IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

MICHELE ROSSOLO, Plaintiff, v. MULTNOMAH COUNTY ELECTIONS DIVISION and TIM SCOTT, Director, Defendants.	)))))))))	Case No. 1401-00046 **ORDER GRANTING AND DENYING MOTIONS FOR SUMMARY JUDGMENT**

INTRODUCTION

This matter comes before the court on the parties' cross-motions for summary judgment. Plaintiff Michelle Rossolo, defendants Multnomah County Elections Division and its Director, Tim Scott, and applicant defendant-intervenor Metro all contend there are no material issues of fact in dispute, but each asserts the governing law supports their respective positions and entitles them to judgment in their favor.

On February 10, 2014, the court heard oral argument on the cross-motions, as well as on Metro's motion to intervene. John DiLorenzo, Jr. appeared on behalf of plaintiff, Jacqueline A. Weber appeared on behalf of defendants, and William F. Gary and Alison R.

Kean appeared on behalf of Metro. Following the oral arguments from counsel and having reviewed the briefs submitted to the court, the court finds as follows:

SUMMARY OF FACTS

Plaintiff Michelle Rossolo is the chief petitioner for a referendum that seeks to strike select portions of a Multnomah County ordinance enacted by the Multnomah County Board of Commissioners (Commissioners) on December 12, 2013. The Ordinance, numbered "1206" (Ordinance 1206), amended Chapter 11 of the Multnomah County Code (MCC), relating to revenue and taxation, to permit revenues raised from certain tourism-related transactions to be expended in support of the construction of a hotel proximate to the Oregon Convention Center, should such a hotel be constructed.

On December 23, 2013, Plaintiff filed a referendum petition with defendant Scott, seeking that it be certified. Certification is a prerequisite to the referendum petition being circulated among the county's voters, as part of the process of obtaining the necessary number of signatures to place the referendum on the ballot.

On December 31, 2013, defendant Scott denied certification, for the reason the proposed referendum related to an exercise of the Commissioners' executive and administrative powers.

In response to Scott's denial, plaintiff filed this lawsuit seeking an order declaring Defendant Scott's determination null and void or, in the alternative, that the petition satisfies the constitutional requirements and requiring Defendant Scott to certify the petition.

Defendants subsequently filed a Motion for Summary Judgment. Metro filed a Motion to Intervene and Motion for Summary Judgment.[1] Plaintiff responded objecting to Metro's intervention in this case and filed a Cross-Motion for Summary Judgment.

ANALYSIS

Plaintiff proffers a sequence of arguments why, as a matter of undisputed fact and law, Defendant Scott was wrong in his determination that the referendum pertains to an administrative act of the Commissioners and, as such, a petition seeking to place the referendum on the Multnomah County ballot may not be circulated. Defendants and Defendant-intervenors present but one argument in support of Scott's determination. I will address each, in turn

First, plaintiff argues Defendant Scott lacked the authority, under State or Multnomah County law, to review plaintiff's proposed referendum and to make a determination that the referendum may not be circulated.

Under Multnomah County Code (MCC) § 5.101(C), Defendant Scott must determine if the proposed referendum that plaintiff is required to file with him, in his capacity as the Director of the Multnomah County Elections Division, complies with the requirements of MCC § 5.101, as well as with "other applicable law." Both of the referenced legal sources serve to incorporate into the Director's determination whether or not the "prospective petition" is "for referendum of county *legislation*." MCC § 5.101 (emphasis added). *Accord* MCC § 5.102(A) and (H) (instructing the director to review the text of initiatives and referenda to determine if they propose "county legislation".) Thus, I reject plaintiff's initial

[1] After analysis of the relevant legal provisions and standards, I grant Metro's motion to intervene.

argument, and simply find Defendant Scott has the authority to make the determination he is, by law, required to make.

Plaintiff next argues that Multnomah County both has the authority to permit referenda to be circulated with respect to the Commissioners' administrative acts, and that the County has, indeed, exercised that authority, thus rendering it unlawful for Defendant Scott to have withheld certification of plaintiff's referendum petition for the reason it pertains to an administrative act of the Commissioners.

I reject plaintiff's argument here, finding it based on a tortured construction of code language that can, at worst, be faulted as inartfully drafted.

But standing more powerfully against this second of plaintiff's argument are three important legalities: 1) there exists close to a century of jurisprudence recognizing the people's referendum power to be legislative in nature; 2) the Oregon Supreme Court has recognized the legislative power embodied in the initiative and referendum processes should not be used to "delay executive conduct," thereby "destroy[ing] the efficiency necessary to [ ] successful administration...."[2] and; 3) the MCC statutory scheme established, in part, through §§ 5.101 and 5.102, explicitly focus the process for initiatives or referenda on "county legislation." *Accord* Dahlen v. Multnomah County, 158 Or App 253, 255 ("[i]t has long been Oregon law that a local initiative may deal only with legislative decisions...not with administrative decisions").

Plaintiff next argument is that Defendant Scott erred in finding the referendum to be directed against an exercise of the Commissioners' executive and administrative powers, because the referendum relates to Ordinance 1206, and the MCC defines "county

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[2] *Monahan v. Funk*, 137 Or 850, 586 (1931) (internal quotations and citations omitted).

legislation" as "any ordinance that has been or lawfully may be enacted by the county, . . ." MCC § 5.100.

When analyzing an act to determine if it is "administrative" or "legislative" for purpose of review under Oregon Constitution, Art. IV or Art. VI, the Oregon Supreme Court has eschewed an approach that makes the label of the act determinative. Rather, the Court has taken an approach that looks not to "the nature of the action but the nature of the legal framework in which the action occurs." *Foster v. Clark*, 309 Or 464, 474 (1990).

This latter approach not only controls this court's review, it also makes good sense. The right of Multnomah County's citizens to refer legislation should not be limited by whatever label - ordinance or resolution - the Commissioners may choose as the particular means to enact the subject of the referral. In sum, I reject plaintiff's definition-determinative argument.

Finally, I turn to plaintiff's last argument and basis for granting summary judgment in her favor, the obverse of which is the defendants' and defendant-intervenor's sole argument and basis for summary judgment in their favor. Resolving this mirror-imaged argument, and so determining in whose favor to grant summary judgment, requires the court to answer the following question: is the plaintiff's proposed referendum to undo certain provisions of Ordinance 1206, directed at a legislative or administrative act by the Multnomah County Board of Commissioners?

Through prior County enactments - which all parties agree were produced through an exercise of the Commissioners' legislative authority - taxes were put in place to derive revenues from tourism-related transactions, such as car and hotel room rentals, and which revenues were to be expended in support of tourism-promoting and tourism-supporting

purposes. This legislative design for tourism related revenues to fund tourism related expenditures, characterized in the words used by the Oregon Supreme Court in *Lane Transit District v. Lane County*, 327 Or 161, 168 (1998) (quoting *Foster v. Clark*, 309 Or 464), constitutes the "completed legislative plan."

Through Ordinance 1206, the Commissioners made certain changes to the MCC to permit a portion of those tourism-derived tax revenues potentially to be expended for a purpose additional to those previously authorized, though still tourism-related: to pay the interest costs associated with bonds issued for the construction of a "convention center hotel," in the event such a hotel is built.

Thus, cast in the terms set by the *Monahan* court, Ordinance 1206 "did not set new policy, but merely carries out legislative policy and purposes already declared." *Monahan*, 137 Or at 584. Or, using the formulation articulated by the Oregon Court of Appeals in the *Dahlen* case, Ordinance 1206 "involved the details of implementing established policy." *Dahlen*, 158 Or App at 255.

In much the same way that executive and administrative decisions determine the specific "driver and motor vehicle services" for which gas tax revenues may be expended[3], Ordinance 1206 - and particularly those portions plaintiff seeks to have submitted to county voters through her proposed referendum – simply implements yet one more administrative determination by the Commissioners regarding how tourism related revenues will be expended for the promotion and support of tourism in Multnomah County and the greater Portland metropolitan area. As Ordinance 1206 is an administrative act,

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[3] *See* ORS § 319.880 and ORS §§ 802.110, *et seq.*

not a legislative one, and in accordance with my rulings above, the ordinance is not properly the subject of a referendum.

CONCLUSION

The plaintiff is representative of a group of Multnomah County voters who clearly feel aggrieved by a decision of the Commissioners and other elected officials to use tax dollars to assist with the construction of a convention center hotel. Plaintiff's desire to overturn that decision will not be advanced by the ruling I issue today, predicated on my understanding of the governing constitutional and statutory provisions.

But while the law does not support plaintiff's effort to challenge a government's administrative decision through the referendum process, that does not mean our system of governance provides plaintiff and other like-minded citizens with no recourse. While the mechanisms for redress envisioned by the drafters of Oregon's governance structures may seem somewhat slow and cumbersome in today's world of immediacy and hyper-connectivity, no small part of the wisdom behind these mechanisms is to permit both the people, and those who govern, the time and space to enable good decision making, be it in the council chamber or at the ballot box.

Consistent with my analysis detailed above, I find that no issue of material fact is in dispute, and further that, as a matter of law applied to the undisputed facts, defendants acted properly in engaging in the review of plaintiff's proposed referendum, and in declining to certify the petition for circulation for the reason that the referendum pertains to an administrative act of the Multnomah County Board of Commissioners.

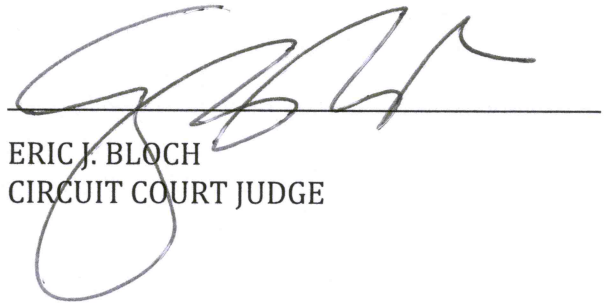
I, therefore, rule as follows:

1. That plaintiff's motion for summary judgment is denied, and further;

2. That defendants' and defendant-intervenor's motions for summary judgment are granted.

IT IS SO ORDERED.

DATED this 3 day of March, 2014.



ERIC J. BLOCH
CIRCUIT COURT JUDGE