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To: Linn County Board of Commissioners

From: Gene Karandy, County Attorney

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Re: Compliance with Minimum Wage as an Unfunded Mandate Under Article XI Section 15

Commissioner Nyquist has asked me to provide the Board with a very brief¹ analysis of two questions regarding the unfunded mandate provisions of the Oregon Constitution contained in Article XI Section 15 (Section 15) as they potentially relate to proposed Oregon increased minimum wage laws:

First Question

Does a local government have to comply with a State law or administrative rule that requires the expenditure of money by the local government for a new program or increased level of service for an existing program, e.g. increased minimum wage, if the State has not appropriated funds to reimburse the local government for costs incurred to carry out the law or rule?

First Answer

No, if the provisions of subsection (3) of Section 15 are met a local government is not required to comply with any State law or administrative rule that requires the expenditure of money by the local government for a new program or increased level of service for an existing program, e.g. increased minimum wage, if the State has not appropriated funds to reimburse the local government for costs incurred to carry out the law or rule.

¹ As indicated in this memo, this is a brief noncomprehensive analysis of two specific subsections of Article XI Section 15 of the Oregon Constitution. Since the provisions of Section 15 have not yet been interpreted nor applied by any Oregon court, there is uncertainty if a future court would agree with this analysis. Additionally, this memo is not intended to be relied on by any person or entity other than Linn County as legal advice.

Analysis

Section 15(1) provides that “when the Legislative Assembly or any state agency requires any local government to establish a new program or provide an increased level of service for an existing program, the State of Oregon shall appropriate and allocate to the local government moneys sufficient to pay the ongoing, usual and reasonable costs of performing the mandated service or activity,” subject to certain exceptions in subsection (7).

While it appears that the provisions of Section 15 have not been invoked by any local government and no Oregon court has yet considered the language, the Oregon Attorney General has issued Opinion Number 8263 analyzing Section 15 in the context of legislation increasing the retirement benefits of PERS retirees. 49 Op Atty Gen 152 (1999). The Attorney General’s analysis concluded that such an increase would require local governments to provide an increased level of service for an existing program and that such an increase would not be subject to the subsection (7)(c) exception for an existing program enacted by legislation prior to January 1, 1997.

If the logic of the Attorney General’s analysis is followed and applied by Oregon courts, they would most likely hold that an increase to the minimum wage requirements would also constitute an increased level of service for an existing program for a local government. If in such case the State does not appropriate and allocate to the local government reimbursement for any costs incurred to carry out the law and the Legislative Assembly does not provide, by appropriation, reimbursement in each succeeding year for such costs, the local government would not be required to comply with the law.²

Second Question

If a local government does not have to comply with a State law or administrative rule that requires the expenditure of money by the local government for a new program or increased level of service for an existing program, e.g. increased minimum wage, does a nongovernment entity that competes with the local government by selling products or services that are similar to the products or services sold by the local government have to comply with the State law or administrative rule?

Second Answer

No.

² Subject to the appropriation parameters of subsections (3)(a) and (b).

Analysis

Subsection (8) of Section 15 provides that “when a local government is not required under subsection (3) of this section to comply with a state law or administrative rule or order relating to an enterprise activity, if a nongovernment entity competes with the local government by selling products or services that are similar to the products and services sold under the enterprise activity, the nongovernment entity is not required to comply with the state law or administrative rule or order relating to that enterprise activity.”

“Enterprise activity” is defined in Subsection (2)(a) as “a program under which a local government sells products or services in competition with a nongovernment entity.” Nongovernmental entity is not defined, but presumably it would include any entity that is not a defined local government (a city, county, municipal corporation or municipal utility operated by a board or commission) such as, for example, a nonprofit corporation or a for profit corporation.

So if the Legislative assembly passed a law that increased the Oregon minimum wage and a local government was not required to comply with that law pursuant to the provisions of Section 15, then a nongovernment entity which competes with the local government by selling products or services that are similar to the products or services sold under an enterprise activity would not be required to comply with the law either. However, there is nothing in the text of Section 15 to suggest that the local government would have any legal authority to authorize or direct a nongovernmental entity to not comply with the law, rather each individual nongovernmental entity would have to make that determination and decision on its own.