



STATE OF OREGON
LEGISLATIVE COUNSEL COMMITTEE

March 21, 2012

Senator Bruce Starr
900 Court Street NE S411
Salem OR 97301

Re: Nominating Election for the Commissioner of the Bureau of Labor and Industries

Dear Senator Starr:

You have asked whether the Secretary of State may decline to hold a nominating election for the office of the Commissioner of the Bureau of Labor and Industries (Commissioner) and instead place the names of the candidates for the office of Commissioner on the November 2012 general election ballot. We believe that current law applicable to the nomination or election of nonpartisan candidates requires the office of Commissioner to be placed on the ballot for the nominating election to be held on the date of the primary election in May 2012.

ORS 249.088 sets forth the general process for nominating or electing nonpartisan candidates. The statute provides that at the nominating election held on the date of the primary election, the two candidates who receive the highest number of votes are nominated unless one candidate receives a majority of votes cast, in which case that candidate is elected. ORS 249.091 provides exceptions to this general rule; in certain circumstances, if no more than two candidates file for candidacy, those two candidates are nominated and their names will be placed on the general election ballot. However, this provision only applies to the office of sheriff, county treasurer or county clerk or to a vacancy in a nonpartisan office. ORS 249.091 does not apply to the nominating election for the office of the Commissioner because the election is not to fill a vacancy.

It is our understanding that the Secretary of State's decision to omit the office of Commissioner from the primary election ballot is based on the secretary's interpretation of section 22a, chapter 511, Oregon Laws 2009, which reads:

Notwithstanding section 22 of this 2009 Act [ORS 249.215] and ORS 651.030, the term of office of the Commissioner of the Bureau of Labor and Industries elected at the general election held on the first Tuesday after the first Monday in November 2012 shall be two years.

The Oregon Supreme Court has adopted a specific method of statutory construction that courts use in this state to interpret statutory provisions and discern the legislative intent of the statute in question. See generally *Portland General Electric Co. v. Bureau of Labor and Industries*, 317 Or. 606 (1993). Under that methodology, the first level of analysis is consideration of the text of the statute in question and the context of that statute. *PGE* at 610-

611. The text of a statute is the best evidence of the legislature's intent. *Id.* at 610. The context of a statute includes statutes on the same subject that were enacted at the same time as or before the statute being construed and that may be said to be "in pari materia," or appropriately construed together. *Griffin by & Through Stanley v. Tri-County Metro. Transit District*, 318 Or. 500, 524 (1994). When the issue to be determined through statutory construction is whether two statutes conflict, context includes the operation of the statutes, their relation to each other and the extent to which the purported conflict is irreconcilable or of a nature that permits both statutes to coexist. *State v. Langdon*, 330 Or. 72, 80-81 (2000).

Applying this first level of analysis, the text and context of section 22a, chapter 511, Oregon Laws 2009, provides that the term of office for the Commissioner elected at the general election is two years. The Secretary of State has apparently interpreted this section to require a candidate for Commissioner to be elected at the general election and to prohibit the election of a candidate at the nominating election held on the date of the primary election. However, this interpretation is flawed in its failure to acknowledge that section 22a neither explicitly nor implicitly overrides the requirements for nominating elections provided in ORS 249.088.

Nothing in section 22a provides that ORS 249.088 does not apply to the nomination or election of the office of Commissioner in 2012. Section 22a merely states that the term of office for the Commissioner elected at the general election is two years. It does not state that the Commissioner must be elected at the general election. The text of section 22a expressly provides that its terms supersede those of two other statutes, ORS 249.215 and 651.030. Significantly however, section 22a does not expressly supersede operation of ORS 249.088. Consideration of ORS 249.088 is appropriate context for the meaning of section 22a as both statutes address the same subject: the election of an individual to the office of Commissioner. All statutes are presumed to be enacted by the legislature with full knowledge of the existing condition of the law and with reference to it. *Coates v. Marion County*, 96 Or. 334, 339 (1920).

Moreover, courts will attempt to construe the meaning of statutes in order to give full effect to all provisions.¹ Cases that have held that the legislature impliedly amended, repealed or otherwise altered a prior statute by enacting a subsequent statute are distinguishable because the conflicts involved in those cases make the terms of the statutes at issue incapable of being given full effect. For example, in *Langdon* the Oregon Supreme Court considered whether a provision of Ballot Measure 11² prohibiting the reduction of certain criminal sentences below mandatory minimum incarceration times impliedly amended an earlier enacted provision in the criminal sentencing guidelines that capped the cumulative amount of consecutive incarceration time for sentences arising out of a single case. *Langdon* at 81-83. The court concluded that the two statutes could not both be given operative effect and therefore would conflict irreconcilably. Because Ballot Measure 11 was the statute enacted later in time, the court held that Ballot Measure 11 impliedly amended the earlier cap on consecutive sentences. *Id.* at 83. When one compares ORS 249.088 and section 22a, however, the irreconcilable conflict found in *Langdon* and similar cases is lacking. Full operative effect may be given to both ORS 249.088 and section 22a if section 22a is interpreted only to prescribe a specific term of office for the Commissioner elected at the general election and not to create a new election process that ignores the provisions of ORS 249.088.

The second level of analysis is consideration of the legislative history of the statute. *PGE*, at 610. A court may consider proffered legislative history of a statute, but need only give

¹ ORS 174.010.

² Ch. 2, Or. Laws 1995.

that legislative history the evaluative weight that the court considers appropriate to shed light on legislative intent. *State v. Gaines*, 346 Or. 160, 171-172 (2009). Finally, if the legislative intent remains unclear after examining the text, context and legislative history of a statute, general maxims of statutory construction may be used to resolve remaining uncertainty. *Id.*

We have reviewed the legislative history of section 22a. Section 22a was offered as the -2 amendment to House Bill 2095 (2009). Both the House and Senate Committees on Rules considered the amendment. When offered in both committees, the stated purpose of section 22a was to change the term of office for the Commissioner elected in 2012 from four years to two years. Section 22a was proffered "with the intent of restoring historical alternating cycle of statewide offices up for election at each general election."³ In the Senate Committee on Rules, the then-director of the Elections Division of the Office of the Secretary, John Lindback testified that the amendment was needed because the election schedule for the office of Commissioner had been altered when a vacancy in the office was filled by appointment and then by election at the following general election for a full four-year term. It was this election that modified the historical alternating cycle for the election of statewide offices. Mr Lindback testified that section 22a was designed to restore the historic cycle by limiting the term of the Commissioner elected in 2012 to two years.⁴ Nothing in the legislative history indicates that section 22a was intended to change the nominating election for the office of Commissioner.

Finally, the third level of analysis, maxims of statutory construction, is to be employed only if, after consideration of the text, context and legislative history of a statute, its meaning remains ambiguous. *Gaine*, at 171-72. Because we conclude that the text and context of section 22a does not alter the requirement in ORS 249.088 that a nominating election be held for the office of Commissioner, we need not consider maxims of statutory construction.

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Very truly yours,

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³ Jerry Watson, Committee Staff, House Rules Committee meeting April 3, 2009.

⁴ John Lindback, Senate Rules Committee meeting May 15, 2009.

