whether third-party will actually provide the promised services for those two years. A third-party may declare bankruptcy and dissolve. A third-party may breach its contract with the city for any number of reasons

⁵³ *Id.* at 450. Other Oregon cases have found a delegation to private persons with a stake in the decision particularly problematic. For example, in *Corvallis Lodge v. OLCC*, 67 Or App 15, 677 P2d 76 (1984), the Court held that an OLCC rule where one class of licensees were permitted to sell liquor to the public only if another class of licensees in the area were unwilling to host the event was an unlawful delegation of government power.

⁵⁴ This requirement applies to municipalities allowed to assume building programs on January 1, 2002 or later.

and discontinue providing services.⁵⁵ A third-party and a city may simply disagree about the correct interpretation of their contract and leave the city without services it presumed would be provided.⁵⁶ By extension, it therefore appears to be unlawful for BCD to delegate or renew such a program under those circumstances.

To remedy this issue, one possibility would be for BCD to require municipalities using third-party inspectors or plan reviewers for their core workload to enter contingency contracts, in order to be allowed to assume or renew a program. The contingency contracts would be entered with: one or more municipalities that do use government employee inspectors and plan reviewers; or, with BCD. Such contracts could include terms providing, in the case of a third-party ceasing to provide contracted services (or failing to provide services the municipality incorrectly presumed were included in its contract), for the municipality's contingency contract partner to provide the services no longer (or never) provided by the third-party.

B. Enforcement of licensing laws

ORS 455.153(2) provides, in pertinent part, "[a]dministration of any specialty code or building requirement includes establishing a program intended to verify compliance with state licensing requirements * * * *". Similarly, ORS 479.855(5) requires, "[a] city or county that performs electrical installation inspections shall perform license enforcement inspections as a part of routine installation inspections." However, cities' contracts with private third-party building programs do not generally include provisions for the third-party to conduct license checks during inspections or enforce licensing laws. Typically, cities submit 75% of all permit fees collected to the private third-party in exchange for building and installation inspections, permit issuance, and reports and answers to questions on permits.⁵⁷ The contracts leave all building department duties to the third-parties, but do not require the third-parties to check, or verify that they have checked, the licenses of the tradespeople and businesses on the job sites.⁵⁸

If BCD delegates a full building program or a full electrical program to a city that is, in turn, delegating that full program to a private party, BCD generally does so by ignoring ORS 455.153(2) and ORS 479.855(5). To remedy this issue, one possibility is for

⁵⁵ In which case, the city may be able to obtain a financial remedy for the breach by, for example, discontinuing payment to the third-party. However, that remedy does not force the third-party to actually provide the city's building department services.

⁵⁶ See, e.g., Attachments A and B from the City of Creswell's program.

⁵⁷ See, e.g., January 11, 2018 letter from City of Creswell, Attachment B.

⁵⁸ See, e.g., Attachments A and B.

BCD to require municipalities using third-party inspectors to demonstrate, via the municipality's contract with the third-party, that the third-party's inspectors will conduct and document regular license checks for the municipality.

VI. RECOMMENDATIONS

Considering the number and seriousness of vulnerabilities presented by delegating and renewing full building and electrical programs to municipalities that sub-delegate their full programs or building official duties to private entities, as well as by promulgating electrical program rules that allow for such delegation and renewal, we recommend that BCD discontinue authorizing such delegations, and discontinue renewing programs run in entirety by private third parties. We also recommend the Electrical and Elevator Board promulgate rules that ensure government review and accountability in delegated electrical programs.

Further, we recommend that BCD and the Electrical and Elevator Board take additional steps to ensure that discretionary and quasi-judicial powers are delegated to government employees, rather than to private parties, even if the full program or building official are not being delegated to third-parties. To accomplish this task, one possibility is for BCD to substantially strengthen the required technical qualifications for building official certification, to ensure that municipalities whose only building department employee is their building official still have the necessary expertise to exercise their own discretionary powers. Another possibility would be for the Electrical and Elevator Board adopt a rule requiring a municipality to employ, or for a group of municipalities to share an employee who is, an individual certified as an A-level electrical inspector. Such a rule is within the Board's authority, would help ensure that the municipality's discretionary electrical program powers are carried out by the government, and would give BCD more flexibility to refrain from requiring building officials to also hold A-level electrical inspector certification, even if BCD strengthens the requirements for building official certification. Finally, with respect to municipalities using only private inspectors and plan reviewers, we recommend that BCD require proof of license verification services, and also that BCD require those municipalities to demonstrate they have a building services "safety net," in case the private company does not provide services the municipality anticipated. One possibility for a safety net is a contingency contract with a government entity that uses employees to provide building services.

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Thank you for the opportunity to work with you. If you have any additional questions or concerns, or would like more in-depth analysis on any of the issues addressed in this memorandum, please do not hesitate to contact us.