



**DEPARTMENT OF JUSTICE**  
GENERAL COUNSEL DIVISION

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**SENT VIA EMAIL**

Steve Trout, Elections Division Director  
Secretary of State  
255 Capitol St. NE  
Salem, OR 97310

Re: Vacancy in Office of State Senator  
DOJ File No: 165200-GG1513-17

Dear Mr. Trout:

You have asked for clarification regarding how a vacancy in the office of state Senator is filled if the vacancy occurs during the first two years of the Senator's term and before the 61<sup>st</sup> day before the general election. Specifically, you would like to know whether the candidates from a major political party are selected through the primary election process. ORS 171.051 provides the process for filling a vacancy in the Legislative Assembly. As discussed in more detail below, we conclude that the statute does not require a major political party to use the primary election process to select a nominee. Instead, the statute permits the party to select its nominee by party rule.

**BACKGROUND**

Senator Ferrioli was elected at the 2016 General Election for a four-year term that will end in January 2020. He has announced his resignation, effective December 31, 2017, creating a vacancy in Senate District 30. The first general election during his current four-year term is the 2018 General Election, scheduled for November 6, 2018. The 61<sup>st</sup> day before that election date is September 6, 2018. Because the vacancy occurs before the 61<sup>st</sup> day, the electors will select who will fill the office for the remaining two years of the term at the 2018 General Election.<sup>1</sup> However, before the general election, there is a primary election scheduled for May 15, 2018.

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<sup>1</sup> The office is filled by appointment for the period between the resignation and the beginning of the two-year term.

We understand that past practice for similar circumstances has been for major political parties to select a nominee at the primary election when time permits.<sup>2</sup> As noted above, ORS 171.051 generally governs the process for filling vacancies in the state legislature. And subsections (4) through (6) apply specifically and exclusively to the situation at hand – a vacancy occurring in the office of state Senator occurring before the 61<sup>st</sup> day before the first general election of the current term:

(4) Notwithstanding any appointment under the provisions of subsection (1)(c) of this section, when a vacancy occurs in the office of a state Senator before the 61st day before the first general election to be held during that term of office, ***the remaining two years of the term of office shall be filled by the electors of the affected legislative district at the first general election.***

(5) Candidates for the remaining two years of the term of office of a state Senator under subsection (4) of this section *shall be nominated as provided in ORS chapter 249 except as follows:*

(a) *A major political party, minor political party, assembly of electors or individual electors may select a nominee for any vacancy occurring before the 61st day before the first general election; and*

(b) *The Secretary of State shall accept certificates of nomination and notifications of nominees selected by party rule and filed with the secretary pursuant to a schedule for filing set by the Secretary of State but in any case not later than the 62nd day before the first general election.*

(6) *The remaining two years of the term of office of a state Senator under subsection (4) of this section will commence on the second Monday in January following the general election. Any appointment under the provisions of subsection (1)(c) of this section shall expire when a successor to the office is elected and qualified. (All emphasis added.)*

Because ORS 171.051(5) refers to the nomination process “provided in ORS chapter 249,” we must also consider ORS 249.200, which sets out the ordinary process a major political party must use to nominate candidates to fill a vacancy. Under that process, whether the party must use the primary election process or a process defined by party rules depends on the timing of the vacancy. Subsection (1) explains,

(1) *A major political party may nominate a candidate to fill a vacancy in a partisan elective office in the following manner:*

(a) *If the vacancy occurs on or before the 70th day before a primary election, by selecting a nominee at the next primary election; or*

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<sup>2</sup> ORS 248.007(7) generally provides that “[a] major political party \* \* \* shall nominate candidates of the major political party, for other than political party office, at the primary election.” However, we believe that this general rule is subject to the statutes more specifically governing the nomination processes for vacancies. ORS 174.020(2) (“When a general and particular provision are inconsistent, the latter is paramount to the former so that a particular intent controls a general intent that is inconsistent with the particular intent.”)

(b) If the vacancy occurs after the 70th day before the primary election but before the 61st day before the general election, by selecting a nominee as provided by party rule. (Emphasis added.)

However, subsection (2) specifically excludes state legislative vacancies filled by appointment from this procedure in favor of the process described in chapter 171: “[t]he procedure under subsection (1) of this section shall not apply in any case in which one of the following specific procedures for filling a vacancy applies: \* \* \* (b) The appointment procedure specified in ORS 171.051 to 171.064 for state legislative office.”

In light of these statutes, you ask if Senator Ferrioli’s party must select a nominee for the general election through the primary election process.

### DISCUSSION

To answer your question, we first set out the framework for filling a vacancy, as set forth in ORS 171.051. Then we interpret ORS 171.051(5), which specifically governs the nomination process for state senators in the present circumstances.

#### 1. Framework of ORS 171.051

ORS 171.051 sets forth the process for filling a vacancy in the office of Legislative Assembly. It may be filled by appointment or by electors, depending on when the vacancy occurs. Subsection (1) provides when and how the vacancy is filled by appointment:

- (1) When any vacancy occurs in the Legislative Assembly due to death or recall or by reason of resignation filed in writing with the Secretary of State or a person is declared disqualified by the house to which the person was elected, the vacancy shall be filled by appointment if:
  - (a) The vacancy occurs during any session of the Legislative Assembly;
  - (b) The vacancy occurs in the office of a state Representative before the 61st day before the general election to be held during that term of office;
  - (c) The vacancy occurs in the office of a state Senator before the 61st day before the first general election to be held during that term of office;**
  - (d) The vacancy occurs in the office of a state Senator at any time after the 62nd day before the first general election and before the 61st day before the second general election to be held during that term of office; or
  - (e) A special session of the Legislative Assembly will be convened before a successor to the office can be elected and qualified.

ORS 171.051(1) (emphasis added).<sup>3</sup>

A vacancy in an office of a state Senator is filled by the electors at the next general election when the vacancy occurs before the 61<sup>st</sup> day before the first general election of the term.

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<sup>3</sup> ORS 171.051(2) and (3) describe the appointment process for persons appointed under ORS 171.051(1).

Subsection (4) explains,

(4) Notwithstanding any appointment under the provisions of subsection (1)(c) of this section, when a vacancy occurs in the office of a state Senator before the 61st day before the first general election to be held during that term of office, the remaining two years of the term of office shall be filled by the electors of the affected legislative district at the first general election.<sup>4</sup>

Subsection (5) provides how parties select their nominees for the general election:

(5) Candidates for the remaining two years of the term of office of a state Senator under subsection (4) of this section shall be nominated as provided in ORS chapter 249 *except as follows*:

(a) A major political party, minor political party, assembly of electors or individual electors *may select* a nominee for any vacancy occurring before the 61st day before the first general election; *and*

(b) The Secretary of State shall accept certificates of nomination and notifications of *nominees selected by party rule* and filed with the secretary pursuant to a schedule for filing set by the Secretary of State but in any case not later than the 62nd day before the first general election.

ORS 171.051(5) (emphasis added).<sup>5</sup>

## 2. Interpretation of ORS 171.051(5)

To determine how a major political party selects its nominee, we must interpret ORS 171.051(5). The Oregon Supreme Court has provided us with the methodology for interpreting the meaning of statutes. The goal is to determine the legislature's intent, and to do so, we examine the text, context and any applicable legislative history.<sup>6</sup> The text normally is the best evidence of legislative intent.<sup>7</sup> In construing the text, courts generally give words of common usage their plain and ordinary meanings and apply statutory and judicial rules of

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<sup>4</sup> Under ORS 171.051(1)(c) and (6), an individual is appointed immediately to carry out the tasks of the office, but the electors select an individual at the general election for the remaining two years of that term.

<sup>5</sup> ORS 171.051(6) describes the period of service for the remaining term:

(6) The remaining two years of the term of office of a state Senator under subsection (4) of this section will commence on the second Monday in January following the general election. Any appointment under the provisions of subsection (1)(c) of this section shall expire when a successor to the office is elected and qualified.

<sup>6</sup> *State v. Gaines*, 346 Or 160, 171-72, 206 P3d 1042 (2009).

<sup>7</sup> *Id.* at 171.

construction.<sup>8</sup> The context of a statute includes other related statutes<sup>9</sup> and their legislative history as broader context.<sup>10</sup>

If the legislature's intent is not clear from text and context, the courts will consider the statute's legislative history,<sup>11</sup> and even if the legislature's intent seems clear, the courts may examine and give it limited consideration, such as to "illuminate" that intent.<sup>12</sup> If the meaning of the text remains ambiguous after examining the text, context and applicable history, we may apply maxims of statutory interpretation.<sup>13</sup>

#### A. Text and Context

Under ORS 171.051(5), the candidates for the vacancy "shall be nominated as provided in ORS chapter 249 except as follows: \* \* \* a major political party, minor political party, assembly of electors or individual electors may select a nominee for any vacancy occurring before the 61<sup>st</sup> day before the first general election." Further, the "Secretary of State shall accept certificates of nomination and notifications of nominees selected by party rule \* \* \* not later than the 62<sup>nd</sup> day before the first general election."

##### (1) Meaning of "except as follows" and "may select"

In interpreting the text and context, we look to the plain, ordinary meaning of the words and the context.<sup>14</sup> Here, that means we must determine what it means to "except" the ORS chapter 249 process. We must also determine what the legislature meant by providing that the major party "may select" its nominee.

The use of the phrase "except as follows" is clear. The word "except," means "with the exclusion or exception of."<sup>15</sup> By using the phrase, the legislature intended that the process of ORS chapter 249 applies but not when there is vacancy in the office of state Senator before the 61<sup>st</sup> day before the general election. ORS chapter 249 generally provides in ORS 249.200 that a vacancy is filled by using the primary election process when the vacancy occurs on or before the 70<sup>th</sup> day before the primary election.<sup>16</sup> Thus, the "except as follows" means that the primary process is not required when there is such a vacancy in the office of state Senator.

<sup>8</sup> *State v. Briney*, 345 Or 505, 511, 200 P3d 550 (2008); *Bureau of Labor and Industries ("PGE")*, 317 Or 606, 611, 859 P2d 1143 (1993).

<sup>9</sup> *State v. Carr*, 319 Or 408, 411-12, 877 P2d 1192 (1994).

<sup>10</sup> "Also considered part of the broader context of a statute is the legislative history of related statutes." *State v. Stamper*, 197 Or App 413, 420, 106 P3d 172, *rev den*, 339 Or 320 (2005).

<sup>11</sup> *PGE*, 307 at 611-12.

<sup>12</sup> *Gaines*, 346 Or at 172-73.

<sup>13</sup> *Id.* at 172.

<sup>14</sup> Ordinary meaning is presumed to be what is reflected in the dictionary. *Dep't of Rev. v. Faris*, 345 Or 97, 101, 190 P3d 364 (2008).

<sup>15</sup> WEBSTER'S THIRD NEW INT'L DICTIONARY, 791 (unabridged ed. 2002).

<sup>16</sup> ORS 249.200(1) provides,

- (1) A major political party may nominate a candidate to fill a vacancy in a partisan elective office in the following manner:
- (a) If the vacancy occurs on or before the 70th day before a primary election, by selecting a nominee at the next primary election; or
  - (b) If the vacancy occurs after the 70th day before the primary election but before the 61st day before the general election, by selecting a nominee as provided by party rule.

The other relevant phrase is “may select.” ORS 171.051(5)(a) provides the party “may select” a nominee. “May” is permissive, not mandatory.<sup>17</sup> The plain meaning here is that the legislature gave a party the discretion to select its nominee by a process different from ORS chapter 249. Had the legislature wanted the parties to use the primary election process to select a candidate, it could have provided for that by, for example, using the same language of ORS 249.200(1) or by not including subsection (5) in ORS 171.051. It did not, and we may not insert what has been omitted, or omit what has been inserted.<sup>18</sup>

Paragraph (b) provides the timeline for when the names of the nominees must be provided to the Secretary of State. We note that paragraphs (a) and (b) are joined with the conjunction “and,” meaning that both are required for the selection of candidates for the remaining two years of state Senator office, and they should be read together.<sup>19</sup>

(a) A major political party, minor political party, assembly of electors or individual electors *may select* a nominee for any vacancy occurring before the 61st day before the first general election; *and*

(b) The Secretary of State shall accept certificates of nomination and notifications of *nominees selected by party rule* and filed with the secretary pursuant to a schedule for filing set by the Secretary of State but in any case not later than the 62nd day before the first general election.

The phrase “nominees by selected by party rule” of paragraph (b), when read with paragraph (a), suggests that the party’s process of selecting a nominee is through party rule. The “party rule” can only refer to a major or minor political party in paragraph (a), as assembly of electors or individual electors do not have party rules.

Thus, a party who selects a nominee under ORS 171.051(5)(a) may select a nominee by party rule. It is not required to follow the primary process of ORS chapter 249, though there is nothing to prevent it from choosing to do so.

## (2) Context of other statutes

Several statutes provide context for ORS 171.051(5). We first consider ORS 249.200, which references ORS 171.051. Next, we consider ORS 249.215(3), which provides that the process for filling a vacancy in state office; it requires the remaining two years of the four-year term be filled by electors, similar to the process for state Senator vacancy.

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<sup>17</sup> *Efimoff v. DMV*, 204 Or App 648, 652, 131 P3d 814 (2006) (“By using the word ‘may,’ the legislature indicated that it was authorizing actions, not requiring them.”), *citing Nibler v. Dept. of Transportation*, 338 Or. 19, 26-27, 105 P3d 360 (2005) (“[T]he word ‘may’ ordinarily denotes permission or the authority to do something.”).

<sup>18</sup> ORS 174.010.

<sup>19</sup> Courts generally assume that legislators intend that statutes be read in a manner consistent with settled rules of grammar and syntax. *See Burke v. DLCD*, 241 Or App 658, 665-66, 251 P3d 796, *rev allowed*, 350 Or 532 (2011)(discussing meaning and importance of the word “or”). [rules of grammar]; ORS 174.010.

**(a) ORS 249.200(2)**

ORS 249.200 explains when a major political party selects a nominee through the primary process but specifically exempts from its application the “appointment procedure specified in ORS 171.051.”<sup>20</sup> ORS 171.051 can be divided between two concepts. Subsections (1), (2), and (3) discuss the circumstances under which a vacancy is filled by appointment. Subsections (4), (5), and (6) concern vacancies in state Senate office that result in a two year term filled by a candidate elected at the next general election.

The direction of ORS 249.200(2), that the “appointment procedure in ORS 171.051” is excepted from its process, and the direction of ORS 171.051(5), that ORS chapter 249 applies “except as follows,” are not incompatible. It is possible for both subsections to apply.<sup>21</sup> ORS 249.200 makes it clear that it does not apply when a vacancy is filled by appointment, and ORS 171.051(5) makes it clear that ORS chapter 249 is not required when the vacancy is filled at the general election.

Moreover, as legislative history of ORS 249.200 reveals, both ORS 171.051 and 249.200 were amended in Senate Bill 576 (1987). ORS 249.200(2) was originally section 4 of SB 576. The Secretary of State’s Exhibit E to the House and State Affairs Committee described section 4 as follows, “Amends ORS 249.200 to provide that procedure specified in ORS chapter 171 is means for filling legislative vacancy.”<sup>22</sup>

**(b) ORS 249.215**

We believe it is worth considering, as context, the similar process to fill vacancies in state office, which are also subject to four-year terms. Like ORS 171.051(5), ORS 249.215 provides that the remaining two years of a four-year term is to be filled by electors. Subsection (3) echoes ORS 171.051(5):

(3) Candidates for the remaining two years of the term of the state office under this section shall be nominated as provided in this chapter except as follows:

(a) A major political party or a minor political party, *by party rule*, or an assembly of electors or individual electors, may select a nominee; and

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<sup>20</sup> ORS 249.200(1) provides,

A major political party may nominate a candidate to fill a vacancy in a partisan elective office in the following manner:

(a) If the vacancy occurs on or before the 70th day before a primary election, by selecting a nominee at the next primary election; or

(b) If the vacancy occurs after the 70th day before the primary election but before the 61st day before the general election, by selecting a nominee as provided by party rule.

<sup>21</sup> ORS 174.010 (“[W]here there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all.”).

<sup>22</sup> *Minutes, House State and Federal Affairs Committee* (SB 576), May 29, 1987, Exhibit E.

(b) The Secretary of State shall accept certificates of nomination and notifications of nominees filed with the secretary pursuant to a schedule for filing set by the secretary, but in any case not later than the 62nd day before the first general election.

The difference, however, is that ORS 249.215 includes “by party rule” in paragraph (a) and ORS 171.051 includes it in paragraph (b). The result, however, is the same. A major party may select its nominee to fill the remaining two years of a four year term using party rule.

ORS 249.215 was enacted in 2009 under House Bill 2095. The section by section summary provided to the House Rules Committee explained, “Current statute is not clear in regards to the term of office for nonpartisan state office that may become vacant in mid-term. This change is suggested to prevent questions regarding what the new term of office for a nonpartisan state office will be.”<sup>23</sup> As context this statute supports that the legislature intended the major party to have the option to select its nominee in this circumstance by party rule.

## **B. Legislative History**

The meaning of ORS 171.051(5) is clear by the text and context, and it is not necessary to consult legislative history. However, the history does illuminate the legislature’s intent: it created a separate and particular process for a major political party to fill a vacancy in state Senate office under very specific circumstances. The process is specifically excepted from the other vacancy statutes of ORS chapter 249 and does not require a primary election process. A review of the legislative history revealed no discussion of a primary election process for this kind of vacancy. At the Senate Committee on Government Operations and Elections, Secretary of State discussed the scenario at issue here and reiterated the language of the bill that “both parties would select nominees.”<sup>24</sup>

## **CONCLUSION**

When a vacancy occurs in the office of state Senator before the 61<sup>st</sup> day before the first general election of the term, a major political party, minor political party, assembly of electors or individual electors the political party may select its nominee for the general election ballot. As it concerns a major political party, there is no requirement that the party follow the primary process outlined in ORS 249.200. Instead, the major party may select a nominee by party rule. It may choose to avail itself of the primary election, circumstances permitting, but there is nothing in the statute that requires it do so.

Sincerely,



Karen E. Clevering  
Assistant Attorney General  
Government Services Section

<sup>23</sup> *Minutes, House Rule Committee (HB 2095), February 23, 2009, Exhibit 9, at 5.*

<sup>24</sup> *Minutes, Senate Committee on Government Operations and Elections Committee (SB 576), March 13, 1987, at 2.*