



DEPARTMENT OF JUSTICE
APPELLATE DIVISION

December 24, 2014

The Honorable Thomas A. Balmer
Chief Justice, Oregon Supreme Court
Supreme Court Building
1163 State Street
Salem, OR 97310

Re: *Eugene Shoenheit & Ben Unger v. Ellen Rosenblum*
SC S062785 (Control), S062787

Dear Chief Justice Balmer:

Chief petitioner Eugene Schoenheit, as well as Ben Unger, have filed ballot title challenges in the above-referenced matters. Pursuant to ORS 250.067(4), the Secretary of State is required to file with the court the written comments submitted in response to the draft ballot title. Those written comments, under the cover of Elections Division Compliance Specialist Lydia Plukchi's letter, are enclosed for filing with the court. Pursuant to ORAP 11.30(7), we also have enclosed for filing with the court the draft and certified ballot titles, together with their respective cover letters.

Sincerely,

/s/ Judy C. Lucas

Judy C. Lucas
Senior Assistant Attorney General
judy.lucas@doj.state.or.us

cc: Aruna Masih/without encl.
Eugene Schoenheit/without encl.

JCL:aft/6116815

IN THE SUPREME COURT OF THE STATE OF OREGON

EUGENE SCHOENHEIT,

Petitioner,

v.

ELLEN F. ROSENBLUM, Attorney
General, State of Oregon,

Respondent.

Supreme Court No. S062785 (Control)

BEN UNGER,

Petitioner,

v.

ELLEN F. ROSENBLUM, Attorney
General, State of Oregon,

Respondent.

Supreme Court No. S062787

RESPONDENT'S ANSWERING
MEMORANDUM TO PETITIONS TO
REVIEW BALLOT TITLE
RE: INITIATIVE PETITION NO. 8
(SUPREME COURT)

Petitioners seek review of the Attorney General's certified ballot title for Initiative Petition (IP) 8 (2016). This court reviews ballot titles for "substantial compliance with the requirements of ORS 250.035." ORS 250.085(5). The Attorney General submits this answering memorandum, as authorized pursuant to ORAP 11.30(6). For the reasons explained below, the Attorney General's ballot title for IP 8 substantially complies with ORS 250.035.

A. The Attorney General's caption substantially complies with ORS 250.035(2)(a).

The caption for the ballot title of a state measure must reasonably identify the subject matter of the measure and contain no more than 15 words.

ORS 250.035(2)(a). A caption substantially complies with ORS 250.035(2)(a) if it identifies the subject matter of the proposed measure in terms that will not confuse or mislead potential petition signers and voters. *Mabon v. Myers*, 332 Or 633, 637, 33 P3d 988 (2001). The caption is the “cornerstone for the other portions of the ballot title” and its “headline,” and it “provides the context for the reader’s consideration of other information in the ballot title.” *Mabon*, 332 Or at 637. The caption must use terms that reasonably identify the proposed measure’s subject matter and do not understate or overstate the scope of the legal changes that the proposed measure would enact. *Kain / Waller v. Myers*, 337 Or 36, 40, 93 P3d 62 (2004).

To determine the subject matter of a proposed measure, the court first examines its words and the changes, if any, that the proposed measure would enact in the context of existing law. *Kain / Waller*, 337 Or at 41. The court then examines the words of the caption to determine whether they reasonably identify the proposed measure’s subject matter. *Id.*

The Attorney General’s caption states:

**Eliminates authority of metropolitan service district to adopt,
enforce land use, air/water quality plans**

Petitioner Eugene Schoenheit, chief petitioner, argues that the caption fails to substantially comply with ORS 250.035 for three reasons. First, Schoenheit contends that the major effect of the measure is “to return land use authority to the counties and cities of Oregon.” Second, Schoenheit contends that the caption must refer to “metropolitan services *districts*,” rather than “district,” because the current statute, ORS 269.030, refers to the districts in the plural. Third, Schoenheit contends that the measure’s effect on “air/water quality plans” is only minor, and should be omitted from the caption. Schoenheit advocates modifying the caption to read:

**Eliminates authority of Metropolitan Service Districts to dictate
land use plans for counties and cities**

The court should reject petitioner Schoenheit’s first argument, because “return land use authority to the counties and cities in Oregon” is not an impartial statement of the measure’s subject matter. In addition, Schoenheit’s proposed caption does not give voters any idea what “land use authority” is at issue. “The proposed caption cannot identify the subject matter of the proposed measure, in the statutory sense, by assuming that voters are aware of its subject matter instead of stating it.” *Kain/Waller v. Myers*, 337 Or 36, 44, 93 P3d 62 (2004). The Attorney General’s caption does not fail to substantially comply with ORS 250.035(2)(a) by not using petitioner’s language.

Second, the problem with referring to metropolitan service “districts,” plural, is that it might mislead voters and potential petition signers to think, incorrectly, that there are currently multiple metropolitan service districts. The Attorney General’s reference to “metropolitan service district” avoids that problem, while not excluding the possible creation of more metropolitan service districts in the future. The Attorney General’s caption does not fail to substantially comply with ORS 250.035(2)(a) by using “district” instead of “districts.”

Third, the measure’s effect on a metropolitan service district’s authority with regard to air and water quality is not “only a minor effect.” As petitioner Unger’s petition for review explains, the measure eliminates a metropolitan service district’s ability to serve as a federally mandated Metropolitan Planning Organization (MPO) responsible for protecting air quality in the area.

For those reasons, the caption is not out of compliance in the ways petitioner Schoenheit contends.

Petitioner Ben Unger argues that the caption does not substantially comply with the statute because it fails to reference a metropolitan service district’s current authority to “coordinate” land use. The petitioner asserts that coordinating land use within the district is at least as important a function as

enforcing land use, and therefore should be included in the caption, as it is in the Attorney General's result statements. One suggestion Unger offers for modifying the caption is:

**Eliminates metropolitan service district's authority to adopt,
coordinate, enforce land use, air/water quality plans**

Although Unger's suggestion might improve the caption, that does not mean that the caption fails to substantially comply with ORS 250.035(2)(a). *See Philips v. Myers*, 325 Or 221, 228, 936 P2d 964 (1997) (showing that a proposed summary is "better" does not show a lack of substantial compliance). In this case, the Attorney General's caption substantially complies.

The court should certify the Attorney General's caption without modification.¹

B. The Attorney General's result statements substantially comply with ORS 250.035(2)(b) and (c).

The two result statements are required to describe the results of approving and rejecting the measure. The statements are limited to 25 words. ORS 250.035(2)(b) and (c). A "yes" vote result statement must accurately describe in simple and understandable terms the result if the proposed measure

¹ If the court agrees with petitioner Unger's argument, the Attorney General suggests that the court approve the proposed language quoted above for the modified caption.

is approved. *Mabon*, 332 Or at 639. A “no” result statement describes the result if the proposed measure is rejected. ORS 250.035(2)(c). ORS 250.035(3) requires the two statements to be parallel “to the degree practicable.”

The Attorney General certified the following result statements:

Result of “Yes” Vote: “Yes” vote eliminates metropolitan service district’s authority to adopt regional plan for managing urban growth; coordinate land use; establish urban growth boundary, urban/rural reserves

Result of “No” Vote: “No” vote retains metropolitan service district’s authority to adopt regional plan for managing urban growth; coordinate land use; establish urban growth boundary, urban/rural reserves.

Petitioner Schoenheit objects that the phrase “coordinate land use” is misleading because the actual major effect of the measure is to eliminate the authority of any metropolitan service district “to dictate land use planning,” returning that authority to the counties and cities. The result of a “No” vote, in the petitioner’s view, is the reverse of that effect. The court should reject the petitioner’s argument, which would result in biased and inadequate result statements.

Petitioner Unger argues that the result statements fail to comply with ORS 250.035(2)(b)-(c) because they are underinclusive in failing to reference

the metropolitan service district's air and water quality function. That argument is wrong, because the result statements' references to the "authority to adopt regional plan for managing urban growth" encompasses the function of air and water quality management. Even assuming petitioner Unger's proposed language is "better," that does not mean the prepared vote result statements fail to comply with ORS 250.035(2)(b)-(c). *See Philips*, 325 Or at 228 (showing that a proposed summary is "better" does not show a lack of substantial compliance).

The court should affirm the Attorney General's result statements.

C. The Attorney General's summary substantially complies with ORS 250.035(2)(d).

The summary is to be a "concise and impartial statement of not more than 125 words summarizing the state measure and its major effect."

ORS 250.035(2)(d). The goal of the summary is to "help voters understand what will happen if the measure is approved" and "the breadth of its impact."

Mabon, 332 Or at 640.

The Attorney General certified the following summary:

Summary: A metropolitan service district ("district") makes public services available in metropolitan area and adopts plans to control land use activities having metropolitan significance, including air and water quality, transportation impacts. Currently, only established district is Portland

metropolitan area. A district adopts urban growth boundary; creates urban/-rural reserves; creates regional plan; may review, change comprehensive plans of cities, counties in district; coordinates land use planning activities within district. District's land use rules are binding on cities, counties within district. Electors of district may change, repeal district's charter. Measure eliminates district's authority to designate urban, rural reserves; adopt, enforce regional land use rules, air and water quality rules; coordinate land use planning within district; receive/distribute federal transportation funds; shifts costs to cities/counties. Other provisions.

Petitioner Schoenheit contends that the Attorney General's summary does not substantially comply with ORS 250.035(d) in four respects.² First, petitioner Schoenheit argues that the sentence, "Currently, only established district is Portland metropolitan area[]" is misleading because the measure applies to any current or future metropolitan service district within Oregon. But nothing in the challenged sentence suggests that other, future metropolitan service districts may not or will not be created. The court should reject this argument.

Second, petitioner Schoenheit objects to the summary's statement: "Electors of district may change, repeal district's charter." According to the petitioner, the statement suggests incorrectly that the measure alters or modifies a district's charter. On the contrary, the challenged sentence correctly informs

² Petitioner Unger does not challenge the Attorney General's summary.

voters and potential petition signers that the electorate of a district currently controls the district's functions. The measure, in contrast, eliminates much of the district's potential authority without regard to the electorate's choices. The sentence does not take the summary out of substantial compliance with ORS 250.035(2)(d).

Third, petitioner Schoenheit argues that the summary is incorrect in stating that the measure "[s]hifts costs to cities/counties." But it is an inevitable result of the measure that returning the district's "authority" to cities and counties will impose additional costs on the governmental unit that takes on the exercise of that authority. The court should reject this argument.

Fourth, petitioner Schoenheit argues that the phrase, "Other provisions" is impermissibly ambiguous and vague. That argument must fail, because the court has historically approved the use of that phrase to alert voters that the summary is not a complete description of the measure. The court should reject the argument.

In sum, the court should certify the Attorney General's summary without modification.

D. Conclusion

Petitioners have not identified any aspect of the Attorney General's ballot title that fails to comply substantially with the statute. The court should certify the Attorney General's ballot title for IP 8 in its entirety. In the alternative, this court could refer the ballot title for IP 8 to the Attorney General for modification of the caption and result statements as requested by petitioner Unger.

Respectfully submitted,

ELLEN F. ROSENBLUM #753239
Attorney General
ANNA M. JOYCE #013112
Solicitor General

/s/ Judy C. Lucas

JUDY C. LUCAS #903285
Senior Assistant Attorney General
judy.lucas@doj.state.or.us

Attorneys for Respondent
Ellen F. Rosenblum, Attorney General,
State of Oregon

OFFICE OF THE SECRETARY OF STATE

KATE BROWN

SECRETARY OF STATE



ELECTIONS DIVISION

JIM WILLIAMS

DIRECTOR

255 CAPITOL STREET NE, SUITE 501
SALEM, OREGON 97310-0722

(503) 986-1518

December 1, 2014

The Honorable Ellen Rosenblum, Attorney General
Anna Joyce, Solicitor General
Dept. of Justice, Appellate Division
400 Justice Building
Salem, OR 97310

Re: Eugene Schoenheit and Ben Unger v. Ellen Rosenblum, Attorney General,
State of Oregon, Petition to Review Ballot Title

Dear Ms. Joyce:

Pursuant to ORS 250.067(4), we transmit to you for filing with the court as part of the record in the above referenced matter, the written comments filed in this office pursuant to ORS 250.067(1), regarding initiative petition #8. We also enclose the draft and certified ballot titles with their respective transmittal letters.

Sincerely, _

Lydia Plukchi
Compliance Specialist

enclosures

An Act to return land use authority to the counties and cities in Oregon

Be it enacted, the People of the State of Oregon propose amending State Statutes as follows:

SECTION 1. Section 2 of this 2014 Act is added to and made a part of ORS 268.300 to 268.393.

SECTION 2. Notwithstanding any other provision of law, a metropolitan service district may not:

- (1) Adopt land-use planning goals and objectives;
- (2) Enact land use regulations;
- (3) Adopt a regional framework plan;
- (4) Designate urban or rural reserves pursuant to ORS 195.137 to 195.145, or enter into an intergovernmental agreement with a county for purposes of making such a designation;
- (5) Exercise coordinative functions pursuant to ORS 195.020 to 195.025;
- (6) Serve as a metropolitan planning organization for purposes of federal law.

SECTION 3. ORS 268.380 is amended as follows:

(1) A district may:

[(a) Adopt land-use planning goals and objectives for the district consistent with goals adopted under ORS chapters 195, 196 and 197;]

[(b) Review the comprehensive plans in effect on January 1, 1979, or subsequently adopted by the cities and counties within the district and recommend that cities and counties, as the district considers necessary, make changes in any plan to ensure that the plan conforms to the district's metropolitan area goals and objectives and the statewide goals;]

[(c) Coordinate the land-use planning activities of that portion of the cities and counties within the district; and]

[(d)] (a) Coordinate its activities [and the related activities of the cities and counties within the district] with the land-use planning development activities of the federal government, other local governmental bodies situated within this state or within any other state and any agency of this state or another state.

[(2) When a district is required by a district charter to adopt a regional framework plan, the regional framework plan shall include and be consistent with land use planning goals and objectives adopted by the district.]

SECTION 4. ORS 268.385 is hereby repealed.

SECTION 5. ORS 268.390 is amended as follows:

(1) A district may define and apply a planning procedure that identifies and designates areas and activities having significant impact upon the orderly and responsible development of the metropolitan area, including, but not limited to, impact on:

- (a) Air quality;
- (b) Water quality; and
- (c) Transportation.

(2) A district may [prepare and adopt functional plans] encourage, but not require, cities and counties within the district to provide a coordinated response for those areas designated under subsection (1) of this section to control metropolitan area impact on air and water quality, transportation and other aspects of metropolitan area development the district may identify.

[(3) (a) A district shall adopt an urban growth boundary for the district in compliance with applicable goals adopted under ORS chapters 195, 196 and 197. When a district includes land designated as urban reserve under ORS 195.145 (1)(b) within an urban growth boundary pursuant to ORS 197.298 (1), the district is not required to consider the capability classification system or the cubic foot site class of the land as described in ORS 197.298 (2).]

[(b) Notwithstanding the procedural requirements for boundary changes under ORS 268.354, when the district adopts an urban growth boundary, the urban growth boundary becomes the boundary of the district.]

[(4) A district may review the comprehensive plans adopted by the cities and counties within the district that affect areas designated by the district under subsection (1) of this section or the urban growth boundary adopted under subsection (3) of this section and recommend or require cities and counties, as it considers necessary, to make changes in any plan to ensure that the plan and any actions taken under the plan substantially comply with the district's functional plans adopted under subsection (2) of this section and its urban growth boundary adopted under subsection (3) of this section.]

[(5) Pursuant to a regional framework plan, a district may adopt implementing ordinances that:]

[(a) Require local comprehensive plans and implementing regulations to substantially comply with the regional framework plan within two years after compliance acknowledgment.]

[(b) Require adjudication and determination by the district of the consistency of local comprehensive plans with the regional framework plan.]

[(c) Require each city and county within the jurisdiction of the district and making land use decisions concerning lands within the land use jurisdiction of the district to make those decisions consistent with the regional framework plan. The obligation to apply the regional framework plan to land use decisions shall not begin until one year after the regional framework plan is acknowledged as complying with the statewide land use planning goals adopted under ORS chapters 195, 196 and 197.]

[(d) Require changes in local land use standards and procedures if the district determines that changes are necessary to remedy a pattern or practice of decision-making inconsistent with the regional framework plan.]

- [(6) A process established by the district to enforce the requirements of this section must provide:]
- [(a) Notice of noncompliance to the city or county.]
 - [(b) Opportunity for the city or county to be heard.]
 - [(c) Entry of an order by the district explaining its findings, conclusions and enforcement remedies, if any.]
- [(7) Enforcement remedies ordered under subsection (6) of this section may include, but are not limited to:]
- [(a) Direct application of specified requirements of functional plans to land use decisions by the city or county;]
 - [(b) Withholding by the district of discretionary funds from the city or county; and]
 - [(c) Requesting an enforcement action pursuant to ORS 197.319 to 197.335 and withholding moneys pursuant to an enforcement order resulting from the enforcement action.]
- [(8) An order issued under subsection (6) of this section:]
- [(a) Must provide for relief from enforcement remedies upon action by the city or county that brings the comprehensive plan and implementing regulations into substantial compliance with the requirement.]
 - [(b) Is subject to review under ORS 197.830 to 197.845 as a land use decision.]
- [(9) The regional framework plan, ordinances that implement the regional framework plan and any determination by the district of consistency with the regional framework plan are subject to review under ORS 197.274.]

SECTION 6. ORS 195.020 is amended as follows:

- (1) Special districts shall exercise their planning duties, powers and responsibilities and take actions that are authorized by law with respect to programs affecting land use, including a city or special district boundary change as defined in ORS 197.175 (1), in accordance with goals approved pursuant to ORS chapters 195, 196 and 197.
- (2) A county assigned coordinative functions under ORS 195.025 (1) *[or the Metropolitan Service District, which is assigned coordinative functions for Multnomah, Washington and Clackamas counties by ORS 195.025 (1),]* shall enter into a cooperative agreement with each special district that provides an urban service within the boundaries of the county *[or the metropolitan district]*. A county *[or the Metropolitan Service District]* may enter into a cooperative agreement with any other special district operating within the boundaries of the county or the metropolitan district.
- (3) The appropriate city and county *[and, if within the boundaries of the Metropolitan Service District, the Metropolitan Service District,]* shall enter into a cooperative agreement with each special district that provides an urban service within an urban growth boundary. The appropriate city and county *[and the Metropolitan Service District,]* may enter into a cooperative agreement with any other special district operating within an urban growth boundary.
- (4) The agreements described in subsection (2) of this section shall conform to the requirements of paragraphs (a) to (d), (f) and (g) of this subsection. The agreements described in subsection (3) of this section shall:
 - (a) Describe how the city or county will involve the special district in comprehensive planning, including plan amendments, periodic review and amendments to land use regulations;
 - (b) Describe the responsibilities of the special district in comprehensive planning, including plan amendments, periodic review and amendments to land use regulations regarding provision of urban services;
 - (c) Establish the role and responsibilities of each party to the agreement with respect to city or county approval of new development;
 - (d) Establish the role and responsibilities of the city or county with respect to district interests including, where applicable, water sources, capital facilities and real property, including rights of way and easements;
 - (e) Specify the units of local government which shall be parties to an urban service agreement under ORS 195.065;
 - [(f) If a Metropolitan Service District is a party to the agreement, describe how the Metropolitan Service District will involve the special district in the exercise of the Metropolitan Service District's regional planning responsibilities;]* and
 - (g) Contain such other provisions as the Land Conservation and Development Commission may require by rule.
- (5) Agreements required under subsections (2) and (3) of this section are subject to review by the commission. The commission may provide by rule for periodic submission and review of cooperative agreements to insure that they are consistent with acknowledged comprehensive plans.

SECTION 7. ORS 195.025 is amended as follows:

- (1) In addition to the responsibilities stated in ORS 197.175, each county, through its governing body, shall be responsible for coordinating all planning activities affecting land uses within the county, including planning activities of the county, cities, special districts and state agencies, to assure an integrated comprehensive plan for the entire area of the county. *[In addition to being subject to the provisions of ORS chapters 195, 196 and 197 with respect to city or special district boundary changes, as defined by ORS 197.175 (1), the governing body of the Metropolitan Service District shall be considered the county review, advisory and coordinative body for Multnomah, Clackamas and Washington Counties for the areas within that district.]*
- (2) For the purposes of carrying out ORS chapters 195, 196 and 197, counties may voluntarily join together with adjacent counties as authorized in ORS 190.003 to 190.620.
- (3) Whenever counties and cities representing 51 percent of the population in their area petition the Land Conservation and Development Commission for an election in their area to form a regional planning agency to exercise the authority of the counties under subsection (1) of this section in the area, the commission shall review the petition. If it finds that the area described in the petition forms a reasonable planning unit, it shall call an election in the area on a date specified in ORS 203.085, to form a regional planning agency. The election shall be conducted in the manner provided in ORS chapter 255. The county clerk shall be considered the elections officer and the commission shall be considered the district elections authority. The agency shall be considered established if the majority of votes favor the establishment.

(4) If a voluntary association of local governments adopts a resolution ratified by each participating county and a majority of the participating cities therein which authorizes the association to perform the review, advisory and coordination functions assigned to the counties under subsection (1) of this section, the association may perform such duties.

SECTION 8. ORS 195.141 is amended as follows:

(1) A county [and a metropolitan service district established under ORS chapter 268 may enter into an intergovernmental agreement pursuant to ORS 190.003 to 190.130, 195.025 or 197.652 to 197.658 to] may designate rural reserves pursuant to this section and urban reserves pursuant to ORS 195.145 (1)(b).

(2) Land designated as a rural reserve:

(a) Must be outside an urban growth boundary.

(b) May not be designated as an urban reserve during the urban reserve planning period described in ORS 195.145 (4).

(c) May not be included within an urban growth boundary during the period of time described in paragraph (b) of this subsection.

(3) When designating a rural reserve under this section to provide long-term protection to the agricultural industry, a county [and a metropolitan service district] shall base the designation on consideration of factors including, but not limited to, whether land proposed for designation as a rural reserve:

(a) Is situated in an area that is otherwise potentially subject to urbanization during the period described in subsection (2)(b) of this section, as indicated by proximity to the urban growth boundary and to properties with fair market values that significantly exceed agricultural values;

(b) Is capable of sustaining long-term agricultural operations;

(c) Has suitable soils and available water where needed to sustain long-term agricultural operations; and

(d) Is suitable to sustain long-term agricultural operations, taking into account:

(A) The existence of a large block of agricultural or other resource land with a concentration or cluster of farms;

(B) The adjacent land use pattern, including its location in relation to adjacent nonfarm uses and the existence of buffers between agricultural operations and nonfarm uses;

(C) The agricultural land use pattern, including parcelization, tenure and ownership patterns; and

(D) The sufficiency of agricultural infrastructure in the area.

(4) The Land Conservation and Development Commission shall, after consultation with the State Department of Agriculture, adopt by goal or by rule a process and criteria for designating rural reserves pursuant to this section.

SECTION 9. ORS 195.143 is amended as follows:

(1) A county [and a metropolitan service district] must consider simultaneously the designation and establishment of:

(a) Rural reserves pursuant to ORS 195.141; and

(b) Urban reserves pursuant to ORS 195.145 (1)(b).

[2) An agreement between a county and a metropolitan service district to establish rural reserves pursuant to ORS 195.141 and urban reserves pursuant to ORS 195.145 (1)(b) must provide for a coordinated and concurrent process for adoption by the county of comprehensive plan provisions and by the district of regional framework plan provisions to implement the agreement. A district may not designate urban reserves pursuant to ORS 195.145 (1)(b) in a county until the county and the district have entered into an agreement pursuant to ORS 195.145 (1)(b) that identifies the land to be designated by the district in the district's regional framework plan as urban reserves. A county may not designate rural reserves pursuant to ORS 195.141 until the county and the district have entered into an agreement pursuant to ORS 195.141 that identifies the land to be designated as rural reserves by the county in the county's comprehensive plan.]

[3] (2) A county [and a metropolitan service district] may not [enter into an intergovernmental agreement to] designate urban reserves in the county pursuant to ORS 195.145 (1)(b) unless the county [and the district also agree to designate] designates rural reserves in the county.

(4) Designation and protection of rural reserves pursuant to ORS 195.141 or urban reserves pursuant to ORS 195.145 (1)(b):

(a) Is not a basis for a claim for compensation under ORS 195.305 unless the designation and protection of rural reserves or urban reserves imposes a new restriction on the use of private real property.

(b) Does not impair the rights and immunities provided under ORS 30.930 to 30.947.

SECTION 10. ORS 195.145 is amended as follows:

(1) To ensure that the supply of land available for urbanization is maintained:

(a) Local governments may cooperatively designate lands outside urban growth boundaries as urban reserves subject to ORS 197.610 to 197.625 and 197.626.

[b) Alternatively, a metropolitan service district established under ORS chapter 268 and a county may enter into a written agreement pursuant to ORS 190.003 to 190.130, 195.025 or 197.652 to 197.658 to designate urban reserves. A process and criteria developed pursuant to this paragraph are an alternative to a process or criteria adopted pursuant to paragraph (a) of this subsection.]

(2) (a) The Land Conservation and Development Commission may require a local government to designate an urban reserve pursuant to subsection (1)(a) of this section during its periodic review in accordance with the conditions for periodic review under ORS 197.628.

(b) Notwithstanding paragraph (a) of this subsection, the commission may require a local government to designate an urban reserve pursuant to subsection (1)(a) of this section outside of its periodic review if:

(A) The local government is located inside a Primary Metropolitan Statistical Area or a Metropolitan Statistical Area as designated by the Federal Census Bureau upon November 4, 1993; and

- (B) The local government has been required to designate an urban reserve by rule prior to November 4, 1993.
- (3) In carrying out subsections (1) and (2) of this section:
- (a) Within an urban reserve, neither the commission nor any local government shall prohibit the siting on a legal parcel of a single family dwelling that would otherwise have been allowed under law existing prior to designation as an urban reserve.
 - (b) The commission shall provide to local governments a list of options, rather than prescribing a single planning technique, to ensure the efficient transition from rural to urban use in urban reserves.
- (4) Urban reserves designated by [a metropolitan service district and a county] local governments pursuant to subsection [(1)(b)] (1)(a) of this section must be planned to accommodate population and employment growth for at least 20 years, and not more than 30 years, after the 20-year period for which the district has demonstrated a buildable land supply in the most recent inventory, determination and analysis performed under ORS 197.296.
- (5) [A district and a county] Local governments shall base the designation of urban reserves under subsection [(1)(b)] (1)(a) of this section upon consideration of factors including, but not limited to, whether land proposed for designation as urban reserves, alone or in conjunction with land inside the urban growth boundary:
- (a) Can be developed at urban densities in a way that makes efficient use of existing and future public infrastructure investments;
 - (b) Includes sufficient development capacity to support a healthy urban economy;
 - (c) Can be served by public schools and other urban-level public facilities and services efficiently and cost-effectively by appropriate and financially capable service providers;
 - (d) Can be designed to be walkable and served by a well-connected system of streets by appropriate service providers;
 - (e) Can be designed to preserve and enhance natural ecological systems; and
 - (f) Includes sufficient land suitable for a range of housing types.
- (6) A county may take an exception under ORS 197.732 to a statewide land use planning goal to allow the establishment of a transportation facility in an area designated as urban reserve under subsection [(1)(b)] (1)(a) of this section.
- (7) The commission shall adopt by goal or by rule a process and criteria for designating urban reserves pursuant to subsection [(1)(b)] (1)(a) of this section.

SECTION 11. ORS 197.296 is amended as follows:

- (1)(a) The provisions of this section apply to [metropolitan service district regional framework plans and] local government comprehensive plans for lands within the urban growth boundary of a city that is located within a metropolitan service district or a city that is outside of a metropolitan service district and has a population of 25,000 or more.
- (b) The Land Conservation and Development Commission may establish a set of factors under which additional cities are subject to the provisions of this section. In establishing the set of factors required under this paragraph, the commission shall consider the size of the city, the rate of population growth of the city or the proximity of the city to another city with a population of 25,000 or more or to a metropolitan service district.
- (2) At periodic review pursuant to ORS 197.628 to 197.651 or at any other legislative review of the comprehensive plan or regional plan that concerns the urban growth boundary and requires the application of a statewide planning goal relating to buildable lands for residential use, a local government shall demonstrate that its comprehensive plan or regional plan provides sufficient buildable lands within the urban growth boundary established pursuant to statewide planning goals to accommodate estimated housing needs for 20 years. The 20-year period shall commence on the date initially scheduled for completion of the periodic or legislative review.
- (3) In performing the duties under subsection (2) of this section, a local government shall:
- (a) Inventory the supply of buildable lands within the urban growth boundary and determine the housing capacity of the buildable lands; and
 - (b) Conduct an analysis of housing need by type and density range, in accordance with ORS 197.303 and statewide planning goals and rules relating to housing, to determine the number of units and amount of land needed for each needed housing type for the next 20 years.
- (4)(a) For the purpose of the inventory described in subsection (3)(a) of this section, "buildable lands" includes:
- (A) Vacant lands planned or zoned for residential use;
 - (B) Partially vacant lands planned or zoned for residential use;
 - (C) Lands that may be used for a mix of residential and employment uses under the existing planning or zoning; and
 - (D) Lands that may be used for residential infill or redevelopment.
- (a) For the purpose of the inventory and determination of housing capacity described in subsection (3)(a) of this section, the local government must demonstrate consideration of:
- (A) The extent that residential development is prohibited or restricted by local regulation and ordinance, state law and rule or federal statute and regulation;
 - (B) A written long term contract or easement for radio, telecommunications or electrical facilities, if the written contract or easement is provided to the local government; and
 - (C) The presence of a single family dwelling or other structure on a lot or parcel.
- (c) Except for land that may be used for residential infill or redevelopment, a local government shall create a map or document that may be used to verify and identify specific lots or parcels that have been determined to be buildable lands.
- (5)(a) Except as provided in paragraphs (b) and (c) of this subsection, the determination of housing capacity and need pursuant to subsection (3) of this section must be based on data relating to land within the urban growth boundary that has been collected since the last periodic review or five years, whichever is greater. The data shall include:
- (A) The number, density and average mix of housing types of urban residential development that have actually occurred;
 - (B) Trends in density and average mix of housing types of urban residential development;

- (C) Demographic and population trends;
- (D) Economic trends and cycles; and
- (E) The number, density and average mix of housing types that have occurred on the buildable lands described in subsection (4)(a) of this section.

(b) A local government shall make the determination described in paragraph (a) of this subsection using a shorter time period than the time period described in paragraph (a) of this subsection if the local government finds that the shorter time period will provide more accurate and reliable data related to housing capacity and need. The shorter time period may not be less than three years.

(c) A local government shall use data from a wider geographic area or use a time period for economic cycles and trends longer than the time period described in paragraph (a) of this subsection if the analysis of a wider geographic area or the use of a longer time period will provide more accurate, complete and reliable data relating to trends affecting housing need than an analysis performed pursuant to paragraph (a) of this subsection. The local government must clearly describe the geographic area, time frame and source of data used in a determination performed under this paragraph.

(6) If the housing need determined pursuant to subsection (3)(b) of this section is greater than the housing capacity determined pursuant to subsection (3)(a) of this section, the local government shall take one or more of the following actions to accommodate the additional housing need:

(a) Amend its urban growth boundary to include sufficient buildable lands to accommodate housing needs for the next 20 years. As part of this process, the local government shall consider the effects of measures taken pursuant to paragraph (b) of this subsection. The amendment shall include sufficient land reasonably necessary to accommodate the siting of new public school facilities. The need and inclusion of lands for new public school facilities shall be a coordinated process between the affected public school districts and the local government that has the authority to approve the urban growth boundary;

(b) Amend its comprehensive plan, regional plan, functional plan or land use regulations to include new measures that demonstrably increase the likelihood that residential development will occur at densities sufficient to accommodate housing needs for the next 20 years without expansion of the urban growth boundary. A local government or metropolitan service district that takes this action shall monitor and record the level of development activity and development density by housing type following the date of the adoption of the new measures; or

(c) Adopt a combination of the actions described in paragraphs (a) and (b) of this subsection.

(7) Using the analysis conducted under subsection (3)(b) of this section, the local government shall determine the overall average density and overall mix of housing types at which residential development of needed housing types must occur in order to meet housing needs over the next 20 years. If that density is greater than the actual density of development determined under subsection (5)(a)(A) of this section, or if that mix is different from the actual mix of housing types determined under subsection (5)(a)(A) of this section, the local government, as part of its periodic review, shall adopt measures that demonstrably increase the likelihood that residential development will occur at the housing types and density and at the mix of housing types required to meet housing needs over the next 20 years.

(8)(a) A local government outside a metropolitan service district that takes any actions under subsection (6) or (7) of this section shall demonstrate that the comprehensive plan and land use regulations comply with goals and rules adopted by the commission and implement ORS 197.295 to 197.314.

(b) The local government shall determine the density and mix of housing types anticipated as a result of actions taken under subsections (6) and (7) of this section and monitor and record the actual density and mix of housing types achieved. The local government shall compare actual and anticipated density and mix. The local government shall submit its comparison to the commission at the next periodic review or at the next legislative review of its urban growth boundary, whichever comes first.

(9) In establishing that actions and measures adopted under subsections (6) or (7) of this section demonstrably increase the likelihood of higher density residential development, the local government shall at a minimum ensure that land zoned for needed housing is in locations appropriate for the housing types identified under subsection (3) of this section and is zoned at density ranges that are likely to be achieved by the housing market using the analysis in subsection (3) of this section. Actions or measures, or both, may include but are not limited to:

- (a) Increases in the permitted density on existing residential land;
- (b) Financial incentives for higher density housing;
- (c) Provisions permitting additional density beyond that generally allowed in the zoning district in exchange for amenities and features provided by the developer;
- (d) Removal or easing of approval standards or procedures;
- (e) Minimum density ranges;
- (f) Redevelopment and infill strategies;
- (g) Authorization of housing types not previously allowed by the plan or regulations;
- (h) Adoption of an average residential density standard; and
- (i) Rezoning or redesignation of nonresidential land.

SECTION 12. ORS 197.299 is amended as follows:

(1) A city within a metropolitan service district organized under ORS chapter 268 shall complete the inventory, determination and analysis required under ORS 197.296 (3) not later than five years after completion of the previous inventory, determination and analysis.

(2)(a) The [metropolitan service district] shall take such action as necessary under ORS 197.296 (6)(a) to accommodate one-half of a 20-year buildable land supply determined under ORS 197.296 (3) within one year of completing the analysis.

(b) The [metropolitan service district] city shall take all final action under ORS 197.296 (6)(a) necessary to accommodate a 20-year buildable land supply determined under ORS 197.296 (3) within two years of completing the analysis.

(c) The [metropolitan service district] city shall take action under ORS 197.296 (6)(b), within one year after the analysis required under ORS 197.296 (3)(b) is completed, to provide sufficient buildable land within the urban growth boundary to accommodate the estimated housing needs for 20 years from the time the actions are completed. The [metropolitan service district] city shall consider and adopt new measures that the governing body deems appropriate under ORS 197.296 (6)(b).

(3) The Land Conservation and Development Commission may grant an extension to the time limits of subsection (2) of this section if the Director of the Department of Land Conservation and Development determines that the [metropolitan service district] city has provided good cause for failing to meet the time limits.

(4)(a) The [metropolitan service district] city shall establish a process to expand the urban growth boundary to accommodate a need for land for a public school that cannot reasonably be accommodated within the existing urban growth boundary. The [metropolitan service district] city shall design the process to:

(A) Accommodate a need that must be accommodated between periodic analyses of urban growth boundary capacity required by subsection (1) of this section; and

(B) Provide for a final decision on a proposal to expand the urban growth boundary within four months after submission of a complete application by a large school district as defined in ORS 195.110.

(b) At the request of a large school district, the [metropolitan service district] city shall assist the large school district to identify school sites required by the school facility planning process described in ORS 195.110. A need for a public school is a specific type of identified land need under ORS 197.298 (3).

SECTION 13. ORS 197.301 is amended as follows:

(1) A city within a metropolitan service district organized under ORS chapter 268 shall compile and report to the Department of Land Conservation and Development on performance measures as described in this section at least once every two years. The information shall be reported in a manner prescribed by the department.

(2) Performance measures subject to subsection (1) of this section shall be adopted by a [metropolitan service district] city and shall include but are not limited to measures that analyze the following:

(a) The rate of conversion of vacant land to improved land;

(b) The density and price ranges of residential development, including both single family and multifamily residential units;

(c) The level of job creation within individual cities and the urban areas of a county inside the metropolitan service district;

(d) The number of residential units added to small sites assumed to be developed in the metropolitan service district's inventory of available lands but which can be further developed, and the conversion of existing spaces into more compact units with or without the demolition of existing buildings;

(e) The amount of environmentally sensitive land that is protected and the amount of environmentally sensitive land that is developed;

(f) The sales price of vacant land;

(g) Residential vacancy rates;

(h) Public access to open spaces; and

(i) Transportation measures including mobility, accessibility and air quality indicators.

SECTION 14. ORS 197.302 is amended as follows:

(1) After gathering and compiling information on the performance measures as described in ORS 197.301 but prior to submitting the information to the Department of Land Conservation and Development, a city within a metropolitan service district shall determine if actions taken under ORS 197.296 (6) have established the buildable land supply and housing densities necessary to accommodate estimated housing needs determined under ORS 197.296 (3). If the [metropolitan service district] city determines that the actions undertaken will not accommodate estimated need, the [district] city shall develop a corrective action plan, including a schedule for implementation. The [district] city shall submit the plan to the department along with the report on performance measures required under ORS 197.301. Corrective action under this section may include amendment of the urban growth boundary, comprehensive plan, [regional framework plan, functional plan] or land use regulations as described in ORS 197.296.

(2) Within two years of submitting a corrective action plan to the department, the [metropolitan service district] city shall demonstrate by reference to the performance measures described in ORS 197.301 that implementation of the plan has resulted in the buildable land supply and housing density within the urban growth boundary necessary to accommodate the estimated housing needs for each housing type as determined under ORS 197.296 (3).

(3) The failure of the [metropolitan service district] city to demonstrate the buildable land supply and housing density necessary to accommodate housing needs as required under this section and ORS 197.296 may be the basis for initiation of enforcement action pursuant to ORS 197.319 to 197.335.

SECTION 15. If any provision of this act is barred from operation by superior law, the other provisions shall remain unaffected.

ELLEN F. ROSENBLUM
Attorney General



FREDERICK M. BOSS
Deputy Attorney General

DEPARTMENT OF JUSTICE
APPELLATE DIVISION

October 10, 2014

Jim Williams
Director, Elections Division
Office of the Secretary of State
141 State Capitol
Salem, OR 97310

RECEIVED
2014 OCT 10 PM 2 17
KATE BROWN
SECRETARY OF THE STATE

Re: Proposed Initiative Petition — Eliminates Authority of Metropolitan Service District
("Metro") to Coordinate Land Use Plans for Cities, Counties
DOJ File #BT-08-14; Elections Division #2016-008

Dear Mr. Williams:

We have prepared and hereby provide to you a draft ballot title for the above-referenced prospective initiative petition. The proposed measure relates to eliminating Metro's authority to coordinate land use plans for cities and counties in Clackamas, Multnomah, and Washington counties.

Written comments from the public are due to you within ten business days after your receipt of this draft title. A copy of all written comments provided to you should be forwarded to this office immediately thereafter.

A copy of the draft ballot title is enclosed.

Sincerely,

Alicia Thomas
Legal Secretary

AFT/5907372

Enclosure

Eugene Schoenheit
13780 S.E. Fernridge Ave.
Milwaukie, OR 97222

Lauri S. Hein
20630 N.W. Rockspring Ln.
Beaverton, OR 97006

DRAFT BALLOT TITLE

Eliminates authority of Metropolitan Service District ("Metro") to coordinate land use plans for cities, counties

Result of “Yes” Vote: “Yes” vote eliminates Metro’s authority to coordinate land use planning in tri-county region, adopt urban growth boundary, review city/county land use plans for compliance.

Result of “No” Vote: “No” vote retains Metro’s authority to adopt land use planning goals for tri-county region, coordinate planning, review local plans for compliance, adopt urban growth boundary.

Summary: Metro is a metropolitan service district that includes land in Clackamas, Multnomah, and Washington counties. Metro is responsible for coordinating land use planning in that district. Metro’s authority includes preparing and adopting functional plans for areas within the district and adopting land use goals. Metro adopts a regional urban growth boundary. Metro and the county designate urban and rural reserves. Metro reviews city and county land use plans, regulations and land use decisions for compliance with Metro’s functional plans and urban growth boundary. Metro may require city or county to change parts of local plan and may require changes in local land use standards and procedures, for consistency with the regional framework plan. Measure eliminates Metro’s authority, participation in city and county land use planning.

RECEIVED
2014 OCT 10 PM 2 17
KATE BROWN
SECRETARY OF THE STATE

As Chief Petitioners for the proposed measure (ID-8 for 2016), we object to the draft caption, result statements, and summary for the reasons set forth below.

Section I: Caption

Caption Provided by the Attorney General
*"Eliminates authority of Metropolitan Service Districts ("Metro")
to coordinate land use plans for cities, counties"*

We challenge this caption as follows:

- 1) The term "to **coordinate** land use plans" is an incomplete and inaccurate statement. The proposed measure certainly prohibits a MSD from forcing coordinated local land use plans, but a MSD retains the authority (Section 5(2)) to encourage that type of coordination. Moreover, the caption chooses one of the effects of the proposed measure over the others, ignoring the equally important limitations on MSD's imposed by Section 2 of the proposed measure. For example, the proposed measure prohibits a MSD from adopting land use regulations (Section 2(2)), goals (Section 2(1)), a regional framework plan (Section 2(3)), urban and/or rural reserves (Section 2(4)), and acting as a MPO for purposes of federal law (Section 2(6)). Metro has done each of these, yet the caption focuses solely on the coordinative functions which the proposed measure prohibits (Section 2(5)).
- 2) A caption must "reasonably describe the subject matter of the state measure." ORS 250.035(2)(a). The draft caption focuses on one small aspect of the measure at the expense of the many other important changes which the measure proposes. As a result, the caption does not "reasonably describe the subject matter."

We suggest the following caption:

Eliminates authority of Metropolitan Service Districts to dictate land use plans for counties and cities

Section II: 'Results'

Draft Results Provided by the Attorney General

Result of "Yes" Vote: "Yes" vote eliminates Metro's authority to adopt land use planning goals for the tri-county region, adopt urban growth boundary, review city/county land use plans for compliance.

Result of "No" Vote: "No" vote retains Metro's authority to adopt land use planning goals for the tri-county region, coordinate planning, review local plans for compliance, adopt urban growth boundary.

RECEIVED
2014 OCT 22 PM 1 00
KATE BROWN
SECRETARY OF THE STATE

We challenge the Results as follows:

- 1) The descriptions in the “yes” and “no” result statements should use the same terms to describe the same things or actions, to the extent practical. ORS 250.035(2)(c). That is not done in the draft result statements. The “yes” statement makes no mention (correctly so) of the elimination of a MSD ability to “coordinate planning”, yet that phrase appears in the “no” statement.
- 2) Moreover, both statements highlight some aspects of the measure at the expense of others. For example, nothing is mentioned in the result statements about the limitation on a MSD’s ability to enact land use regulations (section 2(2)) or serve as a MPO for transportation purposes (Section 2(6)). The latter provision is particularly important, since the federal government routes all federal transportation dollars through MPO’s, and Metro is the MPO for the Portland-metropolitan region, as opposed to an organization composed of locally elected officials from the various metropolitan area cities and counties, as is done in other metropolitan areas. This is a significant aspect of the measure that should be mentioned.
- 3) Finally, it appears that both the “yes” and “no” statements contain 26 words, when the statutory limit is 25.

To correct the above errors, we recommend the following language:

Result of “Yes” Vote: “Yes” vote eliminates the authority of a Metropolitan Service District to dictate land use planning and returns that authority to the counties and cities.

Result of “No” Vote: “No” vote retains the authority of a Metropolitan Service District to dictate land use planning, does not return that authority to the counties and cities.

Section III: ‘Summary’

Draft Summary Provided by the Attorney General

***Summary:** Metro is a metropolitan service district that includes land in Clackamas, Multnomah, and Washington counties. Metro is responsible for coordinating land use planning in that district. Metro’s authority includes preparing and adopting functional plans for areas within the district and adopting land use goals. Metro adopts a regional urban growth boundary. Metro and the county designate urban and rural reserves. Metro reviews city and county land use plans, regulations and land use decisions for compliance with Metro’s functional plans and urban growth boundary. Metro may require city or county to change parts of local plan and may require changes in local land use standards and procedures, for consistency with the regional framework plan. Measure eliminates Metro’s authority, participation in city and county land use planning.*

Summary defects:

- 1) The draft summary neglects to mention the prohibition on a MSD acting as a MPO (Section (2)(6)). This is a significant change in existing law which should be mentioned.

We recommend the following summary:

Summary: This petition removes the authority of Metropolitan Service Districts to: Adopt Land-use planning goals; Enact land use regulations; Adopt regional framework plans; Designate urban reserves; or, Serve as a metropolitan planning organization for the purposes of federal law. Instead, the authority to: Adopt land use planning goals; Enact land use regulations; Adopt regional framework plans; Designate urban reserves; or, Serve as a metropolitan planning organization for the purposes of federal law is returned to the counties and cities in Oregon.

Submitted by,

Eugene Schoenheit
Chief Petitioner for ID-8

RECEIVED
2019 OCT 22 PM 1 00
KATE BROWN
SECRETARY OF THE STATE

October 22, 2014

The Honorable Kate Brown
Secretary of State
Elections Division
255 Capital Street NE, Suite 501
Salem, OR 97301-0722

RECEIVED
2014 OCT 22 PM 4 09
KATE BROWN
SECRETARY OF THE STATE

By E-mail to: irrlistnotifier.sos@state.or.us

Dear Secretary Brown:

I am a registered Oregon voter and I would like to submit the following comments on the draft ballot title for Initiative Petition 8 (2016).

Initiative Petition 8 would have dramatic impacts on land use planning, growth management, air and water quality, and transportation governance and finance in Oregon. These impacts are not adequately conveyed to voters in the draft ballot title. Moreover, in referring specifically to Metro, the ballot title is inaccurate.

The Attorney General has proposed the following caption for the ballot title of Initiative Petition 8:

**Eliminates authority of Metropolitan Service District ("Metro")
to coordinate land use plans for cities, counties**

Inaccurate: The draft caption, and the draft ballot title more generally, refer specifically to Metro, the metropolitan service district for the Portland metropolitan region, and the caption capitalizes the words "Metropolitan Service District" to refer to Metro. But the proposed measure never refers to Metro specifically; rather, it restricts the authority of any metropolitan service district. ORS Chapter 268 is titled "Metropolitan Service Districts" (plural) and Article XI, Section 14 of the Oregon Constitution addresses the charter of "*any* metropolitan service district organized under the laws of this state" (emphasis added). So the constitution and laws of the state clearly contemplate the potential creation of more than one metropolitan service district. For this reason, the ballot title should not refer specifically to Metro.

Does not identify major effect: This caption does not identify the major effect of the proposed measure, which is to eliminate the authority of any metropolitan service district to make land use and transportation decisions in order to manage, on a regional basis, urban growth and its impacts on air and water quality. Instead, the caption concentrates on coordination of land use plans for cities and counties, a vague responsibility which represents a relatively insignificant aspect of the powers of a metropolitan service district.

Specific major impacts of the proposed measure include:

- Eliminates authority to establish regional urban growth boundary. This is the most important specific effect of the proposed measure.

- Imposes an unfunded requirement on every city within a metropolitan service district to undertake an inventory and analysis of buildable lands every five years and to establish an individual urban growth boundary (this work is currently completed by a metropolitan service district).
- Prohibits a metropolitan service district from adopting land use policies and rules that must be complied with by cities and counties within the district to protect air and water quality and manage transportation impacts.
- Prohibits a metropolitan service district from serving as a metropolitan planning organization, thereby eliminating the existing mechanism for receiving and distributing federal transportation funds and for demonstrating compliance with the federal Clean Air Act, which in turn is required to be eligible for federal funding.
- Eliminates authority of a metropolitan service district to collaborate with counties in the designation of urban and rural reserves, which direct where a metropolitan region will or will not grow over a 40-50 year period.

None of these impacts are described in the draft caption; all are much more important effects of the measure than the coordination of land use plans for cities and counties mentioned in the draft caption and should be addressed in a revised caption and a revised overall ballot title.

Thank you for considering these comments.

Sincerely,

Mary Kyle McCurdy
7106 SE 31st Ave
Portland OR 97202

BENNETT, HARTMAN, MORRIS & KAPLAN, LLP

GREGORY A. HARTMAN
MICHAEL J. MORRIS
HENRY J. KAPLAN
NELSON R. HALL
THOMAS K. DOYLE
ARUNA A. MASIH
SHARON MAYNARD
TALIA Y. STOESEL
RICHARD B. MYERS

ATTORNEYS AT LAW
SUITE 500
210 S.W. MORRISON STREET
PORTLAND, OREGON 97204-3149
(503) 227-4600
FAX (503) 248-6800
www.bennetthartman.com

ROBERT A. BENNETT (RETIRED)
LINDA J. LARKIN*
MARGARET S. OLNEY*
PATRICIA A. ARJUN*

* OF COUNSEL
* ALSO MEMBER
WASHINGTON BAR
§ ALSO MEMBER
NEW YORK BAR

October 24, 2014

Via Fax No. 1-503-373-7414

The Honorable Kate Brown
Secretary of State
Elections Division
255 Capital Street NE, Suite 501
Salem, Oregon 97310-0722

Re. Initiative Petition 8 (2016) - Draft Ballot Title Comments
Our File No. 4815-1186

Dear Secretary Brown:

This firm represents Ben Unger, an Oregon elector and the Executive Director of Our Oregon. We write in response to your October 10, 2014, News Release which invites comments regarding the legal sufficiency of the draft ballot title for IP 8. It is Mr. Unger's position that the draft ballot title for IP 8 is statutorily non-compliant.

DRAFT BALLOT TITLE COMMENTS

1. INTRODUCTION.

IP 8 is a statutory initiative that makes changes to ORS chapters 268, 195, and 197 to eliminate the authority of metropolitan service districts to coordinate city and county land use plans, manage urban growth (including the urban growth boundary and urban reserves), protect air and water quality, regulate transportation impacts in a region, and participate in the designation of rural reserves. By eliminating the authority to address these issues at the regional level through metropolitan service districts, IP 8 requires these functions to be fulfilled by individual municipalities and counties. Finally, it eliminates the authority of metropolitan service districts, including Metro (the metropolitan service district with a voter-approved home rule charter that serves the metropolitan area within the boundaries of Clackamas, Multnomah, and Washington counties), to serve as the metropolitan planning organization (MPO) for purposes of receipt and distribution of federal transportation funds. The initiative does not create an alternative MPO. How this change interacts with federal law and funding is unclear. We discuss the changes effected by IP 8 by subject matter with references to sections below.

RECEIVED
2014 OCT 24 PM 4 11
KATE BROWN
SECRETARY OF THE STATE

Honorable Kate Brown

Re. IP 8 (2016) - Draft Ballot Title Comments

October 24, 2014

Page 2

a. Removal of MPO Functions

Federal transportation law requires that every urban area with a population greater than 50,000 must designate an MPO, which must consist of elected and/or appointed state and local officials and representatives of relevant agencies. 23 USC § 134(d). An MPO is established "by agreement between the Governor and units of general purpose local government that together represent at least 75 percent of the affected population." 23 USC § 134(d). The purpose of the federal MPO requirement is to ensure that federal funding for transportation projects and programs is based on a cooperative and comprehensive planning process. All federal transportation funds are then channeled through the MPO for distribution in the urban area. Federal statutes require MPOs to adopt a long-range transportation plan and to update that plan every four years. 23 USC § 134(i). The MPO must also adopt a transportation improvement program that implements the transportation plan by approving funding for specific improvement projects that are identified in the transportation plan. 23 USC § 134(j).

IP 8, Section 2 (6), prohibits a metropolitan service district from serving as a metropolitan planning organization (MPO) for purposes of federal law. Metro currently serves as the MPO for 25 cities and 3 counties in the Portland metropolitan region and has served in this role, distributing millions of dollars annually, for over 30 years. If IP 8 passes, Metro would no longer be able to serve in this capacity and the region would be unable to spend millions of federal transportation dollars until a new MPO is created by the process outlined above, resulting in a potential loss of transportation funds for the region. New roads, new highway interchanges, added lanes and improved transit, to name a few, would be on hold until cities and counties in the region came together to agree upon a new MPO.

MPOs are also responsible for protecting air quality in the area by being the entity in charge of compliance with federal Clean Air Act requirements regarding transportation plans and projects. 23 USC § 134(i). In that role, Metro undertakes an air quality conformity determination every two years that estimates carbon monoxide emissions and precursors of smog (volatile organic compounds and oxides of nitrogen) from cars and trucks in the greater Portland airshed, based on an assumption that all facilities identified in the regional transportation plan are actually built. The results of the air quality conformity analysis are provided to Oregon DEQ and the US Environmental Protection Agency to determine federal Clean Air Act compliance with the carbon monoxide budget approved for the Portland metropolitan region. This work is time consuming and expensive in that it requires traffic volume and air quality modeling for the region every two years. If the MPO function is removed from Metro, the region could be at risk of losing federal transportation funding if there is no new MPO created in time to undertake the modeling and demonstrate that the region is still in conformance with air quality standards within the deadlines imposed by federal law. IP 8 does not provide for creation of another MPO or explain how an alternative MPO would be created.

b. Removal of district air and water quality regulation under ORS chapter 268

In addition to the air quality function of the MPO under federal law, metropolitan service districts are authorized by ORS 268.390 to enact air and water quality protections. ORS 268.390(1) and (2) provide metropolitan service districts the authority to adopt rules that protect air and water quality and control transportation impacts by enacting functional plans. Functional plans are the

Honorable Kate Brown

Re. IP 8 (2016) – Draft Ballot Title Comments

October 24, 2014

Page 3

portions of a metropolitan service district's code that create binding regulatory requirements that cities and counties within the region must comply with. ORS 268.390(4). All of these powers and authorities would be eliminated by IP 8.

For example, the Urban Growth Management Functional Plan (UGMFP), which includes regional land use planning requirements such as the urban growth boundary (UGB), as well as requirements regarding protection of water resources and wildlife habitat, would be gutted by IP 8. Water resources are protected under Titles 3 and 13 of the UGMFP (section 3.07 of the Metro Code), which are called "Water Quality and Flood Management" and "Nature in Neighborhoods." While Title 3 is aimed directly at water quality issues (pollution, temperature, erosion, etc.), Title 13 is aimed at fish and wildlife habitat protections, including protection of riparian areas, trees and other vegetation that provides habitat. These code provisions create requirements that all cities and counties in the region must comply with to protect water quality and habitat.

Thus, in addition to eliminating air quality protections associated with the MPO function described above, Section 5 of IP 8 would eliminate a metropolitan service district's statutory authority under ORS 268.390 to enact binding and enforceable rules protecting air and water quality through the adoption of functional plans. Section 5 removes the ability of a district to require cities and counties to implement such protections, and replaces that authority with a provision that merely allows the district to "encourage" cities and counties to address impacts on air and water quality.

c. Removal of district land use planning powers in ORS chapter 268

IP 8 also removes certain land use planning functions from the list of specific powers granted to metropolitan service districts under ORS chapter 268. IP 8, Section 3 amends ORS 268.380 to remove a district's abilities to: (a) adopt regional land use planning goals and objectives (also prohibited by Section 2 of IP 8), (b) review city and county comprehensive plans for consistency with the district's regional goals, and (c) coordinate the land use planning activities of cities and counties within the district. Section 4 of IP 8 repeals ORS 268.385, which similarly assigns to districts the authority to act as the regional coordinator for land use planning activities of cities and counties within a district under ORS 195.025(1) (the relevant portion of which is also repealed under Section 7 of IP 8).

Moreover, IP 8, Section 5, removes the authority of metropolitan service districts to do the following:

- Adopt a regional urban growth boundary;
- Require cities and counties within the district to make their comprehensive plan maps and policies comply with the urban growth boundary and land use policies and rules adopted by the district, including rules protecting air and water quality;
- Take enforcement action against cities or counties that fail to comply with the district's adopted UGB, plans and rules.

Honorable Kate Brown

Re. IP 8 (2016) – Draft Ballot Title Comments

October 24, 2014

Page 4

d. Removal of urban growth boundary authority in ORS chapter 197

The statutes governing the adoption and amendment of urban growth boundaries by cities across the state are at ORS 197.295 *et seq.* All cities in Oregon are required to have an urban growth boundary. An urban growth boundary is Oregon's mechanism for reducing urban sprawl. All Oregon cities with a population of 25,000 are required to periodically review whether there is a need to expand their UGB in order to maintain a 20-year supply of land for housing inside the boundary, unless they are within a metropolitan service district, which funds and performs these functions on a regional basis. Most of the general requirements that apply to both metropolitan service districts and individual cities are in ORS 197.296.

Section 11 of IP 8 amends ORS 197.296 by taking responsibility for regional UGB review and expansion away from metropolitan service districts. Instead, IP 8 eliminates the regional efficiency of metropolitan service districts and applies the statutory requirements for the land supply inventory and analysis of whether a UGB expansion is needed to all cities located within a metropolitan service district.

There are also specific UGB requirements that apply only to metropolitan service districts in ORS 197.299, including a requirement that a district must undertake its inventory of buildable lands and analysis of whether more land is needed every five years.¹ There is no comparable five-year analysis required for individual cities. Section 12 of IP 8 amends the provisions of ORS 197.299 that apply only to metropolitan service districts by making those requirements apply directly to all cities within a metropolitan service district, rather than the district itself.

One effect of Sections 11 and 12 of IP 8 is that cities located within the Metro region would now be required to undertake their own individual UGB analysis and management processes, under the special requirements in ORS 197.299 that currently only apply to Metro. IP 8 provides no funding for these significant additional requirements imposed upon such municipalities.

e. Removal of authority to designate urban and rural reserves in ORS chapter 195

Under ORS 195.137 *et seq.*, counties and metropolitan service districts are granted authority to map land outside of an existing UGB as urban reserve or rural reserve areas. Land designated as urban reserve is land that can be more efficiently urbanized and provided with urban services, and therefore becomes the first priority for expansion of the UGB if a need is identified as part of a metropolitan service district's review cycle. Land designated as rural reserve is land that is suitable for long-term agricultural operations or natural resource protection, and therefore becomes protected against any future UGB expansion for the next 50 years.

Sections 8, 9 and 10 of IP 8 remove the authority of metropolitan service districts to designate urban and rural reserves. Like removal of the UGB function, this is a significant change in existing law that eliminates their ability to make significant growth management decisions for the region by

¹ HB 4078 (2014) amended this statute to extend Metro's required buildable land inventory and analysis cycle to six years effective January 1, 2015.

Honorable Kate Brown

Re. IP 8 (2016) – Draft Ballot Title Comments

October 24, 2014

Page 5

adopting decisions and mapping land outside of the UGB in a way that will dictate where the region will or will not grow in the next 50 years.

f. Removal of authority to enter into cooperative agreements with special districts for provision of urban services under ORS 195.020

Section 6 of IP 8 removes the authority of metropolitan service districts to enter into cooperative agreements with special districts regarding the provision of urban services within the metropolitan district. The purpose of such agreements is to coordinate land use activities between the metropolitan service district and special districts in order to encourage efficiencies and to ensure that urban services are not duplicative or overlapping.

As explained further below, because these changes go beyond coordination of land use plans for cities, and counties and apply broadly to metropolitan service districts in general, the draft ballot title is legally non-compliant and should be revised.

2. The Caption

ORS 250.035(2)(a) provides that a ballot title contain “a [c]aption of not more than 15 words that reasonably identifies the subject matter of the state measure.” The first step in determining the subject matter of the initiative is “the changes, if any, the measure would enact in the context of existing law.” *Sizemore v. Myers*, 342 Or 578, 583 (2007) (quoting *Phillips v. Myers*, 325 Or 221, 225-226 (1997)). The caption is the “cornerstone for the other portions of the ballot title” and in order to comply with the statute, it must identify the proposal’s subject matter in terms that will not “confuse or mislead potential petition signers and voters.” *Mabon v. Myers*, 332 Or 633, 33 P3d 988 (2001) (citations omitted). It also cannot overstate or understate the scope of the legal changes the initiative would enact.

Here, the draft ballot title reads:

**Eliminates authority of Metropolitan Service District
("Metro") to coordinate land use plans for cities, counties**

First, it is important to note that while Metro, which serves the metropolitan area within the boundaries of Clackamas, Multnomah, and Washington counties, is the only metropolitan service district currently in existence, ORS chapter 268 is written broadly to apply to “a district established under this chapter in any metropolitan area.” See ORS 268.030. Indeed, Article XI, section 14(1) of the Oregon Constitution also envisions that chapter 268 will apply to such a district created by the voters of any metropolitan area. That section expressly provides: “The Legislative Assembly shall provide by law a method whereby the legal electors of any metropolitan service district organized under the laws of this state, by majority vote of such electors voting thereon at any legally called election, may adopt, amend, revise or repeal a district charter.” Therefore, use of the singular with capital letters and the modifier “Metro” is legally deficient. Voters around the state (for example, in the Eugene Springfield area which has a “Metro Plan”)² need to know that the changes effected by IP

² See <http://www.lcog.org/metroplanning.cfm>

Honorable Kate Brown

Re. IP 8 (2016) – Draft Ballot Title Comments

October 24, 2014

Page 6

8 would also limit their rights should they choose to create a metropolitan service district in their metropolitan area.

Second, the draft caption fails to provide voters with adequate information regarding the other important aspects of the changes effected by IP 8, such as the impact on regulations protecting air and water quality. In addition, as discussed further below, these other changes made by IP 8 should also be incorporated into the “yes” vote result statement.

Finally, within the metropolitan area served currently by Metro, voters need to be made aware that functions currently served regionally by Metro will become the unfunded added responsibility of individual municipalities. IP 8 provides no funding for such functions, nor does it reduce Metro’s funding. This is a concept that needs to be addressed in the ballot title. Even if it is not possible to include such info within the word limits of the caption, it should at least be included in the “yes” vote result statement and/or the summary.

The remaining deficiencies could, however, be addressed through revised language along the following lines:

Eliminates metropolitan service districts’ authority to coordinate land use, air/water quality for cities, counties.

3. The Results Statements

ORS 250.035(2)(b)-(c) require that a ballot title contain a simple understandable statement of not more than 25 words that describes the result if the state measure is approved or rejected. Typically, the “yes” vote result statement builds on the caption. The purpose of the “yes” vote result statement is to “notify petition signers and voters of the result or results of enactment that would have the greatest importance to the people of Oregon.” *Novick v. Myers*, 337 Or 568, 574, 100 P3d 1064 (2004). In contrast, the “no” vote result statement must explain to voters “the state of affairs” that will exist if this initiative is rejected, that is, the *status quo*. It is also essential that the law described in the “no” vote result statement concern the subject matter of the proposal. Otherwise, the description could mislead voters about the effect of their vote. *Nesbitt v. Myers*, 335 Or 219, 223, 64 P3d 1133 (2003). *See also*, *Nesbitt v. Myers*, 335 Or 424, 431, 71 P3d 530 (2003)(review of modified ballot title). “[T]o comply with [***] statutory requirements, the Attorney General may have to go beyond the words of a measure in order to give the voters accurate and neutral information about a proposed measure.” *Caruthers v. Myers*, 344 Or 596, 601, 189 P3d 1 (2008).

Here, the Attorney General’s draft ballot title provides the following result statements:

Result of "Yes" Vote: "Yes" vote eliminates Metro's authority to coordinate land use planning in tri-county region, adopt urban growth boundary, review city/county land use plans for compliance.

Honorable Kate Brown

Re. IP 8 (2016) – Draft Ballot Title Comments

October 24, 2014

Page 7

Result of "No" Vote: "No" vote retains Metro's authority to adopt land use planning goals for tri-county region, coordinate planning, review local plans for compliance, adopt urban growth boundary.

The "yes" vote result statement makes some of the same errors noted above for the caption. It improperly focuses exclusively on Metro instead of metropolitan service districts in general. It also introduces a new term, "tri-county region," presumably to refer to the three counties of the Portland metropolitan region, but this term is not at all clear (other regions of Oregon, including Jefferson, Crook and Deschutes Counties, use this term) and it is not in common use; at any rate, for the reasons noted above, this term should be removed. The "yes" vote result statement also fails to account for changes made to the authority of metropolitan service districts to protect air and water quality, to regulate transportation impacts or to receive and distribute federal transportation dollars. Voters around the state need to know that a "yes" vote will limit their ability to manage all these issues at a regional level through a metropolitan service district. Finally, they need to understand that these functions do not disappear but must be performed by local jurisdictions (cities/counties) with no additional funding. Again, commenter understands that given the word limitations, the funding issues may have to be discussed in the summary.

The "no" vote result statement should be revised to track the changes made to the "yes" vote result statement so that voters understand that voting against the initiative will mean that metropolitan service districts will retain their authority to act in all these areas (i.e., urban growth, transportation, and air and water quality).

These deficiencies could be addressed through result statements which reads as follows:

Result of "Yes" Vote: "Yes" vote eliminates authority of metropolitan service districts to coordinate city/county land use, establish urban growth boundary, manage transportation impacts, protect air/water quality

Result of "No" Vote: "No" vote retains the authority of metropolitan service districts to coordinate city/county land use, establish urban growth boundary, manage transportation impacts, protect air/water quality

4. Summary

ORS 250.035(2)(d) requires that the ballot title contain a 125 word statement which accurately summarizes the measure and its major effects in a concise and impartial manner. The goal is to provide voters with enough information to understand what will happen if the measure is approved and the "breadth of its impact." *Fred Meyer, Inc. v. Roberts*, 308 Or 169, 175, 777 P2d 406 (1989).

The draft summary proposed by the Attorney General reads as follows:

Honorable Kate Brown

Re. IP 8 (2016) - Draft Ballot Title Comments

October 24, 2014

Page 8

Summary: Metro is a metropolitan service district that includes land in Clackamas, Multnomah, and Washington counties. Metro is responsible for coordinating land use planning in that district. Metro's authority includes preparing and adopting functional plans for areas within the district and adopting land use goals. Metro adopts a regional urban growth boundary. Metro and the county designate urban and rural reserves. Metro reviews city and county land use plans, regulations and land use decisions for compliance with Metro's functional plans and urban growth boundary. Metro may require city or county to change parts of local plan and may require changes in local land use standards and procedures, for consistency with the regional framework plan. Measure eliminates Metro's authority, participation in city and county land use planning.

Like the caption and the result statements, the summary incorrectly focuses exclusively on Metro, the voter-approved home-rule charter metropolitan service district of the Portland region, rather than all metropolitan service districts that may be created pursuant to the Oregon Constitution and ORS Chapter 268. Also, while the summary does a better job of explaining the authority of Metro as a metropolitan service district, it still fails to cover all the areas of authority of a metropolitan service district impacted by IP 8. For example, it includes no mention of the role metropolitan service districts play in the protection of air and water quality. It also does not discuss their role in regulating transportation impacts or potentially serving as an MPO for purposes of receipt and distribution of federal transportation dollars. These are all important impacts of the initiative about which voters need to be made aware. Without such information, the summary is inaccurate and underinclusive.

The summary should also note that there are other provisions, such as the savings clause, not discussed in the summary and provide some information about the fact that metropolitan service districts are generally created through voter-approved charters. See ORS 268.010 (2); Oregon Constitution, Article XI, section 14.

To correct these deficiencies, we propose the following alternative:

Summary: Metropolitan service districts are authorized by state law/voter-approved home rule charters to address issues of metropolitan significance. In accordance with charter/state law, they are authorized to protect air/water quality, adopt regional urban growth boundaries, designate urban/rural reserves in conjunction with counties, review city/county land use regulations for compliance with urban growth boundary/plan, regulate transportation impacts. Metro, a home-rule charter metropolitan service district for the Clackamas/Multnomah/Washington county area, also serves as metropolitan planning organization to receive/distribute federal transportation dollars. Measure eliminates authority of metropolitan service districts, including Metro, to perform these functions, requiring cities/counties to fulfill them. Provides no additional

Honorable Kate Brown

Re. IP 8 (2016) - Draft Ballot Title Comments

October 24, 2014

Page 9

funding for cities/counties for functions formerly performed by
metropolitan service districts. Other provisions.

Thank you for your careful consideration of these comments. Please send a copy of the
certified ballot title as soon as it is available.

Sincerely,

BENNETT, HARTMAN, MORRIS & KAPLAN LLP

Aruna A. Masih

AAM

cc: Clients

RECEIVED
2014 OCT 24 PM 4 11
KATE BROWN
SECRETARY OF THE STATE

BENNETT, HARTMAN, MORRIS & KAPLAN, LLP

GREGORY A. HARTMAN
MICHAEL J. MORRIS
HENRY J. KAPLAN
NELSON R. HALL
THOMAS K. DOYLE
ARUNA A. MASIH
SHARON MAYNARD
TALIA Y. STOESEL
RICHARD B. MYERS

ATTORNEYS AT LAW
SUITE 500
210 S.W. MORRISON STREET
PORTLAND, OREGON 97204-3149
(503) 227-4600
FAX (503) 248-6800
www.bennethartman.com

ROBERT A. BENNETT (RETIRED)
LINDA J. LARKIN
MARGARET S. OLNEY
PATRICIA A. ARJUN

* OF COUNSEL
* ALSO MEMBER
WASHINGTON BAR
§ ALSO MEMBER
NEW YORK BAR

October 24, 2014

Via Fax No. 1-503-373-7414

The Honorable Kate Brown
Secretary of State
Elections Division
255 Capital Street NE, Suite 501
Salem, Oregon 97310-0722

RECEIVED
2014 OCT 24 PM 4 11
KATE BROWN
SECRETARY OF THE STATE

Re. *Initiative Petition 8 (2016) - Constitutional Procedural Comments*
Our File No. 4815-1186

Dear Secretary Brown:

This firm represents Ben Unger, an Oregon elector and the Executive Director of Our Oregon. We write in response to your October 10, 2014, News Release which invites comments regarding whether Initiative Petition 8 (2016) ("IP 8") complies with procedural constitutional requirements for initiative petitions. It is Mr. Unger's position that IP 8 does not comply with the "full text" procedural requirement of the Oregon Constitution and therefore, the petition should be rejected by the Secretary of State at this initial stage of review. *See State ex rel. Fidanque v. Paulus*, 297 Or 711, 716, 688 P2d 1303, 1306-07 (1984) and *Holmes v. Appling*, 237 Or 546, 554-55, 392 P2d 636 (1964) (explaining that Secretary of State must address constitutional procedural concerns upon receipt of prospective petition and before ballot title process proceeds further).

PROCEDURAL CONSTITUTIONAL REQUIREMENTS

Article IV, section 1(2)(d) of the Oregon Constitution provides that "[a]n initiative petition shall include the full text of the proposed law or amendment to the Constitution." This provision of the Oregon Constitution was construed by the Oregon Court of Appeals in *Kerr v. Bradbury*, 193 Or App 304, 89 P3d 1227 (2004), to require publication not just of the amendatory language, but also of the full text of the "proposed law" as it will read if the proposed amendment is enacted. The purpose of this provision is similar to that underlying Article IV, section 22, which requires that when the legislature amends an existing statute, "the act revised, or section amended shall be set forth, and published at full length." *Id.* at 314. The Oregon Constitution wants its voters, like its legislators, to have sufficient information to intelligently evaluate whether to vote in favor of the proposed law. Although the Oregon Supreme Court allowed review and subsequently dismissed the appeal as moot in *Kerr v. Bradbury*, 340 Or 241, 131 P3d 737 (2006), *adh'd to on recons* 341 Or 200, 140 P3d 1131

Honorable Kate Brown

Re. IP 8 (2016) – Constitutional Procedural Comments

October 24, 2014

Page 2

(2006), the Court of Appeals decision written by then Presiding Judge Landau provides a thoughtful and instructive analysis of the text, context, and history of the current version of Article IV, section 1(2)(d), which should be followed in this instance.

Commencing with the textual analysis, the court explained that the words “proposed law” had an ordinarily understood meaning at the time that Article I, section 1(2)(d) was enacted, which encompassed a “complete act of positive law.” 193 Or App at 312.

“Amendatory wording, which often consists of mere phrases and even single words, [the court noted] is not itself ‘law,’ proposed or otherwise.” *Id.*

Turning next to context, the court looked to cases decided under the prior version of Article I, section 1 (2)(d) and also examined other similar provisions in the constitution, such as Article IV, section 22, requiring the legislature to publish “at full length” the “act revised or section amended.” *Id.* at 312-316. The court found the difference in terminology to be of no consequence given that it was “unlikely” that “the framers of the original constitution intended that legislators be provided with the full text of statutes to be amended when voting on proposed amendments, while the framers of the 1968 amendment [to Article I, section 1(2)(d)] intended that voters not be entitled to the same information.” *Id.* at 315-16.

Turning then to the “enactment history,” the court noted that it was unable to find any history bearing on the meaning. *Id.* at 318. However, the court acknowledged that, “[f]ull text provisions are not uncommon features of state constitutions” and their “general purposes are fairly well-established.” Based on cases from other states with “full text” provisions in their constitutions, the court concluded that, “[t]he purpose of the full text requirement is to provide sufficient information so that registered voters can intelligently evaluate whether to sign the initiative petition.” *Id.* at 320.

Finally, examining relevant canons of constitutional construction, the court noted that the only canon that appears arguably relevant is that, “we attempt to determine what the voters would have intended had they thought about the specific issue.” *Id.* at 325. On this final issue, the court noted that,

“The answer seems apparent to us. It is frankly, difficult for us to imagine that the voters intended that they be provided with less information about the effect of proposed statutory amendments than what the constitution mandates legislators be provided when voting. It seems much more likely to us that, in adopting Article IV, section (1)(2)(d), the voters intended to require publication of the same information—that is the full text of the statute as it would appear if amended—regardless of whether the amendment is proposed by the legislature or by initiative.” *Id.* at 325.

Here, IP 8, Section 12, fails to include the full text of ORS 197.299 as it would appear if amended at the November 8, 2016 General Election. ORS 197.299 was amended by HB 4078, Section 5, during the 2014 Regular Session. That amendment reads, in relevant part as follows:

Honorable Kate Brown

Re. IP 8 (2016) - Constitutional Procedural Comments

October 24, 2014

Page 3

"SECTION 5. ORS 197.299 is amended to read:

197.299. (1) A metropolitan service district organized under ORS chapter 268 shall complete the inventory, determination and analysis required under ORS 197.296(3) not later than *[five]* six years after completion of the previous inventory, determination and analysis."

A review of the legislative history for HB 4078 indicates that the choice to allow metropolitan service districts an additional year to perform this analysis was a substantial change based on substantive policy considerations.¹ The six year cycle reduces public costs and puts the growth management analysis and decision making process on a schedule that is consistent with the biennial electoral cycle of the Metro Council, which was seeking the change. HB 4078 took effect upon passage on April 1, 2014. The amendments to ORS 197.299 made by HB 4078, Section 5, become operative January 1, 2015 (*see* HB 4078, Section 12) and will be in effect at the time the voters will be required to vote on IP 8. IP 8 does not include the version of ORS 197.299 enacted by HB 4078, Section 12. Therefore, the "full text" requirement of Article IV, section 1(2)(d) would require the amended version of ORS 197.299 to be included in IP 8.

In addition, Section 11 of IP 8 also violates the "full text" requirement because it does not include accurate subsection references for ORS 197.296. In IP 8, Section 11, where there should be a reference to ORS 197.296(4)(b), it incorrectly uses the subsection (a) heading.

Because IP 8 fails to include the changes made to ORS 197.299 by HB 4078 and includes the incorrect reference to ORS 197.296(4)(b), the Secretary of State must reject IP 8 as failing to comply with "full text" procedural constitutional requirements of Article I, section 1(2)(d) and take no further action with regard to this initiative.

Thank you for your careful consideration of these comments. We will also be submitting comments regarding the legal sufficiency of the draft ballot title on behalf of Mr. Unger separately.

Sincerely,

BENNETT, HARTMAN, MORRIS & KAPLAN LLP

Aruna A. Masih

AAM

cc: Clients

RECEIVED
2014 OCT 24 PM 4 11
KATE BROWN
SECRETARY OF THE STATE

¹<https://olis.leg.state.or.us/liz/2014R1/Measures/Analysis/HB4078>

STOLL BERNE

STOLL STOLL BERNE LOKTING & SMLACHTER P.C. LAWYERS

Steven C. Berman
sberman@stollberne.com

October 24, 2014

VIA FACSIMILEKate Brown
Secretary of State
Elections Division
255 Capital Street NE, Suite 501
Salem, OR 97310RECEIVED
2014 OCT 24 PM 4 28
KATE BROWN
SECRETARY OF THE STATERe: Initiative Petition No. 8 for the General Election of November 8, 2016

Dear Secretary Brown:

I represent Joseph Baessler regarding the ballot title for Initiative Petition No. 8 for the General Election of November 8, 2016 (the "Initiative"). Mr. Baessler is an elector in the State of Oregon and the Political Director of Oregon AFSCME Council 75. This letter is written in response to your office's press release, dated October 10, 2014, which invites comments on the draft ballot title for the Initiative. It is Mr. Baessler's position that the caption, results statements and summary do not meet the requirements of ORS 250.035(2). We respectfully request that the ballot title be revised to substantially comply with the provisions of ORS 250.035(2).

I. An Overview of Initiative Petition No. 8

The Initiative eliminates the authority of metropolitan service districts to coordinate and manage urban growth and transportation, and to protect air and water quality. The Initiative contains 15 sections, and makes multiple amendments to provisions of ORS chapters 195, 197 and 268. The draft ballot title does not accurately reflect the scope of those changes.

The Initiative would change existing law in the following ways:

- Removing the existing coordinating functions and authority of metropolitan service districts and prohibiting metropolitan service districts from engaging in such functions or having such authority. Initiative, §§ 1, 2.
- Eliminating the authority of metropolitan service districts to adopt rules that protect air and water quality and limit transportation impacts. *See, e.g.* Initiative, § 5 (amending ORS 268.390).
- Removing certain land use planning functions from metropolitan service districts, including the authority to: adopt regional land use goals and objectives, review city and county comprehensive plans for consistency with a district's goals; and

Kate Brown
October 24, 2014
Page 2

coordinate land use planning activities of the cities and counties within a metropolitan service district. Initiative, § 2 (prohibiting metropolitan service districts from adopting land use planning goals and objectives and enacting land use regulations); Initiative, § 3 (amending ORS 268.380); Initiative, §§ 7, 8 (amending ORS 195.025 and ORS 195.141).

- Removing the authority of metropolitan service districts to adopt and amend urban growth boundaries, and to review the inventory of buildable lands within in urban growth boundaries. Initiative, § 11 (amending ORS 197.296); Initiative, § 12 (amending ORS 197.299).
- Removing the authority of metropolitan service districts to designate urban and rural reserves. Initiative, §§ 8, 9, 10 (amending ORS 195.141, ORS 195.413 and ORS 195.145).
- Shifting responsibility to conduct urban growth boundary analysis and management to cities within an existing metropolitan service district without providing a funding mechanism for that costly function. Specifically, the amendments to existing law in sections 11 and 12 of the Initiative would result in each city within an existing metropolitan service district being compelled to undertake its own costly inventory of buildable lands, population forecast and analysis, and housing capacity every five years.
- Removing the authority of metropolitan service districts to enter into cooperative agreements with special districts. Initiative, § 6 (amending ORS 195.020).

The Initiative also prohibits a metropolitan service district from serving as a metropolitan planning organization ("MPO"). Initiative, § 2(6). That impact is significant. Federal law requires every urban area with a population over 50,000 to designate a MPO to ensure that federal funding for transportation projects and programs is based on a comprehensive planning process. 23 USC § 134(d). Federal funds are then channeled through the MPO for distribution within the urban area. MPOs must adopt long-range transportation plans for that urban area, update those plans every five years, and adopt transportation improvement programs that implement the transportation plan. 23 USC § 134(i), (j). For transportation plans and projects, MPOs also are responsible for protecting air quality within the urban area under the federal Clean Air Act. 23 USC § 134(i). Metro currently serves as the MPO for 25 cities and 3 counties within the Portland metropolitan region. IP 8 would prohibit Metro, and any other metropolitan service district, from so acting. As a result, the region would be unable to spend or receive federal transportation funding until a new MPO is created and approved. The Initiative provides no process for creating or approving a new MPO.

Kate Brown
October 24, 2014
Page 3

II. The Draft Ballot Title

A. The Caption

ORS 250.035(2)(a) provides that a ballot title must contain a “caption of not more than 15 words that reasonably identifies the subject matter of the state measure.” The caption must “state or describe the proposed measure’s subject matter accurately, and in terms that will not confuse or mislead potential petition signers and voters.” *Lavey v. Kroger*, 350 Or 559, 563 (2011) (citations omitted; internal quotation marks omitted). The “subject matter” of an initiative is its “actual major effect.” *Lavey*, 350 Or at 563 (citation omitted; internal quotation marks omitted). The “actual major effect” is the change or changes “the proposed measure would enact in the context of existing law.” *Rasmussen v. Kroger*, 350 Or 281, 285 (2011). “The caption is the cornerstone for the other portions of the ballot title.” *Greene v. Kulongoski*, 322 Or 169, 175 (1995). As the “headline,” the caption “provides the context for the reader’s consideration of the other information in the ballot title.” *Greene*, 322 Or at 175. A caption that is underinclusive, because it fails to inform voters of all the major effects of an initiative, is statutorily noncompliant. *Towers v. Myers*, 341 Or 357, 362 (2006). “When the Attorney General chooses to describe the subject matter of a proposed measure by listing some of its effects, [s]he runs the risk that the caption will be underinclusive and thus inaccurate.” *Towers*, 341 Or at 361.

The caption in the draft ballot title provides:

Eliminates authority of Metropolitan Service District (“Metro”) to coordinate land use plans for cities, counties

The caption accurately describes some of the impacts the measure would have on the ability of metropolitan service districts to coordinate certain planning functions and impacts with cities and counties. For an initiative as sweeping as this one, “coordinates” adequately describes a metropolitan service district’s role. However, Mr. Baessler respectfully submits that the caption is legally insufficient, for the following reasons:

- The caption focuses exclusively on the Portland area metropolitan service district known as “Metro.” However, the Initiative impacts not just Metro, but the statewide laws that apply generally to metropolitan service districts. The reference to Metro is underinclusive and inaccurate. The caption should refer to all metropolitan service districts, and not single out Metro.
- The caption focuses only on land use planning, and not the other significant and important functions a metropolitan service district currently performs. As was set forth above, metropolitan service districts also have authority (and responsibility) to coordinate air and water quality standards and requirements for cities and counties. The Initiative removes that authority. Those major effects must be included in the caption.

Kate Brown
October 24, 2014
Page 4

B. The Results Statements

ORS 250.035(2)(b) and (c) require that the "yes" and "no" statements in a ballot title contain "simple and understandable statement[s] of not more than 25 words that describe[] the result if the state measure is" passed or rejected.

The results statements in the draft ballot title provide:

Result of "Yes" Vote: "Yes" vote eliminates Metro's authority to coordinate land use planning in tri-county region, adopt urban growth boundary, review city/county land use plans for compliance.

Result of "No" Vote: "No" vote retains Metro's authority to adopt land use planning goals for tri-county region, coordinate planning, review local plans for compliance, adopt urban growth boundary.

Mr. Baessler respectfully submits that the results statements are flawed for the reasons set forth above. In addition, the results statements fail to set forth for voters and potential petition signers: (1) the impact the Initiative would have on transportation planning by prohibiting metropolitan service districts from serving as MPOs; and, (2) that the Initiative would shift certain costs to cities and counties without providing any funding mechanism. *See, e.g., Novick v. Myers*, 333 Or 12, 17, 35 P3d 1017 (2001) (results statements must inform voters that Initiative would impact funding without providing replacement revenue). For those reasons, the results statements must be revised.


C. The Summary

ORS 250.035(2)(d) requires that the ballot title contain a "concise and impartial statement of not more than 125 words summarizing the state measure and its major effect." The summary in the draft ballot title should be revised for the reasons set forth above.

Mr. Baessler respectfully submits that while it may be appropriate for the summary to discuss the impacts the Initiative would have on Metro, the summary's focus solely on Metro is misplaced. As was discussed above, the Initiative would impact Oregon law regarding metropolitan service districts generally, and not just Metro.

Thank you for your consideration of these comments. Please notify me when a certified ballot title is issued.

Very truly yours,

 Steven C. Baessler

SCB:jjjs
cc: client



DEPARTMENT OF JUSTICE
APPELLATE DIVISION

November 10, 2014

Jim Williams
Director, Elections Division
Office of the Secretary of State
141 State Capitol
Salem, OR 97310

RECEIVED
2014 NOV 10 PM 3 53
KATE BROWN
SECRETARY OF THE STATE

Re: Proposed Initiative Petition — Eliminates Authority of Metropolitan Service District to Adopt, Enforce Land Use, Air/water Quality Plans
DOJ File #BT-08-14; Elections Division #2016-008

Dear Mr. Williams:

We received comments from Eugene Schoenheit, chief petitioner; Mary Kyle McCurdy; Aruna A. Masih on behalf of Ben Unger; and Steven C. Berman on behalf of Joseph Baessler. We have revised the draft ballot title in response to the comments we received. We greatly appreciate all of the comments received, which have been extremely helpful.

A. Caption

The draft caption provides:

Eliminates authority of Metropolitan Service District ("Metro") to coordinate land use plans for cities, counties

Commenters McCurdy and Unger point out, in essence, that the draft caption is underinclusive because the measure applies to any metropolitan service district, not solely to Metro, the district in the Portland metropolitan area. We agree, even though Metro is the only metropolitan service district currently established and, consequently, the only district immediately affected if the measure passes. Therefore, we have changed the caption and the other parts of the certified ballot title to reflect that the measure would apply equally to any metropolitan service district that is established in the future.

Commenter Schoenheit objects to the phrase "to coordinate land use plan" as incomplete and inaccurate. He comments that the measure prohibits a district from "forcing coordinated local land use plans," but retains authority to encourage that type of coordination. In addition, Mr. Schoenheit comments, the draft caption improperly refers to only one of the district's functions that the measure would limit. Therefore, he asserts, the caption does not reasonably describe the measure's subject matter.

Similarly, Ms. McCurdy comments that the draft caption does not identify the major effect of the proposed measure, which she describes as: “to eliminate the authority of any metropolitan service district to make land use and transportation decisions in order to manage, on a regional basis, urban growth and its impacts on air and water quality.” Ms. McCurdy asserts that the caption should mention several other, “much more important effects of the measure,” which she identifies.

Mr. Unger also objects that the draft caption fails to mention the other important changes the measure would effect. He further objects that voters need to be informed that functions currently served by Metro “will become the unfunded added responsibility of individual municipalities.” Mr. Unger does not suggest that information should be in the caption, however.

Commenter Baessler notes deficiencies in the draft caption that are addressed above.

We agree that the draft caption fails to adequately describe the measure’s subject matter. We have revised the caption to read:

Eliminates authority of metropolitan service district to adopt, enforce land use, air/water quality plans

B. The vote result statements

The draft vote result statements provide:

Result of “Yes” Vote: “Yes” vote eliminates Metro’s authority to coordinate land use planning in tri-county region, adopt urban growth boundary, review city/county land use plans for compliance.

Result of “No” Vote: “No” vote retains Metro’s authority to adopt land use planning goals for tri-county region, coordinate planning, review local plans for compliance, adopt urban growth boundary.

As already noted, we have removed references to Metro, as opposed to metropolitan service districts in general. For that reason, the references to “tri-county region” in the result statements are inappropriate, and we have removed them.

Mr. Schoenheit comments that the result statements are insufficiently parallel. In addition, both statements “highlight some aspects of the measure at the expense of others.” In particular, the result statements do not mention the measure’s limitation on the district’s ability to enact land use regulations and to serve as an “MPO” (metropolitan planning organization) by receiving and transferring federal transportation dollars. We agree that the result statements are underinclusive. We disagree with Schoenheit’s comment that the result statements exceed the statutory word limit.

Ms. McCurdy comments that the ballot tile overall fails to sufficiently identify the measure’s important effects. We have revised the draft ballot title in response.

Mr. Unger objects that the result statements fail to tell voters about the measure's effects on the district's authority to protect regional air and water quality, to regulate transportation impacts and to receive and distribute federal transportation dollars—functions that local jurisdictions would have to perform if the measure passes.

Mr. Baessler comments that the draft result statements are flawed for the same reasons as the caption. Like Mr. Unger, he comments that the result statements fail to inform voters of the measure's prohibition on a metropolitan service district functioning as an MPO. He also notes the result statements do not inform voters that the measure would shift certain costs to cities and counties, without providing any funding mechanism.

We have revised the draft "Yes" and "No" vote result statements in response to the comments received, as follows:

Result of "Yes" Vote: "Yes" vote eliminates metropolitan service district's authority to adopt regional plan for managing urban growth; coordinate land use; establish urban growth boundary, urban/rural reserves.

Result of "No" Vote: "No" vote retains metropolitan service district's authority to adopt regional plan for managing urban growth; coordinate land use; establish urban growth boundary, urban/rural reserves.

C. Summary

The draft summary provides:

Summary: Metro is a metropolitan service district that includes land in Clackamas, Multnomah, and Washington counties. Metro is responsible for coordinating land use planning in that district. Metro's authority includes preparing and adopting functional plans for areas within the district and adopting land use goals. Metro adopts a regional urban growth boundary. Metro and the county designate urban and rural reserves. Metro reviews city and county land use plans, regulations and land use decisions for compliance with Metro's functional plans and urban growth boundary. Metro may require city or county to change parts of local plan and may require changes in local land use standards and procedures, for consistency with the regional framework plan. Measure eliminates Metro's authority, participation in city and county land use planning.

As above, we have revised the draft summary to eliminate references to Metro specifically.

Mr. Schoenheit comments that the draft summary improperly fails to mention the measure's prohibition on a metropolitan service district acting as an MPO. Ms. McCurdy and Mr. Unger object that the summary inaccurately fails to include other important functions of metropolitan service districts the measure would eliminate. Mr. Unger notes the summary is

November 10, 2014


Page 4

deficient for failing to state that the measure contains other provisions. Mr. Baessler notes the summary inaccurately focuses on the Portland area Metro. We agree with the comments and have revised the draft summary in response, as follows:

Summary: A metropolitan service district ("district") makes public services available in metropolitan area and adopts plans to control land use activities having metropolitan significance, including air and water quality, transportation impacts. Currently, only established district is Portland metropolitan area. A district adopts urban growth boundary; creates urban/rural reserves; creates regional plan; may review, change comprehensive plans of cities, counties in district; coordinates land use planning activities within district. District's land use rules are binding on cities, counties within district. Electors of district may change, repeal district's charter. Measure eliminates district's authority to designate urban, rural reserves; adopt, enforce regional land use rules, air and water quality rules; coordinate land use planning within district; receive/distribute federal transportation funds; shifts costs to cities/counties. Other provisions.

We certify the attached ballot title.

Sincerely,

Matthew J. Lysne 
Senior Assistant Attorney General
matthew.j.lysne@doj.state.or.us

ML4:aft/5989231

Enclosure

Eugene Shoenheit
13780 SE Fernridge Ave.
Milwaukie, OR 97222
Steven C. Berman
Stoll Bern
209 SW Oak St., Ste. 500
Portland, OR 97204

Lauri S. Hein
20630 NW Rockspring Ln.
Beaverton, OR 97006
Aruna A. Masih
Bennett, Hartman, Morris & Kaplan LLP
210 SW Morrison Street
Portland, OR 97204

Mary Kyle McCurdy
7106 SE 31st Ave
Portland, OR 97202

RECEIVED
2014 NOV 10 PM 3 04
KATE BROWN
SECRETARY OF THE STATE

[Signature]
Attorney General

BALLOT TITLE

Eliminates authority of metropolitan service district to adopt, enforce land use, air/water quality plans

Result of "Yes" Vote: "Yes" vote eliminates metropolitan service district's authority to adopt regional plan for managing urban growth; coordinate land use; establish urban growth boundary, urban/rural reserves

Result of "No" Vote: "No" vote retains metropolitan service district's authority to adopt regional plan for managing urban growth; coordinate land use; establish urban growth boundary, urban/rural reserves.

Summary: A metropolitan service district ("district") makes public services available in metropolitan area and adopts plans to control land use activities having metropolitan significance, including air and water quality, transportation impacts. Currently, only established district is Portland metropolitan area. A district adopts urban growth boundary; creates urban/rural reserves; creates regional plan; may review, change comprehensive plans of cities, counties in district; coordinates land use planning activities within district. District's land use rules are binding on cities, counties within district. Electors of district may change, repeal district's charter. Measure eliminates district's authority to designate urban, rural reserves; adopt, enforce regional land use rules, air and water quality rules; coordinate land use planning within district; receive/distribute federal transportation funds; shifts costs to cities/counties. Other provisions.

RECEIVED
2014 NOV 10 PM 3 05
KATE BROWN
SECRETARY OF THE STATE

NOTICE OF FILING AND PROOF OF SERVICE

I certify that on December 24, 2014, I directed the original Respondent's Answering Memorandum to Petitions to Review Ballot Title Re: Initiative Petition No. 8 (Supreme Court) to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and served upon Aruna A. Masih, attorney for petitioner Ben Unger, by using the court's electronic filing system.

I further certify that on December 24, 2014, I directed the Respondent's Answering Memorandum to Petitions to Review Ballot Title Re: Initiative Petition No. 8 (Supreme Court) to be served upon Eugene Schoenheit, chief petitioner, by mailing a copy, with postage prepaid, in an envelope addressed to:

Eugene Schoenheit
13780 SE Fernridge Ave.
Milwaukie, OR 97222

/s/ Judy C. Lucas

JUDY C. LUCAS #903285
Senior Assistant Attorney General
judy.lucas@doj.state.or.us

Attorney for Respondent
Ellen F. Rosenblum, Attorney General,
State of Oregon