

Chapter 221

Organization and Government of Cities

Chapter 221

LAW REVIEW CITATIONS: 18 OLR 216; 26 OLR 141.

221.020

NOTES OF DECISIONS

The constitutional prohibition against creation of corporations by special laws does not in any way limit the right of the legislature to enact general laws on the subject. *State v. Gilbert*, (1913) 66 Or 434, 134 P 1038; *City of Hillsboro v. Pub. Serv. Comm.*, (1920) 97 Or 320, 187 P 617, 192 P 390. But see *State ex rel. Heinig v. City of Milwaukie*, (1962) 231 Or 473, 373 P2d 680.

The right to incorporate is given, not only to regularly laid out towns, but also to other areas. Agricultural and tide land areas may be included within the limits of the proposed corporation. *State v. Bay City*, (1913) 65 Or 124, 131 P 1038.

Prior to adoption of Ore. Const. Art XI, §2, forbidding the legislature to enact, amend or repeal any charter or act of incorporation, municipal corporations were under the sole control of the legislature which could either grant or withhold particular privileges. *City of Grants Pass v. Rogue R. Pub. Serv. Corp.*, (1918) 87 Or 637, 171 P 400.

A municipal corporation must trace its existence to some state law, either general or special. *City of Hillsboro v. Pub. Serv. Comm.*, (1920) 97 Or 320, 187 P 617, 192 P 390.

The first effort to provide a general law for the incorporation of municipal corporations was made in 1893. *Id.*

Where two authoritative bodies are granted concurrent powers to establish municipal authorities over an area, the authorized body which first institutes proceedings acquires exclusive jurisdiction of the subject area and may proceed to final conclusion unfettered by subsequent proceedings of another authorized body. *Landis v. City of Roseburg*, (1966) 243 Or 44, 411 P2d 282.

The first authorized body to obtain jurisdiction of the subject matter may have the other enjoined or ousted via quo warranto proceeding while its proceedings are pending. *Id.*

FURTHER CITATIONS: *City of Albany v. McGoldrick*, (1916) 79 Or 462, 155 P 717; *State v. Melville*, (1935) 149 Or 532, 39 P2d 1119, 41 P2d 1071; *Davidson Baking Co. v. Jenkins*, (1959) 216 Or 51, 337 P2d 352; *McManus v. Skoko*, (1970) 255 Or 374, 467 P2d 426.

ATTY. GEN. OPINIONS: Assumption by city of pre-existing fire protection district upon incorporation, 1946-48, p 115.

221.030

NOTES OF DECISIONS

A description of the area involved that would be sufficient for a deed was sufficient under a former similar statute. *State v. Bay City*, (1913) 65 Or 124, 131 P 1038; *Smith v. Hurlburt*, (1923) 108 Or 690, 217 P 1093.

FURTHER CITATIONS: *McManus v. Skoko*, (1970) 255 Or 374, 467 P2d 426.

221.040

NOTES OF DECISIONS

Under this section, the county court has no right to deny the residents of an area the right to vote on incorporation. *McManus v. Skoko*, (1970) 255 Or 374, 467 P2d 426.

221.050

CASE CITATIONS: *McManus v. Skoko*, (1970) 255 Or 374, 467 P2d 426; *City of Maywood Park v. State Hwy. Comm.*, (1970) 2 Or App 568, 468 P2d 905, Sup Ct review denied.

221.110

ATTY. GEN. OPINIONS: Office of municipal judge as office of this state, (1970) Vol 35, p 252.

221.120

CASE CITATIONS: *City of Albany v. McGoldrick*, (1916) 79 Or 462, 155 P 717; *City of Grants Pass v. Rogue R. Pub. Serv. Corp.*, (1918) 87 Or 637, 171 P 400.

221.140

NOTES OF DECISIONS

A city legislative body can contract for the employment of a consulting engineer, even though the city has a competent engineer. *Burrell v. Portland*, (1912) 61 Or 105, 121 P 1.

Requiring appointment rather than election of a municipal judge was not unconstitutional under Ore. Const. Art. VII (A), §1. *State ex rel. Mullican v. Parsons*, (1971) 257 Or 468, 479 P2d 734.

221.160

CASE CITATIONS: *State v. Gruber*, (1962) 231 Or 494, 373 P2d 657.

221.170

ATTY. GEN. OPINIONS: Duties of county clerks concerning municipal elections, 1944-46, p 398; sharing regular election expenses between city and county, 1962-64, p 118.

221.180

ATTY. GEN. OPINIONS: Function of city central committee, 1954-56, p 62; application of general law barring defeated primary candidate from general election ballot, (1970) Vol 35, p 38.

221.190

ATTY. GEN. OPINIONS: Constitutionality of this section, 1942-44, p 442; establishing a new tax base when primary nominating elections not held, 1952-54, p 226.

221.200

ATTY. GEN. OPINIONS: Duty of city to conform city ward boundary lines to county precinct boundary lines, 1946-48, p 456; application of Corrupt Practices Act to municipal elections, 1960-62, p 169; application of general law barring defeated primary candidate from general election ballot, (1970) Vol 35, p 38.

221.210**NOTES OF DECISIONS**

Authority of cities and towns to provide for initiative power extends to the manner of amending the charters of cities as well as to the enactment and repeal of municipal ordinances. *Acme Dairy Co. v. Astoria*, (1907) 49 Or 520, 90 P 153.

1907 c.226 is broad enough to include proceedings to amend the charter of the Port of Portland. *Farrel v. Port of Portland*, (1908) 52 Or 582, 98 P 145.

An amendment of the charter of Portland, incorporated under a special Act, proposed and submitted by the city council in accordance with this law, was valid. *McKenna v. Portland*, (1908) 52 Or 191, 96 P 552.

An ordinance which shows by its title and emergency clause an intention to provide the mode of exercising the initiative and referendum in enacting a new charter is sufficient to authorize the enactment of a new charter. *Duncan v. Dryer*, (1914) 71 Or 548, 556, 143 P 644.

The act of commissioners in passing an ordinance adopting a charter is not an enactment of such charter. *Birnie v. LaGrande*, (1916) 78 Or 531, 538, 153 P 415.

A new charter was not adopted where the city, incorporated under the Act of 1893, did not comply with the provision in the Act of 1893 as to notice. *Provoost v. Cone*, (1917) 83 Or 522, 162 P 1059.

A town or city must have been created before the voters of a community can enact or amend a charter; no group of voters in unorganized territory can adopt a charter. *City of Hillsboro v. Pub. Serv. Comm.*, (1920) 97 Or 320, 187 P 617, 192 P 390.

This enactment applies to municipalities which have not provided by ordinance or charter for the manner of exercising initiative powers. *Campbell v. Eugene*, (1925) 116 Or 264, 240 P 418.

A charter amendment which was initiated by an ordinance of the city council was valid. *Salem v. Ore.-Wash. Water Serv. Co.*, (1933) 144 Or 93, 23 P2d 539.

Where a city has by charter or ordinance prescribed its own procedure, this section is inapplicable. *Thompson v. Nelson*, (1936) 155 Or 43, 62 P2d 267.

FURTHER CITATIONS: *Haines v. City of Forest Grove*, (1909) 54 Or 443, 103 P 775; *Thurber v. City of McMinnville*, (1912) 63 Or 410, 128 P 43.

ATTY. GEN. OPINIONS: Qualifications required of voters voting on initiative matters of city, 1944-46, p 56.

221.310**NOTES OF DECISIONS****1. In general**

A resolution for a vote upon a charter amendment in accordance with the provisions of a city ordinance is effec-

tive immediately upon its adoption by the council. *State v. Andresen*, (1915) 75 Or 509, 516, 147 P 526.

The provision requiring 30 days to elapse after passage of ordinance before it is effective is for purpose of allowing required time for invoking referendum against the measure. *Campbell v. Eugene*, (1925) 116 Or 264, 240 P 418.

An ordinance ordering special election to vote on charter amendment is not "municipal legislation" subject to referendum. *Id.*

2. Subsection (1) and referendum ordinances

Notwithstanding a city charter provision that an ordinance shall take effect immediately upon its approval by the mayor, an ordinance upon which a referendum is invoked will take effect as provided in subsection (1). *Long v. Portland*, (1909) 53 Or 92, 98 P 324, 1111.

The 30-day period prescribed by subsection (1) within which an ordinance shall not take effect does not invalidate a city charter provision prescribing a shorter time. *Id.*

A petition for referendum of ordinance must be filed within 15 days from the final passage of the ordinance, in accordance with city charter provisions, and not within 30 days, as provided by subsection (1). *State v. Portland Ry., Light & Power Co.*, (1910) 56 Or 32, 107 P 958.

A method of referendum substituted by a city for that provided by the legislature in subsection (1) will be followed. *Curtis v. Tillamook City*, (1918) 88 Or 443, 171 P 574, 172 P 122.

An ordinance providing for presentment of petitions for referendum not later than the 80th day before the primary or general election or the 60th day before the next special election was for the purpose of allowing city officials time to check names, do printing, and post notices of election, and not to give voters time for invoking the referendum; therefore subsection (1) controlled. *State v. Gibson*, (1948) 183 Or 120, 191 P2d 392.

As to a conflict between subsection (1) and an ordinance as to the time within which a petition of referendum is to be filed, the ordinance controls. *Id.*

3. Emergency measures

Portland city charter, permitting the enactment of emergency ordinances, empowered the city to enact emergency ordinances. *Thielke v. Albee*, (1916) 79 Or 48, 51, 153 P 793.

Invalidity of a declaration of emergency does not void an ordinance but merely fails to accelerate the effective date. *State v. Gibson*, (1948) 183 Or 120, 191 P2d 392.

An emergency declaration will be declared void only if the ordinance discloses on its face that the claim of an existent emergency is false and contradicts other matters apparent on the face of the ordinance or that the legislation proposed thereby is contrary to the organic law of the state or city or is otherwise beyond the scope of its authority. *Greenberg v. Lee*, (1952) 196 Or 157, 248 P2d 324.

A city charter provision, requiring that emergency ordinances contain a statement that an emergency exists and specify with distinctness the facts and reasons constituting such emergency, imposes no greater burden than to report the ultimate fact or facts or the ultimate reason or reasons which impelled the ordinance's emergent character. *Id.*

221.330

ATTY. GEN. OPINIONS: Effect of amendment or repeal of state law adopted by reference as city ordinance, 1936-38, p 666; authority of state officers making arrests within cities for violations of state traffic laws where local ordinances are similar, 1940-42, p 144.

LAW REVIEW CITATIONS: 37 OLR 272; 39 OLR 210, 212, 241; 43 OLR 310; 48 OLR 361, 364.

221.348

LAW REVIEW CITATIONS: 48 OLR 361.

221.349**NOTES OF DECISIONS**

A city ordinance requiring advance deposit of a jury fee to obtain a jury trial in a prosecution for a traffic offense was unconstitutional as a denial of equal protection of the laws. *Miller v. Jordan*, (1970) 3 Or App 134, 472 P2d 841.

221.350 to 221.390**NOTES OF DECISIONS**

These are general procedural statutes that apply to all municipal appeals and supersede particular city charter provisions in contravention of them. *Portland v. Olson*, (1971) 4 Or App 380, 481 P2d 641.

221.350**NOTES OF DECISIONS**

Violation of a city ordinance providing for fine or imprisonment or both was so far criminal that appeal from conviction abated on the death of the defendant. *Salem v. Read*, (1949) 187 Or 437, 211 P2d 481.

ATTY. GEN. OPINIONS: Disposition of fines and forfeited bail, 1960-62, p 22.

221.360**NOTES OF DECISIONS**

Unless a constitutional question is involved there can be no appeal from the circuit court in cases involving ordinance violations arising in the municipal court and appealed to the circuit court. *Salem v. Polanski*, (1954) 202 Or 504, 276 P2d 407; *Portland v. Trumbull Asphalt Co.*, (1970) 2 Or App 1, 463 P2d 606, Sup Ct review denied; *Portland v. Olson*, (1971) 4 Or App 380, 481 P2d 641.

A defendant acquitted in a municipal court but convicted on appeal by the city in the circuit court has the right of appeal to the Supreme Court. *Portland v. Stevens*, (1947) 180 Or 514, 178 P2d 175.

Constitutional questions must be raised in the trial court. *Portland v. Trumbull Asphalt Co.*, (1970) 2 Or App 1, 463 P2d 606, Sup Ct review denied.

FURTHER CITATIONS: *Portland v. White*, (1923) 106 Or 169, 211 P 798; *Portland v. McSparran*, (1942) 169 Or 377, 129 P2d 65; *Portland v. Duntley*, (1949) 185 Or 365, 203 P2d 640; *Portland v. Welch*, (1961) 229 Or 308, 364 P2d 1009, 367 P2d 403; *Portland v. Lloyd A. Fry Roofing Co.*, (1970) 3 Or App 352, 472 P2d 826, Sup Ct review denied; *City of Klamath Falls v. Rutherford*, (1970) 4 Or App 49, 476 P2d 929; *Salem v. Kimball*, (1971) 5 Or App 49, 482 P2d 191.

LAW REVIEW CITATIONS: 7 WLJ 50.

221.380

CASE CITATIONS: *Portland v. White*, (1923) 106 Or 169, 211 P 798; *Portland v. Duntley*, (1949) 185 Or 365, 203 P2d 640.

221.390

ATTY. GEN. OPINIONS: Disposition of fines and forfeited bail, 1960-62, p 22.

221.410**NOTES OF DECISIONS**

City, incorporated under general law, had authority to enact an ordinance licensing bakeries and bakery distributors, notwithstanding that the city had no charter. *Davidson Baking Co. v. Jenkins*, (1959) 216 Or 51, 337 P2d 352.

FURTHER CITATIONS: *Fischer v. Miller*, (1961) 228 Or 54, 363 P2d 1109.

ATTY. GEN. OPINIONS: Use of separate ballot in establishing city tax base, 1958-60, p 62; city licenses for insurance agents, 1958-60, p 77; Green River ordinance restrictions on licensed insurance agents, 1958-60, p 77; hiring lawyer to prepare and present legislation, 1958-60, p 174; ownership of streets in a city, 1960-62, p 311.

LAW REVIEW CITATIONS: 11 OLR 123; 16 OLR 250; 17 OLR 289; 22 OLR 371; 25 OLR 159; 38 OLR 358-361; 5 WLJ 189-310.

221.420**NOTES OF DECISIONS**

There cannot exist at the same time two public bodies having jurisdiction to fix rates. *Portland Ry., Light & Power Co. v. Portland*, (1914) 210 Fed 667.

That the rates of a municipally owned utility should be regulated by the municipality itself was the legislative intention. *Gates v. Pub. Serv. Comm.*, (1917) 86 Or 442, 167 P 791, 168 P 939.

Subsection (2) does not conflict with subsection (1) of ORS 767.035. *Portland Stages, Inc. v. Portland*, (1969) 252 Or 633, 450 P2d 764.

FURTHER CITATIONS: *City of Woodburn v. Public Serv. Comm.*, (1916) 82 Or 114, 161 P 391, Ann Cas 1917E, 996, LRA 1917C, 98; *City of Hillsboro v. Pub. Serv. Comm.*, (1920) 97 Or 320, 187 P 617, 192 P 390; *Yamhill Elec. Co. v. City of McMinnville*, (1929) 130 Or 309, 274 P 118, 280 P 504; *California-Ore. Power Co. v. City of Grants Pass*, (1913) 203 Fed 173.

ATTY. GEN. OPINIONS: Effect on powers of Public Utility Commissioner, 1930-32, p 647; application as to rates and services within Portland and other cities, and as to overlapping of tax expenditures, 1946-48, p 253; Public Utility Commissioner's authority over public motor carriers, 1956-58, p 223; authority for municipal utility transmission line over a river, 1962-64, p 24.

LAW REVIEW CITATIONS: 11 OLR 345.

221.430

LAW REVIEW CITATIONS: 4 WLJ 476, 479.

221.440

LAW REVIEW CITATIONS: 4 WLJ 476, 479.

221.450**NOTES OF DECISIONS**

When a telephone company has appropriated parts of the highways in a city to its exclusive use without a franchise, the state may grant the right to exact compensation for such appropriation. *Portland v. Pac. Tel. & Tel. Co.*, (1933) 5 F Supp 79.

ATTY. GEN. OPINIONS: Limits of discretion, 1930-32, p 125; constitutionality of proposed bill, 1930-32, p 126.

LAW REVIEW CITATIONS: 4 WLJ 476.

221.480

ATTY. GEN. OPINIONS: Use of public funds for city publicity, 1962-64, p 68.

221.490

ATTY. GEN. OPINIONS: Participation in Space Age Industrial Park Development Association, 1960-62, p 314, 1962-64, p 20; necessity of an election, 1962-64, p 68.

221.500

ATTY. GEN. OPINIONS: Necessity of an election, 1962-64, p 68.

221.610

CASE CITATIONS: State v. Sch. Dist. 3, (1915) 78 Or 188, 152 P 221.

ATTY. GEN. OPINIONS: Right of disincorporated city to receive a pro rata share of liquor revenues, 1948-50, p 458.

221.710

NOTES OF DECISIONS

A copy of a city's charter, filed pursuant to this section may be looked to in order to determine whether a particular subdivision lies within the city limits. Bloech v. Hyland Homes Co., (1926) 119 Or 297, 247 P 761.

The section, township and range in which a city is located may be determined by resort to the copy of the charter filed in accordance with the requirements of this section. State v. Miller, (1930) 133 Or 256, 289 P 1063.

FURTHER CITATIONS: Birnie v. La Grande, (1916) 78 Or 531, 153 P 415; Chan Sing v. City of Astoria, (1916) 79 Or 411, 415, 155 P 378; Rusk v. Montgomery, (1916) 80 Or 93, 156 P 435; Spence v. Watson, (1947) 182 Or 233, 186 P2d 785.

221.720

ATTY. GEN. OPINIONS: Ownership of streets in a city, 1960-62, p 311.

LAW REVIEW CITATIONS: 5 WLJ 317.

221.750

NOTES OF DECISIONS

Under a former similar statute, it was held that a statute of limitations would not run against city so as to deprive it of a street; however, circumstances might give rise to an equitable estoppel against the municipality. Oliver v. Synhorst, (1906) 48 Or 292, 86 P 376, 7 LRA(NS) 243; Christian v. Eugene, (1907) 49 Or 170, 89 P 419.

City was not estopped to deny an abutting owner's claim to lands inclosed by a fence, but claimed by the city as a street, by reason of a visit of the city council to the land while certain improvements were being constructed by the owner. Oliver v. Synhorst, (1911) 58 Or 582, 109 P 762, 115 P 594.

City was estopped to claim the right to open streets through property on which it had induced the construction of a sawmill by the defendants, and where there was no

public necessity for such streets. Portland v. Inman-Poulsen Lbr. Co., (1913) 66 Or 86, 133 P 829, Ann Cas 1915B, 400, 46 LRA(NS) 1211.

City was not estopped where part of the street was inclosed and used for a corral and for the growth of vegetables by the defendant. Booth v. City of Prineville, (1914) 72 Or 298, 143 P 994, LRA 1915B, 1084.

The city was estopped where it permitted owner to maintain permanent and valuable improvements in the city street. Barton v. Portland, (1914) 74 Or 75, 144 P 1146.

Inclosing a part of a street for 17 years did not establish title by adverse possession, by reason of this statute. McCoy v. Thompson, (1917) 84 Or 141, 164 P 589.

Prior to the enactment of this statute, it was held that possession by an abutting proprietor of a dedicated street would not defeat the right of a municipal corporation to open a highway unless permanent and valuable improvements have been made and maintained for the period of the statute of limitations. Killam v. Multnomah County, (1931) 137 Or 562, 4 P2d 323.

FURTHER CITATIONS: City of Silverton v. Brown, (1912) 63 Or 418, 128 P 45.

LAW REVIEW CITATIONS: 20 OLR 111; 31 OLR 176.

221.901

NOTES OF DECISIONS

The courts had no doubt of the constitutionality of the 1893 Incorporation Act. State v. Bay City, (1913) 65 Or 124, 131 P 1038.

221.902

ATTY. GEN. OPINIONS: Position of city attorney and deputy district attorney held by one person simultaneously, 1942-44, p 226.

221.903

NOTES OF DECISIONS

A city treasurer's bond which provides that the surety shall make good any loss occasioned by the treasurer's fraud or dishonesty is sufficient and fully protects the city against embezzlements and larcenies on his part. City of Seaside v. Ore. Sur. & Cas. Co., (1918) 87 Or 624, 171 P 396.

A municipal corporation suing upon a fidelity bond furnished by the city treasurer is not entitled to interest in the absence of any provision therefor in the bond. Id.

221.906

LAW REVIEW CITATIONS: 39 OLR 219.

221.911

NOTES OF DECISIONS

This section does not apply to a city created by special Act; such a city may grant a franchise on the same day that the ordinance therefor is introduced. City of Albany v. McGoldrick, (1916) 79 Or 462, 155 P 717.

221.912

NOTES OF DECISIONS

In respect of cities incorporated under the Act of 1893, this section is mandatory, and an ordinance not enacted in accordance therewith is a nullity. Provoost v. Cone, (1917) 83 Or 522, 162 P 1059.

This section is not applicable to a city incorporated by special Act. *Colby v. City of Medford*, (1917) 85 Or 485, 167 P 487.

An enacting clause is not necessary to the validity of an ordinance in the absence of constitutional provision or statute requiring it. *Id.*

221.913

ATTY. GEN. OPINIONS: Manner of enforcing a county tax lien upon property acquired by a municipality, 1922-24, p 212.

221.914

ATTY. GEN. OPINIONS: Authority of Governor to pardon a violation of a municipal ordinance, 1940-42, p 383; authority of Board of Parole and Probation to parole one who has violated a municipal ordinance, 1942-44, p 90; duty of sheriff to take custody of city prisoners under agreement, 1966-68, p 336.

221.915

NOTES OF DECISIONS

To maintain an action on account of a public nuisance, an individual complaining must show that he has sustained an injury of a special character, distinct and different from that suffered by the public generally. *Esson v. Wattier*, (1893) 25 Or 7, 34 P 756; *Wilson v. Portland*, (1936) 153 Or 679, 58 P2d 257; *Columbia R. Fishermen's Protective Union v. City of St. Helens*, (1939) 160 Or 654, 87 P2d 195.

A city council may not arbitrarily and unreasonably declare a structure a nuisance. *Gow Why v. City of Marshfield*, (1931) 138 Or 167, 5 P2d 696.

A city has no more right than an individual to create and maintain a nuisance on its property. *Wilson v. Portland*, (1936) 153 Or 679, 58 P2d 257.

A building is a fire hazard and a nuisance if it contains defects which would attract or cause fires. *Hill Military Academy v. Portland*, (1936) 152 Or 272, 53 P2d 55.

Equity has jurisdiction to grant injunctive relief against a public or private nuisance if there is no other adequate remedy. *Columbia R. Fishermen's Protective Union v. City of St. Helens*, (1939) 160 Or 654, 87 P2d 195.

FURTHER CITATIONS: *McGowan v. City of Burns*, (1943) 172 Or 63, 137 P2d 994, 139 P2d 785.

221.916

NOTES OF DECISIONS

1. In general

A city incorporated by special Act is not governed by this enactment. *City of Albany v. McGoldrick*, (1916) 79 Or 462, 155 P 717.

Privileges accorded in this section also inure to cities incorporated by special Act. *City of Grants Pass v. Rogue R. Pub. Serv. Corp.*, (1918) 87 Or 637, 171 P 400. *But see Fenwick v. City of Klamath Falls*, (1931) 135 Or 571, 297 P 838.

This section applies only to municipal corporations organized under the Act of which it forms a part and does not apply to a city organized under a special charter. *Fenwick v. City of Klamath Falls*, (1931) 135 Or 571, 297 P 838.

A water district organized under 1917 c. 346, as amended by 1927 c. 385, cannot include incorporated cities or towns. *State v. Chandler*, (1946) 180 Or 28, 175 P2d 448.

2. Regulatory powers

Grant of the power to license and regulate the sale of intoxicants carries with it the power to prescribe the pun-

ishment for sale without a license. *State v. Haines*, (1899) 35 Or 379, 58 P 39.

Under the regulatory power conferred by this section, a town may require the operator of a mill race traversing a street to plank it in a substantial manner, though the race was built before the town was incorporated. *Town of Gaston v. Thompson*, (1918) 89 Or 412, 174 P 717.

3. Limitations on powers

The council has no power to enact an ordinance in conflict with a general state law. *Burton v. Gibbons*, (1934) 148 Or 370, 36 P2d 786. *But see State ex rel. Heinig v. City of Milwaukie*, (1962) 231 Or 473, 373 P2d 680.

4. Streets and thoroughfares

A city has ample authority to remove from the streets every obstruction or impediment to their free use by the public. *Portland v. Yates*, (1922) 102 Or 513, 199 P 184, 203 P 319.

A business man who has installed an electric sign that complies in all respects with the municipal ordinances cannot be required to take it down a year or two later because it does not fully comply with the requirements of a subsequent ordinance, if the sign is conceded to be safe and in no way detrimental to the rights of either the public or private persons. *Id.*

5. Public utilities

A municipal corporation that has granted a telephone company a franchise to use the streets cannot thereafter add to the conditions by imposing a license charge for revenue purposes. *Sunset Tel. & Tel. Co. v. City of Medford*, (1902) 115 Fed 202.

A city may grant a franchise to a water company to supply the needs of its inhabitants. *City of Joseph v. Joseph Waterworks Co.*, (1911) 57 Or 586, 589, 111 P 864, 112 P 1083.

A city may maintain an action on a bond deposited by the grantee of a franchise to construct an electric plant therein within a designated period. *City of Grants Pass v. Rogue R. Pub. Serv. Corp.*, (1918) 87 Or 637, 171 P 400.

The authority of a municipal corporation to fix the rates of public utilities operating within its limits is subordinate to the regulatory power of the state exercised through the Public Service Commission. *City of Hillsboro v. Pub. Serv. Comm.*, (1920) 97 Or 320, 187 P 617, 192 P 390.

A city may construct and operate its own waterworks system, though it has awarded a franchise to a private person who is furnishing water thereunder, if the grant does not in any way inhibit the city from taking such action. *Copeland v. City of Waldport*, (1934) 147 Or 60, 31 P2d 670.

This section does not apply except to cities incorporated under the Act of 1893. *Grayson v. State*, (1968) 249 Or 92, 436 P2d 261.

FURTHER CITATIONS: *State ex rel. Cutlip v. City of North Bend*, (1943) 171 Or 329, 137 P2d 607; *Davidson Baking Co. v. Jenkins*, (1959) 216 Or 51, 337 P2d 352.

ATTY. GEN. OPINIONS: Licensing slot machines, punch boards or pinball machines, 1944-46, p 486; installing parking meters on county road, 1950-52, p 311; authority to number and renumber houses outside corporate limits of a city, 1952-54, p 5; authority to assess tax against state-owned armories, 1952-54, p 47; applicability of Green River ordinance to state-licensed insurance agent, 1958-60, p 78.

LAW REVIEW CITATIONS: 11 OLR 123; 16 OLR 250; 17 OLR 76, 289; 22 OLR 371; 25 OLR 159; 38 OLR 358.

221.918

NOTES OF DECISIONS

This statute is applicable to all municipalities and is as much a part of a municipal charter as if it were therein specifically written. *Claypool v. McCauley*, (1929) 131 Or 371, 283 P 751.

By this enactment it was intended to vest the judicial officer of a municipality with the power and jurisdiction of justices of the peace. *Id.*

The jurisdiction of the recorder sitting as ex officio justice of the peace extends only to crimes committed within the city. *Id.*

FURTHER CITATIONS: *State v. Rand*, (1941) 166 Or 396, 112 P2d 1034.

ATTY. GEN. OPINIONS: Authority of city recorder to handle criminal cases, 1938-40, p 632; city recorder ex officio justice of peace, 1940-42, p 611; office of municipal judge as office of this state, (1970) Vol 35, p 252.

221.919

ATTY. GEN. OPINIONS: Impoundment procedure, 1966-68, p 420.

221.921

ATTY. GEN. OPINIONS: Sale of city realty to employe of a councilman, 1938-40, p 449.

221.924

NOTES OF DECISIONS

1. In general

Cities not incorporated under the Act of 1893, but under a special charter granted by the legislature, are not governed by this section. *Umphlette v. City of Silverton*, (1936) 154 Or 156, 59 P2d 244; *Noonan v. Portland*, (1939) 161 Or 213, 88 P2d 808.

"Place," as used in a charter exempting a municipal corporation from liability for damage sustained by reason of defective sidewalk, street, avenue, boulevard, alley, court or place, did not include a wharf operated by the city. *Hise v. City of North Bend*, (1931) 138 Or 150, 6 P2d 30.

Where the State Highway Commission takes over a statutory city street under authority to route a state highway, the route so selected would continue to be a city street. *Cabell v. City of Cottage Grove*, (1943) 170 Or 256, 130 P2d 1013.

2. Corporate or proprietary functions

When a municipality exercises a corporate function as distinguished from its governmental powers, it is held to the same responsibility as a private corporation for injuries resulting from its negligence. *Etter v. Eugene*, (1937) 157 Or 68, 69 P2d 1061; *Blue v. City of Union*, (1938) 159 Or 5, 75 P2d 977; *Noonan v. Portland*, (1939) 161 Or 213, 88 P2d 808.

A municipality may be granted immunity from liability from acts of its officials engaged in the performance of public service; but when the municipality exercises its proprietary or corporate authority and engages in a business enterprise for the commercial advantage of those whose interests it serves, it possesses no immunity from liability in the absence of special exemption. *Hise v. City of North Bend*, (1931) 138 Or 150, 6 P2d 30.

In maintaining a park, a city acts in a governmental capacity. *Etter v. Eugene*, (1937) 157 Or 68, 69 P2d 1061.

3. Validity of charter provisions

A charter provision exempting a city from liability for injuries from street conditions is not unconstitutional. *O'Harra v. Portland*, (1869) 3 Or 525; *Pullen v. Eugene*, (1915) 77 Or 320, 146 P 822, 147 P 768, 1191, 151 P 474, Ann Cas 1917D, 933; *Humphry v. Portland*, (1916) 79 Or 430, 154 P 897; *Caviness v. Vale*, (1917) 86 Or 554, 169 P 95; *Platt v. Newberg*, (1922) 104 Or 148, 205 P 296; *Noonan v. Portland*, (1939) 161 Or 213, 88 P2d 808; *Balls v. Woodward*, (1892) 51 Fed 646.

Whether a city charter adopted under general law, as distinguished from one obtained from the legislature, can free a municipality from liability when a general statute subjects cities to liability, not decided. *Hise v. City of North Bend*, (1931) 138 Or 150, 6 P2d 30.

4. Liability of city

Whenever a city is required, or power is conferred, by its charter, to keep in good condition its streets and sidewalks, the city is liable to anyone sustaining damages by a failure to perform the duty, unless the city is exempted from responsibility. *Blue v. City of Union*, (1938) 159 Or 5, 75 P2d 977; *Noonan v. Portland*, (1939) 161 Or 213, 88 P2d 808.

Though work is done by an independent contractor, a municipal corporation may be held liable for an injury resulting from the negligent conduct of street work. *Lintner v. Wiles*, (1914) 70 Or 350, 141 P 871.

As to open, unimproved city property, the city's liability for tort committed in its maintenance is the same as that of a private owner. *Wheeler v. City of St. Helens*, (1936) 153 Or 610, 58 P2d 501.

A city maintaining a nuisance on its property is subject to the same liability as an individual. *Wilson v. Portland*, (1936) 153 Or 679, 58 P2d 257.

LAW REVIEW CITATIONS: 47 OLR 367, 369; 48 OLR 117, 118; 1 WLJ 358.

221.926

NOTES OF DECISIONS

Every intendment should be made in favor of the validity of an ordinance enacted to promote the public welfare. *Portland v. Yates*, (1922) 102 Or 513, 199 P 184, 203 P 319.

General laws enacted by the legislature are superior to conflicting ordinances of cities and towns. *Burton v. Gibbons*, (1934) 148 Or 370, 36 P2d 786. But see *State ex rel. Heinig v. City of Milwaukie*, (1962) 231 Or 473, 373 P2d 680.

221.927

NOTES OF DECISIONS

This section does not nullify the mandatory requirements of ORS 221.912. *Provoost v. Cone*, (1917) 83 Or 522, 162 P 1059.

221.930

NOTES OF DECISIONS

1913 c.345 §11 was ineffective in repealing any law or curtailing the established privileges of any city except in so far as the change in procedure for incorporation under 1913 c.345 might work as implied repeal of the 1893 Incorporation Act. *City of Grants Pass v. Rogue R. Pub. Serv. Corp.*, (1918) 87 Or 637, 171 P 400.