Date: Thursday, April 14, 2022
To: mayorcouncilandcitymanager@ci.eugene.or.us <mayorcouncilandcitymanager@ci.eugene.or.us>
Subject: City of Eugene Middle Housing Code Amendments

Dear Mayor Vinis and members of the City Council:

Please include these comments in the Council's formal hearing record. They explain the unavailability of the initiative and referendum process as a means to adopt or amend local land use legislation in Oregon.

We are submitting our comments at this time because we have learned of a proposal to initiate or refer to Eugene voters code amendments relevant to the application of Oregon's statewide land use statutes, goals, and rules concerning middle house (HB 2001). This referral would replace or amend the Planning Commission's recommendation before you now.

Our request is consistent with the attached April 8, 2022, letter from counsel for Portland Metro, rejecting a similarly invalid petition. We expect that Eugene's city attorney will do the same with any petitions seeking to displace the authority and responsibility which has been assigned to you by state law.

As explained in the *Gile* and *LTD* cases discussed below, Oregon's statewide land use system prescribes a comprehensive set of substantive and procedural requirements governing local land use decision-making. Under that system, any proposed changes to Eugene's acknowledged land use regulations, whether in the form of plan, code, or charter amendments, must be adopted through statutory procedures for post-acknowledgement amendments (PAPAs) and supported by evidence and findings demonstrating their consistency with statewide land use statutes, goals, and rules, including Oregon's needed housing statutes and housing goal.

As such, they do not qualify as local "legislation" under the Oregon Constitution. Therefore, local land use decisions qualify as "administrative" rather than "legislative" within the meaning of the Oregon Constitution's initiative and referendum provisions. See *Dan Gile and Associates Inc v McIver*, 113 Or App 1, 831 P2d 1024, 1026 (1992).

In *Gile,* the Oregon Court of Appeals said that

> "When the only decision to be made is a land use decision, to which specific land use provisions and requirements must be applied, the governing body must, and the electorate cannot, follow the procedures or be confined to the substance of those requirements. See *Heritage Enterprises v. City of Corvallis,* 71 Or.App. 581, 584-85, 693 P.2d 651, aff'd 300 Or. 168, 708 P.2d 601 (1985). In sum, to hold that a land use decision may be referred to the electorate would be the equivalent of holding that it need not be made in compliance with the procedural and substantive requirements of state [113 Or.App. 6] statutes. As structured by those statutes, it is not a "legislative" decision of the kind to which the constitutional initiative and referendum rights apply."

The reason for this, as the Court explained, is that

> "ORS 197.175(1) requires cities and counties to carry out their planning and zoning responsibilities in accordance with ORS chapters 196 and 197 and the statewide planning goals. ORS 197.175(2) mandates that local governments enact comprehensive plans and land use regulations and that they apply them in making land use decisions. The zoning decision made here required the amendment or

application of a land use regulation, and it was therefore a "land use decision" as defined in ORS 197.015(10)(a). Land use decisions are appealable to LUBA and, in turn, to the appellate courts under ORS 197.805 et seq. That review process is exclusive, ORS 197.825(1), and the grounds for reversing or remanding a local land use decision are carefully defined and limited in those statutes."

More recently and closer to home, the Oregon Supreme Court has explained that

> ". . . the constitutional reservation of the initiative power in Article IV, section 1(5), applies only to "municipal legislation." Proposed initiative measures addressing administrative matters properly are excluded from the ballot. Id. The operative word is "legislation." This court has defined legislative activity as "making laws of general applicability and permanent nature," id., and administrative activity as that "necessary * * * to carry out legislative policies and purposes already declared." Monahan v. Funk, 137 Or. 580, 584, 3 P.2d 778 (1931)." *Lane Transit Dist. v. Lane County*, 327 Or 161, 327 Or. 161 (998)"

To avoid confusion, it is important to understand that the "legislative" versus "administrative" distinction under the initiative and referendum provisions of the Oregon Constitution is different than the "legislative" versus "quasi-judicial" distinction under the *Fasano* line of cases and related procedural statutes, which has to do with what types of procedures and scopes of review apply to land use proceedings before local and state decisionmakers. It doesn't matter whether a local land use decision is "legislative" or "quasi-judicial" for that purpose. Neither flavor is "municipal legislation" for initiative and referral purposes.

For a more general but excellent critique of ballot-box zoning, see UO Law School Dean Marcilynn Burke's lead article in the Notre Dame Law Review:

The Emperor's New Clothes: Exposing the Failures of Regulating Land Use Through the Ballot Box, 84 NOTRE DAME L. REV. 1453 (2009)

Thank you for your attention to this important issue.

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