



## DEPARTMENT OF JUSTICE

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**No. 8290**

This opinion answers a question posed by Representative Kennemer concerning whether the mayor and city council members of the City of Damascus would risk personal liability for expending funds in the manner required by House Bills 3085 and 3086 (2015). Below, we first set out your question and our short answer, followed by our analysis. We emphasize that in accordance with ORS 180.060(2), our legal opinions are solely for Representative Kennemer's use and benefit, and cannot be relied on as advice by local government officials.

### QUESTION

Would the mayor and city council members of the City of Damascus be personally liable either under ORS 294.100 or the Oregon Tort Claims Act for expending city funds in the manner required by House Bills 3085 and 3086?

### SHORT ANSWER

No.

### DISCUSSION

#### I. Background

In 2013, sixty-three percent of Damascus voters voted for disincorporation of the city. City officials interpreted state law to require a majority of all registered voters to approve disincorporation and concluded that the election results did not meet that requirement. A trial court agreed with the city's interpretation and the Oregon Court of Appeals affirmed without opinion. *Hawes v. City of Damascus*, 271 Or App 590, 354 P2d 774 (2015).

In 2015, the Oregon Legislative Assembly enacted House Bill 3085, and referred that bill to Damascus voters for their approval or rejection. Or Laws 2015, ch 603. The bill permits disincorporation by simply majority vote. If the voters approve disincorporation, House Bills



3085 and another House Bill enacted in 2015, HB 3086, require the City of Damascus to expend city funds to satisfy outstanding legal debts and obligations and to return any excess moneys to *ad valorem* property taxpayers of the city. *Id.*, Or Laws 2015, ch 637.

Representative Kennemer informs us that the mayor and city council members have been told that they risk personal liability for expending funds as directed by HB 3085 and 3086 if a court later determines those bills to be unconstitutional. We understand the potential constitutional issue to relate to the legislature's authority to enact the legislation rather than to the expenditure provisions in particular. Representative Kennemer tells us that he is not aware of any current legal challenge to either law.

## **II. ORS 294.100**

We first look to ORS 294.100, under which public officials may be personally liable for expending public moneys either in excess of the amounts authorized by law, or for purposes other than those authorized by law. Because the question posed involves public officials' authority to expend funds as specifically directed by House Bills 3085 and 3086, we consider only the "unauthorized purposes" prong of ORS 294.100.

### **A. Criteria for personal liability**

Under ORS 294.100(1) makes it unlawful for public officials to expend money for unauthorized purposes. ORS 294.100(2) provides, in pertinent part:

(2) Any public official who expends any public moneys \* \* \* for any other or different purpose than authorized by law shall be civilly liable for the return of the money \* \* \* if the expenditure constitutes malfeasance in office or willful or wanton neglect of duty.

To be personally liable under that section, a public official must expend public moneys for a purpose not authorized by law and the expenditure must constitute malfeasance in office or willful or wanton neglect of duty.

#### **1. Purposes authorized by law**

HB 3085 and HB 3086 require city officials to make certain expenditures. *See* Or Laws 2015, ch 603, § 1(1)(a) (providing that the "City of Damascus shall \* \* \* [e]xpand moneys in the funds of the city to satisfy all debts, obligations, liabilities and expenses of the city[.]"); Or Laws 2015, ch 637, § 1(1)(a) (providing that the "City of Damascus shall expend moneys in the funds of the City" in specified ways). City officials who expend funds in the manner required by those laws would expend funds for authorized purposes. Those expenditures, therefore, would not meet the first criteria for personal liability, that the expenditures be "for any other or different purpose than authorized by law[.]"

Nothing in the language of ORS 294.100(2) or any other law of which we are aware suggests that a public official must determine that a duly-enacted statute requiring certain expenditures is constitutional before relying on the expenditure authority it provides. It is in fact questionable whether city officials could elect *not* to make the expenditures directed by HB 3085 and 3086 simply because they thought the bills might be unconstitutional. See *Li v. State of Oregon*, 338 Or 376, 396, 110 P3d 91 (2005) (explaining that Oregon Constitutional requirements that elected officials swear to uphold state and federal constitutions does not imply authority to prescribe remedies for perceived constitutional shortcoming *without regard to the scope of the official's statutory authority to act*) (emphasis in original). Nor is this a case where a specific expenditure potentially authorized under the broad expenditure authority provided by one statutory provision is prohibited by another statutory or constitutional provision. See *Burt v. Blumenauer*, 299 Or 55, 699 P2d 168 (1984) (holding that public officials could be held personally liable under ORS 294.100 for expending funds to oppose ballot measure, because although expenditure was otherwise authorized under county commissioners' broad expenditure authority, that authority was limited by other law prohibiting expenditures for certain government speech).

## 2. Malfeasance in office or willful or wanton neglect of duty

Nor would expending funds as required by HB 3085 and 3086 meet the second criterion for personal liability, which is that the expenditure “constitute[] malfeasance in office or willful or wanton neglect of duty.” This criterion was added to the statute in 2001 changing the former strict liability standard to one requiring malfeasance in office or willful or wanton neglect of duty. Or Laws 2001, chapter 399. While “malfeasance in office” and “willful or wanton neglect of duty” obviously are higher standards than mere negligence, we need not explore their precise parameters as a public official who does nothing more than what the law expressly requires him to do clearly does not commit malfeasance in office or willfully or wantonly neglect his duty.

We conclude that Damascus officials would not incur personal liability under ORS 294.100 merely for expending city funds as required by HB 3085 and 3086.

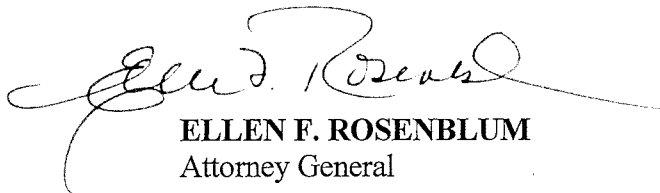
## B. Advice of counsel defense to action for unlawful expenditure of public funds

We also point out that a public official may avoid personal liability for an otherwise unlawful expenditure of public funds under ORS 294.100 if the official relies in good faith and without personal benefit upon the advice of counsel, whether public or private. *Belgarde v. Linn*, 205 Or App 433, 440, 134 P3d 1082 (2006) (so holding).

## III. Oregon Tort Claims Act

You also ask whether city officials could carry out the directives of HB 3085 and 3086 without risking tort action. Violations of ORS 294.100 are not tort claims within the meaning of the Oregon Tort Claims Act, ORS 30.260 to 30.300. See *Burt v. Blumenauer*, 87 Or App 263, 265, 742 P2d 626 (1987) (so holding). Although we have difficulty conceiving what the tort might be, if any person did assert a tort claim for damages against Damascus officials based on the

officials' implementation of HB 3085 and 3086 on the ground that those laws are unconstitutional, ORS 30.265(6)(f) would apply. ORS 30.265(6)(f) grants immunity from liability to officers for a claim "arising out of an act done \* \* \* under apparent authority of a law, \* \* \* that is unconstitutional \* \* \* except to the extent that they would have been liable had the law \* \* \* been constitutional \* \* \* unless such act was done or omitted in bad faith or with malice."



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