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STATE OF OREGON
LEGISLATIVE COUNSEL COMMITTEE

May 25, 2023

Representative Vikki Breese-Iverson
House Republican Leader
900 Court Street NE H395
Salem OR 97301

Re: Continuing resolution

Dear Representative Breese-Iverson:

You asked several questions about the effect of the continuing resolution (chapter 88, Oregon Laws 2023 (Enrolled House Bill 5046)) if the Legislative Assembly were to adjourn sine die without adopting a budget for the upcoming biennium. The responses below were collaboratively prepared by Legislative Counsel, the Legislative Fiscal Officer and the Legislative Revenue Officer.

Question 1: What are the key differences between a continuing resolution and a legislatively adopted budget?

The continuing resolution is a temporary measure that is traditionally intended to provide funding for state agencies whose budgets are not signed into law before the start of a new biennium, that is, July 1 of an odd-numbered year. By its terms, the continuing resolution authorizes an agency that is without a budget to make expenditures at the level authorized for the last quarter of the previous biennium, except for the Department of Human Services and the Oregon Health Authority, which look to different fiscal quarters for their authorized expenditure levels. The continuing resolution appropriates necessary moneys for such expenditures and directs the Oregon Department of Administrative Services (DAS) to reconcile an agency's expenditures under the continuing resolution against the agency budget when it is eventually signed into law, or against DAS's own budget if no agency budget is ever enacted.

Because the continuing resolution is based on expenditures in the previous biennium, it does not authorize funding for any increased expenses, whether from new programs or increased costs for existing programs, including increases due to inflation and caseload projections. Thus, as discussed in further detail below, agencies subject to the continuing resolution may not be able to carry out all of the duties imposed on them by law.

The continuing resolution also does not effect a balanced budget. A legislatively adopted budget balances biennial expenditures with expected biennial revenues, as is constitutionally required under Article IX, sections 2 and 6, of the Oregon Constitution. The continuing resolution is based only on previous expenditures and makes no attempt to balance expenditures with revenues.

Finally, the continuing resolution is temporary. By its terms, the entirety of the continuing resolution is repealed on September 15, 2023. After that date, it no longer provides any expenditure authority whatsoever.

Question 2: Will components of state government go unfunded under the continuing resolution?

As described under Question 1 above, the continuing resolution does not authorize funding for increased expenses. Thus, new programs, or existing programs with increased costs, will not be fully funded. The result would be that affected agencies would need to cut or scale back on some or all of their program duties.

The continuing resolution does not provide guidance to agencies on how to prioritize programs if there is a funding shortfall. Each agency will make its own decisions on which programs to fund, and to what degree.

Similarly, different agencies are likely to take different approaches to scaling back specific programs that are underfunded. An agency might, for example, reduce service levels for an underfunded program to stretch the available funding until the expiration of the continuing resolution. Alternatively, an agency might choose to run an underfunded program at the full service level, but would run out of funding—and stop the program entirely—before the end of the fiscal quarter, unless a legislatively adopted budget were to be enacted.

Question 3: What happens when the continuing resolution expires, assuming no budget is enacted?

The continuing resolution is repealed on September 15, 2023. After that date, if no legislatively adopted budget is signed into law, most state agencies will have their funding eliminated or curtailed.

The responsibility for the practical aspects of planning and carrying out a statewide curtailment or shutdown would fall on the executive branch. This would be a complex task, performed on an agency-by-agency basis, requiring analysis of the statutes underlying existing programs and accounts and forecasting revenues in a highly uncertain and unfamiliar environment. Extensive planning would be required prior to September 15, 2023, to accomplish necessary reductions to or elimination of state government services, furloughs of state employees, determination of other revenues that would continue to be available to certain agencies under existing statute and evaluation of implications for federal funding allocations.

Agencies funded from the General Fund

Many agencies are solely or primarily funded from biennial General Fund appropriations. If no General Fund appropriations are made for such an agency, the agency will be defunded, and will not be required (or able) to perform duties assigned to it by law. *See* 49 Op. Att'y Gen. 284, 357, 2001 WL 166482 at 60 (2001). The services provided by that agency will be unavailable for the remainder of the biennium.

Agencies funded from continuously appropriated funds

Some agencies are authorized to make expenditures from certain "other funds" accounts that are separate from the General Fund and continuously appropriated to the agencies by statute. Biennial budget bills contain expenditure limitations for the vast majority of these accounts. Without a legislatively adopted budget, most agencies will have unfettered spending authority from their continuously appropriated "other funds" accounts. In general, services that rely on continuously appropriated moneys will remain available.

Note, however, that expenditure of some continuously appropriated "other funds" still requires a legislatively adopted budget. For example, the State Highway Fund is continuously appropriated to the Department of Transportation, but under ORS 366.518, expenditures from the fund are limited to the "budget approved according to law." Thus, without a legislatively adopted budget, no expenditures from the State Highway Fund can be made. A similar limitation applies to administrative expenditures by the Department of Revenue. *See* ORS 305.063 (2).

New agencies

Two new state agencies will come into existence on July 1, 2023: the Department of the State Fire Marshal, which is currently an office within the Department of State Police, and the Department of Early Learning and Care, which is currently a division of the Department of Education. *See* section 155a, chapter 539, Oregon Laws 2021, and section 64, chapter 631, Oregon Laws 2021, as amended by section 1, chapter 27, Oregon Laws 2022.

The continuing resolution generally authorizes agencies to make expenditures at the same level authorized for the last quarter of the previous biennium. Since the new agencies did not exist in the previous biennium, they had no authorized expenditure level, and therefore they do not have expenditure authority under the continuing resolution.

However, we think it is likely that, under the continuing resolution, the parent agencies—the Department of State Police and the Department of Education—can make expenditures for the purposes of the new agencies. For example, whatever amount was authorized for the Department of State Police to spend on the Office of the State Fire Marshal in the last quarter of the 2021-2023 biennium may, under the continuing resolution, be expended for purposes of the new Department of the State Fire Marshal.

We think this is permissible despite the fact that the duties of the new agencies are no longer statutorily imposed on the parent agencies. The continuing resolution does not limit the purposes for which a state agency may make expenditures; it only limits the level of expenditures. And permitting the parent agencies to pay for expenses of the new agencies is consistent with the intent of the legislation creating the new agencies, which considers the new agencies to be extensions or continuations of the parent agencies when circumstances so require. *See* sections 92 to 95, chapter 539, Oregon Laws 2021, and sections 67to 70, chapter 631, Oregon Laws 2021.

Judicial funding decisions

It is possible that courts may step in to provide funding for certain governmental functions. The State of Illinois, which failed to enact a full budget for fiscal years 2016, 2017 and part of 2018, provides a recent illustration. Although the Illinois Constitution, like the Oregon Constitution, prohibits expenditures without appropriations, state and federal courts ordered the state to continue to make certain payments, including funding for certain social services and for Medicaid, during the impasse. *See* Karen Pierog, "Courts Call the Shots for Budget-less Illinois," *Reuters*, September 18, 2015.[1] The judicial funding decisions in Illinois were made in an uncoordinated

[1] Available at https://www.reuters.com/article/us-usa-illinois-budget-idUSKCN0RI2EQ20150918.

manner by numerous separate courts. We cannot predict what state and federal courts in Oregon would do in the event of a budget impasse.

Question 4: What are some examples of effects on specific government functions after the continuing resolution expires, assuming no budget is enacted?

You asked specifically about K-12 education and proposed Department of Transportation projects; we will address those first.

K-12 education

K-12 education is funded by a combination of state and local revenues. Approximately two-thirds of statewide K-12 funding is from state General Fund and lottery revenues, which would not be available after the expiration of the continuing resolution. The result would be that K-12 schools would, on average, receive two-thirds less revenue than is currently contemplated for the 2023-2025 biennium.

We note that this reduction is an average; different school districts will be differently impacted, based on the share of school funding that comes from local property tax revenue. In general, a school district with relatively high property tax revenue will be less impacted by an absence of state revenue than a district with relatively low property tax revenue.

We also note that local property tax revenue is not available to school districts until after November 15. Before then, districts are reliant on State School Fund resources for cash flow purposes. An absence of state funding may therefore cause cash flow issues in addition to an overall budget reduction. Districts carry reserve balances that can be used for cash flow purposes, but the amount of such balances varies widely between districts.

Department of Transportation projects

Projects by the Department of Transportation that are primarily funded through previously issued bonds would be able to continue, since the bond revenue is held in continuously appropriated "other funds" that would remain available to the department. New bonds cannot be issued without legislative authorization, so projects reliant on issuance of new bonds could not be carried out.

Projects primarily funded by the State Highway Fund could not continue. Although the State Highway Fund is a continuously appropriated fund, separate statutory limitations prevent expenditure from the fund in the absence of a legislatively adopted budget, as described under Question 3 above.

In general

Determining the ability for each state agency to operate in a limited capacity after expiration of the continuing resolution would require a comprehensive analysis of statutory accounts and corresponding revenues. In broad strokes, the ability of some major agencies to continue operations is outlined below.

Agencies that are primarily supported with General Fund appropriations would not be able to continue operating, as described under Question 3 above. Such agencies include the Oregon Health Authority, the Department of Human Services and the Department of Corrections. These agencies are reliant on General Fund appropriations for operations and to meet federal match requirements.

Agencies that are supported with assessments or charges to other agencies, such as DAS, would likely have curtailed operations, despite being funded by continuously appropriated "other funds." This is because revenues to such agencies would be limited, given the absence of budgeted authority for other agencies to pay the assessments and charges.

The Department of Transportation is primarily supported with motor fuel taxes, driver and vehicle licenses and fees, and weight-mile taxes deposited into the State Highway Fund. Due to a statutory limitation, these revenues would not be available for expenditure in the absence of a legislatively adopted budget, as described under Question 3 above.

The Department of Revenue is subject to a similar limitation for its administrative costs, as described under Question 3 above. Although the department is partially funded from continuously appropriated "other funds," moneys may not be credited to the department's administration account—and therefore no expenditures can be made for the department's administration expenses—in the absence of a legislatively adopted budget.

Question 5: Is a continuing resolution sufficient to ensure that programs such as Medicaid continue to receive federal funding matches?

Yes. States support Medicaid expenditures with federal revenue matched by state funding. Oregon matches federal Medicaid funding with a mix of General Fund and "other funds," which include hospital assessments, insurer assessments and tobacco taxes, among other revenue sources budgeted in the Oregon Health Authority for the payment of Medicaid services. States "draw down" the federal match component when paying for services, meaning states expend the state and federal match components at the same time.

Since the continuing resolution allows the Oregon Health Authority to expend General Fund and "other funds" for Medicaid services, the federal Medicaid match will continue to be available. However, increases in Medicaid caseload above the level of spending authorized in the continuing resolution could result in insufficient funding to support the federal match through September 15, 2023.

Question 6: May the Governor extend a continuing resolution?

No, the Governor cannot extend the continuing resolution. The continuing resolution is a duly enacted law with a repeal provision. The Governor has no authority to unilaterally modify or remove the repeal provision.

Question 7: Can an Emergency Board be appointed if the Senate lacks quorum through adjournment?

The Emergency Board could exist but could not conduct business.

The Emergency Board is composed of the President of the Senate, the Speaker of the House of Representatives, the chairs of the Joint Committee on Ways and Means, eight other members of the Senate and eight other members of the House of Representatives. ORS 291.330.

Under ORS 291.330, appointment of new Senate members requires confirmation by the Senate. Without quorum, the Senate cannot conduct any business, including confirmation of Emergency Board members. Article IV, section 12, Oregon Constitution. If the Senate lacks quorum through adjournment, the only Senate members of the Emergency Board would be the President of the Senate and the Senate chair of the Joint Committee on Ways and Means.

Quorum for the Emergency Board requires both a majority of members from the Senate and a majority of members from the House. ORS 291.332. Thus, for an Emergency Board that lacked a majority of the required Senate members, quorum could not be met, and the board could not conduct any business.

Question 8: Would failure to enact a budget have a negative impact on Oregon's bond rating?

Bond ratings are issued by private rating agencies, and we cannot predict with certainty how those agencies would react to a budget impasse. However, as mentioned in Question 3 above, the State of Illinois provides a recent example. During its budget impasse, rating agencies downgraded Illinois' bond ratings, specifically citing the impasse as a reason for the downgrades. *See* Brandis Friedman, "S&P, Moody's Downgrade Illinois' Bond Rating," *WTTW News*, June 1, 2017.[2]

Although salient differences exist between the situation in Illinois in 2016-2018 and the situation in Oregon now, a failure to enact a budget undoubtedly has the potential to negatively impact Oregon's bond ratings.

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Very truly yours,

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[2] Available at https://news.wttw.com/2017/06/01/sp-moody-s-downgrade-illinois-bond-rating.