

MEMORANDUM

To: Metro Charter Committee

From: Timothy J. Sercombe

Date: July 2, 1992

Re: Draft Proposed Charter Treatment of Contracting to Provide Local Governmental Services

Statement of the Issues: At its June 11, 1992 meeting the Charter Committee considered adding language to the draft proposed charter expressly addressing the procedure for providing local services by contract with a governmental unit. In tabling this issue, the Committee requested advice on the contracting powers available under current state law, the effect of the proposed charter on those powers, and alternative treatments of this issue in the proposed charter.

Summary of Advice: The current statutory authority of Metro to provide services to local governments by contract is unclear. Several statutes allow Metro to provide local services under agreements with local governments. The statutes are ambiguous on whether the metropolitan part of the function must be authorized or approved before local aspects of that function can be contractually supplied. In other words, must Metro be authorized to provide regional parks before it can contract to run the local parks system of a city? Metro's attorneys believe that the legislative history of ORS ch. 268 suggests that contractual provision of local services can occur without a vote on the assumption of a regional function. This conclusion is consistent with general powers granted to local governments to contract with other governments under ORS ch. 190.

These general state statutes under ORS ch. 190 ordinarily would empower METRO, as constituted under the draft proposed charter, to perform services for other local governments. But any *limitation* on power in the charter would control over these general state statutes. The proposed charter expressly provides for a procedure for the assumption of local government services functions. It is reasonable to assume that this procedure must be followed before assuming the function of providing services under a contract with a local

government. This procedure requires adoption of an assumption ordinance and approval of the function assumption by MPAC or the voters.

The general state statutes on intergovernmental contracting powers would not control over particular limitations on these powers in a local charter. They would not allow METRO to avoid specific approvals required under its charter for the function of local provision of services by contract. Even if this conclusion is arguable, if the Committee intends to allow for METRO to contract to provide services (without MPAC or popular approval) this intent should be made clear.

If this is the Committee desire, the text of section 9(2) of the proposed charter should be amended to add:

No approval under this subsection shall be required for the compensated provision of services by METRO to or on behalf of a local government under an agreement with that government.

Alternatively, if the Committee creates a definition of "function," the contractual provision of services could be excluded from that definition.

Discussion: Several parts of the statutes defining and regulating the functions of a metropolitan service district discuss the provision of local services under an agreement between the district and a local governmental unit. By and large, this authority is conditioned. The effect of this conditioning of authority is not clear.

For example, ORS 268.030(3) allows a metropolitan service district the authority to provide various services "subject to the limitations of state law." ORS 268.030(3)(c) then goes on to allow the district to provide "local aspect of these public services" "that are transferred to the district by agreement between the district and other public corporations, cities or counties." The local provision of these services would, nonetheless, be "subject to the limitations of state law." Those limitations include processes required under the metropolitan service district statutes, ORS ch. 268.

The contracting power of a metropolitan service district with local governments noted in ORS 268.300 is "for purposes of its authorized functions." The local provision of water supply and jails is specifically subject to voter approval under ORS 268.312(1)(a)(d). On the other hand, no voter approval seems to be required for the local provision of public transportation services or criminal and juvenile justice planning, if these services are provided under contract. ORS 268.310(4)(7).

The key general statute is ORS 268.320 which provides that,

(1) The electors of a district may, from time to time, and in exercise of their power of the initiative, or by approving a proposition referred to them by the governing body of the district, authorize the district to assume additional functions and determine the number, qualifications and manner of selecting members of the governing body of the district.

(2) Local aspects of the functions authorized by subsection (1) of this section may be assumed only on the basis of agreements between the district and other public corporations, cities or counties.

This statute seems to imply that only local aspects of functions otherwise authorized by the voters may be performed by Metro. On the other hand, other statutes suggest that the contracting power may not be so limited. ORS 268.350 states that, "By contract the district may assume any function of any public corporation, city or county in the district that the district has power to assume under this chapter."

The legal counsel for Metro has concluded that these statutes are ambiguous but that the legislative history of the statutes suggests that no vote of the people is required to contract to provide for the provision of some local services. See, February 14, 1992 memorandum from Senior Assistant Counsel Shaw to General Counsel Cooper.

The conclusions of Metro's attorneys are reasonable. The statutes are ambiguous. That ambiguity is likely to be resolved by legislative history of the statutes. Moreover, a conclusion that Metro generally can perform services for other governments is consistent with general state statutes allowing these types of intergovernmental agreements. But the statutory authority of Metro in this regard is not free from doubt.

There are general state statutes allowing governments to contract with each other for the provision of services. These statutes could *supplement* any authority that the government has in this regard. But they would not overcome specific statutory or charter restrictions on the authority of a particular government to contract.

In particular, ORS 190.010 provides that,

A unit of local government may enter into a written agreement with any other unit or units of local government for the performance of any or all functions and activities that a party to the agreement, its officers or agencies, have authority to perform. The agreement may provide for the performance of a function or activity: . . . (4) By one of the parties for any other party; . . .

ORS 190.030(1) then goes on to state that,

When an agreement under ORS 190.010 has been entered into, the unit of local government . . . designated therein to perform specified functions or activities is vested with all powers, rights and duties relating to those functions and activities that are vested by law in each separate party to the agreement, its officers and agencies.

These general statutes empower local governments to contract in this manner. Under these statutes, METRO could contract to provide local services on behalf of another government.

It is questionable whether this general authority would preempt specific restrictions on contracting powers contained in a municipal charter. Although the conclusion is not free from doubt, it is likely that a court would rule that no preemption would occur. First, the intergovernmental contracting statutes do not clearly show an intent to preempt local limitations on contracting powers. Second, the choice of functions of a limited purpose government is a very basic, constitutive choice. This choice is the heart of the "home rule" powers allowed to voters in adopting a municipal charter. Thus, even if the intent of ORS ch. 190 was to override local limits on contracting authority, that effect is probably unlawful.

The draft proposed charter limits the authority of METRO to contract for the provision of local government services. First, section 4 limits the jurisdiction of METRO to metropolitan concern matters "which are assigned to METRO by the charter or which are authorized under the procedures of this charter for assuming functions." If local contracting is neither assigned or authorized, it is beyond the power of METRO.

Contracting for local government service provision is a "function relating to the provision of local government services" and is, therefore, subject to the procedures of section 9(2) of the draft proposed charter. Before assuming this function, an assumption ordinance would need to be passed and approval of the function assumption would need to be obtained from the voters or MPAC.

At the very least, the draft proposed charter provisions create uncertainty about whether METRO can contract to provide services to or on behalf of a local government. This uncertainty should be resolved one way or another.

There are at least three options:

1. Do nothing. If the present text is retained, it is likely that a restriction on the ability to contractually provide services will be implied. This restriction may control over general state authority.
2. Expressly limit local services contracting ability. If this option is desired, section 9(2) could be amended to make clear that contractual provision of local government services must be approved by MPAC or the voters. This could easily be done by adding words to the first sentence of section 9(2), so that the sentence reads, "An ordinance assuming functions relating to the contractual or other provision of local governmental services"
3. Expressly allow local services contracting ability. If the Committee wishes to exclude the contractual provision of services from the requirement of MPAC or voter approval, then the following sentence could be added to section 9(2),

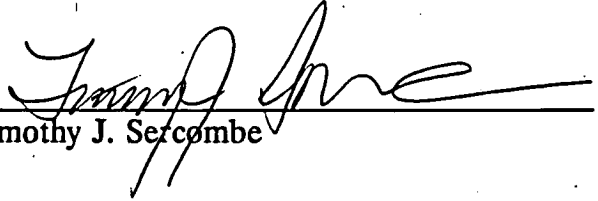
No approval under this subsection shall be required for the compensated provision of services by METRO to or on behalf of a local government under an agreement with that government.

The effect of this change would be to allow intergovernmental agreements as a function subject to the requirements of section 9(1) (adoption of assumption ordinance) and possibly section 9(5) (consultation with MPAC).

This issue is only one of several that relate to the meaning of "function" and the distinction between function, activity, and other actions. The lack of meaning of function, and the ambiguous relationship of the function assumption process to the regional framework planning process, have been and continue to be major weaknesses in the draft proposed charter.

PRESTON THORGRIMSON SHIDLER
GATES & ELLIS

By: _____


Timothy J. Sercombe