



Oregon

Kate Brown, Governor

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February 13, 2018 (updated February 20, 2018)

House Committee on Rules
Oregon House of Representatives
900 Court St. NE
Salem Oregon 97301

Re: Updated testimony regarding HB 4086(-5) and (-6)

Dear Chair Williamson and members of the House Committee on Rules:

Note: This letter, originally submitted on February 13, 2018 to the House Committee on Business and Labor, was updated on February 20, 2018 to reflect a Department of Justice opinion and current amendments.

Thank you for sharing the legislative counsel opinion.

The legislative counsel opinion aligns with our preliminary understanding of these issues. The opinion addresses whether the powers of a building official may be delegated to a private third party company, and how the discretionary decisions of building officials and inspectors are made.

HB 4086(-5) and (-6) both require that a building official be directly employed by a municipality. HB 4086(-6) requires that the building official hold technical expertise or directly employ a head inspector with technical expertise. HB 4086(-6) appears to be the stronger approach to create a legal path forward for local building departments, consistent with the legislative counsel opinion. It is also the best policy approach, ensuring the building official has the skills or the staff necessary to exercise discretion and make technical and safety decisions on behalf of the building department.

HB 4086(-5) would require the division to re-evaluate the technical requirements for certified building officials, since they would be the only required employee at the local level. The division would need to adopt rules for the building official only model in HB 4086(-5) under existing authority to address the discretionary decision making requirement raised in the legislative counsel opinion.

HB 4086(-6) would require minimal rulemaking, because the technical expertise element is addressed through the head building inspector requirement. We believe HB 4086(-6) creates more flexibility for local government, because the technical expertise could be with the building

official or with a separate head inspector. HB 4086(-5) would require that the issue of technical competency be addressed through changes to certification requirements for building officials.

Going forward, for the approximately 25 cities and counties that completely contract out their building inspection program to a third party business, there will be several options to transition to meet the requirements of HB 4086(-6). They can choose to recruit a building official (and, if necessary, a head inspector) or to work with other cities and counties and councils of government to establish a regional approach to services. In either case, municipalities would be able to use third party services where allowed by law. The division is prepared to assist municipalities in the transition once they have identified what approach they want to take to provide building department services on behalf of the state.

Thank you for your continued work on this issue.

Update February 20, 2018:

The Department of Justice (DOJ) has clarified that the current model of contracting out building department functions to a third party is an illegal delegation of government functions, in written advice received February 16, 2018.

HB 4086 creates a new, constitutionally sound model, but its current effective date leaves a gap in time that would require the Division to take interim action. We now understand that the solution for providing local government with additional flexibility as soon as possible is for the (-6) to go into effect immediately. This is because discretionary decisions must be a function of government employees, and current law only allows the building official to exercise discretionary decision making. The (-6) provides more flexibility by allowing a second individual (the head building inspector) to also make discretionary decisions.

Without waiving attorney-client privilege, the division will need to obtain additional advice on next steps and how to adjust agency rules to align with the (-6) amendment. The (-6) amendment would give the division additional tools to address the constitutional and statutory problems identified in the DOJ advice.

The DOJ advice also identifies a new issue not previously discussed. The Electrical and Elevator Board has independent delegation authority for the electrical program. To ensure the electrical program delegation is consistent with the constitution, but still allows some flexibility for local governments, DOJ recommends that the Electrical and Elevator Board require local governments to employ an electrical inspector or ensure the building official or the head inspector (with the (-6) amendment) has the appropriate electrical certification.

The division will need to address these and other issues DOJ has identified in a manner that is consistent with the Oregon Constitution and statutes. The (-6) will provide additional tools to implement the DOJ advice.

Thank you for your continued work on this issue.

Sincerely,

Mark Long
Building Codes Division, Administrator