

POWERS

Studies in County Government

ILLUSTRATIVE PROVISIONS FOR HOME-RULE CHARTERS FOR OREGON COUNTIES: POWERS OF THE COUNTY

The Expansion of County Powers

One aspect of the long evolution of the county as an agency of government has been the expansion of county power, particularly during recent decades. Just half a century ago John F. Dillon, the eminent authority on the law of municipal corporations, wrote:

" * * * counties * * * are involuntary political * * * divisions of the State, created * * * to aid in the administration of government. Their powers * * * generally relate to the administration of justice, the support of the poor, the establishment and repair of highways,--all of which are matters of State, as distinguished from municipal concern. They are purely auxiliaries of the State; * * * and the statutes confer upon them all the powers they possess. * * * Considered with respect to the limited number of their corporate powers, they * * * rank low down in the scale or grade of corporate existence * * *."¹

During the last half century counties have been granted numerous new powers. Oregon counties have many powers they lacked half a century ago, including some probably undreamed of at that time as county powers--for example, power to provide sites for disposal of garbage and refuse,² power to operate airports,³ and power to regulate the sub-division of land.⁴ The general state laws that have conferred new powers on counties have frequently been enacted to meet particular problems that have arisen in one or a few localities. The new powers of counties have frequently been granted to meet problems of urbanization.

The quest for county home rule in Oregon has been a quest not only for better administration in county government but also for more flexibility

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1. 1 Dillon, Municipal Corporations (5th ed. 1911) 67.
 2. ORS 433.720 (1959).
 3. ORS 492.010(12), 492.310 (1959).
 4. ORS 215.150 (1959).

in county power and for power obtainable independently of the state legislature.¹ This quest for power can be seen in the 1956 recommendations of the Legislative Interim Committee on Local Government. The committee recommended that a county-home-rule amendment be added to the state constitution² because "some provision must be made for urban services in areas which are not brought under city governments," because "county governments should be empowered to provide needed services in these areas,"³ because "counties should * * * achieve freedom from their present subordination to the state legislature," and because "urban counties should not be made to rely on specific statutory authority for each act, but should be permitted to exercise legislative power locally."⁴

Reasons for allowing Oregon counties in general "to exercise legislative power locally" can be seen in the exceedingly varied circumstances of the counties. They range in area from 424 square miles (Multnomah) to 10,152 square miles (Harney). They range in population from 2,430 (Sherman) to 521,112 (Multnomah). Some are increasing in population, some declining. Some are almost completely rural, others highly urban. In climate, topography, and economy they vary tremendously.

The county-home-rule amendment that the Legislative Interim Committee on Local Government recommended became a part of the state constitution in 1958. No part of the amendment is more central to the purposes of the amendment than the sentence that reads:

"A county charter may provide for the exercise by the county of authority over matters of county concern."

In the drafting of a county charter three main alternatives regarding "authority over matters of county concern" are possible:

1. The charter may leave the county to depend for its powers on the constitution and laws of the state.
2. The charter may specifically confer upon the county powers additional to those conferred upon it by the state constitution and laws.
3. The charter may, within limits that it prescribes, confer upon the county all the "authority over matters of county concern" that the

1. See Barnett, "Home Rule for Oregon Counties," 1 Or. L. Rev. 47 (1921); Barnett, "A County Home Rule Constitutional Amendment," 8 id. 343 (1929).
2. Oregon, Legislative Interim Committee on Local Government, Findings and Recommendations 131, 147.
3. Id., 128.
4. Id., 131.

county-home rule amendment makes available to the county.

Continuation of Present Powers

The people of a county may desire a county charter quite exclusively for the purpose of re-organizing and improving the governmental structure of the county, and not for the purpose of expanding the power of the county. They may desire that the county continue, after being re-organized, to have powers quite the same as it would have if it were continuing to function without re-organization. The county-home-rule authorization in the state constitution allows a county charter to be so drawn as to give legal effect to these desires.

Mere silence in the charter regarding the powers of the county would achieve this result. If the charter said nothing about the powers of the county, the state constitution and laws as they had legal effect from time to time would determine what powers the county had from time to time.

Continuation of the present powers of the county may be effected, on the other hand, by an explicit, affirmative provision to the effect that under home rule the county have those powers that the constitution and laws of the state confer upon it. The provision may read:

Section _____. POWERS OF THE COUNTY. The county shall have whatever powers are presently or subsequently conferred upon it by the constitution and the laws of the state.

Specific Grants of Power

One of the objectives of the draftsmen of the county-home-rule amendment was to enable the people of a county to determine, through a county charter, what powers the county should have without being wholly dependent as at present on constitutional and statutory provisions. If a county desires power additional to those that it derives directly from the constitution and laws of the state, it can acquire those powers--within pertinent constitutional and statutory limits, of course--by appropriate charter provisions granting specific powers. The following section illustrates such provisions:

Section _____. POWERS OF COUNTY. In addition to the powers presently or subsequently conferred upon it by the constitution and laws of the state, the county shall have power--

- (1) to prohibit animals from running at large and prescribe the conditions under which they may run at large;
- (2) to regulate and license businesses not being regulated and licensed by the state or a city;
- (3) to prevent and abate nuisances;

- (4) to impose restrictions and requirements necessary to minimize pollution of the air;
- (5) to enfranchise public utilities to use public thoroughfares outside cities, and to impose and collect reasonable charges for the use;
and
- (6) to provide water for domestic and industrial purposes and to that end--
 - (a) to acquire by purchase, contract, or condemnation necessary property and property rights,
 - (b) to impose and enforce collection of reasonable charges for water thus provided, and
 - (c) from time to time, with the consent of a majority of the voters of the county voting on the question whether to authorize bonds to help finance county water supply, to issue bonds for that purpose.

As the statutes on powers of county officers, and as many of the older charters of Oregon cities illustrate, specific powers of counties may be spelled out at great length in a county charter. The Oregon Revised Statutes devote approximately 150 lines to a mere indexing of the powers and duties of county clerks, and more than 200 lines to a mere indexing of the powers of county commissioners. The Eugene Charter devotes more than seventy paragraphs--more than ten pages of fine print--to a listing of the powers of the city. The Tillamook Charter devotes more than fifty paragraphs to a listing of the powers of that city.

General Grants of Power

On the basis of judicial interpretations of the municipal-home-rule amendments to the Oregon Constitution,¹ it appears that, within pertinent constitutional limitations, the provision in the county-home-rule amendment that county charters "may provide for the exercise * * * of authority over matters of county concern" constitutes a general "continuous offer" by the state to the electorate in each county in the state of the "whole sum" of "intramural" power for the county. It further appears that a home-rule charter is the device by which that electorate may accept some or all of the power thus offered.² If the electorate desires that only some of that power be accepted--in other words, that only some of that power be conferred upon the county--that objective can be achieved by means of more or less specific grants of power such as those appearing in the illustrative

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1. Oregon Constitution, article IV, section 1-a (1906), article XI, section 2 (1906).
 2. See "General Grants of Municipal Power," which appears as an appendix to the Model Charter for Oregon Cities, prepared and distributed by the Bureau of Municipal Research and Service, University of Oregon.

section immediately above and in the third illustrative section below. If, on the other hand, the electorate of the county desires that all of the county power thus offered in the constitution be accepted and thereby conferred upon the county, a general grant of the power appears to be the most expedient device for making the grant. A specific grant of power, no matter how voluminous and detailed, would quite certainly omit some aspect of the "whole sum" of county power continuously offered to the voters of the county.

General grants of power appear in county charters in other states. For an Oregon county a general grant of power may be patterned as follows on the general grants of power in the charter of Baltimore County, Maryland.¹

Section _____. POWERS OF COUNTY. The county of _____ as it now exists constitutes a body corporate and politic, and shall have all powers of local self-government and home rule as are now or may hereafter be provided or necessarily implied by this charter or by the constitution or laws of the state. The enumeration of powers in this charter shall not be held or deemed to be exclusive, but, in addition to the powers enumerated herein, implied thereby, or appropriate to the exercise thereof, the county council shall have and may exercise all legislative powers which, under the constitution and laws of this state, it would be competent for for this Charter specifically to enumerate.

If a general grant of power derived from Oregon examples is desired, the following section may be included in the charter.

Section _____. POWERS OF COUNTY. Except as this charter provides to the contrary, the county shall have authority over matters of county concern to the full extent granted or allowed by the constitution and laws of the United States and of the state of Oregon, as fully as though each power comprised in that authority were specifically enumerated in this charter.

This grant of power may be supplemented by the following section:

Section _____. CONSTRUCTION OF CHARTER. In this charter no mention of a particular power shall be construed to be exclusive or to restrict the scope of the authority that the county would have if the power were not mentioned. The charter shall be liberally construed to the end that, within the limits of the charter and of the constitutions and laws of the United States and of the state, the county may have all powers necessary or convenient for the conduct of its county affairs, including all powers that counties may assume under the state law and under the county-home-rule provisions in the state constitution.

1. Baltimore County, Home Rule Charter for Baltimore County, Maryland, sections 101 and 304 (1956).

These two sections, although patterned upon the general grants of power that appear in virtually all the new city charters that have been adopted in this state during the past quarter of a century, are set forth here because the Oregon Supreme Court has given general grants like these, and a charter requirement for so construing one of the grants, their intended effect.¹

A general grant of power may be supplemented by a list of powers more specific than the general grant but more general than the specific powers illustrated above. The charter of the city of Beaverton, for example, supplements its general grant of power as follows:

"The following shall be deemed a part of the powers conferred upon the city by this charter:

- (1) Property. To acquire property within or without the corporate limits of the city for any city purpose, in fee simple or any lesser interest or estate, by purchase, gift, devise, lease, or condemnation; and to sell, lease, mortgage, hold, manage, and control such property as the interests of the city require.
- (2) Indebtedness. To borrow money within the limits prescribed by general law.
- (3) Public Services. To purchase, hire, construct, own, maintain, and operate or lease local public utilities, but only after having first obtained the consent of a majority of the qualified electors of the city to do so; to furnish all local public services, either within or without the corporate limits of the city; to acquire, by condemnation or otherwise, within or without the corporate limits, property necessary for any such purposes, subject to restrictions imposed by general laws for the protection of other communities; and to grant local public utility franchises, and to regulate the exercise of such franchises.
- (4) Public Improvements and Eminent Domain. To make local public improvements and to acquire, by condemnation or otherwise, property within or without the corporate limits necessary for such improvements, and also to acquire an excess over that needed for any such improvement, and to sell or lease excess property with restrictions, in order to protect and preserve the improvement.

1. See Davidson Baking Co. v. Jenkins, 216 Or. 51, 337 P. 2d 352 (1959); Paget v. City of Pendleton, 219 Or. 253, 346 P. 2d 1111 (1959).

- (5) Bonds. To issue and sell bonds on the security, in whole or in part, of any such excess property, of any public utility owned by the city, of the revenues thereof, or of both, including, in the case of a public utility, if deemed desirable by the city, a franchise stating the terms upon which, in case of foreclosure, the purchaser may operate the utility.
- (6) Police, Licensing, and Taxing Power. To adopt and enforce within the corporate limits of the city local police, sanitary and other similar regulations not in conflict with the general laws, and to license, tax, and regulate for the purpose of city revenue all businesses, callings, trades, and employments as the city council may require to be licensed or taxed and as are not prohibited by the laws of Oregon."¹

In the Model County Charter of the National Municipal League the general grant of power to the county is supplemented by a list of more specific powers granted to the county governing body, including power to "establish county departments, offices or agencies in addition to those created by this charter," to "levy taxes and special assessments," to "borrow money," to "make appropriations for county purposes," to "make investigations of the affairs of the county," to "require * * * reports * * * from all county departments, offices and agencies," and to "enter into * * * contracts with adjoining counties and with governmental units * * * within the county for joint performance * * * of any function or activity which the county is authorized to perform."²

What Specific Powers are Included in
"Authority Over Matters of County Concern"?

A charter that grants a county full "authority over matters of county concern" is bound to raise the question, Just what powers does the general "authority over matters of county concern" encompass? A closely related question is, What specific powers may the voters of a county confer upon the county in view of the power to "exercise * * * authority over matters of county concern"?

In one sense these questions are unanswerable. What is a matter of

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1. Beaverton Charter, section 5 (1943). This supplementary grant of powers is patterned upon corresponding provisions in the National Municipal League's model charter for cities. See National Municipal League, Model City Charter, pp. xxx-xxxi, 2 (5th ed. 1941).
 2. National Municipal League, Model County Charter, section 2.02 (1956).

county concern at one time may not be a matter of county concern later, and what is not a matter of county concern at one time may become a matter of county concern later. Early in Oregon history the Oregon Supreme Court held in effect that a road that originally lay in territory outside a city became a matter of municipal instead of county concern upon annexation of the territory to the city.¹ Similar results are achieved today by agreement.² In some Oregon counties during the early history of the state the idea that disposal of private garbage and refuse might be a matter of concern to the government of a county would probably have been looked upon as preposterous. Today the statutes of the state regarding disposal of garbage and refuse clearly imply that this activity is a matter of county concern. Only a few decades ago few persons, if any, foresaw airports as county facilities. Today counties are increasingly involved in the operation of airports. The functions of counties have been expanding, particularly in areas undergoing extraordinary urbanization. One of the advantages of the general grant of power for a county is that it is flexible and adaptable to changing conditions, as well as to the conditions that vary from county to county.

If the question about the meaning of "authority over matters of county concern" is in one sense unanswerable, in another sense it is answerable in helpful, and probably in quite satisfactory, ways. Part of the total answer to the question lies in the present state statutes governing counties. These statutes show that matters of county concern include, for example, roads and highways, courthouses, jails, dog-control, regulation of dance halls and automobile wrecking yards, purity of water supply, sewerage, disposal of garbage and refuse, law-enforcement, construction of private buildings, the subdivision of land, and the control of land-use.

The total meaning of the phrase "matters of county concern" can perhaps be further seen in the functions that cities carry on inside their corporate limits. The Attorney General of Oregon has declared that the county-home-rule amendment "patently intended to carve out for exclusive county control a sphere of local governmental autonomy for the county comparable to that possessed by the cities."³ Matters that are matters of municipal concern inside city limits are, certainly in many instances, matters of county concern outside city limits--for example, garbage and refuse disposal, running at large, public parks, the naming of streets in urbanized areas, building regulations, zoning and control of land subdivision, sewerage, regulation of dance halls and junk yards, and prevention of hepatitis.

More generally, it seems quite clear that "authority over matters of county concern" includes county police power in the sense of power to enact legislation, and otherwise to take action regarding the health, safety, and morals of the people of the county.

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1. See City of East Portland v. Multnomah County, 6 Or. 62 (1876).
 2. See ORS 373.270 (1959).
 3. 29 Ops. Atty. Gen. Or. 183, 184 (1959) (*italics in original*).

Limits on County Power

Whether granted in general or specific terms, the powers of a county under home rule would be subject to major limitations.

1. The powers of a county under home rule would be subject to important legal qualifications.
 - a. Under home rule the power of a county would be subject to certain constitutional and statutory restrictions. To illustrate, nothing in such a charter could abrogate the Federal constitutional guarantees of due process of law and equal protection of the laws;¹ presumably nothing in such a charter could abrogate the debt limit that the state constitution and statutes imposes on counties;² and probably nothing in such a charter could modify the requirements of the Local Budget Law³ as they apply to counties, or nullify the statute that restricts to territory outside incorporated cities certain county powers regarding public parks.⁴ These results are suggested by the analogous principle in the Oregon law of municipal home-rule to the effect that municipal action regarding matters of state-wide as well as municipal concern may not run counter to the constitution and laws of the state.⁵ County legislation on a matter of county as well as state-wide concern would appear to be ordinarily possible, but could not prevail over state law governing the matter. If the state law on the matter pre-empted the legislative action regarding the matter, then, of course, the county could not legislate on the matter. When this sort of pre-emption takes place is often a nice legal question, as the Oregon law on voters' qualifications illustrates.⁶
 - b. The legislative powers of a county would be subject under home rule, as they are in counties not under home rule, to the powers of the initiative and the referendum that the constitution and statutes of the state reserve to the voters of every county.⁷ If a county governing body enacted legislation that ran counter to the wishes of a substantial number of voters of the county, these voters could, by means of the referendum, require that any legislation not required to meet an emergency receive the approval of the electorate of the

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1. Oregon Constitution, article XI, section 10 (1958); ORS 287.054 (1959).
 2. United States Constitution, amendment XIV, section 1 (1868).
 3. ORS 294.305 - 294.420 (1959).
 4. ORS 203.120(11) (1959).
 5. City of Portland v. Welch, 154 Or. 286, 296, 59 P. 2d 228 (1936).
 6. See Wright v. Blue Mountain Hospital District, 214 Or. 141, 328 P. 2d 314 (1958).
 7. Oregon Constitution, article IV, section 1-a (1906), and article VI, section 10 (1958); ORS 203.780, 254.310, 254.340 (1959).

county before taking effect; and if the governing body failed to enact legislation that a substantial number of voters of the county desired, they could, by means of the initiative, require an election to be called for the purpose of enacting the legislation.

- c. Whatever general grant of power a county charter contained would be subject to limitations in the charter itself. Such limitations in county charters in other states restrict the power of the county with reference to such matters as purchasing, auditing, and personnel administration.¹ It is certain that any county charter adopted in this state will itself impose restrictions on county power.
2. The powers of a county under home rule, as exercised by the officers and agencies of the county, would be subject to the will of the people of the county as expressed in the press, by petitions, by civic leaders and organizations, and by the voters at the polls. Exercise by the county governing body of any of the powers of the county would be subject to whatever pressures the residents of the county brought to bear on the governing body. Experience indicates that these pressures are keenly felt. They are keenly felt in part because they can be legally implemented through the initiative and referendum, by the recall, and at regular elections at which incumbent office holders can be rejected.
3. In all Oregon counties, particularly those with large urban areas and populations, county power under county home rule would be subject to legal and practical limitations arising out of the existence and functioning of cities. Because the relationship of city powers to county powers under county home rule is a subject for special consideration in counties with large urban areas and population, and because it may be of little concern to other counties, the subject is reserved for discussion in the appendices to this study.

Allocation of Power

Whether the powers that a home-rule charter confers upon a county are conferred in specific or general terms, the charter should make clear, or authorize someone to make clear, which officials of the county are to exercise which powers of the county. The home-rule amendment to the state constitution makes clear that a county may not by charter relieve itself or any of its officers of any of their responsibilities under state law. At the same time the amendment makes clear that under home rule a county must by charter or otherwise prescribe which county officers shall assume which county functions. The charter will normally do this in some particulars. There will usually be need, however, for a residuary provision to the effect that powers not

1. See Fresno County, Charter, secs. 34, 35, and 44 (1956).

otherwise allocated by the charter or by action that it authorizes shall be vested primarily in the county governing body. The following illustrative section is intended to accomplish this objective:

Section _____. EXERCISE OF POWER. Except as--

- (1) this charter or
 - (2) the provisions of the constitution and laws of the state regarding the initiative and referendum
- provide to the contrary,
- (1) the legislative power of the county is vested in, and exercisable only by, the county council and
 - (2) all other powers of the county are vested in the county council and exercisable only by it or by persons acting under its authority.

This authorization would make it possible for the county governing body to delegate its powers other than its legislative power. Under the authorization the governing body could, however, delegate administrative power, including administrative power to promulgate and enforce rules and regulations, and the voters of the county would still have power, by virtue of the constitution and laws of the state, to engage in the legislative function by virtue of the initiative and referendum.

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