



DEPARTMENT OF JUSTICE
GENERAL COUNSEL DIVISION

March 19, 2007

Terri Sahli, Risk Manager
Department of Administrative Services
1225 Ferry Street, SE, U150
Salem, OR 97301-4287

Re: Opinion Request OP-2007-1

Dear Ms. Sahli:

You have asked for advice about the authority of the Department of Administrative Services (DAS) over the payment of restoration costs for a damaged building owned by the State Board of Higher Education (Board). We understand that your inquiry arises from a situation where the Board (acting through the University of Oregon) initially submitted a property damage claim to the Insurance Fund and then attempted to withdraw that claim, asserting that it had discretion to decide whether to submit such a claim and to pay the costs of restoration out of its own funds. Below we set forth your specific question and our short answer, followed by supporting discussion.

Questions and Short Answers

1. If a Board-owned building suffers damages from a DAS-covered peril, may DAS require the Board to submit a claim to DAS for the payment of the restoration costs by the Insurance Fund?

Yes, unless: (1) the amount of damages is less than the deductible established by DAS; or (2) the Board built the damaged building under ORS 351.160 (self-liquidating and self-supporting buildings), there are outstanding construction financing bonds, and the Board has obtained insurance under ORS 351.180 (separate from the Insurance Fund) that covers the loss.

2. Does the Board's authority to obtain its own insurance on bond financed buildings under ORS 351.180 end when the bonds are paid off?

Yes. ORS 351.180 allows the Board to obtain insurance on certain bond-financed buildings "in such sums as will protect the holders of the outstanding bonds." Because the authority to obtain insurance is tied to the value of outstanding bonds, that authority ends when there are no longer any outstanding bonds.

Discussion

1. Statutory Analysis Generally

The powers and duties of DAS and the Board are set out in statutes. Determining the answer to your question requires an analysis of the relevant statutes. In interpreting a statute, the Oregon Supreme Court directs that we should look first at the text and context of the statute to determine the legislative intent. *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610, 859 P2d 1143 (1993). A number of rules apply to this “first level” statutory analysis.

These rules include the admonition that “words of common usage typically should be given their plain, natural, and ordinary meaning.” *Id.* at 611. But some words have a special meaning for professionals in a certain discipline (“terms of art”). If the context suggests that the legislature is using terms in such a manner, the specialized – not the ordinary – meaning is used to interpret the statute. *Dept. of Transportation v. Stallcup*, 341 Or 93, 99, 138 P2d 93 (2006). And whenever possible, we are to construe statutes to be consistent with each other. *Fairbanks v. Bureau of Labor and Industries*, 323 Or 88, 94, 913 P2d 703 (1996) (“statutes should be read together and harmonized, while giving effect to a consistent legislative policy”); *see also* ORS 174.010 (“where there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all”).

The context for a statutory provision includes other portions of the same statute, the other provisions of the bill in which the statute was adopted, and the chapter into which a provision has been codified. *Vsetecka v. Safeway Stores, Inc.*, 337 Or 502, 508, 98 P3d 1116 (2004); *Morsman v. City of Madras*, 203 Or App 546, 561, 126 P3d 6, *rev den* 340 Or 483, 135 P3d 318 (2006); *State v. Ortiz*, 202 Or App 695, 698, 124 P3d 611 (2005). The context of a statute also includes changes in the statute over time. *Krieger v. Just*, 319 Or 328, 336, 876 P2d 754 (1994) (“[W]ording changes adopted from session to session are a part of the context of the present version of the statute being construed.”).

If the legislative intent is clear from the text and context, the inquiry ends there. If the legislative intent is not clear from the text and context of the statute, then we look to the legislative history of the pertinent statutes to attempt to discern that intent. *PGE*, 317 Or at 611-612.

2. ORS Chapter 278 – Insurance and Risk Management for State Agencies

We begin with the statutes setting out DAS’s authority in relation to losses to state-owned property. The statutory provisions concerning insurance, self-insurance programs, and risk management for state agencies are found in ORS chapter 278. For purposes of ORS chapter 278, “state agency” means “each state branch, institution, department, Board, commission or activity of whatever nature.” ORS 278.005(12).

ORS 278.405 provides in relevant part:

[DAS] shall direct and manage all risk management and insurance programs of state government except for employee benefit insurance programs * * *. Authority granted the department in this section includes but is not limited to the following authority:

(1) To provide all insurance coverages * * * which the department determines necessary or desirable for the efficient operation of state government * * *.

(2) To * * * develop and administer self-insurance programs, * * * as may be in the best interest of the state in carrying out the authorities granted in subsection (1) of this section.

* * * * *

(6) To adopt rules and policies governing the administration of the state's insurance and risk management activities * * *.

To assist us in the interpretation of ORS 278.405, we consider the plain meanings of the statute's key terms, "insurance," "risk management," "self-insurance" and "administer" as used in ORS 278.405.

The dictionary definition of insurance is as follows:

1 a : the action or process of insuring or the state of being insured usually against loss or damage by a contingent event (as death, fire, accident, or sickness) **b :** means of insuring against loss or risks <provide *insurance* against floods> **2 a :** the business of insuring persons or property; ***specifically : a device for the elimination or reduction of an economic risk common to all members of a large group and employing a system of equitable contributions out of which losses are paid*** **b :** coverage by contract whereby for a stipulated consideration one party undertakes to indemnify or guarantee another against loss by a specified contingency or peril **c :** the principles and practices of the business of insuring

WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, UNABRIDGED (2002) at 1173 (WEBSTER'S) (***bold italics*** emphasis added).

WEBSTER'S does not define the term "risk management." Accordingly, we break the term into its component parts. The most apt dictionary definition of "risk" is:

3 a (1) : the chance of loss or the perils to the subject matter of insurance covered by a contract (2) : the degree of probability of such loss

Id. at 1961. The most pertinent dictionary definition of "management" is:

1 : the act or art of managing : as **a** : more or less skilled handling of something (as a weapon, a tool, a machine)

Id. at 1372. “Managing” is the present participle of “manage,” the plain meaning of which is:

2 : To control and direct : handle either well or ill : cope with : CONDUCT, ADMINISTER

Id. Thus, the plain meaning of “risk management” appears to be the act of coping with and controlling the chance of loss or the perils to the subject matter of insurance.^{1/}

The dictionary definition of “self-insurance” is:

insurance of oneself or of one's own interests by the setting aside of money at regular intervals to provide a fund to cover possible losses (as in the event of fire)

Id. at 2060.^{2/} Finally, the most apt dictionary definitions of “administer” are:

1 a (1) : to manage the affairs of <a government that is badly *administered* can never be expected to last long -- C.J.Friedrich> (2) : to direct or superintend the execution, use, or conduct of <*administered* the regulations governing interstate travel -- W.M.Emery> <in many Japanese homes the funds are *administered* by the wife -- D.C.Buchanan> <vocational interest tests are *administered* to all students>

Id. at 27.

After combining the plain meanings of these key terms in ORS 278.405, it appears that this statute charges DAS (subject to any other statute that limits DAS’s authority) with the responsibility to direct and manage **all** state programs to:

- Eliminate or reduce economic risks that are common to state agencies through a system of equitable contributions out of which losses are paid (i.e., insurance);
- Plan for or control the chances of loss to the insured state property; and
- Cover state losses due to property damage (among other risks) from a state fund set aside for that purpose (i.e., self-insurance).

ORS chapter 278 also establishes the Insurance Fund “as a separate fund in the State Treasury separate and distinct from the General Fund, which shall be used to provide insurance and self-insurance for the State of Oregon * * *.” ORS 278.425(1). The moneys in the Insurance Fund are continuously appropriated to DAS to administer the provisions of ORS chapter 278 and other statutes. ORS 278.425(3). The Insurance Fund is to operate on an “actuarially sound basis.” ORS 278.435(1). DAS may apportion and collect contributions determined by DAS “to purchase insurance or administer self-insurance programs * * *.” ORS 278.435(2).

ORS 278.011 directs “each state agency” to supply to DAS such information regarding “its property, personal and real,” as DAS “shall require for risk control, insurance and claims purposes.” ORS 278.050(1) provides that, subject to the other provisions of the same statute,

if any property designated in ORS 278.011 is lost, damaged or destroyed by any peril, the Oregon Department of Administrative Services may elect to cover by rule or policy, but excluding any loss from mysterious disappearance, lack of maintenance or inherent vice, [DAS] shall pay the cost of restoring the property out of the Insurance Fund * * *.

ORS 278.011 “designate[s]” each state agency’s personal and real property, which generally includes all tangible personal property “owned, leased, controlled or possessed” by the agency and all of its land and improvements except insofar as DAS may choose to exclude pathways, roadways, and the like. See ORS 278.005(8) and (11). “[S]hall” is a command “used in laws, regulations, or directives to express what is mandatory.” *Preble v. Dep’t of Revenue*, 331 Or 320, 324, 14 P3d 613 (2000) (quoting WEBSTER’S).

The comma between the words “any peril” and “the Oregon Department of Administrative Services” in the above-quoted portion of ORS 278.050 poses an interpretational question, however. That is: are the words immediately following the comma (“the Oregon Department of Administrative Services may elect to cover by rule or policy”) intended to mean that DAS may decide whether to cover particular damages after the fact or instead that DAS may decide only to cover damages caused by particular perils? As noted above, we are to consider the context of a statute in interpreting its meaning. Statutory context includes changes to the statute over time that may assist in discerning legislative intent. *Krieger*, 319 Or at 336.

After 1991 amendments to ORS 278.050(1), it provided in pertinent part:

if any property designated in ORS 278.011 is * * * damaged * * * **by any peril**
the department may elect to cover by rule or policy * * *.

Or Laws 1991, ch 566, § 3 (emphasis added). The 1991 amendments added the emphasized language to the statute. Notably, there was no comma between the “peril” and “the department.” The statute clearly indicated that the pertinent phrase (“the department may elect to cover by rule or policy”) qualified the type of perils that could be the basis for losses covered by the Insurance Fund. In other words, the legislature intended DAS’s predecessor (the Department of General Services) to develop rules or policies that identified the perils that DAS would cover through the Insurance Fund.

ORS 278.050 was amended again in 1993. Or Laws 1993, ch 500, § 26. This amendment occurred as part of the bill that abolished the Department of General Services and transferred its functions to the Oregon Department of Administrative Services (Or Laws 1993, ch 500, § 1) and changed the name of the former Executive Department to the Oregon Department of Administrative Services (Or Laws 1993, ch 500, § 2b). Section 26 of chapter 500, Oregon Laws 1993, substituted the name “Oregon Department of Administrative Services” for the

former “Department of General Services” in four places in ORS 278.050, added the confusing comma to subsection (1), and substituted the word “required” for “approved by the department” in subsection (4).^{3/} Chapter 500 of Oregon Laws 1993 merely made similar name changes and other minor housekeeping changes to other provisions of ORS chapter 278. In sum, the 1993 amendments to ORS chapter 278 evince no legislative intent to make substantive changes to that chapter. This context for ORS 278.050(1) indicates that even after the addition of the comma to that subsection, the words “the department may elect to cover by rule or policy” continue to qualify “perils.”

We turn to the dictionary to determine the meaning of “peril.” The most apt definition of “peril” is:

2 a : something that imperils : a source of danger or possible cause of loss : RISK
<to lessen the *perils* of the streets> <the *perils* of a turgid rhetoric -- Van Wyck Brooks> <a *peril* is marine if it threatens a waterborne vessel -- H.L.Haehl>

WEBSTER’S at 1680.^{4/}

Thus, the pertinent elements of ORS 278.050(1) are as follows:

- If the state’s tangible personal property or real property
- Is damaged
- Due to a cause of loss that DAS has decided to cover by rule or policy
- Then DAS “shall” pay the cost of restoring the property out of the Insurance Fund.

ORS 278.050(3) provides that DAS “may establish deductibles for certain perils or classes of property covered by the Insurance Fund.” The most apt dictionary meaning of deductible is:

1 : a clause in an insurance policy relieving the insurer of responsibility for an initial specified small loss of the kind insured against

Id. at 589. Accordingly, DAS may create exceptions to the general coverage obligation under ORS 278.050(1) for initial losses of certain types.

Finally, ORS 278.052(1) provides that, if a payment is made from the Insurance Fund for a covered loss, then DAS “is subrogated, to the extent of the payment, to the rights of the state agency against any person or other entity legally responsible in damages for the loss.” DAS may file an action in any court to enforce its right. ORS 278.052(1). Any amounts recovered are credited to the Insurance Fund. *Id.*

3. ORS Chapter 351 – State Board of Higher Education

The Department of Higher Education (Department) is under the control of the Board. ORS 351.010. ORS 351.060(3) provides that the Board has the power to “[e]rect, improve, repair, maintain, equip and furnish buildings, structures and lands for higher education.”^{5/} Subsection (9) of the same statute allows the Board to delegate any of the powers set out in the statute to “any state institution of higher education within the Oregon University System.”^{6/} “Repair” in this context, means “to restore by replacing a part or putting together what is torn or broken” and to “fix” or to “mend.” WEBSTER’S at 1923. “Repair” could be needed in a given instance for any number of reasons, of course, such as ordinary wear and tear, damage by peril, lack of maintenance, and inherent flaws.

The Department and the Board are exempt from a number of statutes that apply generally to other state agencies (*e.g.*, ORS chapters 279A, 279B, and 279C (public contracting code) and ORS chapter 240 (the state personnel relations law)), but ORS chapter 278 is not among them. See ORS 351.086 (listing statutes that do not apply to the “Oregon University System”).^{7/} Therefore, unless some statute provides otherwise, the Board’s property losses are covered by the Insurance Fund under ORS chapter 278.

ORS 351.180 is the single exception. Under this statute, the Board “may cause the buildings * * * referred to in ORS 351.160 and 351.170 * * * to be insured * * * in such sums as will protect the holders of the outstanding bonds issued to finance the cost thereof.” ORS 351.180. This insurance “is in lieu of that afforded by the Insurance Fund * * *.” *Id.* ORS 351.160 and 351.170 are statutes that authorize the Board to construct buildings that are “wholly self-liquidating and self-supporting * * * ” (ORS 351.160(1)) and to establish “such rates, charges and fees” for use of the buildings that are sufficient to pay the principal and interest owed on bonds issued to finance the construction (ORS 351.170(1)). Thus, if the Board builds a building under ORS 351.160, there are outstanding construction financing bonds, the Board has obtained insurance under ORS 351.180, and the building is damaged, the other insurance – not the Insurance Fund – covers the building’s restoration costs.

In addition, the Board’s authority to insure buildings under ORS 351.180 arises only when there are outstanding bonds, and insurance is necessary to protect the holders of those bonds. If there are no outstanding bonds, then there is no authority to purchase insurance under the statute.

4. Analysis of Interplay between DAS and Board Statutes

As the foregoing statutory discussion makes clear, DAS is, with limited exceptions (such as ORS 351.180, discussed in the two preceding paragraphs), the exclusive provider of property damage insurance and self-insurance for state agencies, including the Board. DAS is required to establish coverage policies, procedures, and rules to carry out its responsibilities in this area. But the Board has statutory authority to “repair” its own buildings. As noted above, we are to read statutes together and harmonize them, if possible, while giving effect to a consistent legislative policy. *Fairbanks*, 323 Or at 94. For several reasons, we conclude that (1) DAS’s powers under

ORS chapter 278 are compatible with the Board's authority to repair its own buildings; and (2) DAS generally may require the Board to submit a claim for restoration costs for a damaged Board-owned building.

While no statute expressly provides that a state agency like the Board must file a property damage claim with DAS whenever a DAS-covered peril damages a building, that obligation is implicit in ORS 278.011, 278.050, and 278.405. As explained above, ORS 278.050(1) *mandates* that DAS pay the cost of restoring property designated in ORS 278.011 that is damaged due to a cause DAS covers by rule or policy.^{8/} Obviously, DAS cannot carry out that legislative direction unless it becomes aware of the loss. But once it receives notice of covered damage to a building, ORS 278.050(1) compels DAS to pay covered restoration costs out of the Insurance Fund (subject to any statutory exceptions). Moreover, for the legislature to require that DAS pay the costs is necessarily to imply that no other agency may do so.

An agency has both the powers expressly conferred by statute and the implied powers necessary to carry out the powers expressly granted. *Ochoco Const. v. DLCD*, 295 Or 422, 426, 667 P2d 499 (1983). ORS 278.405 requires DAS to direct and manage all of the state's insurance programs, with the exception of employee benefit insurance programs as otherwise provided in ORS chapter 243. As part of its management of these programs, DAS may require state agencies like the Board to notify DAS of any property damage and to file damage claims with DAS. ORS 278.011 requires state agencies to provide DAS with such information regarding their property, personnel, budget and activities as DAS may require for risk control, insurance and claims purposes. This statute provides DAS with ample authority to require agencies to report property damage.

Moreover, ORS 278.405(2) specifically authorizes DAS to administer the state's self-insurance programs. State agencies like the Board may not establish their own self-insurance programs unless they are part of DAS's overall management of the state's insurance needs. As the ordinary definition of insurance quoted above indicates, insurance is a means to reduce economic risk common to members of group through a system of equitable contributions and payment of claims from a common fund. DAS reasonably may conclude that requiring state agencies to report property damage claims and receive restoration funds from the Insurance Fund is an appropriate method to reduce economic risk and to apportion costs equitably for all of state government.

The fact that ORS chapter 278 requires that DAS generally pay restoration costs for damaged state buildings does not conflict with the Board's authority under ORS 351.060(3) to repair Board buildings. Under ORS 351.060(3), ORS 351.086(1) (exemption from DAS purchasing oversight), and ORS 351.087 (Board's obligation to develop policies), the Board may repair a damaged building with its own staff or use its own procurement procedures to contract for any repairs. Notably, ORS 351.060(3) is silent as to the source of funds for the repair of Board buildings. At bottom, ORS chapter 278 merely describes a system for obtaining funds for building restoration, either through DAS-purchased insurance or DAS-administered self-insurance.

Conclusion

Generally, if a Board-owned building suffers damages due to a DAS-covered peril, DAS may require the Board to submit a claim to DAS for the payment by the Insurance Fund of the building's restoration costs. This general rule does not apply if the amount of damages is less than the deductible established by DAS or if the damages are covered by insurance obtained under ORS 351.180 (self-liquidating and self-supporting buildings). If DAS makes a payment from the Insurance Fund for a covered loss, then DAS is subrogated to the extent of the payment to the rights of the Board against any person who is legally responsible for the loss.

Please let me know if you have any other questions or concerns.

Sincerely,

Donald C. Arnold
Chief Counsel
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DCA:jtm/GEN289985

^{1/} We have considered whether the legislature intended to use the term "risk management" in ORS 278.405 as a term of art. A leading legal dictionary defines "risk management" in a manner similar to its ordinary meaning:

risk management. The procedures or systems used to minimize accidental losses, esp. to a business.

BLACK'S LAW DICTIONARY (eighth ed., 2004, B. Garner ed.) at 1353 (BLACK'S). A leading primer on insurance describes the term in part as including the concepts of minimization of risks, insurance, and self-insurance:

Risk Management

The recognition and identification of risks is an important step in dealing with the unknown. * * * Although the total elimination of uncertainty is not possible, management of risk is an attainable goal. There are several approaches to risk management, including (1) risk control, (2) risk transference, and (3) risk retention.

R. Keeton and A. Widiss, INSURANCE LAW: A GUIDE TO FUNDAMENTAL PRINCIPLES, LEGAL DOCTRINES, AND COMMERCIAL PRACTICES (1988), 10-11. As ORS 278.405 separately mentions insurance (risk transference) and self-insurance (risk retention), it appears that the legislature likely intended the term "risk management" to encompass only a risk control element, as suggested by WEBSTER'S and BLACK'S.

^{2/} We also have considered whether "self-insurance" is a term of art for purposes of ORS 278.405. Again the legal dictionary meaning of the term is quite similar to the ordinary meaning:

self insurance. A plan under which a business maintains its own special fund to cover any loss. Unlike other forms of insurance, there is no contract with an insurance company. – Also called *first party insurance*.

BLACK'S at 819.

^{3/} Section 26 of chapter 500 of Oregon Laws 1993 amended ORS 278.050(4) as follows:

(4) The [*Executive Department*] **Oregon Department of Administrative Services** shall draw warrants on the State Treasurer payable from the Insurance Fund for all claims [*approved by the department*] **required** in carrying out the provisions of this chapter.

^{4/} We considered whether the term "peril" is a term of art for purposes of ORS 278.050. Again the legal dictionary meaning of the term is quite similar to the ordinary meaning:

peril. * * * **2. Insurance.** The cause of risk of a risk of loss to person or property; esp., the cause of a risk such as fire, accident, theft, forgery, earthquake, flood, or illness
<insured against all perils >

BLACK'S at 1174.

^{5/} Subsection (3) was added to ORS 351.060 by section 31a, chapter 771, Oregon Laws 1975. A 1976 Attorney General's opinion discusses chapter 771 and its amendment of ORS 351.060 as follows:

Chapter 771 established procedures for bidding, advertising and awarding of contracts under new provisions found at ORS 279.011 to 279.055. The specific intent was to enact a new law and make this law uniform for all agencies by repealing all variant procedural statutes under which individual agencies were allowed to operate. (Tape of Senate Judiciary Committee Minutes of June 3, 1975).

If an agency was otherwise empowered by statute to enter into its own construction contracts, the provisions of Chapter 771 did not abrogate that statutory power. To the contrary, when it was feared that the repeal of ORS 351.195 would mean the loss of the Board of Higher Education's enabling provisions as well as its independent procedures, Chapter 771 was amended to include § 31a (now ORS 351.060 as amended), which was added for the express purpose of establishing this agency's authority to handle its own construction contracts. Appendix to House Judiciary Committee minutes of April 17, 1975.

37 Op Atty Gen 1534, 1535-1536 (1976).

^{6/} OAR 580-050-0032 allows the Vice Chancellor for Financial Affairs of the DHE to delegate to an individual at each institution the authority to contract for repairs and public improvements.

^{7/} Although there is no ambiguity as to whether the Department and the Board are subject to ORS chapter 278, we note for background purposes that ORS 351.086 originated in section 2 of chapter 612, Oregon Laws 1995 (SB 271). As originally introduced, SB 271 (filed at the request of the Board) included ORS chapter 278 among the statutes that would not apply to the "Oregon Public University System." Section 4(1), SB 271 (1995). SB 271 subsequently was amended to delete this and some other (but not all) proposed statutory exemptions for Department. See section 2 of SB 271B-Engrossed (1995) (containing May 25, 1995 Senate Amendments to SB 271).

^{8/} Agencies remain responsible for the cost of losses resulting from perils not covered by DAS, and for the deductible portion of covered losses.