



101 SW Main Street, Suite 1100
 Portland, Oregon 97204
 balljanik.com
 t 503.228.2525
 f 503.295.1058

August 24, 2011

Stephen T. Janik
 sjanik@balljanik.com

D. Daniel Chandler
 Strategic Policy Administrator
 Public Services Building
 2051 Kaen Road
 Oregon City, OR 97045

Re: Legal Analysis of Petition No. 3-371 "Voter Approval of Urban Renewal"

Dear Mr. Chandler:

You have requested our firm's legal opinion on whether Petition No. 3-371's (the "Petition") complies with the Oregon Constitution and state law. There is no direct authority on point, so we cannot express a definitive conclusion about the Petition's legality. However, as detailed below, we have serious concerns about the Petition's compliance with the Oregon Constitution, ORS Chapter 457, ORS Chapter 250 and ORS Chapter 203.

1. The Petition is Likely Preempted by Article IX, Section 1c of the Oregon Constitution and ORS Chapter 457 (Urban Renewal)

Clackamas County does not have a county charter, so the county is limited to the scope of authority granted to it by the Legislature and implied powers. *Davidson Baking Co. V. Jenkins*, 216 Or 51, 337 P2d 352 (1959). The Legislature has granted the governing body and electors of a county the power to exercise authority within the county over matters of county concern. ORS 203.035. The assessment, collection and distribution of real property taxes are, however, matters of statewide concern (even though these activities are primarily undertaken by a county). The division of ad valorem taxes in urban renewal areas is a constitutionally based statutory exception, allowed under Article IX, Section 1c of the Oregon Constitution and ORS Chapter 457, to the state taxation system's normal allocation of property tax revenue; accordingly, how urban renewal powers are authorized and exercised are similarly issues of statewide concern. The Legislature was granted the exclusive authority to enact laws related to urban renewal and the division of ad valorem taxes by the people of Oregon when they adopted Article IX, Section 1c of the Oregon Constitution in a general election in 1960. The Legislature implemented Article IX, Section 1c by adopting ORS Chapter 457, which exclusively occupies the field of the elements of urban renewal regulated by the Petition.

::ODMA\PCDOCS\PORTLAND\785036\5



D. Daniel Chandler
August 24, 2011
Page 2

Through ORS Chapter 457, the Legislature automatically created in every municipality¹ "a public body corporate and politic to be known as the 'urban renewal agency.'" ORS 457.035. The Legislature detailed an urban renewal agency's powers, and precisely determined in whom urban renewal powers are vested. ORS 457.045.

As detailed in the next section, the Petition proposes to change the statutorily-mandated authority and powers related to urban renewal by substituting different decision makers, the electors, for the prescribed urban renewal agency authority, and deviating from the requirements for activating and terminating an urban renewal agency. To the extent the Petition is incompatible with the Oregon Constitution, ORS Chapter 457 and other statutes, it is preempted by state law. *LaGrande/Astoria v. PERB*, 281 Or 137, 576 P2d 1204, *aff'd on reh'g*, 284 Or 173, 586 P2d 765 (1978). In short, the Petition must yield to state law.

2. The Petition is Likely Incompatible with the Oregon Constitution, ORS Chapter 457, ORS Chapter 250 and ORS Chapter 203

Several provisions in the Petition would not appear to be consistent with ORS Chapter 457 because (1) those provisions relate to elements of urban renewal that are the sole domain of the Legislature, and (2) the provisions may raise conflicts with ORS Chapter 457, ORS Chapter 250 and ORS Chapter 203.

The Legislature vested the authority to activate an urban renewal agency with "the governing body of the municipality." ORS 457.035(1). It further prescribed a process and prerequisites for termination of an urban renewal agency. ORS 457.075.

ORS 457.010(7) defines "governing body of a municipality" in relevant part: "in the case of a county, the board of county commissioners or other legislative body thereof." We find no reported decisions addressing whether the electors of a county, exercising their power of initiative and referendum, constitute a "legislative body" of the county within the meaning of ORS 457.010(7).

Although the Constitution vests the electors with legislative authority in the form of initiative and referendum, there are several reasons to believe the Legislature did not consider the electors to be a legislative body for purposes of the urban renewal statutes. First, if the Legislature had intended to identify the electors within the definition of "governing body," it could easily have done so.

Second, the Legislature used the definite article "the" and singular noun "governing body" (instead of "a governing body" or "the governing bodies"). In other words, each county has one governing body. The definition in ORS 457.010(7) also uses the disjunctive term "or": the most plausible meaning is

¹ ORS 457.010(11) defines "municipality" to include "any county or any city in this state."



D. Daniel Chandler
August 24, 2011
Page 3

that the legislature intended to refer to the board of county commissioners or such other legislative body as may be elected to govern the county. For example, some counties have been governed by a "county court" exercising legislative authority. In other words, each county has one governing body for purposes of the urban renewal statutes, and it is either a board of commissioners or another legislative body, but not both. The Legislature did not use the conjunctive "and," as would be the case if the Legislature had intended to simultaneously vest authority in the board of commissioners and a different legislative entity (whether the electors or any other entity). We note that the Board of Commissioners of Clackamas County has already acted as the "governing body" for purposes of activating the urban renewal agency. We think the better interpretation of the statute is that the Board of Commissioners is, therefore, the "governing body of the municipality" within Clackamas County and the statute does not admit of a second "legislative body" holding the authority simultaneously.

Third, as discussed below, we believe requirements placed on the "governing body of the municipality" by the Legislature in ORS 457 likely cannot be met by the electorate. Therefore, an interpretation of "governing body of the municipality" that vests authority under the statute in the electorate conflicts with the overall statutory scheme.

If the electors are not a "legislative body" within the meaning of ORS 457.010(7), then the Petition requirement in Chapter 3.03.010 that an urban renewal agency be activated by the county electors at a general election conflicts with ORS 457.035. The Legislature limited the authority to activate an agency solely to the governing body of the municipality, and an agency can be activated only by a nonemergency ordinance that declares that blighted areas exist, there is a need for an urban renewal agency, and that the agency's powers will be exercised in one of the three ways provided in ORS 457.045.

Chapter 3.03.010 suggests that an urban renewal agency is "authorized to exercise additional powers" if approved by the county electors at a general election. An urban renewal agency is allowed only the powers articulated by ORS 457; the county's electors cannot grant the agency additional powers. To the extent the Petition authorizes the electors to grant additional powers to an urban renewal agency, it is incompatible with ORS Chapter 457.

Chapter 3.03.020 would require every new urban renewal plan or substantial change to an existing plan to be approved by county electors at a primary or general election. The Legislature precisely established where urban renewal powers may be exercised by describing three exclusive alternatives – the housing authority, an urban renewal agency board or commission, or the governing body of the municipality. ORS 457.045. In framing the provisions of ORS Chapter 457, the Legislature could have delegated urban renewal authority to several possible alternatives, such as the entire electorate of the jurisdiction, all real property tax payers in the jurisdiction, or the governing body of an urban renewal



D. Daniel Chandler
August 24, 2011
Page 4

authority. The Legislature designated in ORS 457.045 the three alternative governing authorities set forth above and chose not to grant the electors the powers of an urban renewal agency. The inconsistency of the Petition with ORS Chapter 457's establishment of urban renewal authority in an urban renewal agency is further established by ORS 457.055, which allows the transfer of urban renewal authority by the county board, but only to one of the three bodies described above and not to the county electors. To the extent that Chapter 3.03.020 would shift the decision making powers of an urban renewal agency to the electors, it would conflict with ORS 457.045.

This should be contrasted with the legislative grant of referendum authority to amend an ordinance adopting or substantially amending an urban renewal plan. ORS 457.120(3)(d). In counties without a charter, such as Clackamas County, a referendum must comply with ORS 250.165 to ORS 250.235. ORS 250.155(2). If Chapter 3.03.020 is interpreted as compelling a referendum on all ordinances adopting or substantially changing an urban renewal plan without the requisite signatures or compliance with statutory referendum requirements, the referendum would conflict with ORS Chapter 250. (See also section 3 of this letter.)

Petition Chapter 3.03.050 would require the termination of the county urban renewal agency upon the retirement of all urban renewal indebtedness, and that any continuing obligations or rights of the terminated agency be assumed by the county. The circumstances under which an urban renewal agency may be terminated, and how the termination must be accomplished, are prescribed by the Legislature. ORS 457.075. Among other things, the Legislature requires that the governing body find that "there no longer exists a need for an urban renewal agency under ORS 457.035" as a prerequisite to terminating the agency. Chapter 3.03.050 would compel the termination of an urban renewal agency without such a finding, and is therefore incompatible with the statute. ORS 457.075. It is not clear if Chapter 3.03.050's description of "retirement of all urban renewal indebtedness" as the exclusive trigger for terminating an agency is compliant with the Legislature's requirement that "no urban renewal agency shall be terminated under this section unless all indebtedness to which a portion of taxes is irrevocably pledged for payment under ORS 457.420 to 457.460 is fully paid." ORS 457.075.

Chapter 3.03.060 would define the terms "substantial change" and "urban renewal indebtedness" (also referred to as "URI"). At best, the Petition's definitions confuse and complicate the definitions, concepts and requirements of ORS 457, and at worst, they conflict.

"Maximum indebtedness" is defined in ORS 457.010(10), and includes only the "amount of the principal of indebtedness included" in an urban renewal plan, and does not include interest. That statute expressly excludes the "indebtedness incurred to refund or refinance existing indebtedness." The importance of this definition is reflected in ORS 457.085(h), which requires that any proposed



D. Daniel Chandler
August 24, 2011
Page 5

"urban renewal plan" include a statement of the "maximum amount of indebtedness." It is an urban renewal plan that then must be approved by an urban renewal agency and which is, thereafter, subject to potential judicial review. Chapter 3.03.060 defines "urban renewal indebtedness" as "debt incurred pursuant to an urban renewal plan where repayment is pledged from ad valorem taxes assessed within the county." It is unclear if the Petition's proposed definition of "urban renewal indebtedness" is intended to include only the principal of indebtedness, or also the expected interest that will be payable on the debt. The uncertainty is further compounded by Chapter 3.03.030(C) and (D) which require that the notice to the voters set forth the "maximum amount of the new Urban Renewal Indebtedness" (C) and the "maximum amount of interest payable on the debt" (D). The Petition's failure to limit the definition of "urban renewal indebtedness" to the principal of indebtedness and the other concepts in ORS 457.010(10) could be interpreted as being incompatible with the state statutes definition of "maximum amount of indebtedness."²

Another definition proposed by Chapter 3.03.060 of the Petition, "substantial change," may conflict with the meaning of a comparable term in ORS Chapter 457 ("substantial amendment"). The importance of the statutory term is that it differentiates those changes in an adopted urban renewal plan that must be approved in the same rigorous manner as the original plan, from those changes which may be made without compliance with the process for approving the original urban renewal plan. "Substantial change" is not defined in ORS Chapter 457, but the statute uses the term "substantial amendments" repeatedly, and provides a non-exclusive list of actions that may be substantial amendments, including adding land to an urban renewal plan area in excess of one percent of the existing plan area and increasing the maximum amount of indebtedness (as defined in ORS 457.010(10) – the principle of indebtedness). ORS 457.085(2)(i) and ORS 457.220. The statute requires substantial amendments to urban renewal plans to be adopted in the same manner that approved the original plan. ORS 457.220. "Substantial change" is defined extremely broadly by the Petition, and would include any addition of land area and any change that "alters the basic

² While not pertinent to the issue of the potential conflict between the Petition and the state law, it is worth noting that the proposal in Chapter 3.03.030(D) that would require notice to the voters of the "maximum amount of interest" would likely prevent an urban renewal authority from issuing two types of bonds that have been issued by urban renewal agencies for decades. Bonds that have a variable rate of interest, fluctuating based on market index, could not be issued because the dollar amount of interest would not be known at the time of issuance. Similarly, bonds that have a call right or redemption right, allowing the issuer to pay off the original bonds early and refinance the debt with newly issued bonds at a lower interest rate, could not be issued because the lower interest rate of the replacement bonds would not be known at the time of issuance of the original bonds. In each case, the effect may be to deny an urban renewal authority of a means to reduce the interest cost of bonded debt.

purpose, engineering or financing principles of a voter-approved plan."³ The Petition would require that a substantial change to an existing plan be subject to approval of the county electors. Chapter 3.03.020. To the extent that the Petition's definition of "substantial change" conflicts with "substantial amendment" in ORS 457, the Petition is incompatible with the state law.

Chapter 3.03.070 would require public notice to be mailed to all county electors at least two weeks prior to "any public hearing to consider legislation that would conflict with provisions of this chapter or prevent them from operating," and that "any legislation passed in violation of this provision shall be void." "Legislation" is not defined, and while the Petition may have intended to apply only to legislative actions of the county (i.e., an ordinance that amends Chapter 3.03), the Petition is unclear. The terms of the Petition could be interpreted to apply to legislation considered and adopted by the state Legislature. The county does not have the authority to void state law, so to the extent that the Petition attempts to do so, it is invalid.

Even if Chapter 3.03.070 would apply only to county legislation, the Petition may run afoul of state law. The notice requirement proposed in Chapter 3.03.070 may be preempted by state law. A county without a charter must follow the procedures in ORS 203.045 when adopting an ordinance. The notice provisions proposed by Chapter 3.03.070 may conflict with the statutory procedure available for adopting an emergency ordinance, in which case the Petition is preempted by state law. We are also concerned that Chapter 3.03.070 could improperly bind subsequent county code amendments related to urban renewal. A legislative act, including an initiative, cannot bind subsequent governing bodies (such as the Board of County Commissioners), except by contract. *Johnson v. City of Pendleton*, 131 Or 46, 55-56 (1929). Petition Chapter 3.03.070 would create an additional procedural requirement for subsequent ordinances that conflict with Chapter 3.03, which may be a procedural barrier that impermissibly binds subsequent Boards of County Commissioners.

3. The Petition May Require Referrals that Bypass Constitutional Limitations on the Referendum Power Reserved to County Electors

The Petition initiative contains two provisions that appear to implicate or require an automatic referral to the electors:

³ Arguably the quoted portion of the "substantial change" definition applies only to urban renewal plans that are adopted in the future because the quoted portion of the definition is limited to "voter-approved" plans. Therefore, changes to existing urban renewal plans that alter the basic purpose, engineering or financing principles of the plan may or may not be subject to Chapter 3.03.020. This is significant because refinancing or a change in a variable interest rate bond could be considered an alternation of the "financing principles" of an urban renewal plan, and therefore a "substantial change" that is subject to an election.



3.03.010 A county urban renewal agency shall not be activated or authorized to exercise additional powers without the approval of county electors at a general election.

3.03.020 Every new urban renewal plan, or substantial change to any existing plan, shall be referred to county electors for their approval at a primary or general election.

Chapter 3.03.010 does not specifically mention "referral" but we assume that in practice it would require the Board of Commissioners to refer any legislation activating an urban renewal agency, authorizing additional powers by an urban renewal agency, or making a substantial change in any urban renewal plan to a vote of the electors. We believe this "automatic referral" suffers from several fundamental defects: (1) it could result in referral of matters that are not "legislative" in nature; (2) it uses one power of the electorate – the initiative – to bypass the statutory requirements for referendum on legislative acts of the Board of Commissioners; and (3) it purports to restrict prospectively the legislative authority of the Board of Commissioners.

A. **Constitutional Basis of Initiative and Referendum**

Article IV of the Oregon Constitution governs the "Legislative Department." Section 1(1) of Article IV grants the legislative power to the Legislative Assembly "except for the initiative and referendum powers reserved to the people." Section 1(2) and Section 1(3) explain how the initiative power and referendum power, respectively, may be exercised with respect to state legislation. Section 1(5) provides for initiative and referendum at the local level:

(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. The manner of exercising those powers shall be provided by general laws, but cities may provide the manner of exercising those powers as to their municipal legislation. In a city, not more than 15 percent of the qualified voters may be required to propose legislation by the initiative, and not more than 10 percent of the qualified voters may be required to order a referendum on legislation.

As discussed below, several general principles follow from this constitutional reservation of the powers of initiative and referendum: (1) initiative and referendum are limited to "legislative" matters; and (2) the Legislative Assembly,

through "general laws," can regulate the exercise of the initiative and referendum with respect to county legislation, whereas cities have inherent constitutional authority, within the specified limits, to determine the requirements for exercise of the powers of initiative and referendum on matters of city legislation.

B. Limitation to "Legislative" Matters

The referendum and initiative power granted under the Oregon Constitution is limited to legislative matters. *Foster v. Clark*, 309 Or 464, 472 (1990); *see also Lane Transit District v. Lane County*, 327 Or 161 (1998). Referendum and initiative powers cannot be exercised upon "administrative" matters. The "distinction between making laws of general applicability and permanent nature, on the one hand, as opposed to decisions implementing such general rules, on the other," provides the distinction between "legislative" and "administrative" matters. *Foster*, 309 Or at 472. In other words, administrative activities are those which are "necessary . . . to carry out legislative policies and purposes already declared." *Lane Transit District v. Lane County*, 327 Or 161, 176 (1998) (quotation omitted). The crucial test for determining whether the subject of an initiative or referendum is legislative or administrative is whether the ordinance is making a law or executing a law already in existence. *State ex rel Allen v. Martin*, 255 Or 401, 406 (1970) (quotation omitted).

It is possible that certain matters subject to referral to voters under Chapters 3.03.010 and 3.03.020 would be not be "legislative" and therefore not properly subject to referral to the electorate. In *Estate of Gold v. Portland*, 87 Or App 45, 52-53, 740 P2d 812 (1987), the Court of Appeals held that an amendment to an urban renewal plan to add a single property and to authorize public acquisition of that property was not "legislative" in nature. The initial adoption of an urban renewal plan for a 900-acre industrial park, by contrast, has been held to be "legislative." *Zimmerman v. Columbia County*, 40 Or LUBA 483, 491 (2001).

Chapter 3.03.020 would require referral to the electors for "every new urban renewal plan, or substantial change to an existing plan" "Substantial change" is defined in Chapter 3.03.060 to include a change that:

- (A) Expands the boundary, duration or borrowing authority of any plan; or,
- (B) Alters the basic purpose, engineering or financing principles of a voter-approved plan.

It is likely that some "substantial changes" in urban renewal plans, including small expansions of boundaries or changes in "engineering", would not be "legislative" in nature and therefore would not properly be subject to the referendum power reserved to the electors of Clackamas County under Article IV, Section 1(5) of the Oregon Constitution. The Petition's requirement that every "substantial change", including changes in "engineering" be subject to a



referendum is of very questionable legality. For example, if an urban renewal plan specified the location and dimensions of a public plaza, any change in those dimensions (the "engineering" of the plaza), would require referral to the electors under the terms of the Petition. Clearly, such a change is not legislation and is an administrative act.

C. **Obligation to Follow Statutory Procedures for Referendum**

As quoted above, Article IV, Section 1(5) of the Oregon Constitution distinguishes between cities and other local governments: cities, within stated limits, can establish rules for the exercise of the initiative and referendum powers on matters of city legislation, whereas the exercise of those powers on matters of county legislation is subject to "general laws."

This distinction is reflected in the statutes governing initiative and referendum. ORS 250.265 to 250.346 govern "the exercise of initiative or referendum powers regarding a city measure under section 1, Article IV, Oregon Constitution, unless the city charter or ordinance provides otherwise." In other words, the statutory provisions for cities are a "default" set of rules applicable only if a city has not established its own rules.

Similarly, the Legislature has provided statutory standards for exercise of the initiative and referendum powers with respect to county legislation in ORS 250.165 to 250.235. As with cities, those standards are "default" rules for "home rule" counties – those counties operating under a charter adopted pursuant to section 10, Article VI of the Oregon Constitution. In other words, the statutes apply "unless the county charter or ordinance provides otherwise." ORS 250.155(1). By contrast, the statutory rules apply without exception to counties that have not adopted a charter. ORS 250.155(2). Because Clackamas County has not adopted a charter, the statutes governing initiative and referendum apply directly to the county.

The Petition may run afoul of the statutory requirements in that it would bypass the statutory referendum requirements. Those requirements govern the form of referendum petition, filing of the prospective petition, and signature requirements specifically applicable to non-home rule counties. With proper use of these provisions, the electors of Clackamas County can already exercise their referendum power with respect to legislation adopted by the Board of Commissioners. The Petition's approach appears to displace the required statutory process for obtaining a referendum, or the discretionary authority of the Board of Commissioners to refer legislation to the voters, in favor of a requirement that an entire class of actions by the Board of Commissioners be automatically subject to referral to the electors.

We find no guidance from the Oregon courts regarding whether electors may use one of their constitutionally reserved powers – initiative – to institute compulsory



D. Daniel Chandler
August 24, 2011
Page 10

referral of a class of legislation in any jurisdiction, let alone a nonhome rule county subject to the statutory requirements of ORS 250.165 to 250.235.

Even if the initiative power can lawfully be used to adopt an ordinance requiring referral, that requirement cannot bind future legislative action by the Board of Commissioners. As already noted, the Oregon courts have followed the established principle that a legislative act, including an initiative, cannot bind subsequent legislative bodies. If the Petition is placed on the ballot and passes, the Board of Commissioners necessarily retains the legislative authority to adopt an ordinance concerning urban renewal and to determine that the ordinance does not have to be referred to the electors.

4. Conclusion

In sum, in our opinion, certain provisions of the Petition are more likely than not to be inconsistent with the Oregon Constitution and ORS Chapter 457. Because of the absence of dispositive judicial authority on the relevant legal issues set forth above, we cannot express a more definitive conclusion on the novel legal issues posed by the Petition.

Our analysis is not intended to completely identify all potential legal infirmities with the Petition. Instead, we have analyzed the Oregon Constitution, statutes and case law, and have identified serious concerns with the Petition's compliance with Oregon law.

Very truly yours,


Ball Janik, LLP

STJ:DLK