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Rules Advisory Committee Members

RE: Proposed third party administrative rule

Please accept these additional comments as a follow-up to a letter submitted August 7 by the Association of Oregon Counties (AOC) and the League of Oregon Cities (LOC). Without going into too much detail AOC and LOC believe the current third-party system in place serves a critical need for rural communities across Oregon. The proposed rules may well be a starting point, but clearly lack volumes of input offered over the last two plus years.

The proposed rules are overly broad and extend well beyond what's needed to respond to legal advice from the Department of Justice (DOJ) and Legislative Counsel (LC). They collectively will not just eliminate the practice of local government's contracting for a building official; but, will indirectly limit the availability of contracted inspectors and other overflow services critical to all jurisdictions in Oregon. We believe the combination of these impacts will extend to jurisdictions across Oregon who depend, at some level on outside expertise for inspection services.

Without a sensible rule moving forward the communities who currently utilize the third-party system risk unreasonable delays with permit approvals for home construction, business development and affordable housing across Oregon. We estimate that there are at least 19 cities who are solely dependent on contract services for their building and construction services and another 9 cities and 11 counties who use outside inspectors as part of their building programs.

The most significant issue identified in the draft rules are of course the proposed shift in policy regarding a municipality's ability to utilize a third-party building official. The agency has relied heavily on legal communications from Legislative Counsel (LC), dated February 7, 2018; the Department of Justice (DOJ), dated February 16, 2018; and a final letter from DOJ, dated March 14, 2019.

LOC and AOC both recognize and respect the need to ensure whatever process is adopted complies with both the Oregon Constitution and the Oregon Revised Statutes. The last thing either organization, or its memberships want is to run and administer programs in an unlawful manner. That said, both organizations believe the opinions issued by the DOJ and LC take an unnecessarily narrow view of delegation law in Oregon, and to be blunt, purposefully ignore the ability of both local governments and the DCBS to craft appropriate procedural safeguards.

Admittedly the State and our organizations seldom agree on the correct interpretation of home rule and the power it provides both cities and counties, but neither the DOJ nor the LC opinions address how our members' home rule authority impacts the delegation analysis or their ability to assume control of a local building inspection program.

We agree with the DOJ and LC that in order for delegation of governmental power to be lawful it must only occur when adequate procedural safeguards have been put in place. The courts, in opinions referenced by the DOJ, give DCBS clear guidance on how it can adopt rules that provide the needed and adequate procedural safeguards – **and guidance that does not require DCBS to require municipalities to actually employ a building official.** To highlight this point, we refer to the following case law for reference:

1. Medford Firefighters Assn. v. City of Medford. This case dealt with a statute that provided for the use of an arbitrator appointed by the Employment Relations Board to issue binding decisions to resolve a dispute between the city and the union over employment agreements. The Court of Appeals, in issuing its decision upheld the statute as a lawful delegation of governmental power, and gave clear guidance on the types of procedural safeguards that equate to a lawful delegation, specifically:

    a. The third-party was not permitted to have a personal interest in the outcome of the decision they made. *This safeguard arguably already exists in ORS 455.129(2)(n) (which prohibits a licensee from performing code inspections or plan reviews on a project they or their relatives has a financial interest in or is affiliated with their business). If DCBS does not believe this statute, by itself, is enough to reasonably ensure a third-party building official does not have a personal interest in the outcome of a decision they make, such a rule could very easily be crafted.* **Neither AOC nor LOC would object to any such rule that provides additional, reasonable safeguards to ensure personal interest does not interfere with decision making.**

    b. The decisions being made by the third-party person need to be based on factors created by a governmental body. *While seemingly, as it stands now, the Building Official has discretionary authority, some of which were specifically pointed out on the bottom of page 8 of the DOJ opinion issued on March 14, 2019, that discretionary authority can be limited by providing procedural safeguards which dictate how that discretionary authority can be utilized. As noted by the Court of Appeals in City of Damascus v. Brown, delegation is permissible if the third-party entities are provided guidance on how to exercise their discretionary authority. The DOJ correctly notes that currently a Building Official may "waive the requirement to submit building plans and calculations if 'the nature of the work applied for is such that reviewing of plans is not necessary to obtain compliance with th[e] code.'"* **LOC and AOC are confident that we can work with DCBS to identify procedural safeguards that better describe the limited instances in which that type of wavier can be granted.**

    c. The decision being made by the third-party person is subject to judicial review. *Arguably this protection already exists. The protection begins with ORS 455.475 which states that any "applicant for a building permit may appeal a decision made by a building official" to the DCBS. If someone believes the decision by DCBS to be incorrect, they have the authority, under ORS 183.480, to seek judicial review of the DCBS order.* **LOC and AOC are open to additional dialogue with if DCBS finds it necessary, to provide additional steps or layers for due process protection. For example, perhaps an**

administrative rule that allows for an aggrieved person to file an appeal of a third-party building official's decision to the relevant city or county council.

2. City of Damascus v. Brown. In this case, the Court of Appeals had to determine whether the legislature unlawfully delegated its authority to private parties through the passage of HB 4029 (a law which permitted landowners with property located on the boundary of the city of Damascus to withdraw that property from the jurisdiction of the city outside of normal statutory procedures). Much like with the Medford Firefighters case, the Court of Appeals, in issuing its ruling that the statute was an unlawful delegation of governmental power, gave clear guidance on the types of procedural safeguards that equate to a lawful delegation, specifically:

    a. When a third-party is provided discretionary authority in a delegation of governmental powers, that discretionary authority must come with specific criteria for how the third-party is to exercise that discretionary authority. **As noted above, LOC and AOC recognize that the current DCBS rules may provide discretionary authority to Building Officials; but, we strongly believe that adequate criteria for how that discretionary authority is to be used can be crafted and placed in the final administrative rules.** *Again, the DOJ opinion from March 14, 2019, calls out the discretionary authority of a Building Official to waive or modify site plan requirements "when otherwise warranted." Surely if that provision was removed, the remaining criteria would be enough to ensure the discretionary authority provided to the Building Official passed legal muster.* **LOC and AOC would not object to the removal of that one criteria.**

    b. When a third-party is delegated governmental powers, the governmental entity itself must be able to usurp that power. *Cities and counties are entities which regularly ensure due process for the property owners and developers who operate in their communities. If DCBS, DOJ and LC feel that currently cities and counties do not have the authority to usurp the third-party building official's power, why can't the rules be amended to require it?* **For example, AOC and LOC are comfortable with a rule that requires any locality using a third-party building official to require, in its contract with that the third-party building official or in an ordinance regulating the building inspection program, a clause that stipulates that at any time, a decision or action taken by the building official can be paused or voided by the localities chief executive officer or governing body.**

3. Qwest Corp. v. PUC. This case asked the Court of Appeals to render a decision regarding rules promulgated by the PUC which required utility pole occupants to enter into a contract with the utility pole owner and to obtain a permit to occupy a utility pole. The rules also made utility pole occupants subject to financial penalties if they occupied a pole illegally. In upholding the PUC rules, the Court provided clear guidance on the factors that existed which made the delegation lawful:

    a. When delegating power to a third-party, the government cannot delegate any rulemaking authority, the government itself must be solely responsible for determining the conditions that will lead to sanctions. *It is DCBS, and perhaps the localities depending on the specific factual circumstances, that make the rules the third-party building official must follow and the sanctions that will be imposed upon a property owner if the rules are not followed.* **This criteria is presently met by existing rules and procedures.**

b. Delegating powers to a third-party requires the final decision to be made by a governmental body, and preference for a multi-layered review process is desirable. *As previously noted, the final decision is made by DCBS or the court upon the receipt of any appeal.* **Local governmental entities are willing to consider the addition of a layer of review and appeal at the local level be it through their chief executive officer or governing bodies.**

When read together, the above summarized cases provide DCBS with a different policy choice and clear guidance on the types of standards it can impose to ensure any delegation by a municipality to a third-party building official remains lawful. **There is no need, and indeed no basis in the law, to require cities to directly employ a building official themselves.** It may take time to develop the needed procedural safeguards, but LOC, AOC, and their respective members are committed to working with DCBS to achieve this goal.

Additionally, the DOJ correctly notes that delegation of a governmental power needs to be "expressly authorized, or impliedly authorized if there is a reasonable basis to do so." **LOC and AOC strongly believe that authorization is impliedly provided through the home rule provisions of the Oregon constitution.**

As the Oregon Supreme Court noted in La Grande/Astoria v. PERB, a municipality properly exercises its home rule authority if its actions are authorized by its charter and the action does not contravene state or federal law. Contravention of state or federal law occurs when the action taken by the municipality is either expressly preempted or impliedly preempted by the higher governmental authority. **There is no express preemption from a local government utilizing a third-party building official in the Oregon Constitution or the Oregon Revised statutes.**

LOC and AOC believe there is no implied preemption. Implied preemption only exists when a state law and local law cannot both be complied with – that is not the case in this instance. Most importantly, particularly in this context, in Oregon, the courts presume that the Legislature did not mean to preempt local authority – this was made clear by the Oregon Supreme Court in Rogue Valley Sewer Services v. City of Phoenix. **To that end, the home rule authority granted to Oregon's cities and counties allows for them to utilize the services of a third-party building official, provided appropriate safeguards are put in place.**

LOC and AOC believe that DOJ and LC recognize that DCBS delegates the administration and enforcement of local building inspection programs to cities and counties. AOC and LOC believe that a more accurate reading of the Oregon Revised Code, particularly when the legislative history surrounding the adoption of a statewide building code is properly considered, is that local governmental units have an affirmative right to administer and enforce the State's building inspection program in their own respective jurisdictions.

To state that DCBS "delegates" authority to local governments implies that DCBS possesses the authority to decide whether a municipality may administer and enforce a building inspection program. It does not. The Legislature has already determined that cities and counties have the right to do so, and DCBS may only determine whether a municipality meets the requirements for administration and enforcement of a building inspection program.

When reading the court decisions regarding both delegation of governmental authority and home rule, LOC and AOC can find no reason for DCBS to require building officials to be employed by cities or counties. **LOC and AOC believe that the needed procedural**

safeguards to ensure proper governmental delegation are achievable and we respectfully ask that DCBS continue to work with us, and our members, to craft the criteria.

The following represents the remaining issues associated with the proposed rules.

1. Fees and Billing:
We do not understand the purpose behind the change in the financial/billing model being proposed. What problem is the agency trying to fix by prohibiting the use of fees, because if there is such a reason, it has not been shared with the RAC. The use of a fee-based model is used by several state agencies and local governments without problems that can be addressed by the existing oversite that is typically part of a service contract. This change is expected to increase the costs of administration and costs associated with excluding the use of fees, which will only increase the costs of home construction. Local governments can and do implement fee schedules typically with the use of an ordinance and resolution. We believe BCDS can implement a fee schedule, but we are not convinced BCDS has authority to regulate the method used. **AOC and LOC object to this proposed change.**

2. A-Level Certification Requirements for Building Officials:
The proposed rule would establish a distinction between trained professionals and certification requirements, which seem arbitrary and would not result in improved safety or efficient permit processing. As an alternative, the agency should reach out to Oregon's Architects Board and Oregon State Board of Examiners for Engineering and Land Surveying. Both organizations could provide helpful perspective that will add real value for certification. We also understand there is national testing for ICC certification to establish qualifications. **AOC and LOC support the current certification process, but are willing to listen and try to understand what the rationale is behind the proposed change. At the very least it makes sense to consult with the professional boards above before pursuing any change.**

3. Insurance and Liability:
The proposed changes for insurance requirements are unclear and have not been discussed by the RAC. Like many of the comments that we are offering AOC and LOC have not seen justification for the change. **We are not aware of the purpose of these changes and welcome additional broader discussion and explanation.**

4. Implementation Timeline:
Based on the communication with our collective membership the proposed timeline is not possible. Oregon and the nation are in the middle of a pandemic where the service delivery is focused on essential needs of the community. Given the final scope of the proposed rules are yet to be determined its clear in our view that there is no way the proposed rules could be implemented within the proposed timelines. Our members believe there is a national crisis over available building officials with an appropriate level of experience and knowledge to meet the proposed new standards. That alone presents a difficult path forward without an adequate source of qualified individuals and the hiring process. Developing new contracts and setting new fees and revised fee schedules through the state's process will take months. Our local jurisdictions cannot afford these costs or delays during this current crisis.

AOC and LOC recommend a minimum of one year from the date the rules are enacted, preferably 18 months with a 6- month extension to provide a reasonable transition and not stop the permitting process in its tracks. It's likely that during the implementation of new rules that mistakes will occur, so it's reasonable to expect compliance violations, major delays and more

uncertainty for jurisdictions who won't be able to meet these rules in that timeline. It only makes sense for BCD to address an implementation schedule and the current challenges.

Conclusion:
As proposed this draft rule has gone well beyond issues identified by DOJ and LC. The draft has not fully considered comments offered during RAC deliberations and in submitted testimony by a range of interests. As stated earlier this proposed draft has taken a significant step backwards. If left intact the rules will endanger a local government's ability to respond to their respective community's needs and put them in the position of dismantling the delivery of core services in their community.

AOC and LOC have offered comments and recommendations that closely mirror a reasonable response to the legal opinions offered by DOJ and LC. Our collective recommendations should serve as a template for a redraft of the rules for the RAC to consider. We believe we've identified a pathway that will meet the legal test and concerns presented by comments from DOJ and LC. We are happy to continue our work with the RAC, provide additional comments, and respond to any questions BCD or the RAC have related to our comments and a solution.

Sincerely,

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