OFFICE OF THE ATTORNEY GENERAL

DAVE FROHNMAYER

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The incorporation of Rajneeshpuram as an Oregon city is in violation of state and federal constitutional guarantees of separation of church and state, according to an opinion issued today by Attorney General Dave Frohnmayer. The opinion was requested by State Representative Mike McCracken and is based on a series of known and assumed facts concerning the Rajneesh community.

"After months of study, we have come to the inevitable conclusion that on the facts presented to us, Rajneeshpuram cannot be a city," Frohnmayer said in issuing the opinion. "The constitutional prohibition against intermingling of church and state is so basic to our system of government that we feel a responsibility now to determine whether the facts are as we believe and, if so, to take appropriate legal action."

McCracken's request questioned the legality of the city to receive state revenue sharing funds. The opinion concluded that the city could not receive state funds. In researching that issue, Frohnmayer concludes that the very incorporation violates both state and federal constitutional guarantees of separation

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of church and state. "The basic principle underlying our opinion is that a city must behave as a city. In this instance, it is not possible for religion and city government to be insulated from each other under the facts assumed," Frohnmayer said. "The intrusion of the religion into city government affairs is pervasive and unavoidable. There is in effect a total fusion of government and of religious functions. In short, as presently constituted, this city is fundamentally incapable of behaving as a city."

The opinion predicts that the courts would regard the four entities involved -- foundation, corporation, cooperative and city -- as one because of their interlocking nature. "The city is the functional equivalent of a religious commune," the opinion stated.

"Because of the seriousness of this conclusion, I intend to verify the information we received in our preliminary inquiries," Frohnmayer said in releasing the opinion. "If the facts assumed in the opinion are verified, then the issues presented are so fundamental that all citizens have a right to expect prompt judicial resolution of this matter."

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Contact: Marla Rae (378-6002)

SUMMARY OF OPINION

Introduction

1. The opinion is based on nine known or assumed legally operative facts. Among them: All property in the city is owned by a corporation which, in turn, is wholly owned by a religious foundation. The property is leased to a cooperative religious commune created specifically to further the religious purposes of the same religion. Only adherents of the religion are admitted to residence in the city, and accordingly only adherents of the particular religion can accordingly be officers of the city.

2. The opinions stated are our predictions of how courts would resolve questions of state and federal law.

3. The opinion discusses the historical and constitutional context of freedom of religion and separation of church and state provisions:

> "Our legal system requires that the pathway to religion be private and internal to each pilgrim's mind and soul. The state and federal constitutions do not permit the road to Damascus to be paved with public funds."
>
> "The fundamental prohibition may be stated in a number of ways: No government may be a theocracy. Neither public funds nor the official acts of government bodies may officially advance the cause of a particular creed. No person may be forced, by governmental action, to endure religious indoctrination in which he or she does not believe."
>
> "Apart from adverse religious discrimination, a similar question may be raised concerning improper assistance through governmental funds to further the purposes of a particular religion. If a court

> which applied standards of 'strict scrutiny' to the operations of the city were to conclude that these technically separate legal forms of organization were in reality alter egos of each other, formidable consequences and constitutional restrictions would follow."

4. "A city must behave as a city; not as the secular arm of an organized religious group."

City Authority Over County Roads

1. A city may not prevent or limit travel by non-residents of the city on a county road within the corporate limits of the city.

City Authority Over City Streets

1. A city has general authority to regulate travel on city streets if a city ordinance does not conflict with or is not expressly preempted by state regulation.

2. A city ordinance restricting travel must be consistent with state and federal constitutional protections and rights, such as freedom of speech, freedom of religion, the right to assemble, the right to petition the government, or the right to travel.

3. A city ordinance restricting travel by non-residents might be invalid if it interfered with statutory rights, such as access to public meetings and public records.

Private Rights Over Private Roads

1. Generally, private property owners may place whatever restrictions they please on the use of their property by third persons.

2. In general, trespass ordinances may be enforced. But the city may be enjoined from enforcing trespass provisions in those instances involving public rights of access of the city government itself.

3. If the owner allows public access to its property, the public may acquire rights. The wider that access and the broader the purposes for which it is allowed, the more likely that First Amendment and similar state constitutional rights will be held to arise in public.

Use of State Highway Funds on Private Roads

1. It is "abundantly clear" that highway funds may not be spent on private roads.

Distribution of State Funds to City

1. The issue presented is whether a city's authority to use state revenue sharing funds (liquor and cigarette tax revenues and state highway funds) is affected by the fact that all of the land within the city is owned by a single, private party. The close relationship of that party to a particular religion is also relevant.

Public Purpose Doctrine

2. The "public purpose" doctrine of the Oregon Constitution holds that public money cannot be appropriated for private purposes.

3. We presently have no facts to determine whether and to what extent municipal expenditures would benefit private

property. But because all of the property within the city is owned by a single private owner, an expenditure may become questionable.

4. City funds may be used for fire and police protection and for the day-to-day expenses of municipal government.

5. It is difficult to reach a conclusion concerning city funds being spent that create a permanent benefit for the single property owner. (Take for example the creation of a municipal water system. If the city were to disincorporate, the water system would remain for the benefit of the property owner.)

6. "It would be appropriate for the city to exercise great caution in determining that all of any proposed expenditure in fact creates a municipal benefit, rather than a purely private benefit, and for audit authorities to scrutinize strictly all city expenditures to assure that they meet the test."

Religious Character of the City

7. "Under our assumed facts, we have not merely a single property owner, but a single property owner which has very close ties to a particular religion. The lessee cooperative was specifically created to further the purposes of that religion, as stated in its articles of incorporation. The cooperative in turn leases or otherwise makes property (i.e. residence) available only to individuals of the foundation's religious faith. Continued residence is thus apparently contingent upon continued adherence to the faith. Even if it is not, the corporation and the religious cooperative clearly have the power

to make residence so contingent, and in that case to control city officers, even to oust them from office by terminating their residence."

8. "The city appears to have been created to carry out purposes, religious or otherwise, of the corporation and cooperative. By virtue of the exclusivity of land ownership and the consequent control of residence, the corporation and cooperative have complete effective control of the city, whether or not they choose to exercise it."

9. ". . . In view of the interlocking nature of the four entities involved, foundation, corporation, cooperative and city, it is our judgment that a court would regard these not as four separate entities but as one, for purposes of evaluating the constitutional validity of payment of state funds to the city."

a. Strict scrutiny is given by courts in cases of possible governmental entanglement with religion.

b. ". . . The courts have exalted substance over form, have pierced the corporate veil, have found one entity to be the alter ego of another."

c. The city is the functional equivalent of a religious commune.

10. "We accordingly conclude that payment of state funds to the city is in effect the payment of state funds to the corporation or the cooperative, and ultimately to the religion."

Payment for Benefit of Religion

11. The Oregon Constitution sets forth a strict prohibition against the payment of money for the benefit of religion.

12. The religious character of the foundation which is sole owner of the corporation would directly prohibit any expenditure of state or city funds creating permanent improvement of the corporation's property.

13. Every expenditure by the city for whatever purpose will benefit only adherents of the faith of the cooperative, and the property of the corporation. Therefore, any payment of funds to the city benefits the purposes of the religion.

Establishment of Religion

14. The Establishment Clause of the First Amendment to the U.S. Constitution also would prohibit payment of state funds to the city.

15. "In a pervasively religious city, exclusively owned and exclusively inhabited by the religion and its members, every city action would directly affect the religion. . . ." This would clearly constitute the prohibited government entanglement with religion.

Organization and Existence of the City

16. Aside from religious considerations, it can be asserted that it is an improper and unconstitutional delegation of government authority for a city to be organized and controlled for the private purposes of a single property owner. Where that private purpose is primarily religious, the state and federal constitutional prohibitions of government aid to religion become the overriding consideration.

17. "It is not possible for religion and city government to

be insulated from each other in this city under the facts assumed. The intrusion of the religion into city government affairs is pervasive and unavoidable. There is in effect a total fusion of government and of religious functions, where the religion has sole power to select the inhabitants of the city and accordingly to select city officers."

18. "It is difficult to imagine a clearer violation of the Establishment Clause than the incorporation of a religion as a city. . . ."

Free Exercise of Religion

19. It may be asserted that a conflict exists between the Establishment Clause and the Free Exercise Clause. While we see no conflict, we suppose that the prohibition on allowing a religion to exercise governmental authority would have the greater weight.

MR:tlg

DAVE FROHNMAYER
ATTORNEY GENERAL

DEPARTMENT OF JUSTICE
100 State Office Building
Salem, Oregon 97310
Telephone: (503) 378-4400

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No. 8148

This opinion is issued in response to questions presented by the Honorable Mike McCracken, State Representative.

FIRST QUESTION PRESENTED

May a city prevent or limit travel by non-residents of the city on county roads situated within the corporate limits of the city?

ANSWER GIVEN

No.

SECOND QUESTION PRESENTED

May a city limit or prevent travel by non-residents of the city on city streets, roads and ways?

ANSWER GIVEN

Generally, no. A city may not prevent travel by non-residents of the city. It may regulate travel to the extent necessary to further legitimate public purposes. In appropriate circumstances and locations such regulation can consist of limitations on travel.

THIRD QUESTION PRESENTED

May streets, roads and ways within the corporate limits of a city which are owned by a private corporation and other property of the corporation open to use by residents be closed to general public use, and open only to residents of the city and invitees of the corporation?

ANSWER GIVEN

Generally, yes. Such streets are not "city streets" described in the second question. A private owner ordinarily may impose any desired limits on the use of its property including such streets, roads and ways. But this general power is subject to the exercise of statutory and constitutional rights by members of the general public and residents of the city.

FOURTH QUESTION PRESENTED

If the streets, roads and ways described in Question Three are private roads, may the city use state funds received under ORS 366.785 to 366.820 to improve, repair, maintain, use and police those roads?

ANSWER GIVEN

No.

FIFTH QUESTION PRESENTED

(a) When all land within a city is owned by a private party, does distribution of state moneys under ORS 221.770, 323.455 and 366.785 to 366.820 to that city constitute a violation either of Article XI, § 9 of the Oregon Constitution or of the doctrine that public funds may be used only to promote a "public purpose"?

(b) Does distribution of such state moneys to a city constitute a violation of Article I, § 5 of the Oregon Constitution and the First Amendment to the United States Constitution under the following circumstances:

1. All of the real property within the city limits of the incorporated city is owned by a "for profit" corporation;

2. All of the stock of the "for profit" corporation is in turn owned by a religious foundation which is exempt from taxation pursuant to IRC 501(c)(3);

3. All of the real property within the city limits of the incorporated city is leased by the "for profit" corporation to a religious cooperative the express purpose of which is to be a "religious community whose life is in every respect guided by" the religious teachings of the spiritual head of the religious foundation; and

4. The religious cooperative permits residence in the city only by adherents of the same religious faith.

ANSWER GIVEN

(a) No. However, such funds received by the city may be spent only for public purposes, consistent with Art XI, § 9, and should be subject to strict audit scrutiny to assure that all of such spending is in fact spent for public purposes and not for purely or substantially private benefit.

(b) Yes. Payment to such a city is a payment for the benefit of religion, in violation of Art I, § 5 and the Establishment Clause of the First Amendment. We further conclude that the very incorporation and continued existence of such a city under the facts assumed is a violation of the Establishment Clause, and possibly also of the Oregon Constitution.

SIXTH QUESTION PRESENTED

Does the operation of a hotel or other accommodation covered by ORS 659.033 under the facts assumed comply with the Oregon Public Accommodations Law?

ANSWER GIVEN

Yes.

INTRODUCTION

A. Factual Context

The questions asked arise out of actions purportedly occuring within the City of Rajneeshpuram. We have determined

the existence of some facts, but other critical facts which could influence the answer to any one of the questions presented can only be assumed. Therefore, for broader purposes of Oregon law we refer only to "city" generally. This discussion is based on the following known or assumed legally operative facts:

(1) The community is incorporated and operating as a city under the laws of Oregon.(FN1)

(2) The city has a charter enacted by its voters (a home rule charter) which grants power couched in general terms similar to ORS 221.410(1) or the city does not have a home rule charter but may act directly pursuant to ORS 221.410(1).

(3) The only public road within the city is a county road.

(4) All land within the city limits (save for the county road) and contiguous land is owned by a "for profit" corporation.

(5) All of the stock of the "for profit" corporation is, in turn, owned by a religious foundation which is exempt from taxation pursuant to IRC 501(c)(3).

(6) All land within the city limits and contiguous land is leased by the corporation to a cooperative, the Articles of Incorporation of which describe its purpose as

> ". . . to be a religious community whose life is, in every respect, guided by the religious teachings of [the spiritual head of the religious foundation described above] and whose members live a communal life with a common treasury . . . ."

(7) The religious cooperative permits residence in the city only by adherents of the religious faith described above.

(8) The city has a small police force certified under state law. We do not know what other usual "city services" the city performs. The corporation or

cooperative furnishes water and sewage services within the city.

(9) The corporation or cooperative plans to build a hotel on property in the city. It will only let rooms to people of the faith of the foundation or those professing an interest in that faith.

In rendering opinions, the Department of Justice is precluded by law from acting as legal counsel for any Oregon city. The opinions stated are our predictions of how courts would resolve questions of state and federal law. Our opinion is given solely for the use and benefit of Representative McCracken.

B. Historical and Constitutional Context

Some of the questions presented have clear answers under laws enacted by the Oregon legislature. The analysis of other issues is more difficult and much more significant. Those questions require this office to examine the known and assumed facts against some of the most ancient and fundamental premises of our constitutional system.

American history chronicles the experience of lonely minorities seeking refuge from religious persecution. Liberty of conscience and belief is not merely an abstract icon of our constitutional guarantees, state and federal. The Mayflower Compact sealed the promises of a religious minority consenting to a system of civil government. Roger William and other dissenters from the New England Puritan establishment fled to Rhode Island to protect their fundamental beliefs, and to establish a society without an established church. Brigham Young and his Morman followers made history in a pilgrimage to a frontier affording

protection from oppression. The spartan Amish lifestyle has been guarded from improper state intrusions. Thousands of Jewish refugees from Hitler's death camps came to these shores and enriched our culture. The constitutional battle for private Catholic education--ultimately resolved by the United States Supreme Court--was fought against the governmentally enforced bigotry of the Ku Klux Klan five decades ago in this very state. All these experiences reinforce the commitment of this nation's founders to protection of the free exercise of religion. Tolerance is not merely a moral virtue; it is a matter of constitutional policy.

But the very diversity of beliefs and convictions which led the authors of the Bill of Rights to protect religious liberty generated a parallel constitutional restriction. Neither the United States government nor that of the State of Oregon may create a state religion or an established government church. This restriction in favor of governmental religious neutrality obviously extends to political subdivisions such as cities, counties and school boards.

We need look no further than the contemporary civil strife of Ireland, Iran and Lebanon to grasp the historic wisdom of the prohibition against state-sponsored religion. A tragic price in human bloodshed has been paid whenever government has claimed the right to construct the exclusive thoroughfare to spiritual redemption. Our legal system requires that the pathway to religion be private and internal to each pilgrim's mind and soul.

The state and federal constitutions do not permit the road to Damascus to be paved with public funds.

The fundamental prohibition may be stated a number of ways: No government may be a theocracy. Neither public funds nor the official acts of governmental bodies may officially advance the cause of a particular creed. No person may be forced, by governmental action, to endure religious indoctrination in which he or she does not believe. These are the most obvious ways to characterize the First Amendment requirements--and its Oregon constitutional analogies--of separation of church and state.

On any occasion where adherents of a particular creed also possess governmental power, it is obvious that a legal tension may arise. That tension lies between the liberty of belief to which they are entitled as individuals and the requirement of governmental religious neutrality which they must observe in taking official action.

The facts assumed in this opinion suggest a particularly troublesome issue concerning the maintenance of religious neutrality and the strict separation of church and state. The issue is simply how far the technically separate forms of legal organization--a city, a religious foundation, a development corporation and a religious cooperative--may be used to shield results which may produce religiously discriminatory effects on Oregon citizens who do not share the creed of those who inhabit the city. Apart from adverse religious discrimination, a similar question may be raised concerning improper assistance through

governmental funds to further the purposes of a particular religion. If a court which applied standards of "strict scrutiny" to the operations of the city were to conclude that these technically separate legal forms of organization were in reality alter egos of each other, formidable consequences and constitutional restrictions would follow. Even absent a conclusion of concerted action among these four entities, however, the close relationships they observe of necessity may require stronger restrictions to be observed than would be the case of religiously diverse communities. A city must behave as a city; not as the secular arm of an organized religious group.

DISCUSSION

I. CITY AUTHORITY OVER COUNTY ROADS

The issue presented by the first question is whether a city may prevent or limit travel by non-residents of the city on a county road within the corporate limits of the city. We conclude that it may not.

All public roads within a county are under county jurisdiction, except roads which are part of the state highway system and roads within the corporate limits of a city other than "county roads." ORS 368.016. ORS 368.001(1) defines a "county road" as "a public road under the jurisdiction of a county that has been designated as a county road under ORS 368.016."

"Public road" is defined by ORS 368.001(5) as "a road over which the public has a right of use that is a matter of public

record." Under ORS 368.016, a county may, by resolution or order, establish certain public roads within its jurisdiction as county roads. County roads are subject to county control.

When a county road passes through the corporate limits of a city, it nevertheless remains subject to county rather than city control unless jurisdiction over the road is transferred to the city pursuant to ORS 373.270. Jurisdiction of a county road within a city may be transferred to the city by agreement between the county and city. ORS 373.270 provides that either the county or the city may initiate the transfer procedure. Once the procedure has been initiated, the county must provide public notice and an opportunity for a public hearing before issuing a final order transferring jurisdiction. The transfer must be accepted by the governing body which did not initiate the procedure. On completion of the transfer, county jurisdiction ceases. The city acquires the same jurisdiction over the former county road that it has over other city streets. When a county withdraws county road status from a portion of a county road, the road remains a public road. ORS 368.026(3).

Unless a county formally transfers jurisdiction over a county road to a city, pursuant to ORS 373.270, city authority over county roads within its city limits is very limited. The city has only that authority which is expressly conferred upon it by the legislature. Cole v. Seaside, 80 Or 73, 156 P 569 (1916) (home rule provision does not confer jurisdiction over county road running through city limits). For instance, ORS 373.210 and

373.250 authorize a city to expend certain funds on the improvement and maintenance of county roads within its borders. However, neither these statutes nor any other statutes give the city the broad authority necessary to pass an ordinance which would restrict travel on a county road by non-residents.

In summary, the above statutes do not give a city jurisdiction over a county road simply because the road is within the city limits. A formal procedure requires public notice and hearing and the consent of both governing bodies before a city gains general jurisdiction over a county road. As a result, a city may not limit or prevent travel by non-residents of the city on county roads within the city.

II. CITY AUTHORITY OVER CITY STREETS

The issue presented by the second question is whether a city may prevent or limit travel by non-residents of the city on city streets which are open to the residents of the city. We conclude that a city has general authority to regulate travel on city streets only to the extent that the state has not pre-empted such regulation. In contrast to other states, Oregon has not pre-empted all local regulation of city streets. However, the city's regulation must be within the scope of the city's authority and must be consistent with the Oregon and United States Constitutions.

Although we have assumed that no city streets exist, city streets may come into being in the future, by transfer of authority over the county road, or by other action by the city.

By "city street" we mean a throughfare intended for public use within a city. Heiple v. City of East Portland, 13 Or 97, 8 P 907 (1885); 34 Op Atty 846 (1969).

A. Legislative Authority

Under settled law public roads belong to the state as a whole. In Parker v. City of Silverton, 109 Or 298, 220 P 139 (1923) the court stated:

> "The public streets within the limits of an incorporated city or town are a part of the public highways of the state and belong to the whole people of the state. They are maintained primarily for the benefit of the people at large. Persons residing in the city or town have an equal, but not a superior right, to the use of the streets, over those who reside elsewhere. All alike must make a reasonable use of them so as not unduly or unreasonably to interfere with the common right possessed equally by all. The municipalities themselves possess no legislative power over the public streets within their corporate limits unless conferred by some legislative authority. It is within the legislative power to delegate to municipalities the sole power to regulate and control the streets within their corporate limits and to withdraw this delegated power at will." 109 Or at 303.

In Cabell v. Cottage Grove, 170 Or 256, 130 P2d 1013 (1943), the Oregon Supreme Court considered whether the statute creating the city or any other statute gave the city the power to close one end of a city street to block access to a main road designated as a state highway. The court began with the following premise:

> "'The fundamental idea of a street is not only that it is public, but public for all purposes of free and unobstructed passage, which is its first and primary, but by no means sole, use.' 3 Dillon, Municipal Corporations (5th Ed.) 1849 § 1163." 170 Or at 274.

The court noted that the legislature, by virtue of its plenary authority, could close a street or delegate such authority, but that a municipality lacked such authority absent express delegation or delegation by necessary implication. The court held that such grants of authority are strictly construed "in the interest of the common right." 170 Or at 275.

One major source of municipal legislative authority in Oregon is the Oregon Constitution. Article IV, § 1(5) and Article XI, § 2, the municipal "home rule" provisions, reserve to the people of the cities the right to adopt city charters. Cities incorporated under ORS 221.010 to 221.090 whose voters have not adopted a home rule charter must follow the general statutory authority of ORS 221.410(1) in place of a charter. Davidson Baking Co. v. Jenkins, 216 Or 51, 337 P2d 352 (1959). ORS 221.410(1) provides:

> "Except as limited by express provision or necessary implication of general law, a city may take all action necessary or convenient for the government of its local affairs."

See also, Jarvill v. City of Eugene, 289 Or 157, 613 P2d 1, cert denied 449 US 1013 (1980); LaGrande/Astoria v. PERB, 281 Or 137, 576 P2d 1204, aff'd on rehearing, 284 Or 173, 586 P2d 765 (1978).

Home rule provisions empower people to confer jurisdiction over municipal affairs upon their city governments. A home rule charter cannot empower a city to exercise jurisdiction over matters of statewide concern. It is well established that the regulation of public roads is in many respects a matter of

general state concern. In Winters v. Bisaillon, 152 Or 578, 54 P2d 1169 (1936), the court made clear that:

> "[T]he state has and retains, either by act of the legislature or by vote of the electorate, the right to enact general laws prescribing the speed of motor vehicles and general rules regulating traffic on the highways of the state, which right when exercised can not be curtailed, infringed upon or annulled by local authorities." 152 Or at 591.

This relationship between the cities and the state has been codified in the state Motor Vehicle Code. ORS 487.015 provides in part:

> "[N]o local authority may enact or enforce any rule or regulation in conflict with the provisions of this chapter and ORS chapter 483 except as specifically authorized in this chapter and ORS chapter 483." (Emphasis added.)

Oregon's statute, which expressly does not fully pre-empt the field, stands in contrast to the analogous provision in the Uniform Vehicle Code, which does provide for complete state pre-emption.(FN2) The uniform provision is exemplified by section 21 of the California Vehicle Code which provides:

> "Except as otherwise expressly provided, the provisions of this code are applicable and uniform throughout the State and in all counties and municipalities therein, and no local authority shall enact or enforce any ordinance on the matters covered by this code unless expressly authorized herein." (Emphasis added.)

In City of Lafayette v. County of Contra Costa, 91 Cal App3d 749, 154 Cal Rptr 374 (1979), the California court rejected the city's claimed authority to close city streets to non-resident traffic. Under California constitutional provisions and statutory authority quoted above, the state had pre-empted the

field and the city had no authority to regulate the flow of traffic except as expressly delegated.

In contrast, Oregon has not pre-empted the field. Cities may pass ordinances relating to motor vehicles. While the grant of legislative authority under a home rule charter can be quite broad, and the legislative provisions quoted above are quite broad, the provisions above must be strictly construed "in the interest of the common right." Cabell v. Cottage Grove, supra, 170 Or at 275. As the court held in Winters v. Bisaillon, supra:

> "'While it is true that the regulation of traffic upon a public street is of special interest to the people of a municipality, it does not follow that such regulation is a municipal affair, and if there is a doubt as to whether or not such regulation is a municipal affair, that doubt must be resolved in favor of the legislative authority of the state.'" 152 Or at 590-591, quoting from Ex parte Daniels, 183 Cal 636, 192 P 442 (1920).

Thus, depending upon the terms of its charter, a city may have the power to regulate vehicular travel generally, but the regulation must be within the scope of the municipal authorization. For example, a newly incorporated city without a home rule charter must confine such an ordinance to that which is "necessary or convenient for the government of its local affairs" under ORS 221.410(1). Further, no city may enact an ordinance that conflicts with the Motor Vehicle Code. If the ordinance does conflict with the Motor Vehicle Code, the city must identify express statutory authorization for such a conflicting ordinance. Of course, the legislature may enact a statute preventing or limiting a city's authority to regulate traffic flow on the basis

of residency status. The principles stated in Parker v. City of Silverton, 109 Or 298 supra, remain effective. Any granted right (statutory or charter) to regulate and control must be exercised "so as not unduly or unreasonably to interfere with the common right possessed equally by all." Id. at 303.

B. Constitutional Limitations

To be valid, a city ordinance restricting travel on city roads by non-residents must also be consistent with the protections of the Equal Protection Clause(FN3) of the Fourteenth Amendment to the United States Constitution, and the Privileges and Immunities Clause(FN4) of the Oregon Constitution, Article I, § 20.(FN5) While very close official examination must be given to any law which grants privileges or imposes limitations on persons by virtue of the place of their residency, several reported cases have rejected challenges to city parking ordinances which discriminate on the basis of residency status.

In Jarvill v. City of Eugene, 289 Or 157, 613 P2d 1, cert denied, 449 US 1013 (1980), plaintiffs challenged a city ordinance which provided free parking to persons visiting within a designated business district and restricted parking by employers, employes, and residents of the district. Plaintiffs contended that the ordinance violated Article I, § 20 of the Oregon Constitution and the Fourteenth Amendment to the United States Constitution. The court rejected the contention on the ground that the ordinance applied upon the same terms to all members of the general public. Any member of the public could

take advantage of the free parking by not working or residing in the district. Similarly, no member of the public could park free while employed or residing in the district.(FN6) The court also noted that the ordinance furthered a valid municipal objective. 289 Or at 185.

In Arlington County Board v. Richards, 434 US 5 (1977), commuters to a certain neighborhood challenged the constitutionality of a county ordinance under which residents of the neighborhood were issued free parking permits. Parking without a permit during business hours constituted a misdemeanor. The purposes of the ordinance related to traffic congestion, safety conditions, air and noise pollution, and quality of life considerations. The Court had no trouble concluding:

> "The Constitution does not outlaw these social and environmental objectives, nor does it presume distinctions between residents and nonresidents of a local neighborhood to be invidious. The Equal Protection Clause requires only that the distinction drawn by an ordinance like Arlington's rationally promote the regulation's objectives. . . . On its face, the Arlington ordinance meets this test." 434 US at 7.

See also South Terminal Corporation v. EPA, 504 F2d 646 (1st Cir 1974) (restrictions upheld); Friends of the Earth v. EPA, 499 F2d 1118 (2nd Cir 1974) (restrictions upheld); Commonwealth v. Petralia, 362 NE2d 513 (Mass 1977) (restrictions upheld); State v. Whisman, 24 Ohio Misc 59, 263 NE2d 411 (1970) (restrictions invalidated).

Most of these cases uphold restrictions on parking on the basis of residency rather than restrictions on direct access to

and over a roadway. Therefore, the cases do not involve direct interference with community access. However, under appropriate circumstances, an ordinance restricting the use of private vehicles on city streets by non-residents might survive an equal protection challenge. Restrictions based on residence within a small geographic portion of the city would be more likely to be sustained than would restrictions applicable city-wide. For example, an ordinance prohibiting through traffic on a residential street, thus permitting access only by residents and their visitors, would almost certainly be valid. A city may be able to close a particular street to non-resident vehicular traffic during morning and afternoon hours when children are arriving or departing from school. (By non-resident, we mean non-resident in the immediate vicinity of the school.) However, it is clear that a city would have a heavy burden of demonstrating that local conditions exist which give rise to a valid governmental objective. Moreover, any such limitation on access would be highly suspect if its practical effect were to foreclose completely non-resident access to all or a portion of a city.

Basic rights under the United States Constitution must be considered in this discussion. Even if a city could establish that a particular ordinance discriminating against non-residents furthers a valid state objective, the ordinance may be invalid if it restricts fundamental rights such as freedom of speech, freedom of religion, the right to assemble, the right to petition

the government, or the right to travel.(FN7) If fundamental rights are affected, a reviewing court will adopt "strict standards of scrutiny" of the classification imposed by the ordinance. The legislation will be upheld only if the city demonstrates a compelling state interest. See e.g., Shapiro v. Thompson, 394 US 618 (1969). It is unlikely that a city could establish a compelling state interest for its discrimination when fundamental rights are affected, or that a total ban on access by non-residents would be sustained.

C. Statutory Limitations

Finally, an ordinance restricting travel by non-residents on city streets might be invalid if the ordinance interferes with statutory rights. When an ordinance conflicts with state law in an area of substantive policy, state law will prevail over a local ordinance. LaGrande/Astoria v. PERB, supra. For instance, ORS 192.420 requires a city to permit any person to inspect any public record of any public body. ORS 192.630 requires that meetings held by the governing body must be open to the public, that persons must be permitted to attend, and that the meeting must be held within the geographic boundaries of the city, at the administrative headquarters of the governing body, or at the nearest practical location. If the ordinance or any municipal act operated in a way which interfered with the public's rights under these statutes, it would be invalid.

III. PRIVATE RIGHTS OVER PRIVATE ROADS

The issue presented by Question Three is whether private roads open to city residents retain their character as private roads; and if they do, whether some rights of access nevertheless arise for non-residents. The same issue may arise with respect to other places on private property which are freely accessible to city residents but closed to non-residents.

As a general proposition, private property owners may place whatever restrictions they please on the use of their property by third persons. Unless a private road takes on a public character, a private property owner cannot be forced to provide public access to his or her property but neither can he or she use the land in a manner which interferes with the right of others.

A. "Private" versus "Public"

In general, other than through municipal purchase of real property, a private road within a city can become a public road in one of three ways. First, land may be dedicated by the private property owner. Dedication of land has been defined as an appropriation of land to a public use by the owner which has been accepted by or on behalf of the public. Harris v. City of St. Helens, 72 Or 377, 143 P 941 (1914).

Second, a public road can be created by the exercise of the power of eminent domain. ORS 223.005 expressly authorizes cities to appropriate any private real property to a public or municipal use.

Finally, a public road can be created by prescriptive use of a private road by the public. In order to obtain prescriptive rights, the public's use of the road must be under a claim of right and must be open, notorious, hostile, adverse, uninterrupted and continuous for a period of ten years. ORS 12.050. Huggett v. Moran, 201 Or 105, 266 P2d 692 (1954); Parrott v. Stewart, 65 Or 254, 132 P 523 (1913). The use must be of such character that the landowner is adequately notified that the land will be burdened by a public servitude unless the owner takes appropriate action to prevent it. Doyle Milling Co. v. Georgia-Pacific Corp., 256 Or 271, 473 P2d 135 (1970). On the other hand, no public right arises where the use is permissive. Macleay Estate Co. v. Curry County, 127 Or 356, 272 P 263 (1928).

In general, in the absence of a dedication, a condemnation proceeding, or prescriptive use, municipal regulations for the protection of private property, such as those forbidding trespasses thereon without the consent of the owner, are enforceable. 6 McQuillin, Municipal Corporations, § 24.95 (3rd ed 1980); 5A Shepard's, Ordinance Law Annotations, Trespass §§ 1-8.

In Oregon, it is a crime for a person to enter or remain upon premises which are not open to the public or when the entrant is not otherwise licensed or privileged to do so. ORS 164.205; ORS 164.245. Except where pre-empted by state law, cities may replicate these state statutory trespass provisions, thereby making them municipal offenses as well. Lyons v. City of

Portland, 115 Or 533, 235 P 691 (1925). This action gives a municipal court jurisdiction over the offense. 39 Op Atty Gen 355 (1978). Under such circumstances a municipal police force may enforce either the state statute or the municipal ordinance. See City of Klamath Falls v. Winters, 289 Or 757, 619 P2d 217 (1980).

B. Constitutional Limitations

Despite the general rule, enforcement of a penal trespass ordinance in the nature of ORS 164.245 could violate the federal constitution under certain circumstances. In Marsh v. Alabama, 326 US 501 (1945), the United States Supreme Court held that the First Amendment constitutional guarantees of freedom of expression and freedom of religion prohibited the enforcement of a statute similar to ORS 164.245 against a person who undertook to distribute religious literature on a street of a company-owned town contrary to the wishes of the town management. In this instance the property interests of the owner of a company town did not justify the state in permitting the corporation to infringe on fundamental rights. The Court noted the extent to which the company town was factually indistinguishable from a traditional municipal setting:

> ". . . Whether a corporation or a municipality owns or possesses the town the public in either case has an identical interest in the functioning of the community in such manner that the channels of communication remain free. As we have heretofore stated, the town of Chickasaw does not function differently from any other town. The 'business block' serves as the community shopping center and is freely accessible and open to the people in the area and those passing through. The

> managers appointed by the corporation cannot curtail the liberty of press and religion of these people consistently with the purposes of the Constitutional guarantees, and a state statute, as the one here involved, which enforces such action by criminally punishing those who attempt to distribute religious literature clearly violates the First and Fourteenth Amendments to the Constitution." 326 US at 507-508.

The Court also noted that the more the private property owner "opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it." 326 US at 506. Furthermore, the Court recognized that the question whether the road had been dedicated was a question of state law. A determination that no dedication has been made means that "the corporation could, if it so desired, entirely close the sidewalk and the town to the public." 326 US at 505, fn 2.

The holding of Marsh v. Alabama, supra, has been restricted to the facts of that case by recent Supreme Court cases. It is now established that an owner of a privately owned shopping mall may not be compelled to permit the exercise of First Amendment rights on the property. Lloyd Corp., Ltd. v. Tanner, 407 US 551 (1972); Hudgens v. NLRB, 424 US 507 (1976), overruling Food Employees v. Logan Valley Plaza, 391 US 308 (1968). Private property owners' constitutional property rights are not outweighed by First Amendment considerations unless the private property has all the attributes of a town. The fact that the private property functions in the same manner as a municipal business district is no longer sufficient, under the federal

constitution, to trigger the application of the holding of Marsh v. Alabama, supra, if other attributes of a town are absent. Accord, Illinois Migrant Council v. Campbell Soup Co., 574 F2d 374 (7th Cir 1978); International Society for Krishna Consciousness v. Reber, 454 F Supp 1385 (C.D. Calif 1978).

In this case, unlike those cited above, a duly organized city is involved. However, it is not the authority of the city to ban persons from areas within its boundaries with which we are concerned; it is the authority of a private corporation to ban persons from its privately owned property. The fact that the corporation owns all the property in the city (except for the county road) is factually significant, but legally irrelevant in this context.

In Marsh v. Alabama, the Court concluded that the opening of private property to the public for certain purposes resulted in opening it also for the exercise of First Amendment claims. But it further held that (unless dedication had occurred) "the corporation could, if it so desired, entirely close the sidewalk and the town to the public." 326 US at 505, fn 2. (Emphasis added.)

It seems to follow that if the owner and lessee of all property in the city chose entirely to bar the general public from the private property which they own and lease, admitting only residents (their tenants) and persons invited for specific and limited purposes, they may do so. If the owner and lessee allow access to the non-resident public for some purposes, those

persons may have the consequent First Amendment right to conduct religious, political and other free speech activities while lawfully present. As stated in Marsh, the more the property owner opens up the property for general public use, the more "his rights become circumscribed by the statutory and constitutional rights of those who use it." 326 US at 506. A conclusion could be reached as to any particular private roadway or place of congregation only on the facts applicable to that particular place. The relevant inquiry is: To what degree is that place open to the general public, and for what purposes?(FN8)

Article I, §§ 2, 3 and 8 of the Oregon Constitution guarantee freedom of worship, freedom of religious expression, and freedom of speech, writing and printing. In City of Portland v. Thornton, 174 Or 508, 149 P2d 972 (1944), the court held that the right to free exercise of religion is identical under the state and federal constitutions. In Wheeler v. Green, 286 Or 99, 593 P2d 777 (1979), the court noted that the Oregon Constitution does not make a distinction between the press and individuals with regard to the freedom of expression. However, it appears that the state and its political subdivisions have narrower authority under Art I, § 8 to restrict freedom of expression than that existing under the First Amendment to the United States Constitution. Deras v. Myers, 272 Or 47, 535 P2d 541 (1975).

In recent months, Oregon Supreme Court decisions have exhibited a trend toward a greater reliance on independent analysis of the Oregon Constitution rather than on doctrinal

theories of the United States Constitution. State v. Kennedy, supra, State v. Caraher, 293 Or 741, 653 P2d 942 (1982), State v. Robertson, 293 Or 402, 649 P2d 569 (1982). As a result, we express no opinion on how these issues might be treated if presented to the court today, except for our view that the court would continue to follow Deras, supra, and provide a larger measure of protection for citizens' rights of free expression under the state constitution.

The relevance of the state and federal authority discussed above in the present context is limited. Rights to free speech and religion on private property may be subordinate to constitutional property rights,(FN9) or such First Amendment rights and their state constitutional equivalents may simply not arise on someone else's property for persons admitted for a more limited purpose. But it seems clear that no such rights arise in the general public with respect to private property to which the public has no right of access in the first place. We find nothing in the above cases, or in the line of cases starting with Marsh v. Alabama, supra, indicating that a right of access to private property arises out of the First Amendment, or out of any Oregon constitutional provision. Those cases involved situations in which the general public, or a significant portion of it, had been granted a right of access, and the question was what First Amendment rights could be exercised during the course of that access.

C. Statutory Limitations

In addition to constitutional limitations, a city's authority may also be restricted by general laws creating statutory rights. For instance, where a single private party owns all the land within the city's limits and the city refuses to exercise the power of eminent domain, the city may be enjoined from enforcing trespass provisions against a person exercising, or attempting to exercise, the rights created by ORS ch 192 relating to public meetings and public records. (See discussion relative to Question Two.)

D. Summary

In summary, we conclude that, in general, the owner of a private road may limit or prevent use of the road by any person or class of persons the landowner desires. See ORS 483.038. In general, trespass ordinances may be enforced. Under the facts which we assume, the city may be enjoined from enforcing trespass provisions only in a very few circumstances involving public rights of access to the city government itself. If the owner allows public access to its property, however, the public may acquire rights. The wider that access and the broader the purposes for which it is allowed, the more likely that First Amendment and similar state constitutional rights will be held to arise in the public.

IV. USE OF STATE HIGHWAY FUNDS ON PRIVATE ROADS

The issue presented by the fourth question is whether a city may use highway funds disbursed under ORS 366.785 to 366.820 for

the improvement, repair, maintenance, use or policing of private roads within the city. ORS 366.785 to 366.820 provide for the distribution of a portion of State Highway Fund revenues to cities. ORS 366.790 provides:

> "Money paid to cities under ORS 366.785 to 366.820 shall be used only for the purposes stated in § 3, Article IX of the Oregon Constitution and the statutes enacted pursuant thereto including ORS 366.514."

Article IX, § 3a, Oregon Constitution provides in pertinent part:

> "(1) Except as provided in subsection (2) of this section, revenue from the following shall be used exclusively for the construction, reconstruction, improvement, repair, maintenance, operation and use of public highways, roads, streets and roadside rest areas in this state:
>
> "(a) Any tax levied on, with respect to, or measured by the storage, withdrawal, use, sale, distribution, importation or receipt of motor vehicle fuel or any other product used for the propulsion of motor vehicles; and
>
> "(b) Any tax or excise levied on the ownership, operation or use of motor vehicles." (Section 3a adopted in lieu of former § 3, Art IX, May 20, 1980.) (Emphasis added.)

We think it is abundantly clear that Highway Funds may not be expended to maintain private roads.

ORS 366.505 creates the State Highway Fund and declares it to be a trust fund to be used only for purposes authorized by law. The Oregon Supreme Court has stated that this declaration means that highway funds are to be devoted exclusively to the particular public uses over which the Department of

Transportation is given jurisdiction. State Highway Com. v. Rawson, 210 Or 593, 617-618, 312 P2d 849 (1957).

Earlier opinions of the Attorney General interpreting Art IX, § 3, and its successor § 3a, clearly indicate the nature of the intended use of highway fund proceeds. Article IX, § 3, placed in the Constitution legislative restrictions on the use of highway funds which had already existed since 1913. The purpose for enactment of this provision was to guarantee that taxes derived from the use of the highways would continue to be used for highway and park purposes. 35 Op Atty Gen 70 (1970) at 71-72.

In 33 Op Atty Gen 73 (1966), this office concluded that highway fund moneys may be spent for snow removal from public access roads to ski areas, but not for snow removal from private roads located on private property from which the general public could be excluded by the owner. This opinion was rendered under former Article IX, § 3. The analysis would not change under § 3a.

By its own terms Art IX, § 3a of the Oregon Constitution limits the permissible uses of the highway fund to the improvement, repair, maintenance and use of public highways, roads, streets and roadside rest areas. The fact that the motor vehicle fuel and other highway use taxes which make up the State Highway Fund are assessed against all highway users in this state, coupled with the expressed intent of the people to limit use of the funds to those purposes which would benefit the payors

of the tax, underscores the requirement that these funds be used only for public roads.(FN10)

Finally, the use of highway funds distributed to cities will necessarily be limited by Article XI, § 9, Oregon Constitution and the "public purpose doctrine" generally. (See discussion of Question Five.)

V. DISTRIBUTION OF STATE FUNDS TO CITY

The issue presented by the fifth question is whether a city's authority to use revenue sharing funds is affected by the fact that all of the land within the city is owned by a single, private party. The close relationship of that party to a particular religion is also relevant.

Certain state revenues are apportioned among and distributed to cities in Oregon under ORS 221.770, 323.455, 366.785 to 366.820 and 471.810. The sources of the revenues so distributed are liquor tax revenues (distributed under ORS 221.770 and 471.810), cigarette tax revenues (distributed under ORS 323.455) and the State Highway Fund (distributed under ORS 366.790). With the exception of distributions from the State Highway Fund, the revenues are available for use by the cities for general governmental purposes. (See discussion under Question Four for limitations on expenditure of state highway funds.)

A. Public Purpose Doctrine

Article XI, § 9 of the Oregon Constitution provides in part:

> "No county, city, town or other municipal corporation, by vote of its citizens, or otherwise, shall become a stockholder in any joint company,

> corporation or association, whatever, or raise money for, or loan its credit to, or in aid of, any such company, corporation or association. . . ."

Within its terms, Art XI, § 9 was designed to curb speculation which in many instances resulted in pecuniary loss to the taxpayer. Johnson v. School District No. 1, 128 Or 9, 12, 270 P 764, 273 P 386 (1929).(FN11)

The "public purpose" doctrine has been developed from Article XI, § 9 of the Oregon Constitution and similar provisions. Simply stated, the doctrine holds that public money cannot be appropriated for private purposes. It is questionable whether the "public purpose" doctrine acts as a limitation on the state legislature. 38 Op Atty Gen 451, 463 (1976). Article XI, § 9 by its terms appears only to apply to units of local government.

The Oregon Supreme Court has adopted a very broad test to be applied in determining whether an expenditure of government funds satisfied the restrictions of the "public purpose" doctrine. In Carruthers v. Port of Astoria, 249 Or 329, 438 P2d 725 (1968), the court characterized Art IX, § 9 and the "public purpose" doctrine as preventing a "giving of a public thing of value or a lending of credit in aid of a private corporation--a credit that has the possibility of general tax liability." Id. at 340. The Oregon Supreme Court adopted the following test under Art XI, § 9, in evaluating the public purpose for government expenditures:

> "'The only valid criterion would seem to be whether the expenditures are sufficiently beneficial to the community as a whole to justify governmental

involvement; but such a judgment is more appropriate for legislative than judicial action. The judiciary should invalidate expenditures only where reasonable men could not differ as to their lack of social utility.' Note, 66 Harv L Rev 898, 903 (1953)." Id. at 341.

This test was quoted and applied by the court again in the case of Miles v. City of Eugene, 252 Or 528, 532, 451 P2d 59 (1969). See also, Nicoll v. City of Eugene, 52 Or App 379, 628 P2d 1213, 53 Or App 528, 632 P2d 502 (1981).

Assuming for purposes of this discussion that the "public purpose" doctrine applies to the disbursement of funds by the State of Oregon, we conclude that no violation occurs under the facts presented. Measured by the test adopted by the Oregon Supreme Court, the actions of the Legislative Assembly in appropriating funds from liquor revenues, cigarette tax revenues and the State Highway Fund for the benefit of cities to aid them in carrying out municipal functions cannot be said to violate the "public purpose" doctrine. ORS 221.770 directs the apportionment and distribution of public revenues to cities "for general purposes." ORS 366.790 specifically limits the purpose for which highway funds may be used to those authorized in Article IX, § 3a of the Oregon Constitution.

With respect to expenditures of state revenue sharing or any other public funds by cities the cases generally hold that if there is a substantial public benefit from expenditure of public funds, the expenditure will not be unlawful merely because a private purpose is also served.

> "The relevant inquiry would seem to be whether the proposed project will augment the community's total value position." 70 Yale LJ 789, 796 (1961), cited with approval in Carruthers v. Port of Astoria, supra, 249 Or at 341.

We have recently expressed the opinion that contributions of funds by a county to a nonprofit corporation would not violate the "public purpose" doctrine so long as the funds were used for purposes primarily benefiting the community. 40 Op Atty Gen 11 (1979).

Even aside from Article XI, § 9, it would be ultra vires for a municipality to spend public funds for something which is not a proper municipal purpose. Although the legislature has plenary power, cities have authority only to take action authorized by the constitution, statute or charter. Richards v. City of Portland, 121 Or 340, 255 P 326 (1927). Nothing in Article IV, § 1(5) or Art XI, § 2, the municipal "home rule" provisions, grants authority to provide in a charter for the spending of money for purely private purposes. We do not believe, for example, that the spending of money for purely private purposes is "necessary or convenient for the government of its local affairs." ORS 221.410(1). In short, although the determination of what constitutes a public and municipal purpose is largely a legislative judgment, there are limits, enforceable by the courts, as to what properly fits within the terms.

The opinion request presents no facts concerning the nature of expenditures which the city might make. We therefore cannot determine whether or to what extent such expenditures would

benefit private property. However, the existence of private benefit does not itself disqualify an expenditure. Presumably any municipal expenditures would benefit its residents and property within the city. The furnishing of fire and police protection for example, obviously confers a private benefit to residents. In fact, it is difficult to imagine any city service or activity which is not intended to benefit both persons and their property. The test is whether the expenditure will benefit the municipality, not whether it will also benefit private individuals and property.

The difficulty here is that, because all of the property within the city is owned by one entity, every city expenditure will benefit the property only of a single owner. An expenditure of general benefit to all property in the city, or in a portion of the city, ordinarily could be made without possible objection. But here an expenditure may become questionable because the benefits to property are restricted to the property of the single owner.

The fact that an expenditure which benefits a single property owner might also benefit the city's residents may not be sufficient to counterbalance the fact that the expenditure of public moneys uniquely and exclusively benefits a single corporate citizen. Under the assumed facts, residence may not freely be acquired and continued, since the owner corporation and its cooperative lessee permit residence within the city only by those who satisfy their conditions. Any resident who fails to

continue to meet those conditions may be required to leave. Thus in effect residents may enjoy the benefits of city expenditures only by sufferance of the single property owner or its lessee.

The same may be true of any "company town" which is incorporated as a city. Any "municipal" benefit is a benefit to a single private property owner, and to a community which exists by sufferance of that property owner. The unique and exclusive nature of the benefit which would accrue to a single property owner by virtue of an expenditure of public money for permanent land improvements creates a difficult public purpose doctrine issue. Principles which would control expenditures of public funds benefiting private property in a more diverse municipal setting may not be sufficient to preserve the bedrock principle that public moneys should be expended for public rather than private purposes. In the "one property owner" city, the courts undoubtedly will review public expenditures more scrupulously.

We conclude that city funds acquired from state revenue sharing or any other source may be used for fire and police protection, for the day-to-day expenses of municipal government, for some legal expenses, and for similar purposes. The benefit is enjoyed, to a substantial extent, when the expenditure is made, and the purely transient nature of interests of the residents as residents is irrelevant.

It is more difficult to reach a conclusion concerning expenditures creating long term or permanent benefits to the community, or improving the property of the single owner.

Disregarding for the moment any questions relating to religion, such long term benefits would accrue only to the single property owner, and to a community selected by it to carry out its purposes. However, we find no cases holding or hinting that otherwise proper municipal expenditures become improper in such circumstances. Take for example the creation of a municipal water system. Should the city disincorporate, it would remain for the benefit of the property owner. However, the municipal funds spent ordinarily would be derived from taxes on the property owner and from user fees, paid to a great extent directly or indirectly by the property owner. We find no reason why state revenue sharing funds may not be used to supplement locally generated funds, and we see no analytical basis to distinguish between such a case and a case in which property within the boundaries of the city is held in multiple ownership. The most we can say is that it would be appropriate for the city to exercise great caution in determining that all of any proposed expenditure in fact creates a municipal benefit, rather than a purely private benefit, and for audit authorities to scrutinize strictly all city expenditures to assure that they meet the test.

B. Religious Character of the City

Under our assumed facts we have not merely a single property owner, but a single property owner which has very close ties to a particular religion. The lessee cooperative was specifically created to further the purposes of that religion, as stated in its articles of incorporation. The cooperative in turn leases or

otherwise makes property (i.e. residence) available only to individuals of the foundation's religious faith. Continued residence is thus apparently contingent upon continued adherence to the faith. Even if it is not, the corporation and the religious cooperative clearly have power to make residence so contingent, and in that case to control city officers, even to oust them from office by terminating their residence.

Similarly, the city appears to have been created to carry out purposes, religious or otherwise, of the corporation and cooperative. By virtue of the exclusivity of land ownership and the consequent control of residence, the corporation and cooperative have complete effective control of the city, whether or not they choose to exercise it.

We note, incidentally, that the cooperative's title describes it as a "commune," and point out again that its articles of incorporation describe its purpose

> ". . . to be a religious community . . . whose members live a communal life with a common treasury . . . ." (Emphasis added.)

Admission to residence in the city is admission to the religious commune, and it would be contrary to the cooperative's stated purpose to admit anyone not adhering to the religious faith which it was created to advance.

We cannot predict with certainty what a court may hold in any particular case, but in view of the interlocking nature of the four entities involved, foundation, corporation, cooperative and city, it is our judgment that a court would regard these not

as four separate entities but as one, for purposes of evaluating the constitutional validity of payment of state funds to the city. We reach this conclusion for three reasons:

1. Where constitutional provisions creating fundamental rights and prohibitions are concerned, courts interpreting the federal constitution give strict scrutiny to governmental actions infringing upon those provisions. Such strict scrutiny is given in cases of possible governmental entanglement with religion. See, e.g., Larkin v. Grendel's Den, Inc., ___ US ___, 74 L Ed2d 297 (1982) (discussed at length below); Roemer v. Bd. of Public Works, 426 US 736, 755 (1976); Committee for Public Education v. Nyquist, 413 US 756 (1973); Lemon v. Kurzman, 403 US 602 (1971).

2. In analogous cases, the courts have exalted substance over form, have pierced the corporate veil, have found one entity to be an alter ego of another. See, e.g., Amfac Foods, Inc. v. International Systems & Controls Corp., 294 Or 94, 654 P2d 1092 (1982) (the court restated the rule that under some circumstances corporate shareholders may be held liable if the corporation is a mere "instrumentality" or "alter ego"). See also People v. Teolis, 20 Il12d 95, 169 NE2d 232 (1960) (mere ownership of all the realty in a municipality by one corporation, an association of the majority of the residents, does not of itself void the incorporation of the municipality but if in fact any private person or corporation were found to control a city for its own private purpose this would evidence an improper or illegal

exercise of municipal government powers and bear upon the issues presented in a quo warranto proceeding).

Similarly in Martin v. Oregon Building Authority, 276 Or 135, 554 P2d 126 (1976) the court held that an allegedly independent legal entity created to avoid the prohibition on the incurring of indebtedness by the state was in fact the state, and that the "independence" created in an attempt to validate the creation of a state debt was a "scheme which would fool only a lawyer." Id. at 145.

3. In Marsh v. Alabama, supra, the court reached a conclusion that a private property owner was required to allow religious solicitation, i.e., could not restrict First Amendment rights, because its property, although private, was the functional equivalent of a "town" or city. In this case we have an incorporated city, but what is it functionally? It lacks many usual characteristics of a city. It is not the means of administering the community interest of its inhabitants: The commune is. The city is the means or one means of administering the leased property of the cooperative, and of advancing certain of the cooperative's private purposes. The city is the functional equivalent of a religious commune.

We accordingly conclude that payment of state funds to the city is in effect the payment of state funds to the corporation or the cooperative, and ultimately to the religion. It is in that light that it must be tested against the state and federal constitutions.

C. Payment for Benefit of Religion -- Art I, §5

It is appropriate first to examine requirements of the Oregon Constitution, which may be dispositive of any given matter. Deras v. Myers, supra. The Oregon Constitution sets forth a strict prohibition against the payment of money for the benefit of religion, perhaps more strict than any federal requirement. Dickman v. School Dist. 62-C, 232 Or 236, 260, 366 P2d 533, cert denied, 371 US 823 (1962). Or Const Art I, § 5 provides:

> "No money shall be drawn from the Treasury for the benefit of any religeous (sic), or theological institution . . . ."

The religious character of the foundation which is sole owner of the corporation would directly prohibit any expenditure of state or city(FN12) funds creating permanent improvement of the corporation's property, even if it did not have a monopoly of property ownership and effective control of the city. Such use of funds to create improvements increasing the value or utility of corporation property would directly violate Art I, § 5.

This conclusion follows even if the expenditure is for an otherwise proper public purpose. In Dickman v. School Dist 62-C, supra, n. 2, it was held that the furnishing of schoolbooks to children in a parochial school violated Art I, § 5. Although it was later held that so doing would not violate the United States Constitution, Board of Education v. Allen, 392 US 236 (1968), we believe Dickman still to be the law in Oregon. If a parochial school must or wishes to teach mathematics, science and English

as well as religion, for the state to aid it in doing so by furnishing textbooks to its students also aids its religious purposes.

In Fisher v. Clackamas School Dist. 12, 13 Or App 56, 507 P2d 839 (1973), the court struck down arrangements under which a "public" grade school and "public" middle school were created in a parochial school building, and teachers, supplies and schoolbooks were provided for entirely non-religious instruction. All of the students were also simultaneously enrolled in a parochial school, and after dismissal of the "public" school continued in their other "parochial" school. It was perfectly proper to furnish teachers, supplies and schoolbooks for the children; it was unconstitutional to do so in a way constituting a benefit to the affiliated religious schools. We note that the arrangement clearly violated the First Amendment as an excessive entanglement of church and state, but the case was decided entirely on Oregon constitutional grounds.

In Fisher v. Clackamas School Dist. 12, supra, the court found it significant under Art I, § 5 that admission to the questioned educational program was based on religious affiliation. Under our assumed facts, residence and continued residence in the city is based upon religious affiliation. Thus every expenditure by the city for whatever purpose will benefit only adherents of the faith of the cooperative, and the property of the corporation. In other words, the community benefited by city expenditures is the exclusive community selected by the

religion for its purposes. Any payment of funds to the city therefore benefits the purposes of the religion.

It may be argued that protective services such as police and fire protection, at least, can be furnished without a violation of Art I, § 5. It would be a denial of several provisions of state and federal constitutions to preclude such protection for the city, or for any Baptist, Catholic, Jewish or other place of worship, or for this religious commune. But it would be a violation of Art I, § 5 to furnish public funds to a Baptist or any other church, to be used for such protective service or other purposes as the church may in its discretion choose, however proper it may be for a governmental body to furnish such services directly. The commune is entitled to receive police and fire protection from the county on the same terms as all other residents of the county; it may not, however, itself exercise sovereign power to provide such protection.

Not all benefits to religious institutions are prohibited. Numerous instances in which public bodies have properly conferred benefits upon religious organizations are set forth in Dickman, supra, 232 Or at 256. Such benefits are permissible:

> ". . . where that benefit does not accrue to the institution as a religious organization. The proscription is against aid to religious functions. The benefits of police and fire protection, sewage disposal, and other community financed services accrue to churches not as religious organizations but as owners of property in the community." Ibid. (Emphasis in original.)

A city, county or state obviously could not furnish public funds to a religious organization to be used to pay for any service, in the discretion of the organization, which the public body could furnish directly. Payment to the city under the assumed facts is indistinguishable from payment directly to the religion.

We conclude that payment of any state funds to the city is a violation of Art I, § 5, regardless of the purposes for which they may be used.(FN13)

D. Establishment of Religion -- First Amendment

Were it necessary to go beyond the Oregon Constitution, the Establishment Clause of the First Amendment to the United States Constitution also would prohibit payment of state funds to the city. That provision, applicable to the states and local governments under US Const Amend XIV, provides:

> "Congress shall make no law respecting an establishment of religion . . . ."

Although Art I, § 5 is the Oregon analogue of this provision and in some respects even more strict, see Dickman v. School Dist. 62-C, supra, this broad language may in other respects prohibit state action not reached by Art I, § 5.

In Committee for Public Education v. Nyquist, 413 US 756 (1973), the Supreme Court summarized the requirements set forth in previous cases for state statutes and municipal ordinances to avoid violation of the Establishment Clause. The requirements would apply to any official actions. They

> ". . . first, must reflect a clearly secular legislative purpose, second, must have a primary effect that neither advances nor inhibits religion, and third, must avoid excessive government entanglements with religion." Id. at 772-773.

The statutes providing for payment of state revenue-sharing funds to cities undoubtedly have a clearly secular purpose. The same cannot be said of any particular city ordinance or action under which the funds might be spent, and a question arises as to any such action in these circumstances. To what extent does planning and engineering for a city improvement have a clearly secular purpose, when every such improvement directly affects and probably directly benefits the religious commune or the property owner? To what extent does payment for legal services in connection with land use matters have a clearly secular purpose, for the same reasons, even without a factual assumption (which could well be made) that a particular pattern of land use has been claimed to be integral or at least significant to the religious purposes of the religious faith? Serious questions arise under this first prong of the test as to any city expenditure, and, as we shall see, the careful examination by audit authorities necessary to assure validity of expenditures would run directly into the third prong.

The second prong of the test is that the action must have a primary effect that neither advances nor inhibits religion. Again, the religiously neutral state statutes pass this test, but any expenditure by the city gives rise to the same questions as under the first prong of the test. Further, even the payment by

the state to the city must necessarily fail the test if it is deemed to be the alter ego of the cooperative, regardless of the religious neutrality of the statutes authorizing payment.

Payment to the city, we have concluded, is in effect payment to the religion. It is not a payment for services rendered, or for a specified proper purpose. It is a payment for any municipal purpose determined by the city in its discretion. Even if the payment to the city were conditioned by a requirement that no hint of a directly religious purpose be permitted, such direct payment to a religion for discretionary use per se must be held to have a primary effect that directly advances religion.

The third prong of the test cannot be satisfied. The governmental action "must avoid excessive entanglements with religion." Even if we conclude that it would be possible to examine city expenditures to assure that in any case there is a clearly secular purpose and a primary effect which does not advance religion, it would be necessary in doing so to make judgments as to what the religious purposes of the foundation are, and how the action would inhibit or advance these purposes. It could be necessary to examine the motivations, religious and otherwise, of city officials. In a pervasively religious city, exclusively owned and exclusively inhabited by the religion and its members, every city action would directly affect the religion, and the examination would have to be made as to every action. This would clearly constitute the prohibited government entanglement with religion. But see Bob Jones University v.

United States, 51 US LW 4593 (1983), relating to screening of textbook by government officials.

E. Organization and Existence of the City

Under the assumed facts we conclude that the city cannot exist at all without creating excessive governmental entanglement with religion. We again summarize those assumed facts, and the additional factual conclusions we draw from them. All property in the city is owned by a corporation which, in turn, is wholly owned by a religious foundation. The property is leased to a cooperative religious commune created specifically to further the religious purposes of the same religion. Only adherents of the religion are admitted to residence in the city, and only adherents of the particular religion can accordingly be officers of the city. On these assumed facts there is a strong inference that the city was created to carry out purposes, religious or otherwise, of the corporation and the religious commune cooperative. The corporation and cooperative have complete control of the city, whether or not they care to exercise it. The city can do nothing which does not affect property of the corporation. No municipal benefit can be achieved which is not a benefit to a community selected on religious criteria by the religion, or to property owned by the religious foundation, or both. No municipal regulation can be enacted which does not affect the same community and property. The city, the corporation and the cooperative are in effect alter egos of each other and of the religion which engendered them.

Aside from religious considerations, it can be asserted that it is improper and an unconstitutional delegation of government authority for a city to be organized and controlled for the private purposes of a single property owner. People v. Teolis, supra. Where that private purpose is primarily religious (the sole stated purpose set forth in the articles of incorporation of the owner of all property in the city, or its lessee, is religious), the state and federal constitutional prohibitions of government aid to religion become the overriding consideration.

In Larkin v. Grendel's Den, Inc., supra, the Supreme Court voided a Massachusetts statute which gave a veto power to churches and schools over the granting of liquor licenses to establishments within 500 feet of such a church or school. It was held to be a violation of the Establishment Clause, in granting to a religious institution the authority to exercise some portion of the sovereign power of government.

The Court said:

> "The purposes of the First Amendment guarantees relating to religion were twofold: to foreclose state interference with the practice of religious faiths, and to foreclose the establishment of a state religion . . . . Religion and government, each insulated from the other, could then coexist." ___ US at ___, 74 L Ed2d at 304. (Emphasis added.)
>
> ". . . This statute emmeshes churches in the exercise of substantial governmental powers contrary to our consistent interpretation of the Establishment Clause; '[t]he objective is to prevent, as far as possible, the intrusion of either [Church or State] into the precincts of the other.' Lemon v Kurtzman, supra 403 US, at 614 . . . ." ___ US ___, 74 L Ed2d 306-307.

> "As these and other cases make clear, the core rationale underlying the Establishment Clause is preventing 'a fusion of governmental and religious functions,' School District of Abington Township v Schempp, 374 US 203, 222 . . . (1963)." Id. ___ US ___, 74 L Ed2d at 307.

The Larkin case dealt with the exercise by a church of a comparatively insignificant government power. A veto over the issuance of a liquor license is far less than the power to exercise all the governmental powers of a city. It is not possible for religion and city government to be insulated from each other in this city under the facts assumed. The intrusion of the religion into city government affairs is pervasive and unavoidable. There is in effect a total fusion of government and of religious functions, where the religion has sole power to select the inhabitants of the city and accordingly to select city officers.

It is difficult to imagine a clearer violation of the Establishment Clause than the incorporation of a religion as a city, with all the sovereign powers thus inhering. This embodies the central evil of establishing "religious . . . control over our democratic processes." Wolman v. Walter, 433 US 229, 263 (1977) (Powell, J., concurring and dissenting). It is a "concert or union" of church and state. Zorach v. Clauson, 343 US 306, 312 (1952).

We have said that the city is the functional equivalent of a religious commune. Of course a religious commune can adopt rules for its own governance, but it cannot exercise the sovereign

power of the state to enforce those rules, any more than it can receive public money in doing so. A church, a religious commune and any other religious or private body may call upon the sovereign power of the state to aid in enforcement of its rights or for protection, but it may not exercise that power itself. The commune is entitled to police protection in the same way that First Christian Church of Madras and Congregation Beth Israel of Portland are entitled to protection, but none of them may invest anyone with the powers of a police officer for that purpose, nor could any church or synagogue or the foundation do so by bringing adherents onto its privately owned property to incorporate as a city.

F. Religious Test for Office -- Art I, § 4

We find nothing in the Oregon Constitution which specifically incorporates all of the requirements of the Establishment Clause, as set forth in Committee for Public Education v. Nyquist, supra. Those three tests certainly would be applicable to any expenditure of public funds, but perhaps not where governmental action other than the spending of money is concerned. Nevertheless, the Oregon Constitution does contain a provision which casts doubt upon the validity of the incorporation under these facts, or whether the city can continue as such without a change in the facts assumed to exist. Article I, § 4 provides:

> "No religious test shall be required as a qualification for any office of trust or profit."

There is a religious test required as a qualification for the holding of office in this city. We are asked to assume the fact that only adherents of the faith of the religious foundation are allowed to reside in the city. Accordingly, only adherents of the faith may hold city office. This violates Art I, § 4. It is not clear to us whether this is an alternative independent state ground for invalidity of the original incorporation, or whether a remedy may exist in judicial invalidation of the restrictive residence policy. It may be that upon further analysis this provision will be concluded to act together with other provisions, such as Art I, §§ 2, 3 and 5, to incorporate all of the breadth of the Establishment Clause of the First Amendment.

G. Free Exercise of Religion: First Amendment, Or Const §§ 2, 3

It will be asserted that the conclusions reached above cannot be sustained because to do so would deprive adherents of the religion of the right to free exercise of their religion, under the First Amendment and Or Const Art I, §§ 2 and 3. If in fact a conflict does arise between the Establishment Clause and the Free Exercise Clause, and between their Oregon analogues, we suppose that the prohibition on allowing a religion to exercise governmental authority would have the greater weight. There is, after all, no significant deprivation of the free exercise of religion merely because the property on which the religion may be practiced cannot take on the attributes of a city. Worship may continue as before. However, we see no conflict. The religion

may not incorporate a city; its adherents are free to do so. There are several Oregon cities originally settled almost or perhaps entirely exclusively by adherents of a particular faith. But in those cases the religion did not own all property within the city. Property ownership was diverse. Non-adherents were free to move into the city, if they could find any single resident willing to sell or rent residential property to them. Under our assumed facts, no such opportunity exists here.

The difference is critical. Persons who happen to be adherents of an identical faith, choosing to live in the same area by their own choice, may incorporate a city, assuming other requirements are met. The religion itself may not incorporate the city. On the assumed facts before us, the religion, acting through its adherents, was the incorporator of the city.(FN14)

H. Summary and Conclusion

We reiterate that we write on the basis of assumed facts which we do not know to be true as well as an the basis of other known facts. If the facts assumed with respect to ownership of the property, relationship of the religion to the corporation, or ineligibility for residence of non-adherents of a particular religious faith are incorrect, our conclusion could change in some respects or to a substantial extent. Other facts of which we are not aware may also modify our conclusion.

However, if the corporation is religiously affiliated and owns all property in the city, if the lessee cooperative admits only adherents of the faith to residence in the city, if our

conclusions drawn from these facts as to control and purposes are correct, then the city is merely another manifestation of a religious body: The alter ego of the cooperative and corporation which are themselves manifestations of that body. In these circumstances, the First Amendment and Or Const Art I, § 5 prohibit the payment of state revenue-sharing funds to the city, and thus in effect to the religious body. More fundamentally, the First Amendment, at least, and possibly also Or Const Art I, §§ 4 and 5, prohibits the incorporation and continued existence of the city.

VI. PUBLIC ACCOMMODATIONS LAW

The sixth question presented is whether the corporation or cooperative which proposes to build a hotel on leased land within the city, limiting its use and occupancy to members of the religious foundation which owns the land to be leased, would violate Oregon's Public Accommodations Act, ORS 30.670 to 30.685. This question raises the issue whether the proposed hotel would be a "place of accommodation which is in its nature distinctly private" and thus excluded from the Public Accommodations Act by reason of ORS 30.675(2) which provides:

> "However, a place of public accommodation does not include any institution, bona fide club or place of accommodation which is in its nature distinctly private."

ORS 30.670 provides that all persons within the state are entitled to the full and equal accommodations and facilities of any place of public accommodation free of discrimination on

account of race, religion, sex, marital status, color or national origin. ORS 30.675 defines a place of public accommodation, subject to the exclusion of subsection (2) of the statute quoted above, to be,

> ". . . any place or service offering to the public accommodations, advantages, facilities or privileges whether in the nature of goods, services, lodgings, amusements or otherwise."

There is no question, based upon the facts as assumed, that the proposed hotel is a place of accommodation--the issue, however, is whether it is a place of public accommodation as distinguished from a place of accommodation distinctly private in its nature. We have not found any Oregon cases applying the "distinctly private" exception contained in ORS 30.675(2).(FN15) This statutory exception no doubt derives in large part from the First Amendment right to associational freedom guaranteed by the United States Constitution. As we observed in 38 Op Atty Gen 929 (1977), private associational freedoms based upon religious, racial, political or sexual preferences are granted great deference by the courts.

The facts as assumed are somewhat limited. The corporation owns the real property on which it or the cooperative proposes to build a hotel. The hotel will be limited in its use and occupancy to individuals who profess or show an interest in professing the same faith as of the corporation owners or the cooperative. That is, the hotel would be distinctly private and for the exclusive use of the members and those professing a bona

fide interest in becoming members of the religious faith. If these were in fact the circumstances, we believe the restricted use of the facility would not violate of the Public Accommodations Act because it would then come squarely within the exception for places of accommodation which are in their nature distinctly private.

Almost ironically, the First Amendment freedom of association, which includes the right discriminatorily to exclude, may be lost if the exclusiveness is not absolute. If any persons are admitted who are outside of the limited class, or for purposes which do not further the private interest of the owner or operator, it is likely that the exemption will be lost. For example, if preference is given to adherents of the faith, but others are admitted on a space-available basis, the exemption will be lost. If persons having business with the city (assuming its continued existence) are admitted in addition to adherents and potential adherents of the faith, it is quite possible that the exemption will be lost, since city business would be presumptively outside of the "distinctly private" purpose of advancing the faith. Similarly, if the purported exclusivity is in name or form only and it is actually a device for denying accommodation to a selected, protected class, for instance, Blacks, Asians, Catholics, etc., with accommodations not otherwise exclusively restricted to all except members of the religious foundation or those professing a bona fide interest in that faith, then a court certainly would look through the form to

the actual conduct or operation to determine whether the distinctly private exception was lost. We do not intend to suggest that this course of conduct would occur, but only set forth a hypothetical example of how the distinctly private exception might be lost.

Obviously, it would be much more difficult to assert the distinctly private exception successfully if the class of individuals to whom the accommodation is made available becomes so large and diverse that the existence of "private" purposes becomes questionable. For example, a limitation to occupancy by members of the Christian faith, or to a large group (such as Catholics) of that faith, would be of highly questionable validity unless occupancy were related to the exercise of that faith. Without such relation the purposes of maintenance of the accommodation would appear to be commercial rather than religious or otherwise private.

We see a possible distinction between a case in which a non-religously oriented business corporation operates the hotel, and a case in which an overtly religious organization operates it as, in effect, an extension or facility of its religious faith. It could be argued that the private religious character of the hotel cannot be private purposes of a business corporation. However, under ORS 30.675(2) it is the distinctly private nature of the accommodation which is relevant, and we suppose that any

individual or company could establish a "distinctly private" accommodation for a limited class.

Dave Frohnmayer
Attorney General

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1. For example, a post-1979 incorporated city must file notice of incorporation with the Secretary of State under ORS 198.782. We specifically express no opinion on the legal effects of any actions taken by a purported city where the act of incorporation might subsequently be found in violation of Oregon land use laws. We note such a question is presently in appellate litigation. See 1000 Friends of Oregon v. Wasco County, 62 Or App 75, 659 P2d 1001 (1983).

2. Commentary by the 1975 Interim Judiciary Committee on what became ORS 487.015 stated:

> "The rule of this section allows local authorities to enact regulations which are not in conflict with the provisions of ORS ch 483. Supplementary, but nonconflicting provisions, are common. Furthermore, cities can duplicate state laws by ordinance under the rule of ORS 483.042. Prohibition of enactment of a conflicting rule would preclude a local authority from imposing a penalty for violation of a traffic regulation greater than the penalty imposed under state law for commission of the same prohibited act. A lesser penalty imposed by the local authority would not be in conflict.
>
> "The provisions of both ORS 483.036 and 483.042 were interpreted in Winters v. Bisaillon, 152 Or 578, 54 P2d 1169 (1936). The court held that a municipal ordinance restricting motor vehicle speed within the city limits was in conflict with the state statute requiring reasonable speed, and hence invalid. Local authorities may not curtail, infringe upon or annul state law regulating traffic.
>
> "This principle was further developed in Ceccacci v. Garre, 158 Or 466, 76 P2d 283 (1938), a case which involved a parking ordinance prohibiting parking more

than one foot from the curb. The court held that since there was no legislation prescribing the manner in which motor vehicles should be parked in a business district in a city, a city ordinance in this area did not curtail, infringe upon or annul any general law, was not inconsistent with state statute, and therefore valid.

"The analogous UVC provision prohibits the local authority from enacting or enforcing any ordinance on a matter covered by the UVC rules. Hence, ordinances duplicating any subject covered by a state law would be invalid." Interim Committee on Judiciary, Proposed Revision Oregon Vehicle Code 4-5 (Jan., 1975).

Oregon's new vehicle code which will not become operative until January 1, 1986 apparently does not alter the present statutory state/local relationship. See sections 4(3) and 8(1) of HB 2031 enacted by the 1983 Oregon Legislature. See also section 10.

3. Amendment XIV, cl 1 provides in pertinent part:

"* * * No State shall * * * deny to any person within its jurisdiction the equal protection of the laws."

4. Article I, § 20 provides:

"No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens."

5. The Oregon Privileges and Immunities Clause, Or Const Art I, § 20, differs semantically from the federal Equal Protection Clause in that the state provisions prohibit extending a right to an individual or class legally indistinguishable from all others so situated, while the federal provision prohibits the denial of a right to a disfavored minority. When determining the validity of a particular ordinance, it is analytically correct to consider and dispose of all questions of state law before encountering federal constitutional issues. State v. Kennedy, 295 Or 260, 264-265, 666 P2d 1316 (1983). However, an independent equal protection analysis is not always necessary.

Although our Supreme Court has recognized the semantic difference between the two provisions, it has held that the protection afforded by the two provisions is coextensive when the legal basis for the challenge is the same under both provisions. School District No. 12 v. Wasco Co., 270 Or 622, 529 P2d 386 (1974). See also, City of Klamath Falls v. Winters, 289 Or 757,

619 P2d 217 (1980). If the assertion is that the challenged legislation discriminates on the basis of "suspect classifications" or that it infringes on a "fundamental" right under the federal constitution, an independent analysis under the state's provision is unnecessary. On the other hand, it has also been recognized that a broader construction of the Privileges and Immunities Clause is possible if a legal basis exists for such a construction. School District No. 12 v. Wasco Co., supra. Such a basis exists if a right or privilege is asserted under the Oregon Constitution independent of the federal constitution. Olsen v. State ex rel Johnson, 276 Or 9, 554 P2d 139 (1976). Therefore, a separate state constitutional analysis is necessary only if such a right or privilege is asserted. But see Planned Parenthood Assn. v. Dept of Human Resources, 63 Or App 41, 663 P2d 1247 (1983); Cooper v. OSAA, 52 Or App 425, 629 P2d 386, rev den 291 Or 504 (1981). See also State v. Freeland, 295 Or 367, 667 P2d 509 (1983). Assuming such a right or privilege is asserted, the Oregon Supreme Court has held that the appropriate standard for judicial review under the state constitution is a balancing test in which the court weighs the detriment imposed by the challenged legislation against the justification for it advanced by the state. Olsen v. State ex rel Johnson, supra. See also, Planned Parenthood Assn v. Dept of Human Resources, supra; Cooper v. OSAA, supra. We are aware of no rights which exist under the state constitution and not the federal constitution which would be affected by an ordinance restricting travel on the basis of residency.

6. The opinion concentrated on the uniformity of taxation provision, Or Const Art I, § 38, and gave only superficial analysis to the issues arising under Art I, § 20. However, the ordinances

> ". . . restrict parking by those persons employed, resident or lodged within the District while in their place of employment or while in their lodging or residence . . . ." Jarvill v. City of Eugene, supra, 289 Or at 184. (Emphasis added.)

Thus such persons could park free, like anyone else, while shopping or strolling in the district. The privilege of other persons to park free in the district while in their places of employment, lodging or residence, presumably some distance away, would be of little or no value to them. It appears that the discrimination against the class of in-district residents and employes was minimal.

7. The right to travel in a constitutional sense means more than the right to drive a private vehicle on a particular road. It encompasses the right of access by some reasonable means to

public places. A city street is itself by definition a public place.

8. An entirely separate question which we do not address is the extent to which residents of the city may exercise their First Amendment rights on private property to which such city residents have general access, and whether those rights include the right to invite guests who would not otherwise be admitted.

9. See Lloyd Corp., Ltd. v. Tanner, 407 US 551 (1972), and discussion in Lenrich Associates v. Heyda, 264 Or 122, 504 P2d 112 (1972).

10. See letter opinion dated January 19, 1983 to Representative Billy Bellamy (OP-5444), fn 3 for a discussion of what may constitute public roads.

11. See 43 Op Atty Gen 186 (No. 8140, March 10, 1983), fn 4.

12. We find no cases directly holding that this prohibition applies to local governments as well as to the state. However, we conclude that it does. Art I, § 5 applies to school districts, which carry out functions of the executive branch of state government. Dickman v. School Dist. 62-C, supra; Fisher v. Clackamas School Dist. 12, 13 Or App 56, 507 P2d 839 (1973); see Monaghan v. School Dist. No. 1, 211 Or 360, 315 P2d 797 (1957). In the Dickman and Fisher cases the court did not rely on or consider the existence of state support for public schools. It therefore appears that the word "Treasury" does not simply mean the State Treasury, but is broad enough to include any public funds. Cities and other local governments are created by virtue of state law to carry out purposes contemplated by state law. The principles leading to adoption of Art I, § 5 would be violated to the same extent by a city or water district contribution to a religion as by a state contribution. We accordingly conclude that Art I, § 5 is intended to reach any expenditure for the benefit of religion, from whatever source, by any government body.

13. A payment of public funds to a religious body for services rendered by the religious body is permissible, we held in 43 Op Atty Gen 11 (1982). The money is paid for the service rendered, and it can thereafter be used for any purpose the payee desires. Thus if enabling statutes permit, there would be no constitutional objection to a contract under which the corporation or the cooperative agreed with a fire district or the county to furnish fire or police protection services on behalf of the fire district or county, or for payment of the reasonable value of the services thus rendered.

14. A free exercise claim in this context is relevant, if at all, only to the question of how land use regulations may be enforced against a religious community. If, for example, the only way that a religious community could comply with restrictions on population density were for the community to incorporate as a city, it is possible that the community could assert a free exercise right to an exemption from the land use laws. The appropriate accommodation to the right of members of the religious community to practice their religion would be to exempt the community from the requirement that it obtain city status, not to confer upon the community the sweeping sovereign powers that city status carries with it. We express no view as to whether the land use laws may be qualified in this context by the asserted right of residents of the city or commune to practice their religion.

15. But see Schwenk v. Boys Scouts of America, 275 Or 327, 551 P2d 865 (1976), dissenting opinion of Justice O'Connell.