

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR MULTNOMAH COUNTY

ROBERT SHORT,)	
)	
Petitioner,)	
)	
v.)	Case No. 18CV10103
)	
MARY HULL CABALLERO, in her)	
official capacity as CITY OF PORTLAND)	
AUDITOR,)	
)	
Respondent.)	
)	OPINION AND ORDER
)	
and)	
)	
ADRIANA VOSS-ANDREA, ELBERT)	
MONDAINE AND PAIGE)	
RICHARDSON,)	
)	
Intervenors.)	

INTRODUCTION

This case came on for hearing on April 20, 2018 on Petitioner’s Petition to Review Determination of Compliance with Constitutional Provisions (hereafter, “Petition”). Petitioner Robert Short appeared by and through his counsel, Jill Gibson. Respondent Mary Caballero, in her official capacity as the City of Portland Auditor, appeared by and through Deputy City Attorney Maja Haium. Intervenors Adriana Voss-Andrea, Elbert Mondaine, and Paige Richardson appeared by and through their counsel, Margaret Olney.

Petitioner challenges Respondent’s determination that an initiative entitled “Portland Clean Energy Community Benefits Initiative 2018” (hereafter, “PDX 04”) meets the

requirements of Article IV, section 1(2)(d) of the Oregon Constitution. Petitioner argues that because PDX 04 does not satisfy this constitutional mandate, the Court should overturn Respondent's determination, which would preclude PDX 04 from being circulated for signatures in support of qualification for the ballot.

Respondent and Intervenors argue that PDX 04 complies with the relevant constitutional provision.

For the reasons explained in this Opinion, the Court finds that the conceded flaw in PDX 04's enacting clause is not of constitutional dimension, and that Respondent's determination that PDX 04 meets the dictates of Article IV, section 1(2)(d) of the Oregon Constitution is correct. The Court therefore denies the Petition.

PROCEDURAL HISTORY

The Portland City Code ("PCC") required Respondent, as City of Portland Auditor, to determine whether PDX 04 complied with Article IV, section 1(2)(d) of the Oregon Constitution. Respondent determined that PDX 04 does, in fact, comply with the relevant constitutional provisions. Petitioner timely filed the instant challenge to that determination.

On March 23, 2018, the Court entered a stipulated order allowing intervention in this action by Adriana Voss-Andrea, Elbert Mondaine, and Paige Richardson.

DISCUSSION, ANALYSIS & CONCLUSIONS

Petitioner is plainly correct in his assertion that an error in PDX 04's enacting clause renders the clause inaccurate and leaves voters with incomplete information. With respect to the error: PDX 04's enacting clause states that if PDX 04 is approved by the voters, it will "enact the following Ordinance to be added to and made part of the Portland City Code, Chapter 7 (Business Licenses)." Respondent concedes that the PCC does not contain a "Chapter 7." It

contains a Title 7, and there are sequentially numbered Chapters within that Title, beginning with Chapter 7.02. The enacting clause, then, states nonsensically that PDX 04 will be added to a nonexistent part of the PCC. The question for decision is whether this mistake brings PDX 04 out of compliance with the Oregon Constitution.

ORS 257.270(4) provides that an elector may petition a Circuit Court to “overturn the determination of the City election’s officer” that a prospective petition for an initiative measure “meets the requirements of section 1(2)(d) and (5), Article IV of the Oregon Constitution.”¹ In this case, Petitioner argues that the PDX 04 fails to satisfy the requirements of Article IV, section 1(2)(d) of the Oregon Constitution, which requires that an initiative “include the full text of a proposed law or amendment to the Constitution.”

The scope of this “full text” requirement has been defined most fulsomely in *Kerr v. Bradbury*, 193 Or. App. 304, 89 P.3d 1227 (2004). In *Kerr*, the Court of Appeals stated that Article IV, section 1(2)(d) means what its plain language suggests: voters presented with a ballot measure must be provided with the “full text of the statute as it would appear if amended.” 193 Or. App. at 325; 89 P.3d at 1238.

Petitioner’s argument is founded on the view that because PDX 04’s enacting clause does not define where in the PCC the ordinance would be placed upon passage (because it states that the ordinance will be placed in a nonexistent part of the PCC), PDX 04 fails to comply with the “full text” requirement. Petitioner reasons that if PDX 04 passes, the new ordinance will have to be placed somewhere in the PCC. He reasons further that the “full text” requirement mandates that PDX 04 must therefore include the as-yet-undetermined PCC statute that will serve as PDX

¹ The Court is also mindful of ORS 250.270, which provides that “[t]he review by the circuit court shall be the first and final review, and shall be conducted expeditiously to ensure the orderly and timely circulation of the petition.”

Respondent's argument is without persuasive value; it ignores both the reality of the full text requirement, and its purpose. Pursuant to the Oregon Constitution, registered voters are entitled to see the "full text of the statute as it would appear if amended." *Kerr*, 193 Or. App. at 325; 89 P.3d at 1238. It is the City of Portland Auditor's responsibility (as Portland's elections officer) to provide the voters with this information. The City of Portland Auditor cannot evade this responsibility by presenting registered voters (intentionally or by mistake) with a proposed measure that simply delegates the task of placing the statute wherever the City of Portland Auditor thinks is most appropriate.

Respondent's second argument in opposition to the Petition urges that notwithstanding the conceded mistake in the enacting clause, PDX 04 does comply with the "full text" requirement. Respondent argues that PDX 04 is – with the exception of an eight-word proposed amendment to PCC 7.02.600(G) – a stand-alone ordinance. It therefore – with the exception of that exception – does not "amend" any other statute that would need to be included pursuant to the "full text" statute. In other words, Respondent's position is that the "full text of the statute as it would appear if amended" is the text of PDX 04 itself.

The Court finds Respondent's argument on this point persuasive. PDX 04 on its face would enact a stand-alone provision of the PCC. It does not purport to amend any other statutory text in the PCC; if passed, it would plainly be an entirely new addition to the PCC that would not change the language or the meaning of any other portion of the PCC. Thus, the "full text of the statute as it would appear if amended" is found in the measure itself. Registered voters will have a full understanding of what PDX will do from reading the proposed measure itself. Both the full text requirement of Article IV, section 1(2)(d) and its underlying purpose are therefore satisfied.

04's landing spot. Petitioner posits that because PDX 04 does not include the full text of that (unknown) statute, PDX 04 fails to satisfy the "full text" requirement.

Petitioner's position carries logical force. The purpose of Oregon's constitutional "full text" requirement is to permit registered voters to have a full understanding of the proposed measure being circulated for signatures. Without the context of the present state of the law and/or how that law would be modified by passage of a ballot measure, registered voters could not fully understand the potential impact(s) of a proposed ballot measure. That is, the full text requirement is intended to "provide sufficient information so that the registered voters can intelligently evaluate whether to sign the initiative petition." *Kerr*, 193 Or. App. At 320; 89 P.3d at 1227 (quoting with approval *Mervyn's v. Reyes*, 69 Cal.App.4th 93, 81 Cal.Rptr.2 148, 151 (1998)). It would frustrate the very purpose of the "full text" requirement if sponsors of proposed measures or city elections officials could – by design or through honest mistake – avoid this requirement by causing or permitting an enacting clause to reference a non-existent statute.

Respondent's² first argument in opposition to the Petition relies on PCC 1.01.035(B), which authorizes the City Auditor to – among other things – "rearrange, number * * * and divide provisions of the City Code, and to correct clerical errors * * * in accordance with the meaning and intent of the provisions of the Code." Respondent reasons that because the City Auditor enjoys the authority to "rearrange" provisions of the City Code, the "effect of [PDX 04's] imprecision is merely to provide discretion to the City Auditor, subject to approval of the City Attorney, to determine where in Title 7 (Business Licenses) the city will codify [PDX 04] if it is approved by voters. (City's Response at 3).

² Intervenors' arguments in response to the Petition largely track Respondent's arguments. For the sake of brevity, the Court will incorporate its analysis of Intervenors' arguments into its discussion of Respondent's positions.

Petitioner argues that this conclusion is incompatible with *Kerr*, and notes that the proposed initiative petition in *Kerr* also involved “new” statutory provisions that did not change the words of the existing statutes which they sought to amend. (Petitioner’s Reply at 3). The Court agrees with Petitioner’s description of *Kerr*, but disagrees with Petitioner’s conclusion.

Unlike the PDX 04, the proposed statutory amendments presented by the initiative petition in *Kerr* would have changed the meaning of the already existing statutes which they sought to amend, even though they did not seek to change any of the extant words of those statutes. In particular, the new language would have: (1) amended an existing statute that required that schools provide special emphasis in instructing certain values (including “honesty” and “respect for all humans, regardless of * * * sex”) to add a provision that precluded the teaching of “sexual orientation”; and (2) added new sanctions for any school found to have violated the proposed preclusion. *Kerr*, 193 Or. App. At 6; 89 P.3d at 1229.

The effect of the proposed statutory amendments in *Kerr*, then, was to change the meaning (or at the very least limit the potentially available meanings) of a statute that was being truly amended. For example, schools may have understood the extant requirement that they emphasize “respect for all humans” included teaching “respect for humans of all sexual orientations”; the proposed initiative measure, if passed, would have eliminated that meaning from the existing statutory language (without changing that existing language itself). The proposed initiative measure in *Kerr* thus sought to change the underlying statutes, and the Oregon Constitution required that those to-be-amended statutes be presented to registered voters in full.

The circumstances in *Kerr* are very different from those presented here. PDX 04’s proposed new ordinance does not affect the text or the meaning of any PCC ordinance already in

existence. Unlike the proposed statutory amendments in *Kerr*, PDX 04 does not alter or amend either the text or the meaning of any existing statute. It proposes a true “stand-alone” statute that would not effect a substantive “amendment” of any other provision of the PCC. Thus Article IV, section 1(2)(d)’s requirement that the “full text of the statute as it would appear if amended” is satisfied by the text of PDX 04 itself.

As noted above, there is an exception to PDX 04’s self-contained nature: Respondent concedes that PDX 04 does include an eight-word amendment to PCC 7.02.600(G). PDX 04 includes the entirety of PCC 7.02.600 (including paragraph (G)) as it would appear if PDX 04 was approved by the voters. The inclusion of the full text of this statute, in combination with the fact that PDX 04 is otherwise self-contained and would not alter the text or meaning of any other portion of the PCC, means that the “full text of the statute as it would appear if amended” is presented by PDX 04 itself. The enacting clause error does not render things otherwise.

CONCLUSION

For the reasons stated above, the Petition is DENIED. Respondent will prepare an appropriate form of judgment.

Dated this 30th day of April, 2018.

A handwritten signature in black ink, appearing to read 'B. Souede', written over a horizontal line.

Benjamin Souede
Circuit Court Judge