

ORDINANCE NO. 2474

AN ORDINANCE AMENDING BEND MUNICIPAL CODE SECTION 1.60.015

Recital

- A. ORS 401.309 allows a city to declare by ordinance or resolution that a state of emergency exists within that city and permits a city to establish procedures for and to carry out any activity to prevent, minimize, respond or recover from an emergency. Such ordinance or resolution must describe the conditions required for the declaration of a state of emergency within the jurisdiction. ORS 401.309(2).
- B. Bend Municipal Code (BMC) 1.60, Emergencies, sets out the authority and procedures for emergency situations in the city of Bend.
- C. BMC 1.60.015 authorizes the City Manager of the City of Bend to issue a declaration of a state of emergency within the city. Among other things, BMC 1.60.015 states that “[t]he City Manager will submit the declaration of emergency to the Deschutes County Emergency Manager for County Commission approval.”
- D. Arguments have been rejected by Bend Municipal Court and Deschutes County Circuit Court judges that the City intended to cede duty and power to enact an emergency to the County when it enacted the provision of BMC 1.60.015 requiring the emergency declaration be submitted “for County Commission approval.” See, e.g., *Laui Life Coffee LLC v. The Municipal Court for the City of Bend*, Deschutes County Circuit Court Case No. 21CV30165, Decision Letter (July 26, 2022).
- E. The Bend City Council now wishes to amend Section 1.60.015 to remove the requirement that the City Manager submit a declaration of emergency to the Deschutes County Emergency Manager for County Commission approval. It is not the intent of the Bend City Council to delegate to Deschutes County the power to declare an emergency within the city of Bend.

Based on these findings,

THE CITY OF BEND ORDAINS AS FOLLOWS:

- Section 1.** Section 1.60.015 of the Bend Code is amended to read as shown on the attached Exhibit A.
- Section 2.** All other provisions of Chapter 1.60 Bend Code remain unchanged and in full effect.
- Section 3.** If any provision, section, phrase, or word of this ordinance or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions that can be given effect without the invalid provision or application.

First Reading Date: April 19, 2023

Second Reading and adopted by roll call vote on May 3, 2023

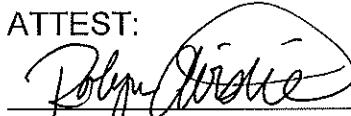
YES: Mayor Melanie Kebler
Councilor Barb Campbell
Councilor Anthony Broadman
Councilor Megan Perkins
Councilor Ariel Méndez
Councilor Megan Norris
Councilor Mike Riley

NO: none



Melanie Kebler, Mayor

ATTEST:



Robyn Christie, City Recorder

Approved as to form:



Mary Winters, City Attorney

Chapter 1.60

EMERGENCIES

Sections:

- [1.60.005 Emergency Situation and Declaration.](#)
- [1.60.010 Effect of Emergency Declaration.](#)
- [1.60.015 Emergency Declaration.](#)
- [1.60.020 Emergency Management Policies and Procedures.](#)

1.60.005 Emergency Situation and Declaration.

An emergency situation exists when the health, safety or welfare of the City or a portion of the City is threatened by a potential or actual natural disaster, accident, act of war or terrorism, disease, or other event or ongoing occurrence that results in an immediate and substantial threat to life, health or property. The City may declare an emergency following the procedures of BC [1.60.015](#) when an emergency situation exists. [Ord. NS-2159, 2011]

1.60.010 Effect of Emergency Declaration.

A. On declaration of an emergency, the City shall have all powers not prohibited by Federal and State constitutions and laws, including any powers authorized in emergency situations. The powers of the City shall be exercised by the incident commander. The incident commander shall be the City Manager or other person designated in the emergency declaration. Notwithstanding the delegation of powers to the incident commander under this section, the City Council will remain the governing body of the City and the incident commander shall remain subject to Council direction and control.

B. Notwithstanding any other provision of law, the City may take the following actions during an emergency:

1. Procure goods and services without compliance with normal procurement procedures.
2. Use any available City funds for emergency purposes.
3. Close or limit the use of streets and other public places.
4. Order and assist the evacuation of people to protect safety or health.
5. Turn off water, gas, fuel, or electricity.
6. Control, restrict, and/or regulate the sale of goods and services, including the imposition of price controls.
7. Prohibit the sale or possession of any weapons or explosives in public places.
8. Any other action for the protection of safety, health, life or property.

C. In the event of an emergency, the City will continue to provide government services to the extent reasonably practical under the circumstances. City employees are expected to report to work and may be assigned to duties other than their regular job responsibilities. [Ord. NS-2159, 2011]

1.60.015 Emergency Declaration.

A declaration of a state of emergency within the City of Bend may be issued by the City Manager. Prior to declaring an emergency, the City Manager will make reasonable efforts to contact City Councilors to inform them of the need to declare an emergency. ~~The City Manager will submit the declaration of emergency to the Deschutes County Emergency Manager for County Commissioner approval.~~ At its next City Council meeting, the Council shall consider ratification of the declaration of emergency. [Ord. NS-2159, 2011]

1.60.020 Emergency Management Policies and Procedures.

The City Council shall adopt an Emergency Operations Plan and the City Manager shall periodically review the Plan, in an effort to establish procedures to prepare for and carry out activities to prevent, minimize, respond to or recover from an emergency. [Ord. NS-2159, 2011]

The Bend Code is current through Ordinance NS-2458, passed December 7, 2022.

Disclaimer: The city recorder's office has the official version of the Bend Code. Users should contact the city recorder's office for ordinances passed subsequent to the ordinance cited above.

[City Website: www.bendoregon.gov](http://www.bendoregon.gov)

[Code Publishing Company](#)

WELLS B. ASHBY, *Presiding Judge*
BETH M. BAGLEY, *Judge*
RAYMOND D. CRUTCHLEY, *Judge*
ALISON M. EMERSON, *Judge*
BETHANY P. FLINT, *Judge*
ALYCIA M. HERRIOTT, *Judge*
MICHELLE A. MCIVER, *Judge*
WALTER R. MILLER, JR., *Judge*
ALYCIA N. SYKORA, *Judge*



CIRCUIT COURT OF OREGON
11TH JUDICIAL DISTRICT
Deschutes County Courthouse
1100 NW Bond Street
Bend, Oregon 97703
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July 22, 2022

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Re: *Lau Life Coffee, LLC v The Municipal Court for the City of Bend*,
Deschutes County Circuit Court Case No. 21CV30165
Writ of Review from *City of Bend v Kevista Coffee*,
Bend Municipal Case Nos. M269470 and M269474

Mr. Mannix and Mr. Selkirk:

This case arises on a writ of review. On July 14, 2022, this case was assigned to the undersigned judge. The parties ask the court to decide the case on the record without oral argument. (Stipulation, 9/08/21, ¶¶7, 10). The sole issue on review is whether the Bend Municipal Court improperly construed Bend Municipal Code (BMC) 1.60.015. (Writ Petition, ¶¶9, 10).

Background

Petitioner (“Kevista Coffee”) is a company conducting business in the City of Bend, which is in Deschutes County, Oregon. The City of Bend issued two complaints and citations to Kevista Coffee for failing to abide by the City’s COVID mask rule in December 2020 and January 2021. The City’s mask rule sprung from the City’s Emergency Declaration at issue.¹

On March 16, 2020, the City of Bend Manager signed an Emergency Declaration and the City of

¹ Writ Petition, Exhibit 3, page 5-7, ¶¶27-31 and A-F.

Bend submitted its Emergency Declaration to the Deschutes County Emergency Manager.² On March 18, 2020, the City of Bend ratified the Emergency Declaration. In the Emergency Declaration, the City Manager stated: “The Declaration will also be submitted to the Emergency Manager for County Commissioner approval.”³

On the City’s submission of its Emergency Declaration, the County Commissioners used the word *acknowledged* not *approved*.⁴ “Approval, not acknowledgement” by the County Commission is required for the City of Bend’s Emergency Declaration to be valid, per Kevista Coffee.⁵ The County Commission meeting minutes provide this statement, amid other COVID-related emergency agenda items:⁶

City of Bend State of Emergency Declaration

Tom Anderson presented the City of Bend Local State of Emergency Declaration as a result of COVID-19 Pandemic. He mentions that the city has the county approve their declarations as part of their city code.

HENDERSON: Moved to Acknowledge the City of Bend Emergency Declaration as a result of COVID-19 Pandemic dated March 16, 2020.

DEBONE: Second

VOTE: HENDERSON: Yes
DEBONE: Yes
ADAIR: Chair votes yes. Motion Carried

Kevista Coffee was cited for violating the city’s mask rule on December 4, 8, 9, and 12, 2020, and February 9, 2021.⁷ In the Bend Municipal Court, Kevista Coffee filed two motions to dismiss the complaints and citations. The Bend Municipal Court denied both motions in March 2021.⁸ On June 03, 2021, after a court trial, the Bend Municipal Court entered a verdict against Kevista Coffee for violating the city’s mask rule on each charged date with a \$750 for each of the four charges.

² PI’s Motion to Strike and Response to Kevista Coffee’s Motion to Dismiss, p. 7, lines 9-12; Exhibit A to that motion; filed 9/01/21).

³ PI’s Motion to Strike and Response to Kevista Coffee’s Motion to Dismiss, p. 7, lines 9-12; Exhibit A to that motion, paragraph J, filed 9/01/21.

⁴ Writ Petition, ¶7, p. 3, lines 17-18) (emphasis by Kevista Coffee); PI’s Motion to Strike and Response to Kevista Coffee’s Motion to Dismiss, Exhibit A, item 13, page 23.

⁵ Writ Petition, ¶7, p. 3, line 19.

⁶ City of Bend’s Motion to Quash, Exhibit A, page 23.

⁷ Writ Petition, Exhibits 2 and 5.

⁸ Writ Petition, Exhibit 4.

On July 27, 2021, in the Deschutes County Circuit Court, Kevista Coffee filed a petition for writ of review with an undertaking under ORS 34.020 for both of the Bend Municipal Court cases, which are consolidated. On August 02, 2021, the circuit court issued the writ of review. On July 14, 2022, the undersigned judge received this case.

Writ of Review

The court has jurisdiction over the case.⁹ *Spivak v Marriott*, 213 Or App 1, 8-10 (2007) (timely filing). The writ-of-review statutes in ORS 34.010 to 34.102 “grant circuit courts limited authority to review certain judicial and quasi-judicial decisions, including those of local governing bodies” such as city councils. *Subaru v City of Wilsonville*, 315 Or App 572, 581 (2021). Kevista Coffee contends only that the Bend Municipal Court “improperly construed the applicable law” under ORS 34.040(1)(d). (Writ Petition, ¶¶9, 10).

On writ of review, this court “reviews the record and does not take new evidence.” *Id.* at 581 (quoting *Alt v City of Salem*, 306 Or 80, 84 (1988)). This “court’s task [i]s to review the particular claimed errors underpinning” the Bend Municipal Court’s decision as alleged in the “petition for writ of review.” *Id.* at 581-82. “The criteria set out in ORS 34.040(1) also constitute the legal standards that the circuit court is to apply in determining whether to affirm, modify, or reverse the action of the tribunal or officer whose action is being reviewed. ORS 34.100.” *Crainic v Multnomah County Adult Care Home Program*, 190 Or App 134, 141 (2003).

On review, Kevista Coffee does claim it honored the City’s mask rule. It contends that the City had no valid mask rule. It argues that the mask rule, springing from the City’s Emergency Declaration, is invalid without proof that the County Commission approved the City’s Emergency Declaration.¹⁰

The issue on review is whether the Bend Municipal Court improperly construed the applicable law. The applicable law is Bend Municipal Code 1.60.015, which provides:

“A declaration of a state of emergency within the City of Bend may be issued by the City Manager. Prior to declaring an emergency, the City Manager will make reasonable efforts to contact City Councilors to inform them of the need to declare an emergency. The City Manager will submit the declaration of emergency to the Deschutes County Emergency Manager for County Commissioner approval. At its next City Council meeting, the Council shall consider ratification of the declaration of emergency.”

⁹ On September 01, 2021, the City of Bend moved to quash the writ for non-service under ORS 34.080 or alternatively to affirm the Bend Municipal Court’s denials of Kevista Coffee’s motions to dismiss the two citations at issue. On September 09, 2021, Kevista Coffee’s counsel filed a “Stipulation” stating, *inter alia*, that the City of Bend, as intervenor-respondent, withdrew its motion to dismiss and waived objections to service, after Kevista Coffee served the City of Bend.

¹⁰ The City of Bend’s mask rule issued on July 27, 2020 and was renewed thereafter. The November 16, 2020 mask rule provided civil penalties of up to \$750 for businesses violating the mask orders by not providing masks for employees or mask signage. Writ Petition, Exhibit 3.

Kevista Coffee's theory is that with the word "approval," the enactors of BMC 1.60.015 imposed power, duty, and authority on the County Commission. Besides the word "approval" in the BMC, Kevista Coffee presents no support that the enactors of the BMC or the City intended to transfer such power, duty, and authority to the County -- or that the County approved or accepted such a transfer.

Interpreting the Bend Municipal Code

Interpreting a municipal code is an issue of law. *City of Eugene v Comcast of Oregon II, Inc.*, 359 Or 528, 540 (2016); *Subaru v City of Wilsonville*, 315 Or App 572, 583 (2021). Courts begin with the text and context of a law or code and may consider the law or code's history to understand intent. *State v Gaines*, 346 Or 160, 171-72 (2009). "We are not to determine the meaning of rules and statutes merely by analyzing their meanings in the abstract" but instead "we construe each part together with the other parts in an attempt to produce a harmonious whole." *Subaru*, 315 Or App at 584 (quoting *Assoc. Unit Owners of Timbercrest Condo v Warren*, 352 Or 583, 595 (2012)).

If the drafter's or enactor's intent is ambiguous from text, context, and history, courts may apply canons of statutory construction to resolve uncertainty. *Gaines*, 346 Or at 172; *Comcast*, 359 Or at 540-41 (same rules for municipal ordinances); *Frost v State of Oregon*, 320 Or App 753, *2 (2022) (methodology). The "threshold of ambiguity is a low one. It does not require that competing constructions be equally tenable. It requires only that a competing construction not be 'wholly implausible.'" *State v Mayes*, 220 Or App 385, 389 (2008) (quotation omitted).

Discussion

As BMC 1.60.015 requires, the City Manager declared a state of emergency after (a) *making* reasonable efforts to contact and inform City Councilors and (b) *submitting* the declaration to the declaration to the County Emergency Manager for County Commissioner approval. The City Council ratified the declaration of emergency on March 18, 2020.¹¹

Nothing in the text of BMC 1.60.015 expressly requires the County Commission's approval to make a City emergency declaration valid. The City Manager was required to *submit* the Emergency Declaration - and did.

As for context, BMC 1.05.005 provides interpretive guidance:

"This code shall be interpreted as giving the City, City officials and City staff the broadest possible scope of authority * * *."

BMC 1.60.005 explicitly provides emergency-declaration powers to the City without mentioning the County Commission:

¹¹ Declaration of Michael N. Selkirk in Support of City of Bend's Motion to Quash, Exhibit A, filed 9/1/21.

“The *City* may declare an emergency following the procedures of BMC 1.60.015 when an emergency situation exists.”

Context of BMC 1.60.015 references only the powers of the City relative to the incident commander – without mentioning the County Commission. The City’s powers are curtailed by the United States Constitution, the Oregon Constitution, federal law, and state laws – but not the County:

“On declaration of an emergency, *the City shall have all powers* not prohibited by Federal and State constitutions and laws, including *any powers* authorized in emergency situations. The *powers of the City* shall be exercised by the incident commander. The incident commander shall be the City Manager or other person designated in the emergency declaration. Notwithstanding the delegation of powers to the incident commander under this section, *the City Council will remain the governing body of the City* and the incident commander shall remain subject to *Council direction and control.*” BMC 1.60.010(A) (emphasis by court).

That context demonstrates power retention in the City.

This court has been unable to locate any history of BMC 1.60.015 in the parties’ arguments and exhibits.

The court does not find ambiguity in the text or context of the phrase “for County Commission approval.” Nothing in the text or context demonstrates that the City’s Emergency Declaration is intended to be retroactively void *ab initio* or to collapse on County Commission *disapproval*, inaction, or acknowledgement. That can end the analysis. However, for completeness, and given the absence of history in the record, the court proceeds to interpretive canons.

One canon is to construe a law’s wording “in a manner that is consistent with its purposes.” *State v Mayes*, 220 Or App 385, 395-96 (2008) (citing *Welliver Welding Works v Farmen*, 133 Or App 203, 210 (1995)). Stated a little differently, the “canon instructs us to attempt to ascertain the result the legislature would have most likely wanted had it thought of the specific issue.” *State v B.Y.*, 319 Or App 208, 216 (2022) (citing *State v Rodriguez*, 217 Or App 24, 34 (2007) (“when all else fails, we attempt to do what the legislature most likely would have done had it thought of the specific issue.”); *Westwood Homeowners Ass’n, Inc. v Lane County*, 318 Or 146, 158 (1993) (“where no legislative history exists, the court will attempt to determine how the legislature would have intended the statute to be applied had it considered the issue”); *Angle v Board of Dentistry*, 294 Or App 470, 479 (2018) (When “a specific issue is not addressed clearly in a statute or its legislative history, we use the broader purpose of the statute as a guide in our attempt to discern what the legislature would have intended had it considered it.”)).

The express purpose of the BMC is to provide the widest control, power, and authority to the City, curtailed only by state and federal constitutions and laws – not by the County. And ORS 401.309 specifically allows the city or county to declare that a state of emergency exists within

the city or county.¹² The City expressly relied on that statute as authority to take action in this emergency. (Writ Petition, Exhibit 3, page 6, ¶28).

That is instructive on whether the City or the enactors of BMC 1.60.015 intended to cede duty and power to declare an emergency to the County.

Kevista Coffee argues: “The other acknowledgements made by the Commission during the year 2020 included acknowledgements of information that did not require board approval.” (Writ Petition, page 6, lines 9-10). Kevista Coffee’s point is consistent with the idea that the County Commission did not need to “approve” the City of Bend’s Emergency Declaration. The County Commission acknowledged information that did not require its “approval” like the other “acknowledgements” Kevista Coffee offers.

Kevista Coffee’s point about the County Commission “acknowledging” but not “approving” also is consistent with the legal tenet that a municipality “cannot, on the basis of its home-rule authority, impose a duty on or impair a power of another governmental entity.” *Rogue Valley Sewer Services v City of Phoenix*, 357 Or 437, 449 (2015) (“local governments cannot interfere with another government’s exercise of its own governmental power and functions”) (citing, *inter alia*, *Kiernan v Portland*, 57 Or 454 (1910), *cert dismissed*, 223 US 151 (1912); *City of Eugene v Roberts*, 305 Or 641 (1988); Orval Etter, *Municipal Home Rule On and Off: “Unconstitutional Law in Oregon” Now and Then* 103 (Sourcebook ed. 1991)).¹³

A question is whether the City could transfer the power and duty to another municipality without evidence of the other municipality’s acceptance of a transfer. That raises another canon: “when

¹² ORS 401.309 provides in part:

“(1) The governing body of a city or county in this state may declare, by ordinance or resolution, that a state of emergency exists within the city or county. The ordinance or resolution must limit the duration of the state of emergency to the period of time during which the conditions giving rise to the declaration exist or are likely to remain in existence.

(2) A city or county in this state may, by ordinance or resolution, establish procedures to prepare for and carry out any activity to prevent, minimize, respond to or recover from an emergency. The ordinance or resolution shall describe the conditions required for the declaration of a state of emergency within the jurisdiction.

(3) An ordinance or resolution adopted under subsection (2) of this section may designate the emergency management agency, if any, or any other agency or official of the city or county as the agency or official charged with carrying out emergency duties or functions under the ordinance.

¹³ Article XI, section 2, of the Oregon Constitution provides:

“Corporations may be formed under general laws, but shall not be created by the Legislative Assembly by special laws. The Legislative Assembly shall not enact, amend or repeal any charter or act of incorporation for any municipality, city or town. The legal voters of every city and town are hereby granted power to enact and amend their municipal charter, subject to the Constitution and criminal laws of the State of Oregon, and the exclusive power to license, regulate, control, or to suppress or prohibit, the sale of intoxicating liquors therein is vested in such municipality; but such municipality shall within its limits be subject to the provisions of the local option law of the State of Oregon.”

one plausible construction of a statute is constitutional and another plausible construction of a statute is unconstitutional, courts will assume that the legislature intended the constitutional meaning. * * * It is not necessary that the constitutional argument would necessarily prevail; rather, it may be invoked where ‘there is even a tenable argument of unconstitutionality.’” *Rosenblum v Living Essentials, LLC*, 313 Or App 176, 194, *review allowed*, 368 Or 787 (2021) (quoting *State v Kitzman*, 323 Or 589, 602 (1996) and *Westwood Homeowners Ass’n, Inc. v Lane County*, 318 Or 146, 160 (1993) (“We see no reason to assume that the legislature would wish to raise such questions.”)).

This court sees no reason to assume that the City or the enactors of the BMC 1.60.015 would wish to raise the significant governmental questions Kevista Coffee’s theory requires. The seismic shifts in governmental power, duty, and structure are greater than those words allow.

In sum, the words “for County Commission approval” in BMC 1.60.015 do not evidence intent to have the City foist its constitutional, statutory, and municipal duty to declare an emergency onto the County. Neither do context nor interpretive canons.¹⁴

The City of Bend does not offer a reason why BMC 1.60.015 contains the phrase “for County Commission approval” or what that means. Words are not assumed to be surplus. *State v Mayes*, 220 Or App 385, 389 (2009); ORS 174.010. The sentence at issue could have ended without those words. It has some meaning. As Justice Jack Landau has written: “It’s important, though, not to get carried away with the idea that every single word of a statute has to have meaning. It’s not a hard-and-fast rule. Redundancy is simply too common a feature of ordinary communication, and it is no less common in the law.” Jack L. Landau, *Oregon Statutory Construction*, 97 OR L REV 583, 666 (2019).

Whatever “for County Commission approval” means, it doesn’t mean that the County Commission’s “acknowledgement” of the City’s COVID Emergency Order invalidated it. Nowhere does the BMC provide that the validity of the City Emergency Declaration under BMC 1.60.015 must depend on whether the County Commission made a record at *its* meeting using the word “approved,” or any other word, or no word. The phrase “for County Commission approval” could be intended to provide the County Commission the ability to approve or disapprove for its own purposes. But the County Commission does not render the City’s Emergency Declaration *invalid*.

Conclusion

Four times, Kevista Coffee did not honor the mask rule or mask posting rule. There is no error in the Bend Municipal Court’s denial of Kevista Coffee’s motions to dismiss, or its verdict, or the judgment, because the Bend Municipal Court did not improperly construe BMC 1.60.015.

¹⁴ The City does not ask for interpretive deference. This court affords the City no interpretive deference on BMC 1.60.015. Cf. *Subaru v City of Wilsonville*, 315 Or App 572, 585 n 2 (2021).

The decisions of the Bend Municipal Court are affirmed. The City of Bend is to prepare an order on these two consolidated cases subject to the writ of review.

Sincerely,

A handwritten signature in black ink, appearing to read "Alycia N. Sykora".

Alycia N. Sykora
Circuit Court Judge