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MEMORANDUM

TO: Hon. Senator Lieber, Chair
Senate Rules Committee

FROM: Chris Crean, North Plains City Attorney CSC

SUBJECT: House Bill 4026-A

DATE: March 5, 2024

This firm serves as the city attorney for the City of North Plains. Thank you for your consideration of House Bill 4026-A. Please accept these comments on behalf of the City.

As you know, the Oregon Constitution, Article IV, Section 1(5) reserves to the voters the power to initiate and refer local legislation.[1] Because this provision is expressly limited to municipal "legislation," it does not apply to a local administrative decision. Thus, the question presented by HB 4026-A is whether an ordinance adopting or amending a UGB is a legislative or administrative decision. If it is legislation, then it is subject to referral under Article IV, Section 1(5); if it is an administrative decision, then it is not subject to referral under Article IV, Section 1(5).

First, we need to acknowledge Legislative Counsel's thorough analysis, both in its February 26, 2024, letter and its letter on the same subject dated February 19, 2024. In particular, we agree with Legislative Counsel's conclusion that a court would likely bar a referral of a UGB decision from the ballot.[2] Presumably this is because the state statutes and administrative rules are so extensive and prescriptive that they represent a "completed legislative plan, requiring no further legislative contribution," in which case a city decision that implements them is administrative and not legislative.[3] As Legislative Counsel notes in the February 19 letter: "[I]f there is a 'prescribed legislative process' or a 'completed 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." We are in complete alignment with Legislative Counsel on this point. Significantly, this also means that HB 4026-A *does not infringe on any rights protected by the Oregon Constitution*.

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[1] "The initiative and referendum powers [are] reserved to the qualified voters of each municipality and district as to all local, special and municipal legislation[.]"

[2] "If effective, the -1 amendments to HB 4026 would then appear to bar this referendum from the ballot. Again, we expect that the same result would occur if this question were considered by an Oregon court."

[3] *Foster v. Clark*, 309 Or 464, 472-73 (1990).

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Legislative Counsel's February 26 letter also correctly notes that when a petition to refer an ordinance is filed with the city, the North Plains municipal code requires the city to determine whether the referral complies with state law within five business days. We note however, that ORS 250.270 and 250.275, cited in the letter, only apply to an initiative measure; they do not apply to a referral.[4] Thus, there is no state law requirement that a city determine compliance with Article IV, Section 1(5), when faced with a referral petition.

Frankly, this underscores the difficulty that cities, and particularly small cities, face when presented with a referral petition. Ultimately, the issue is that a city only has five days to determine whether a referral complies with the myriad requirements under the Oregon constitution, state law and the local code. This is a heavy lift for small cities that may be facing significant political and financial pressures. And if the city gets it wrong, it can't pull it back. If Legislative Counsel is correct that these decisions are really administrative, then saying so in statute will save these cities and their residents the expense and disruption of having to litigate the question every time. Importantly, there are myriad statutes[5] that expressly state when a decision can and cannot be referred, so there is nothing remotely precedential about putting a statement to that effect in ORS 197.626.

Thus, while we concur with Legislative Counsel's conclusion that legislation is not necessarily required to prohibit a referral, because state law does not say so expressly, there is ambiguity on the issue. In practice, this means a local jurisdiction has to take on the political heat of denying a petition and incur the costs of litigating the issue, which could be avoided simply by clarifying state law in the first instance.

More broadly, we also agree with Legislative Counsel that the legislature cannot statutorily limit the constitutionally empowered referendum rights, but we do not believe that is what HB 4026-A does. The legislature has established by statute (and LCDC by rule) the process and requirements that cities have to follow to adopt and expand a UGB. The legislature can therefore define what that process is, and whether it is administrative in nature or municipal legislation. Clarifying that the legislature intended this to be an administrative decision is what HB 4026-A does; *it does not limit the scope of the constitutional referendum powers*.

We hope this information is helpful. Thank you again for your consideration of HB 4026-A.

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[4] 250.270. (1) Not later than the fifth business day after receiving a prospective petition for an *initiative measure,* the city elections officer shall determine in writing whether the initiative measure meets the requirements of section 1 (2)(d) and (5), Article IV of the Oregon Constitution.

250.275. (1) When a prospective petition for a city measure to be referred is filed with the city elections officer, the officer shall authorize the circulation of the petition containing the title of the measure as enacted by the city governing body or, if there is no title, the title supplied by the petitioner filing the prospective petition. * * *

[5] For just a few examples, see ORS 222.120(6), 222.524(4) and 222.750(4).