To: Senate Committee on Rules
From: Glenna Wilder, farmer
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I am a farmer located just outside the existing North Plains urban growth boundary. I raise heritage sheep and hay. I am writing to express my opposition to HB 4026 for the following reasons:

- Urban growth boundary expansions that are forced upon adjacent farmers destroy irreplaceable farmland. In the case of North Plains, the soils that would be destroyed in their current quest to double the size of their city are of the highest soil rating in the United States.
- Farmers have no voice in forced UGB expansions that take their land out of Exclusive Farm Use designation.
- In the case of North Plains, there is adequate undeveloped land within their current UGB to satisfy their need to add housing.
- I have volunteered alongside many other volunteers for the last eight months gathering signatures to place a referendum on the May ballot. HB 4026 would retroactively erase our effort and silence our voices by taking the referendum off the May ballot.

Why is it deemed to be acceptable to force legislation like HB 4026 onto famers? Why is overflow housing from Portland onto high-value farmland deemed to be more important than farms and the people who have invested their lives (and sometimes generations) creating and working on these farms?

Farmers are rural but we are not stupid. In the case of North Plains, it is about greed, not need, that drives the city council to destroy farmland in order to elevate their status with high-tech development and housing sprawl to match.

Please see the letter following from Kenneth Dobson, who serves as counsel for Friends of North Plains Smart Growth.

Thank you for the opportunity to testify. Please vote **NO** on HB 4026.

Glenna Wilder

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February 29, 2024

VIA ELECTONIC MAIL
Aaron Nichols
Friends of North Plains Smart Growth
11000 NW Jackson Quarry Road
Hillsboro, Oregon 97124

Re: *Legislative Counsel's Opinions on Proposed Amendment to HB 4026*

Dear Friends of North Plains Smart Growth:

You asked me to review two letters prepared by the Oregon Legislative Counsel regarding a proposed amendment to HB 4026 currently under review by the Oregon Legislature. That amendment states:

> "(5) A local government determination described in subsection (1) of this section is not subject to being referred to voters by referendum petition and is reviewable exclusively under this section."

In a letter dated February 27, 2024 to Representative Ed Diehl, Legislative Counsel Dexter Johnson opined that "the amended bill is likely constitutional, but has limited impact on existing law." For the reasons set forth below, I disagree with that assessment.

The legal authority for a voter referendum on a municipal ordinance is Article IV, section 1 of the Oregon Constitution which states in relevant part:

> "(3)(a) The people reserve to themselves the referendum power, which is to approve or reject at an election any Act, or part thereof, of the Legislative Assembly . . . (5) The initiative and referendum powers reserved to the people by subsections (2) and (3) of this section are further reserved to the qualified voters of each municipality and district as to all local, special and municipal legislation of every character in or for their municipality or district."

Under this section, the right of a referendum applies to municipal ordinances that are "legislative" in character. *Rossolo v. Multnomah Cnty. Elections Div.*, 272 Or App 572, 584, 357 P3d 505 (2015). By contrast, the right of referendum does not apply to municipal ordinances that are "executive, administrative, or adjudicative" in nature. *Id.* The Oregon Court Appeals explained the difference:

> "In classifying an enacted or proposed law as legislative in character (and subject to the initiative and referendum provisions in the Oregon Constitution) and not executive, administrative, or adjudicative in nature (and outside the scope of those provisions), Oregon courts assess the law to determine if it makes policy of general applicability and is more than temporary in duration (and is thus legislative in nature), or if it applies previous policy to particular actions, or is otherwise compelled in substance or process by predicate policy (and is thus executive, administrative, or adjudicative in nature." *Id.*

Mr. Dexter's letter specifically cites the recent UGB expansion decision of the City of North Plains as an example of a decision which, in his opinion, is not legislative in nature. However, decisions like Ordinance 490 involving annexations and plan amendments are considered "legislative" under the City Charter and are treated as a Type IV decision. See North Plains City Charter § 155.032(D). In substance, Ordinance 490 establishes a "policy of general applicability" and is "more than temporary in duration." Specifically, the ordinance establishes future land use planning policies in a large swath of land in the UGB expansion area totaling 855.2 acres which the City determined was needed for 20 years of growth. Because Ordinance 490 creates policies of general applicability over a large area, it is legislative in nature. *See Parelius v. City of Lake Oswego*, 22 Or App 429, 430, 539 P2d 1123 (1975) (rezoning of a 72.9-acre area made up of numerous separately owned parcels of property was a legislative matter); *Culver v. Dagg*, 20 Or App 647, 654, 532 P2d 1127 (1975) (holding that rezoning of half of the land in Washington County was legislative).

Moreover, Ordinance 490 is not "compelled in substance." On the contrary, the various reports appended to the ordinance make clear that the City had a large degree of discretion in crafting the policies for the UGB expansion area. For example, the Supplemental Staff Report dated August 3, 2023 notes on page 7 that "Goal 9 rules and recent Court decisions make clear that North Plains has ***"reasonable discretion"*** in determining what method it uses to determine how much land it needs to accommodate a demonstrated need for improved City livability as allowed by Goal 14." (emphasis added). Similarly, page 64 of the UGB Expansion Report discussed how the PAC used information to deliberate various options for the direction of the UGB expansion area, including competing alternatives for road configurations in certain subareas.

Other sections of the UGB Expansion Report further highlight the degree of discretion the City had in developing the land use policies, explaining "[t]o expand the UGB, North Plains must complete a boundary location analysis, comparing alternative locations and considering which addition to the UGB will result in the most accommodating and cost-effective boundary, while creating the fewest conflicts with neighboring land uses, and causing the fewest negative environmental, economic, social and energy consequences." UGB Expansion Report p. 25. Importantly, the report notes:

> "The analyses that follow ***do not provide any definitive conclusion*** as to where the North Plains UGB should be expanded. Rather, they provide the data City

leaders need to make an informed decision about how the City should grow over the next 20 years." Id. (emphasis added)

In another section discussing the Goal 5 ESEE analysis similarly states: "Like the other boundary location analyses, the ESEE analysis ***does not provide a definitive conclusion*** as to where the North Plains UGB should be expanded but contains information to help inform decision makers." Id. p. 54 (emphasis added). The fact that the vote to approve Ordinance 490 was not unanimous further highlights that it was not "preordained."

Mr. Dexter's February 27 letter also states: "HB 4026-1 amendments replicate in effect the authority the North Plains City Recorder currently possesses under city code." This is not true. While it is true the North Plains City Recorder has an obligation to determine whether a particular UGB expansion is subject to the right of referendum, the City Recorder is not bound by any particular decision. On the contrary and as discussed above, the UGB expansion at issue can properly be characterized as "legislative" in both title and substance and therefore subject to referendum under Article IV, Section 1 of the Oregon Constitution. Other UGB decisions by other local governments might similarly qualify as "legislative" in nature depending on the particular circumstances and the substance of the enactment, ordinance, or decision in question. In fact, Mr. Dexter's letter states: "we acknowledge that small cities like North Plains may find deciding whether the subject of a prospective referendum petition is 'local, special or municipal legislation' for which Article IV, section 1, guarantees referral to be challenging."

By contrast, HB 4026-1 would set an absolute presumption that any decision by a local government UGB expansion is not legislative in nature, thereby eliminating any discretion by a local government to find otherwise. More importantly, under the current law, a decision by a local government that a particular land use ordinance is not subject to a referendum is subject to judicial review. HB 4026-1 would effectively strip courts of the ability to review decisions by local governments on whether a particular local legislative enactment was subject to the right of referendum. In short, HB 4026-1 fundamentally alters the current law as it relates to local government decisions on whether a particular ordinance or enactment is subject to the right of referendum and judicial review of such decisions.

Legislative Counsel cites *Dan Gile and Associates, Inc. v. McIver* for the proposition that "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 the procedural and substantive requirements of state statutes." 113 Or App 1 (1992). However, that decision involved the rezoning of a single property, which is quasi-judicial in nature and inherently different from UGB expansion decisions establishing land use policies for multiple properties covering an expansive geographic area. In fact, the Oregon Attorney General noted that distinction when it opined that referendum provisions of the Oregon Constitution are applicable to land use decisions "except in the case of ordinances which apply to property so limited in area or ownership as not to be legislative in nature." Oregon Attorney General Opinion 80-113 (Sept. 10, 1980).

Legislative Counsel also states that at the time of the Supreme Court's decision in *Allison v. Washington County*, 24 Or. App. 571 (1976), which held that zoning ordinance and comprehensive plan amendments were subject to referendum, "land use laws were far less developed than such laws currently are." While this may be true, Legislative Counsel fails to cite to any specific statewide land use law that would alter the process for determining whether a particular enactment concerning UGB expansions was legislative in nature. The only law cited is ORS 197.626

which simply requires that the Land Conservation and Development Commission review local government decisions regarding UGB expansion and sets no specific criteria for local governments to adhere to when enacting local legislation concerning such expansions which might otherwise make such decisions "administrative or quasi-judicial" in nature.

It is important to note that even the Legislative Counsel qualified its opinion when it said "[w]e conclude that a city ordinance expanding the city UGB ***is likely*** not a matter that may be referred." (emphasis added). The use of the term "likely" is equivocal and confirms that even the Legislative Counsel acknowledges that there could be situations, albeit unlikely, where a UGB expansion might be considered legislative in nature. As the Legislative Counsel additionally noted in its February 26, 2024 to Representative Mark Gamba:

> "[I]f such measures are subject to referral, the exercise of the voters of the initiative and referendum power under Article IV, section 1, of the Oregon Constitution, cannot be limited statutorily. The Legislative Assembly may not through a statutory change alter the text or meaning of the Oregon Constitution."

In light of this acknowledgement that the Legislature cannot limit the right of referendum enshrined in the Oregon Constitution, it is unclear why the Legislature would pass a "redundant" law that, if the Legislative Counsel is wrong, would be a clear abrogation of this important Constitutional right. In addition, if the Legislative Assembly can attempt to limit the right of referendum for a certain class of local legislation involving UGB expansions based on a sweeping assumption that all such legislation is "administrative" in nature, it would set a dangerous precedent that risks limiting the right of referendum for any other type of local government enactment the Legislature unilaterally determines is inherently not "legislative" in nature. Under these circumstances, it would be inappropriate, if not reckless, to expose HB 4026 to near certain legal challenge especially when the Legislative Counsel has opined that the amendment is unnecessary.

Sincerely,
Kenneth P. Dobson