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IN THE CIRCUIT COURT OF THE STATE OF OREGON  
FOR THE COUNTY OF CLATSOP

EMIL E. NYBERG, DON ATWOOD, and  
PETER HACKETT,

Plaintiffs,

v.

FRED R. NEAL, in his official capacity as  
Interim Clatsop County Clerk,

Defendant.

No. 082218

MOTION FOR PRELIMINARY  
INJUNCTION

Oral Argument Requested

**I. UTCR 5.050 STATEMENT**

Plaintiffs request oral argument on this motion, and estimate that one hour will be required for argument. Plaintiffs request official court reporting services.

**II. MOTION**

Pursuant to ORCP 79, plaintiffs move for a preliminary injunction to enjoin defendant from processing the "Clatsop County Referendum Petition" ("the Referendum") that Marc Auerbach, Debbie Twombly, and Don West filed with defendant on April 11, 2008, by which the referendum sponsors seek to refer Sections 5 and 6 of Clatsop County Ordinance 08-05 to the voters of Clatsop County. Copies of Ordinance 08-05 and of Referendum are attached to the complaint in this case as Exhibits 1 and 2, respectively.

**III. STATEMENT OF FACTS**

Plaintiffs are residents and registered voters in Clatsop County. Defendant is the interim County Clerk of Clatsop County.

1 The Clatsop County Board of Commissioners adopted Clatsop County Ordinance  
2 08-05 on March 20, 2008. (Complaint, Ex. 1.)

3 On April 11, 2008, Marc Auerbach, Debbie Twombly, and Don West filed the  
4 Referendum with defendant, seeking to refer Sections 5 and 6 of Clatsop County Ordinance  
5 08-05 to the voters of Clatsop County. (Complaint, Ex. 2.)

6 On April 11, 2008, defendant ruled that Sections 5 and 6 of Clatsop County  
7 Ordinance 08-05 are the proper subjects for a referendum, and approved the Referendum for  
8 circulation to the voters of Clatsop County. A copy of defendant's letter to Clatsop County  
9 District Attorney Joshua Marquis, dated April 11, 2008, in which defendant stated that he  
10 had "approved this petition for circulation" is attached to the Complaint as Exhibit 3.

11 On April 11, 2008, an announcement was posted on the official Internet website for  
12 Clatsop County, stating that defendant approved the Referendum that afternoon and that he  
13 "will forward copies of the proposed referendum to the District Attorney who will then have  
14 5 days from receipt to draft a ballot title, per ORS 250.175(3)."<sup>1</sup>

#### 15 IV. MEMORANDUM

16 Ordinance 08-05 contains seven substantive sections. Sections 1, 2, and 3 changed  
17 the zoning on various individual parcels of land. Section 4 amended the county's  
18 comprehensive plan. Sections 5 and 6 amended the county's Land and Water Development  
19 and Use Ordinance ("LWDUO") to add "'cable, sewerline, waterline, or other pipeline' as a  
20 conditional use in the OPR zone." Section 7 adopted certain findings of fact and conclusions  
21 of law in support of the ordinance, more fully described below.

22 Each individual section of Ordinance 08-05, and the ordinance as a whole, constitutes  
23 a "land use decision." A "land use decision" is defined in ORS 197.015(10) as follows:

24 \_\_\_\_\_  
25 <sup>1</sup> The announcement is posted at  
26 <http://www.co.clatsop.or.us/news.asp?pageid=5&pressID=2416&deptid=6> (visited April 13,  
2008).

1           “(A) A final decision or determination made by a local  
2           government \*\*\* that concerns the adoption, amendment or  
3           application of:

4           “(i) the goals [that is, the statewide planning standards adopted  
5           by the Land Conservation and Development Commission];

6           “(ii) A comprehensive plan provision;

7           “(iii) A land use regulation; or

8           “(iv) A new land use regulation[.]”

9           It is clear that Sections 5 and 6 of Ordinance 08-05 constitute “land use decisions”  
10          under that statutory definition, because they amended a land use regulation (namely,  
11          LWDUO), and they applied the statewide planning goals and the county’s comprehensive  
12          plan. Ordinance 08-05 itself recites that it was adopted in compliance with land use laws,  
13          and in Section 7 of the Ordinance, the Board adopted a 326-page document dated March 5,  
14          2008, containing Findings of Fact and Conclusions of Law in support of the land use  
15          decisions set out in the Ordinance. That document explained in great detail how and why the  
16          Board concluded that the proposals satisfied the County’s comprehensive plan and the  
17          statewide planning goals.<sup>2</sup> In short, it is indisputable that Sections 5 and 6 of Ordinance 08-  
18          05 are “land use decisions.” As such, they may not be referred to the voters, because the  
19          Court of Appeals has squarely held that land use decisions are not subject to the referendum.  
20          *Dan Gile and Assoc., Inc. v. McIver*, 113 Or App 1, 831 P2d 1024 (1992) (“*Gile*”).

21          In *Gile*, a county governing body approved a zone change on the plaintiffs’ property.  
22          Opponents of the zone change filed a referendum petition, seeking to place the question on  
23          the ballot. The plaintiffs sued to enjoin the referendum election, but the trial court rejected

24          \_\_\_\_\_

25          <sup>2</sup> The Findings and Conclusions are available on the County’s website, at  
26          [http://clatsopcounty.us/Assets/Dept\\_12/PDF/032008%20Findings%20exhibit%20A%20final.pdf](http://clatsopcounty.us/Assets/Dept_12/PDF/032008%20Findings%20exhibit%20A%20final.pdf)  
        (pdf (visited April 13, 2008).

1 their claim on the ground that the county’s action in approving the zone change had been  
2 “legislative” and was therefore the proper subject of a referendum.

3 The plaintiffs appealed, and the Court of Appeals reversed. The Court of Appeals did  
4 not discuss whether the county’s action in changing the zoning was legislative or quasi-  
5 judicial; instead, the court focused on the fact that the county’s decision “required the  
6 amendment or application of a land use regulation, and it was therefore a ‘land use decision’  
7 \*\*\*.” *Id.* at 4. The Court explained:

8 “ORS 197.175(1) requires cities and counties to carry out their  
9 planning and zoning responsibilities in accordance with ORS  
10 chapters 296 and 197 and the statewide planning goals. ORS  
11 197.175(2) mandates that local governments enact  
12 comprehensive plans and land use regulations and that they  
13 apply them in making land use decisions. *The zoning decision*  
14 *made here required the amendment or application of a land*  
15 *use regulation and it was therefore a ‘land use decision’ as*  
16 *defined in ORS 197.015(10)(a). Land use decisions are*  
17 *appealable to LUBA and, in turn, to the appellate courts under*  
18 *ORS 197.805 et seq. That review process is exclusive, ORS*  
19 *197.825(1), and the grounds for reversing or remanding a local*  
20 *land use decision are carefully defined and limited in those*  
21 *statutes.”*

22 *Id.* (emphasis added).

23 The Court of Appeals went on to note that the Supreme Court, in *Heritage*  
24 *Enterprises v. City of Corvallis*, 300 Or 168, 708 P2d 601 (1985), had explained that in some  
25 situations, such as annexations, a local governing body makes a “land use decision” and  
26 Oregon statutes then provide that the voters are entitled to vote whether to approve or reject  
that decision. The Court of Appeals noted that this two-step process does not apply to a land  
use decision that does *not* involve statutorily-required voter ratification. In such  
circumstances, the Court held, submission of the decision to the voters for their approval by  
way of a referendum petition is not permissible.

The Court of Appeals applied that reasoning to the zone change at issue in that case  
as follows:

1            “[T]his case involves only one decision—whether to allow the  
2            zone change—and it is a land use decision under state law.  
3            The clear import of the statutory scheme, generally, and  
4            *Heritage Enterprises v. City of Corvallis*, *supra*, specifically, is  
5            that **that decision cannot be referred**. When the only  
6            decision to be made is a land use decision, to which specific  
7            land use provisions and requirements must be applied, the  
8            governing body must, and the electorate cannot, follow the  
9            procedures or be confined to the substance of those  
10           requirements.”

11 *Gile*, 113 Or App at 5 (boldface added).

12            The *Gile* decision is squarely on point. Just as the zoning decision at issue in *Gile*  
13 “required the amendment or application of a land use regulation and \*\*\* was therefore a  
14 ‘land use decision’,” *id.* at 4, so did the Clatsop County Commission’s decision to amend the  
15 county’s Land and Water Development and Use Ordinance “require[] the amendment or  
16 application of a land use regulation.” The Commission acted under the authority of its  
17 LWDUO, pertinent portions of which are attached to this motion as Exhibit 1. As the  
18 “whereas” clauses at the beginning of Ordinance 08-05 recite (*see* Ex. 1 to the complaint),  
19 the ordinance was enacted in response to an application by Bradwood Landing to change the  
20 zoning of certain properties in Clatsop County, to amend the Clatsop County Comprehensive  
21 Plan, and to amend LWDUO. When the County received that application, the County  
22 Planning Commission was required, by section 2.330(1) of LWDUO, to “[i]dentify the  
23 provisions of the Comprehensive Plan that govern the decision and prepare findings  
24 describing how the proposal complies or fails to comply with these Plan provisions.” (The  
25 Comprehensive Plan, of course, is the tool used by local governments in Oregon to  
26 implement the statewide planning goals to which every local governing body is required to  
adhere. Clatsop County’s Comprehensive Plan is available on the County’s website, at  
<http://www.co.clatsop.or.us/default.asp?pageid=313&deptid=12>. Once they adopt  
comprehensive plans, local governing bodies must then adopt ordinances to implement the  
plan; in the case of Clatsop County, the LWDUO was one such ordinance adopted by the

1 Board of County Commissioners to implement that county’s comprehensive plan. The text  
2 of LWDUO is not available on the County’s website; instead, the website contains a notice  
3 stating that “This Ordinance is kept in a separate booklet and can be reviewed at the Clatsop  
4 County Planning Department.”<sup>3</sup>

5 After considering the Comprehensive Plan and making findings as to the application  
6 of the Plan to the Bradwood Landing application, the Planning Commission was required to  
7 make a recommendation to the Board of County Commissioners, and to “[s]tate reasons” for  
8 that recommendation. LWDUO § 2.330(3). Upon receipt of the Planning Commission’s  
9 recommendation, the Board of County Commissioners was required to consider “compliance  
10 with the [Comprehensive] Plan” in determining whether to confirm, amend, or reverse the  
11 Planning Commission’s recommendation. LWDUO § 2.335.

12 All of these steps are part of the normal required steps that local governing bodies  
13 must take, under Oregon law, when they make *any* “land use decision.” The Court of  
14 Appeals in *Gile* held that the zoning decision at issue there was a “land use decision”  
15 precisely because it entailed those required steps of considering the application of a land use  
16 regulation, and the *Gile* opinion mandates the same conclusion here: the Clatsop County  
17 Commission’s decision, in Sections 5 and 6 of Ordinance 08-05, to amend LWDUO entailed  
18 several statutorily-required steps entailing the application of land use regulations. That  
19 decision was therefore a “land use decision,” and under the square holding of the Court of  
20 Appeals in *Gile*, that decision is not subject to the referendum process. There is no reported  
21 appellate court decision since *Gile* that discusses this issue—perhaps because the legal point  
22 is so well settled that no one has attempted, since *Gile*, to challenge a land use decision by  
23 way of referendum. In any event, the *Gile* opinion does not limit or qualify its holding in any  
24 way: it holds, flatly, that a land use decision “cannot be referred.” *Gile*, 113 Or App at 5.

25 <sup>3</sup> [http://www.co.clatsop.or.us/Assets/Dept\\_6/PDF/35%20Land%20and%20Water](http://www.co.clatsop.or.us/Assets/Dept_6/PDF/35%20Land%20and%20Water%20Use%20and%20Development%20Ordinance.pdf)  
26 [%20Use%20and%20Development%20Ordinance.pdf](http://www.co.clatsop.or.us/Assets/Dept_6/PDF/35%20Land%20and%20Water%20Use%20and%20Development%20Ordinance.pdf) (visited April 15, 2008).



**SECTION 2.300 LEGISLATION.**

**Section 2.310 Legislative Action Under This Ordinance.**

- (1) The following are legislative actions under this Ordinance:
  - (A) An amendment to this Ordinance.
  - (B) A district or zone change action the County Commission has designated as legislative after finding the matter at issue involves such a substantial area and number of property owners or such broad public policy changes that administrative processing would be inappropriate.
- (2) A legislative action shall follow the Type IV procedure subject to the modifications and supplements of Sections 2.310 to 2.335.

**Section 2.315 Legislative Hearing Notice.**

Notice of a hearing on a legislative decision under this Ordinance need not include a mailing to property owners where the matter at issue does not relate to a specific geographic area. Where such mailing or posting is omitted, the Community Development Director shall prepare a notice program designed to reach persons believed to have a particular interest and to provide the general public with a reasonable opportunity to be aware of the hearings on the proposal.

**Section 2.320 Arguments on Policy.**

In addition to matters pertaining to compliance with criteria and consistency with the Comprehensive Plan, a person may provide information and opinion regarding the desirable policy of the County relevant to the proposed legislative matter.

**Section 2.325 Information at Planning Commission Hearing.**

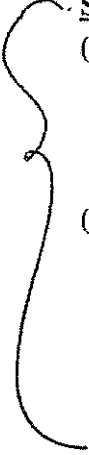
The Planning Commission shall afford an interested person the opportunity to submit written recommendations and comment in advance of the hearing and this information shall be available for public inspection. At the hearing, written recommendations and other information will be received and oral statements will be permitted.

**Section 2.330 Planning Commission Recommendation.**

In preparing its recommendation the Planning Commission shall do the following:

- (1) Identify the provisions of the Comprehensive Plan that govern the decision and prepare findings describing how the proposal complies or fails to comply with these Plan provisions.
- (2) Review the nature of the proposal and describe whether the proposal warrants processing as a legislative matter.
- (3) State reasons for the recommendations and make the recommendations.  
Recommendations may include policy advice of the Planning Commission in addition to determinations described in (1) and (2) above.

Section 2.335 Board of Commissioners Legislative Action.

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- (1) The Board of Commissioners may limit the nature of the information it will receive at the hearing and may establish separate rules for consideration of each of the following:
    - (A) Compliance with the Plan.
    - (B) Appropriateness of the legislative process.
    - (C) Policy changes or refinements proposed.
  - (2) After confirming, amending or reversing the recommendations of the Planning Commission, the Board of Commissioners may take any of the following steps:
    - (A) Enact or defeat an Ordinance on all or part of the proposal under consideration.
    - (B) Refer some or all of the proposal back to the Planning Commission for further consideration. If such referral is subsequently returned, no further hearing need be conducted if the proposal is processed under the County procedure for Ordinance enactment.