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To: Representative Mark Gamba

From: Catherine M. Tosswill, Special Counsel and Chief Editor

Subject: HB 4026 -1 —Withdrawing referenda authority for urban growth boundary decisions

You have asked whether the proposed -1 amendments to House Bill 4026 are compatible with Article IV, section 1 of the Oregon Constitution. We believe that land use decisions made under a statutory administrative process already are not subject to referendum. These decisions are more likely administrative, rather than legislative, bringing them outside the ambit of Article IV, section 1(5), which reserves to local voters the initiative and referendum powers as to all "local, special and municipal legislation." As a result, while the -1 amendments are likely constitutional, they are also probably redundant.

By way of background, electors' right to a referendum of a local government's political decision is a right given by the Oregon Constitution.[1] However, although the referendum right is constitutional, it is not unlimited. Referendum is available only for legislative acts and does not apply to the executive or administrative actions of local governments.[2] Determining whether a decision is legislative or administrative is not always a clear-cut process. But courts are more inclined to find an action legislative if it is generally applicable, is permanent, or is prescribing a rule of civil conduct.[3] An action is more likely administrative if it is specific to a situation or circumstance, is temporary or implements a previously made decision or follows an adopted decision-making process.[4] The form of the decision is not dispositive: even if a decision is made by an ordinance of a legislative body, it may still be administrative for the purposes of determining whether it is subject to a referendum.[5] Of importance with respect to local land use decisions is the idea that, if there is a "prescribed legislative process" or a "complete scheme" that the governing body is bound to follow, then even if the final decision takes the form of an ordinance, the action is not legislative.[6] Because land use decisions are governed by specific land use provisions created under a statutory framework, even if the local code considers a significant change legislative, it is likely that a court will find it adjudicative and not subject to referendum.[7] As the court has explained, "to hold that a land use decision may be referred to the electorate would be the equivalent of holding that it need not be made in compliance with

[1] Article IV, section 1 (5) (municipalities and districts); Article VI, section 10 (counties); Article XI, section 14 (metropolitan service district).
[2] *Rossolo v. Multnomah Cty. Elections Div.*, 272 Or. App. 572, 584 (2015).
[3] *Id.* at 584-585.
[4] *Id.* at 584-586.
[5] *Id.* at 585.
[6] *Id.* at 586 (*citing Foster v. Clark*, 309 Or. 464 (1990)).
[7] *Dan Gile & Asso., Inc. v. McIver*, 113 Or. App. 1, 3-5 (1992).

the procedural and substantive requirements of state statutes."[8] Currently, a change to an urban growth boundary is subject to complex state statutory and regulatory schemes, requiring the discovery of facts and the application of law to those facts[9] that simply could neither be conducted through the initiative process nor reversed by the referendum process.

Accordingly, what the -1 amendments add to ORS 197.626 (6) simply states what a court would very likely decide anyway with respect to an attempted referendum petition.

We are aware of reference to *Allison v. Washington County*[10] as a reason that this amendment was arguably necessary and permissible, as *Allison* upheld the referral of a comprehensive plan and stated that through legislation, "the delegation can be withdrawn from the local governing body and the local voters."[11] However, there are some issues with this argument. First, the case was decided early in the history of Oregon's statewide land use planning law, when land use laws and procedures were still crystallizing.[12] Second, the legislative direction in *Allison* to Washington County was simply that their "governing body shall adopt and may from time to time revise a comprehensive plan,"[13] which was far less detailed than the current statutory and regulatory land use regime for comprehensive plans or urban growth boundary amendments. Finally, that the court in *Allison* suggested that the Legislative Assembly could remove the decision from the county electorate does not mean that they endorsed simply literally removing the referendum rights to specific decisions. On the contrary, the court seemed to suggest that because land use planning was a matter of statewide concern, the legislature could enact its own statewide zoning map or comprehensive plan, or delegate that role to the Land Conservation and Development Commission rather than to Washington County.[14]

In fact, the *Allison* court makes a salient comment that specifically contradicts the approach taken by the -1 amendments: "The minimum guarantee of the [C]onstitution should not be allowed to be diluted by either legislative action or inaction."[15] In researching this matter, we could not find any comparable instance in the Oregon Revised Statutes where the right to referendum of a local matter was explicitly limited by the legislature. This is not surprising; the Legislative Assembly is not empowered to withdraw constitutional rights from the electorate.

In short, under the Oregon Constitution, the Legislative Assembly probably cannot limit citizens' use of the referendum process, but under court precedent, land use decisions made under a statutory administrative process already are not subject to referendum—which is to say that this statutory fix is very likely redundant. And if it is not, it is very likely unconstitutional.

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[8] *Id.* at 5-6.
[9] ORS chapter 197A.
[10] 24 Or. App. 571 (1976).
[11] *Id.* at 588.
[12] *Webber v. Skoko*, 432 F. Supp. 810, 813 (D. Or. 1977) ("Oregon courts are still deciding to what extent the state and its municipalities may limit the development of private property, and what procedures are to be followed in enacting such limitations.") (*citing Allison v. Washington* in n.13).
[13] ORS 215.050 (1975 Edition).
[14] *Allison*, 24 Or. App. at 585.
[15] *Allison*, 24 Or. App. at 575.