CIRCUIT COURT OF OREGON
FOR BENTON COUNTY

MATTHEW J. DONOHUE
CIRCUIT JUDGE

BENTON COUNTY COURTHOUSE
POST OFFICE BOX 1870
CORVALLIS, OREGON 97339

(541) 766-6843

February 24, 2017

James K. Brewer (via Email only)
Attorney at Law

David E. Coulombe (via Email only)
Attorney at Law

Chad Jacobs (via Email only)
Attorney at Law

Larry & Teresa Desaulniers
830 NE Lawndale Place
Corvallis, OR 97330

Eva & Javier Ixtlahuac
810 NE Lawndale Place
Corvallis, OR 97330

Edward Trueblood
815 NE Lawndale Place
Corvallis, OR 97330

J. Nicole DeFever (via Email only)
Attorney at Law

Sean O'Day (via Email only)
Attorney at Law

Caldwell Farms, LLC
c/o Lynn Nordhausen, Reg Agent
2773 Titleist Circle
Corvallis, OR 97333

Michael & Patricia Galpin
7906 NE 131st Street
Kirkland, WA 98034

George Stovall
825 NE Lawndale Place
Corvallis, OR 97330

Re: City of Corvallis v. State of Oregon, Kate Brown, Governor; Jeanne P. Adkins, Secretary of State; Jim Rue, Oregon DLCD; Caldwell Farms, LLC; Larry & Teresa Desaulniers; Michael & Patricia Galpin; Eva & Javier Ixtlahuac; George Stovall; and Edward Trueblood - Benton County Circuit Court Case No. 16CV17878

Dear Counsel and Parties:

This matter comes before the court on State Defendants' Motion For Summary Judgment, Plaintiff City of Corvallis' Cross-Motion For Summary Judgment and Plaintiff-Intervenors City of Philomath's and League of Oregon Cities' Cross-Motions For Summary Judgment. The court heard oral argument on January 20, 2017 and took the matter under advisement on February 3, 2017 following the parties' respective submissions on State Defendants' Motion To Strike declarations supporting the City of Corvallis' Cross-Motion For Summary Judgment. Having reviewed the case file, the parties' respective

filings, and having heard the arguments at hearing, the court makes the following findings and determinations.

Motion To Strike

State Defendants move to strike the Declarations of Patrick Caran, George Wisner, Maria Wilson, Jack Wolcott, W. Kent Buys, William Koenitzer, Marilyn Koenitzer, M. Boyd Wilcox and Stephen McLaughlin (hereinafter referred to collectively as "Citizen and Former Citizen Declarations") submitted by Plaintiff City of Corvallis in support of its Cross-Motion For Summary Judgment. State Defendants argue that the declarations do not comply with ORCP 47D because (1) they address issues outside of the declarants' personal knowledge and (2) they are irrelevant for the purpose of demonstrating voter intent in the 1976 Corvallis city election.

Under ORCP 47D affidavits or declarations supporting or opposing summary judgment "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant or declarant is competent to testify to the matters stated therein." Declarations that do not meet this standard may be stricken. *See Dority v. Hiller*, 162 Or App 353 (1999).

The Citizen and Former Citizen Declarations are all essentially identical form declarations stating, in pertinent part, (1) the declarant voted in the November 2, 1976 Corvallis city election in which voters approved the annexation charter amendment, (2) the declarant understood the "unless mandated by State law" provision of the proposed annexation charter amendment to be a narrow exception limited to annexation for health hazards, (3) the State Defendants' current interpretation of that text is not consistent with their view or the view of other citizens of Corvallis who approved the amendment in 1976 and (4) the declarant's understanding of the primary purpose of the amendment was to give the citizens of Corvallis the authority to decide on annexations when a land owner sought to have their property annexed into the City's boundary. To the extent that the Citizen and Former Citizen Declarations purport to identify the intent of other voters in the 1976 election, the court grants State Defendant's Motion To Strike as nothing in any of the declarations provide any foundation demonstrating that those statements are based on the declarant's personal knowledge. OEC 602 ("a witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.").

As to the declarants' statements of their own understanding of the scope of the annexation amendment, a court is generally precluded from considering post-enactment statements when determining the legislative intent of a statute. *Salem-Keizer Association Of Classified Employees v. Salem-Keizer School District 24J*, 186 Or App 19, 26-28 (2003). While *Salem-Keizer Association Of Classified Employees v. Salem-Keizer School District 24J* dealt with determining the legislative intent of a statute enacted by the legislature, courts should apply a similar legislative intent analysis for voter-approved legislation. *Hazell v. Brown*, 352 Or 455, 465 (2012). This includes confining the court's analysis to the text of the initiative and any other informational material that existed at the time of the election. *State v. Allison*, 143 Or App 241, 251-52 (1996). The Citizen and Former Citizen Declarations were not part of any information available to voters during the November, 1976 election but are instead individual recollections of each declarant as to their understanding of the intent of the proposed charter amendment. Under *State v. Allison*, such post-hoc recollections are not relevant to any determination of voter intent in November, 1976 and are therefore not admissible evidence under ORCP 47D. OEC 402 ("Evidence which is not

relevant is not admissible"). The Court grants State Defendant's Motion To Strike the Citizen and Former Citizen Declarations.[1]

State Defendants also move to strike the declaration of Scott Fewel (hereinafter referred to as "Fewel Declaration") submitted by the City of Corvallis in support of its Cross-Motion For Summary Judgment. State Defendants argue that the Fewel Declaration suffers from the same deficiencies found in the Citizen and Former Citizen Declarations and it contains inadmissible hearsay. The Fewel Declaration discusses Mr. Fewel's understanding of (1) the purpose behind the formation of the group that placed the 1976 City of Corvallis annexation charter amendment on the ballot and (2) a conversation between Mr. Fewel and third parties regarding the intent of the drafters of the annexation amendment when including the "unless mandated by State Law" text. The court agrees that the portion of the Fewel Declaration discussing his conversation with third parties is hearsay that is not admissible. The remainder of the declaration suffers from the same foundation and relevance problems identified above. The court therefore grants State Defendant's Motion to Strike the Fewel Declaration as it does not comply with the requirements of ORCP 47D.

Motions For Summary Judgment

State Defendants move for summary judgment against Plaintiff's and Plaintiff-Intervenors' (hereinafter collectively as "Plaintiffs") claim seeking a declaration that 2016 Or Laws Chapter 51 (hereinafter "SB 1573") is unconstitutional and their request for an injunction preventing its implementation. Plaintiffs cross-move for summary judgment on their claims. Having reviewed the parties' respective summary judgment filings, the court determines that there is no genuine issue of material fact precluding an award of summary judgment.

"As Applied" Constitutional Claim

State Defendants argue that Plaintiffs' constitutional "as applied" challenge fails because they have not demonstrated that State Defendants have taken any action to enforce SB1573. "[A]n as-applied challenge asserts that executive officials, [* * *], violated the constitution when they enforced the ordinance." *City of Eugene v. Lincoln*, 183 Or App 36, 41 (2002). Plaintiffs support their "as applied" challenge with an April 18, 2016 letter from the Department of Land Conservation and Development (DLCD). The letter, addressed to all local governments, state agencies and interested persons, discussed land use legislation enacted during the 2016 legislative session. The letter, among other things, notified recipients that SB 1573 may require cities to change their comprehensive plans or land use ordinances and that it may affect city charters and codes. The letter does not require any city to make any changes to its charter or codes to comply with SB 1573 nor does it establish any penalty for cities that refuse to comply with it if it is inconsistent with their charter. The letter is therefore not an attempt by DLCD to compel compliance with SB 1573 but is instead a notification to cities that the new law may impact their charters and codes. The letter does not support Plaintiffs' "as applied" challenge because it does not make any attempt to impose any penalty on Plaintiffs for noncompliance with SB 1573 nor does it impose any restrictions on them to

[1] Denying State Defendants' Motion To Strike these declarations regarding the declarant's intent would not substantially alter the court's legal analysis regarding voter intent. The statements in the Citizen and Former Citizen Declarations regarding their understanding of the scope of the phrase "unless mandated by State law" at the time of the election represents the views of nine voters in a city-wide election. Any attempt to determine the intent of the majority of the voters in the November, 1976 election based on such a small sample size would be an exercise in pure speculation.

compel their compliance. See *City of Eugene v. Lee,* 177 Or App 492 (2001) (as applied challenge based on arrest and conviction); *Clarke v. OHSU,* 206 Or App 610 (2006) (as applied challenge based on court substitution of defendants in tort case). Plaintiffs' "as applied" challenge is therefore not supported by any evidence in the record and State Defendants are entitled to summary judgment on it as a matter of law.

Facial Constitutional Claim

Plaintiffs also allege that SB 1573 is facially unconstitutional. Under Section 2 of SB 1573,

> " Notwithstanding a contrary provision of the city charter or a city ordinance, upon receipt of a petition proposing annexation of territory submitted by all owners of land in the territory, the legislative body of the city shall annex the territory without submitting the proposal to the electors of the city if:
>
> (a) The territory is included within an urban growth boundary adopted by the city or Metro, as defined in ORS 197.015;
>
> (b) The territory is, or upon annexation of the territory into the city will be, subject to the acknowledged comprehensive plan of the city;
>
> (c) At least one lot or parcel within the territory is contiguous to the city limits or is separated from the city limits only by a public right of way or body of water; and
>
> (d) The proposal conforms to all other requirements of the city ordinances."

Plaintiffs argue that Section 2 of SB 1573 (1) violates Article XI, Section 2 of the Oregon Constitution by infringing on their Home Rule decision making authority; (2) impermissibly infringes on Article IV, Section 1 of the Oregon Constitution by restricting municipal citizens' right to vote on annexations and; (3) does not aid or facilitate multiple articles of the Oregon Constitution.[2] State Defendants argue that Plaintiffs' requests for declaratory and injunctive relief should be denied because (1) voters have no constitutional right to vote on municipal annexations; (2) Plaintiffs' respective city charters do not conflict with SB 1573 and; (3) Plaintiffs' "aid or facilitate" claim fails because SB 1573 does not impact any constitutional provisions involving either a city's Home Rule authority or citizens' right to vote on municipal referenda.

Statutory Analysis

The court first addresses State Defendants' argument that Plaintiffs' charters do not conflict with SB 1573. *Leo v. Keisling,* 327 Or 556, 562 (1998) (courts should address subconstitutional grounds for relief before addressing constitutional issues). State Defendants argue that SB 1573 does not conflict with Plaintiffs' city annexation charter provisions because those provisions allow for annexation without a citizen vote if required by state law. Section 53 of the Corvallis Charter establishes the requirement that annexations be approved by citizen vote "[u]nless mandated by State law." Section 11.1 of the Philomath Municipal Code creates a charter amendment that is substantially identical to Section 53 of the Corvallis Charter. In *Pieper v. Health Division,* 288 Or 551 (1980), the Supreme Court determined that a statute requiring the annexation of property without a citizen vote to address health hazards did not conflict with the Corvallis City Charter because the charter allowed for annexation without a vote when mandated by State law. 288 Or at 555. In *Mid-County Future Alternatives Committee v. City of Portland,* 310 Or 152

[2] Plaintiff City of Corvallis and Plaintiff- Intervenor City of Philomath raise this "aid or facilitate" claim. Plaintiff-Intervenor League of Cities does not join them in that claim.

(1990) the Supreme Court found no conflict between a State law allowing a "triple majority" annexation without a citizen vote because the charters of the cities of Portland and Gresham both had text permitting such State legislative exemptions. 310 Or at 163-64. Under *Pieper* and *Mid-County*, Sections 53 of the Corvallis Charter and Section 11.1 of the Philomath Municipal Code do not conflict with SB 1573 because both specifically allow for annexation without a citizen vote if it is mandated by statute.

Plaintiffs respond to this interpretation of *Pieper* and *Mid-County* by asserting that the voters who approved the Corvallis and Philomath annexation charter amendments in 1976 and 1995 believed that the "unless mandated by State law" or similar provisions in city charters only implicated State laws mandating annexation that existed at the time the cities approved their charter amendments.

In determining the proper interpretation of a city charter, the court should apply the same methodology used to interpret other legislation. *Brown v. City of Eugene,* 250 Or App 132, 136-37 (2012). This includes determining voter intent by examining the text and context of the charter amendment as well as any information that may have been available to voters at the time of the election. *Id.* In the case of the Corvallis and Philomath charter amendment elections, no party submitted any admissible evidence demonstrating that the voters in either election had access to any information interpreting the scope of the phrase "unless mandated by State law." The court therefore must rely primarily on the text and context of the charter amendments to determine voter intent.

Plaintiffs argue that, in order to correctly interpret the voters' intent when approving the Corvallis and Philomath annexation amendments, the court should examine the amendments in context with those provisions of the Corvallis and Philomath city charters requiring that each charter be construed liberally "to the end that the City may have all powers that cities may assume pursuant to the laws and to the municipal Home Rule provisions of the Constitution of the State of Oregon." However, cities do not have the authority under Article XI, Section 2 to annex property outside their boundaries but instead derive that authority from the legislature. *Mid-County Future Alternatives Committee v. City of Portland,* 310 Or 152, 161-163 (1990). In addition, the *Mid-County Future Alternatives Committee* Court determined that nothing in the Oregon Constitution grants citizens the right to vote on municipal annexations. 310 Or at 166. Further, a city does not have any common-law authority under its charter and it cannot exceed any authority granted to it by statute. *DeFazio v. Washington Public Power Supply System,* 296 Or 550, 580 (1984). Examining Plaintiffs' cited text against this case law arguably cuts against their contextual argument regarding voter intent because voters could have believed that annexation authority in a city charter must be consistent with state annexation statutes as they existed at the time of the elections or as they may change in the future because that is the body of State law defining the extent of the city's annexation authority at any given time. The cited text is therefore ambiguous as to voter intent.

In examining the text of the annexation amendments, the court should give words their plain, natural and ordinary meaning. *PGE v. BOLI,* 317 Or 606, 611 (1993). As discussed above, the *Pieper* Court interpreted the phrase "unless mandated by State law" as used in the Corvallis Charter as allowing statutory exemptions to annexation voter requirements. The question remaining after applying the rationale in *Pieper* is whether a State statutory exemption must have been enacted at the time the annexation amendments were approved by voters or whether subsequently-enacted statutory exemptions would also apply. In *Seale v. McKinnon,* 215 Or 562 (1959) the Supreme Court examined the effect prospective rule changes may have on existing statutes referencing those rules. The *Seale* Court determined that a statutory provision specifically referencing another body of law should be interpreted as

only adopting the law as it existed at the time of legislative enactment. 215 Or at 572. In contrast, a general reference to another body of law should be interpreted as incorporating both the law that existed at the time of enactment as well as any subsequent changes to the law. *Id.* Under the rationale in *Pieper* and *Seale*, the "unless mandated by State law" text in the Philomath and Corvallis annexation charter amendments is a broad reference that should be interpreted as including any statutory citizen vote exemptions existing at the time of enactment as well as any subsequently enacted exemptions such as SB 1573.

Plaintiffs argue that interpreting the "unless mandated by State law" text in their annexation charter amendments as including subsequently-enacted statutes violates constitutional non-delegation principles. Article I, Section 21 of the Oregon Constitution states that,

> "No ex-post facto law, or law impairing the obligation of contracts shall ever be passed, nor shall any law be passed, the taking effect of which shall be made to depend upon any authority, except as provided in this Constitution; provided, that laws locating the Capitol of the State, locating County Seats, and submitting town, and corporate acts, and other local, and Special laws may take effect, or not, upon a vote of the electors interested."

Article I, Section 21 "prohibit[s] laws that delegate the power of amendment to another governmental entity." *Advocates for Effective Regulation v. City of Eugene*, 160 Or App 292, 311 (1999). As an initial matter, there is a question as to whether the phrase "unless mandated by State law" as used in Plaintiffs' annexation charter amendments delegates anything to the State. As mentioned above, Article XI, Section 2 of the Oregon Constitution does not grant a city the authority to annex property. *Mid-County Future Alternatives Committee v. City of Portland,* 310 Or 152, 161-163 (1990). That annexation authority therefore comes from the State which, in granting that authority, may establish procedures a city must follow for annexation. *Id.* A city that requires a vote on annexations unless another procedure is mandated by State law does not appear to be delegating any authority to the legislature but is instead acknowledging that the legislature authorized the city to annex land and may modify annexation procedures.

In addition, the phrase "unless mandated by State law" does not violate Article I, Section 21 of the Oregon Constitution because it articulates a complete legislative policy. In their cross motions for summary judgment Plaintiffs cite *Osborn v. Psychiatric Security Review Board*, 325 Or 135 (1997), *Hillman v. N. Wasco County PUD*, 213 Or 264 (1958) and *Advocates for Effective Regulation v. City of Eugene*, 160 Or App 292 (1999) as supporting their non-delegation arguments. In all three cases, the appellate courts determined that specific references to another body of law or information in a specific rule or ordinance must be interpreted as adopting that body of law or information as it existed at the time the rule or ordinance took effect. Those cases did not deal with applying non-delegation principles to a general reference to another body of law. In *State v. Long*, 315 Or 95 (1992) the Supreme Court determined that the legislature "cannot delegate its power to make law, but that it can delegate, at least to an agency of government, the power to determine the existence of facts or circumstances mentioned in the law upon which the law will become operative." 315 Or at 100. The *Long* Court determined that such a delegation is constitutionally permissible because, in doing so, the legislature had not delegated its power to make law, but only the power to determine the existence of facts or circumstances mentioned in the law upon which it will become operative. *Id.* In *City of Damascus v. Brown*, 266 Or App 416 (2014) the Court of Appeals stated that,

> "[t]he test for determining whether a particular enactment is an unlawful delegation of legislative authority [* * *] is whether the enactment is complete when it leaves the legislative halls. A legislative enactment is complete if it contains a full expression of legislative policy and sufficient procedural safeguards to protect against arbitrary application."

266 Or App at 443. Plaintiffs' charter amendments requiring annexation by citizen vote unless another method is mandated by State law evidence an intent that a citizen vote by annexation will be required unless State law mandates otherwise. That is a complete legislative policy determination under *City of Damascus v. Brown* because any change in State law would not have any impact on the policy itself which describes the role state law plays in a city's annexation decision making process. Under *Long* and *City of Damsacus* interpreting the phrase "unless mandated by State law" to include subsequently-enacted statutes does not violate Article I, Section 21 of the Oregon Constitution. State Defendants are entitled to judgment as a matter of law against Plaintiff City of Corvallis and Plaintiff-Intervenor City of Philomath because SB 1573 does not conflict with their respective annexation charter amendments.

Constitutional Analysis

A determination that SB 1573 does not conflict with the Corvallis and Philomath city charters does not resolve all of the constitutional issues raised by Plaintiff-Intervenor League of Cities (LOC). While most of the cities represented by LOC have similar "unless mandated by State law" text in their charter annexation provisions, two cities, Mollala and Lake Oswego, do not have such an exemption. SB 1573 therefore conflicts with those cities' charters requiring a citizen vote on all annexations. The court therefore must determine whether SB 1573 impermissible infringes on those cities' Article XI, Section 2 Home Rule authority or on their citizens' Article IV, Section 1 voting rights.

LOC argues that SB 1573 impermissibly alters the structure of city government by mandating an annexation process that is inconsistent with a city charter requiring a citizen vote. While Plaintiff LOC acknowledges that the legislature has the authority to control and direct annexation, it argues that it cannot exercise that authority in a manner that interferes with any internal decision making process a city has for determining whether, or how, to annex property.

As mentioned above, cities do not have the authority under Article XI, Section 2 to annex property outside their boundaries but instead derive that authority from the legislature. *Mid-County Future Alternatives Committee v. City of Portland,* 310 Or 152, 161-163 (1990). Because the legislature provides the authority for annexation, it also may establish the annexation procedure a city must follow. *Id.* In addition, the *Mid-County Future Alternatives Committee* Court determined that nothing in the Oregon Constitution grants citizens the right to vote on municipal annexations. 310 Or at 166. Any statute requiring a city to annex property without a citizen vote therefore does not impermissibly infringe on the constitutional Home Rule authority of a city to annex land or on any constitutional right of city residents to vote on annexation.

The remaining question is whether SB1573 is unconstitutional because it intrudes into a city's Article XI, Section 2 authority to establish its own process for making internal government decisions. When determining whether a statute conflicts with an existing city charter amendment,

> "the validity of a state law vis-a-vis local entities does not depend upon a source of authority for the law, nor on whether a locality may have authority to act on the same subject; it depends on the limitations imposed by article XI, section 2"

City of LaGrande v. Public Employees Retirement Board, 281 Or 137, 142 (1978). This is because, when it comes to enacting State law, "the legislature has plenary authority except for such limits as may be found in the constitution or in federal law." *Id.* Under the analysis articulated in *City of LaGrande v. PERB*,

> "When a statute is addressed to a concern of the state with the structure and procedures of local agencies, the statute impinges on the powers reserved by the amendments to the citizens of local communities. Such a state concern must be justified by a need to safeguard the interests of persons or entities affected by the procedures of local government.
>
> Conversely, a general law addressed primarily to substantive social, economic, or other regulatory objectives of the state prevails over contrary policies preferred by some local governments if it is clearly intended to do so, unless the law is shown to be irreconcilable with the local community's freedom to choose its own political form. In that case, such a state law must yield in those particulars necessary to preserve that freedom of local organization."

Mid-County Future Alternatives Committee v. City of Portland, 310 Or at 160-61 (*quoting City of LaGrande v. Public Employees Retirement Board,* 281 Or 137, 142 (1978)).

LOC argues that SB 1573 impermissibly intrudes on two aspects of a city's constitutional Home Rule authority. First, it impacts a city's internal decision making process by excluding municipal voters from some annexation decisions. Second, it requires a city to modify its boundary by annexing property if a proposed annexation meets the criteria established in SB 1573. LOC premises its argument on the proposition that a decision whether to annex property and the decision making process for annexation are both part of a city's Home Rule "intramural" authority. State Defendants argue that annexations are an "extramural" exercise of authority and that the legislature can place procedural requirements on a city, including a requirement that annexation occur without a citizen vote.

In determining a city's constitutional Home Rule decision making authority in a given case, a court must determine whether the city is exercising intramural or extramural authority. As explained in *State ex rel Mullins v. Port of Astoria*, 79 Or 1, (1916),

> "Powers exercisable by cities and towns may be placed in two separate classes, which, for the sake of brevity and the want of better terms, will be designated as: (1) Intramural; and (2) Extramural. When the legal voters of a city enact municipal legislation which operates only on themselves and for themselves, and which is confined within and extends no further than the corporate limits, then such voters are exercising intramural authority. When, however, the legal voters of a city attempt to exercise authority beyond the corporate limits of their municipality, they are using an extramural power."

State ex rel Mullins v. Port of Astoria, 79 Or at 17. "Extramural authority [***] is not available to the legal voters of cities and towns, unless the right to exercise it has first been granted either by a general law

enacted by the legislature or by legislation initiated by the people of the whole state." *Id* at 19. While the *Mid-County Future Alternatives Committee* Court concluded that the State had the authority to establish conditions on a city's legislatively-granted extramural annexation authority, it also noted that,

> "Even though a city must follow a legislatively-approved procedure to annex territory, it does not follow that the legislature can decree any annexation for any reason. There still is room to argue, [* * *], that the borders of a municipal corporation are an integral part of the corporate charter which cannot be altered by the legislature."

310 Or at 163.

In determining whether SB 1573 violates Article XI, Section 2, it is helpful to put it in context with existing land use law. *State v. Gaines*, 346 Or 160, 170-172 (2009) (court should examine, text, context and legislative history as primary factors for determining legislative intent). SB 1573 is limited to land that a city has already designated as part of its Urban Growth Boundary (UGB). "A UGB is the part of the land use map in a city's comprehensive plan that demarcates the area around a city that is available for expansion and future urban uses." *1000 Friends of Oregon v. Land Conservation and Development*, 244 Or App 239, 241 (2011). Land within a city's UGB but outside its boundary is classified as urbanizable land necessary for the expansion of that city's urban area. *1000 Friends of Oregon v. Wasco County Court,* 299 Or 344, 350-51 (1985). Once land is included within a city's UGB, it is then considered as being available to that city for conversion to urban use as necessary and consistent with the city's comprehensive land use plan. *Id,* at 351-52. LCDC's Goal 14 addresses urbanization and UGBs. Goal 14 was promulgated "[t]o provide for an orderly and efficient transition from rural to urban land use, to accommodate urban population and urban employment inside urban growth boundaries, to ensure efficient use of land, and to provide for livable communities."

SB1573 requires a city to annex property without a citizen vote under the following circumstances. First, all landowners within the area to be annexed must consent to it. The land to be annexed must also be within a city's existing UGB and at least one lot or parcel must be either contiguous with the existing city boundary or separated from the boundary by a body of water or public right of way. The proposed annexation also must conform to all requirements of the city's ordinances and land use plans.[3] SB 1573 therefore requires annexation without a citizen vote if the proposed property is within the city's UGB, is adjacent to the city's existing boundary and if annexation is consistent with all local ordinances, including a city's land use plan. SB 1573 does not compel a city to annex property that is outside of its existing UGB nor does it require a city to annex property if doing so would violate any city ordinance or land use plan.

This interpretation is consistent with the legislative history supporting SB 1573. On February 24, 2016 the Senate held a work session on SB 1573. Proponents of SB 1573 testified that they believed the bill would create a reasonable and predictable process by which a city would annex land outside its boundaries that it had identified as necessary for the city's growth over the next 20 years. Exhibit E to Declaration of Evan

[3] The City of Corvallis has established an extensive set of application requirements for annexation petitions. *See Corvallis Land Development Code,* Chapter 2.6 (Declaration of Nicole DeFever In Support Of State's Combined Response To Plaintiff and Philomath's Cross Motions For Summary Judgment, Exhibit Q). The city has also established review criteria that examine, among other things, the reason for the annexation, any health issues involved, the availability of public facilities to service the property, the relative advantages and disadvantages of the annexation, and the proposed annexation's compatibility with existing uses, traffic patterns, and infrastructure. *Id.*

Christopher, pp.5-7 (testimony of David Hunnicutt).

In making its intramural authority argument, LOC focuses as its starting point on a city's decision as to whether to annex a property. However, as it relates to SB 1573, there is an earlier city decision that must be examined as well. As discussed above SB 1573 only applies to land within a city's UGB. In designating a UGB, a city is exercising extramural authority as it is identifying land outside its existing boundary that it believes it must acquire in order to meet its projected growth needs. While a city may develop its own internal decision making process for establishing or modifying its UGB, the UGB development process is subject to significant statutory criteria and procedural requirements. *See* ORS 197.295 *et seq.*; ORS 197A.300 *et seq.* In addition, the State reviews and approves a city's proposed UGB. *See* ORS 197A.325.

Taken in the context of a city's UGB designation, SB 1573 is an annexation process a city must follow for annexing land that it has identified outside of its existing boundary as being necessary for future growth. While a city may designate its own UGB development process, it is using that process to exercise extramural authority granted by the State. In addition, placing citizen vote exemptions on a city's extramural annexation authority is within the legislature's authority. *Aloha Incorporation Advisory Commission v. Portland Metro Area Local Government Boundary Commission*, 72 Or App 299, 302-03 (1985). SB 1573 is therefore is a valid exercise of the legislature under *State ex rel Mullins v. Port of Astoria* and *Mid-County Future Alternatives Committee v. City of Portland.* To be sure, and as noted by the *Mid County Future Alternatives* Court, the fact that a city is exercising extramural annexation authority granted by the legislature does not answer the question as to whether the State has *carte blanche* to require it to annex land. A statute requiring a city to annex land that it has not identified as necessary for future growth, or requiring it to annex land in violation of local ordinances or land use plans, may violate a city's constitutional Home Rule authority. However, SB 1573 is not that law because it exempts annexation from a citizen vote only after a city, through its own internal decision making process, identifies its proposed expansion in the form of a UGB and then decides, through its own internal process, that the annexation of land within that UGB complies with all local laws.

The court recognizes that SB 1573 does truncate a city's decision making process for certain annexations by exempting them from a citizen vote. However, the fact that a statute impacts a city's decision making process does not mean that it is categorically prohibited by Article XI, Section 2. As noted above, the test established in *City of LaGrande v. PERB* requires that a State law impacting a city process must address a State concern and must be justified by a need to safeguard the interests of persons or entities affected by the procedures of local government. A city's exercise of its extramural authority to reserve land within its UGB has impacts on individuals and entities beyond the city's existing boundary. Placing property in a city's UGB does not provide landowners within that UGB any certainty as to when their property will be annexed to the city or what ultimate criteria will be applied to their request if the petition is subject to a citizen vote. Exhibit E to Declaration of Evan Christopher, pp.5-7 (testimony of David Hunnicutt). The State arguably has an interest in providing those landowners with some predictability regarding UGB annexation decisions. In addition, the State has an interest in developing a predictable annexation process for land within a city's UGB because those annexations may affect the land use planning decisions of surrounding municipalities on issues such as transportation and infrastructure development. *Id.* These appear to be the type of state concerns that the *City of LaGrande v. PERB* Court indicated would support a statute affecting a city's internal procedures in order "to safeguard the interests of persons or entities affected by the procedures of local government." *LaGrande v. Public Employees Retirement Board,* 281

at 142.

Even assuming, as LOC argues, that a city's decision making process for annexation is an intramural decision, SB 1573 is still a valid exercise of legislative authority under *City of LaGrande v. PERB*. Under the analysis in that case, "a general law addressed primarily to substantive social, economic, or other regulatory objectives of the state prevails over contrary policies preferred by some local governments if it is clearly intended to do so, unless the law is shown to be irreconcilable with the local community's freedom to choose its own political form." *City of LaGrande v. Public Employees Retirement Board,* 281 Or at 142. SB 1573 is a general law addressed toward the regulatory objective of implementing the State's comprehensive land use planning system in a manner consistent with statewide planning goals. *See City of Pendleton v. Kerns*, 56 Or App 818, 826-27 (1982) (statewide land use planning goals are "are general laws addressed primarily to substantive, regulatory objectives of the state"). The application of SB 1573 to city annexation decisions "[n]otwithstanding a contrary provision of the city charter or a city ordinance" demonstrates that the legislature clearly intended its annexation requirements to supersede any city's law requiring annexation by citizen vote.

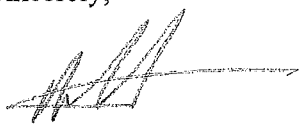
The remaining question under the *City of LaGrande v. PERB* analysis is whether SB 1573 is irreconcilable with a city's freedom to choose its own political form. While the *City of LaGrande v. PERB* Court did not define the term "irreconcilable" it did note that "[i]nstances where general regulatory laws have this effect are probably rare" but hypothesized that "state laws that would impose policy responsibilities or record-keeping, reporting, or negotiating requirements on persons or entities contrary to their allocation under the local charter" may be irreconcilable with a city's freedom to choose its own political form. *City of LaGrande v. PERB*, 281 Or at 156, fn 31. In *City of Sandy v. Metro*, 200 Or App 481 (2005) the Court of Appeals determined that Metro's statutory authority to require the City of Hillsboro to modify its UGB and re-examine its industrial zoning ordinances was not irreconcilable with the city's freedom to choose its own political form. 200 Or App at 495-96. In *Springfield Utility Board v. Emerald People's Utility District*, 339 Or 631 (2005) the Supreme Court determined that the State Public Utility Commission (PUC) had statutory authority to displace a municipal utility district. The *Springfield Utility Board* Court determined that the State law was reconcilable with the city's Home Rule authority to develop its own structure and form because the statutes authorizing the PUC action "do nothing to affect the structure or the form of the city's government and, instead, merely provide a comprehensive, statewide system for allocating service territories to different utility providers." 339 Or at 647. A city may have Article XI, Section 2 authority to both establish its initial boundary and to determine whether it wishes to change that boundary. However, once a city determines that it must expand its boundary to accommodate future growth, its decision as to how to expand that boundary is regulated in large part by state land use planning laws and it must rely on a grant of legislative authority to expand that boundary through annexation. Under the case law cited above, SB 1573 is not irreconcilable with the city's freedom to determine its own political structure or form.

In sum, SB 1573 does not violate Article XI Section 2 because it is a permissible exercise of the legislature's authority to regulate the extramural process by which a city identifies land outside of its boundaries for future growth and then acquires it. SB 1573 also satisfies the requirements of the test articulated in *City of LaGrande v. PERB* for determining the validity of a statute that conflicts with city Home Rule authority. State Defendants are therefore entitled as a matter of law to judgment against LOC's constitutional challenge to SB 1573.

Finally, Plaintiffs City of Corvallis and City of Philomath argue that SB 1573 is invalid because it does not "aid or facilitate" Oregon Constitution Article I, Section 1, Article IV, Sections 1(1), 1(2)(a), 1(5) or Article XI, Section 2.[4] Plaintiffs City of Corvallis and City of Philomath argue that SB 1573 nullifies, abrogates or amends the authority and structure established by the electorate of the City of Corvallis. As discussed above, cities do not have constitutional authority to annex property and municipal citizens do not have a constitutional right to vote on annexation. Any impact that SB 1573 may have on a city's charter amendment requiring a citizen vote on annexation therefore does not abrogate, amend, or nullify any constitutional Home Rule authority or any citizen's constitutional right to vote on local initiatives or referenda. In addition, neither Plaintiff City of Corvallis nor Plaintiff-Intervenor City of Philomath identify any voting right implicated by SB1573 that affects state voters in general beyond the right to vote in municipal decisions. State Defendants are therefore entitled to judgment as a matter of law on Plaintiffs City of Corvallis' and City of Philomath's "aid or facilitate" claim.

For the reasons above, State Defendants are entitled to judgment as a matter of law on Plaintiffs' constitutional challenges to SB 1573 and their request for injunctive relief. State Defendants' Motion For Summary Judgment is granted and Plaintiffs' Cross-Motions for Summary Judgment are denied. Ms. De Fever please, within 21 days, submit an order to the court consistent with this letter ruling.

Sincerely,



Matthew J. Donohue
Circuit Court Judge

[4] The court resolved Plaintiff's and Plaintiff-Intervenor City of Philomath's Article XI, Section 2 and Article VI, Section 1 constitutional challenges against SB1573 in relation to their respective charter annexation amendments on sub-constitutional grounds. However, their "aid and facilitate" argument appears to be a broader constitutional challenge as it implicates not just city voters, but all Oregon voters as well. The court therefore addresses this constitutional argument as part of its summary judgment ruling.