

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

Stanton Long

Plaintiff,

vs.

Cheryl Betschart; Stephen E. Dingle

Defendants,

and

Robin Bloomgarden; Lynn Bowers; Michele
De La Cruz; Katja Kohler Gause; Laura M.
Ohanian; Tao Orion

Intervenor Defendants.

Case No. 16CV31579

OPINION AND ORDER

THIS MATTER is before the Court on Plaintiffs' *Motion for Summary Judgment* (filed December 13, 2016) and Intervenor-Defendants' *ORCP 21 Motion to Dismiss* filed (December 12, 2016). On February 3, 2017 the Court heard oral arguments on the parties' motions. At the hearing on February 3, 2017, Defendants and Intervenor Defendants orally moved for summary judgment. William Gary of Harrang Long Gary Rudnick P.C. appeared on behalf of Plaintiffs. Stephen E. Dingle, Lane County Counsel, represented Defendants. Ann Kneeland appeared on behalf of Intervenor Defendants. Oral arguments were stereographically reported by C&C Reporting.

Factual and Procedural History

In 2015, petitions for three proposed amendments to the Lane County Charter were filed with the Lane County Clerk's Office. The first, entitled "A Charter Amendment to Protect the Right to a Local Food System of Lane County," was filed on March 16, 2015. The second, entitled "Lane County Freedom from Aerial Spraying of Herbicides Bill of Rights," was filed on September 11, 2015. The third, entitled "Lane County Community Self-Government Charter Amendment," was filed on September 30, 2015.

In 2015, Defendant Betschart's Office approved all three proposed charter amendments for preparation of ballot titles and, ultimately, for signature gathering. The proposed charter amendments were submitted and reviewed for compliance with ORS 250.168. ORS 250.168 provides that a proposed initiative must comply with the single subject rules found in section 1 (2)(d), Article IV, and section 10, Article VI of the Oregon Constitution.

On August 24, 2016, attorney William F. Gary wrote to the Office of the County Clerk of Lane County, on behalf of Plaintiff, demanding that the County commit to completing the review under ORS 203.725 within a reasonable time and announce the date by which such review will be completed.

On August 26, 2016, attorney William F. Gary wrote to Defendant Lane County Counsel Stephen Dingle providing him with a legal analysis of the three proposed charter amendments and raising questions concerning whether any of the three proposed measures satisfied the requirements of ORS 203.725.

By letter dated September 7, 2016, Defendant Dingle responded to Plaintiff's counsel on behalf of Defendant Betschart and Lane County. Defendant Dingle stated that, in the event a petitioner submits and Defendant Betschart verifies the legally required number of valid signatures, the County would file a petition under ORS 33.710. In such a validation proceeding under ORS 33.710, Defendants would ask Lane County Circuit Court to advise Defendant Betschart as to her legal responsibilities under ORS 203.725. Plaintiff has taken this as a *de facto* refusal to conduct pre-election review of the proposed charter amendments for compliance with ORS 203.725.

On September 27, 2016, Plaintiff filed *Appeal of Failure to Conduct Review of Proposed Charter Amendments Pursuant to ORS 203.725*. Plaintiff claims that "[i]n order to comply with the statute and in order to avoid harm to the election process and citizens' rights to participate in it, such review must be conducted as soon as practicable after any proposed charter amendment is filed and before the start of signature-gathering and campaigning." Plaintiff claims that "Defendant Dingle's proposal to wait until petitioners complete the signature-gathering process and then to petition the Lane County Circuit Court seeking advice as to Defendant Betschart's obligations under the law is a *de facto* refusal to conduct pre-election review of the proposed charter amendments for compliance with ORS 203.725."

In his *Appeal of Failure to Conduct Review of Proposed Charter Amendments*, Plaintiff "prays for judgment against defendants directing them to comply with the County's duty to conduct pre-election review of pending charter amendments for compliance with ORS 203.725, and to do so at a reasonable time in light of voters' statutory rights to challenge defendants' determination."

On October 4, 2016, Intervenor Applicants Bloomgarden, Bowers, De La Cruz, Kohler Gause, Ohanian and Orion moved to intervene as Intervenor Defendants through their attorney Ann Kneeland. The Intervenor-Applicants are the Chief Petitioners for the proposed charter amendments.

On October 10, 2016, Defendants Betschart and Dingle filed their *Answer and Affirmative Defense*, asserting Plaintiff failed to state a claim.

On December 1, 2016, the Court granted Robin Bloomgarden, Lynn Bowers, Katja Kohler Cause, Michele De La Cruz, Laura Ohanian, and Tao Orion's *Motion to Intervene as Intervenor Defendants*. On December 9, 2016, Intervenor Defendants filed their *Answer and Counterclaims*. In their answer, Intervenor Defendants raised the affirmative defense of issue preclusion, and cited ORCP 21 A(1)(lack of subject matter jurisdiction), ORCP 21 A(8)(failure to state a claim), & ORCP 21 A(9)(failure to commence within time authorized by statute) as affirmative defenses.

On December 12, 2016, Intervenor Defendants filed an ORCP 21 *Motion to Dismiss* under ORCP 21 A(8)(failure to state a claim), & ORCP 21 A(9)(failure to commence within time authorized by statute).

On December 13, 2016, Plaintiffs filed a *Motion for Summary Judgment* and an *Amended Motion for Summary Judgment*.

On December 14, this Court entered a Scheduling Order requiring that all "briefing, motions, responses, and replies" that "address all issues raised by the complaint, answer, affirmative defense, counterclaim, and Plaintiff's pending Motion for Summary Judgment" must be filed "by 5:00 pm on January 20, 2017."

On December 29, 2016, Plaintiff filed their *Response to Intervenor Defendants' Motion to Dismiss*. On December 29, 2016 Defendants filed their *Response to Intervenor Defendant's Motion to Dismiss*. On January 9, 2017, Intervenor Defendants filed their *Reply to Plaintiffs Response to Intervenor's Motion to Dismiss*.

On January 13, 2017, both Defendants and Intervenor Defendants filed their *Responses to Plaintiff's Motion for Summary Judgment*. On January 20, 2017, Plaintiffs filed their *Reply in Support of Amended Motion for Summary Judgment*.

This Court heard oral arguments on the motion on February 3, 2017. At oral argument, both Defendants and Intervenor Defendants orally moved for summary judgment. Counsel for the Plaintiff did not object to Defendants' and Intervenors' motion.

On February 10, 2017, that is, after oral argument, Intervenor Defendants filed a *Motion for Summary Judgment*. On February 14, 2017, Plaintiff filed a *Motion to Strike Intervenor Defendants' Motion for Summary Judgment* on the basis that it fell outside the timeframe allowed under the Court's scheduling order. On February 15, 2017, Defendants filed a *Motion for Summary Judgment*, incorporating all arguments, points and authorities contained in *Defendants' Response to Plaintiff's Motion for Summary Judgment* and those presented at oral argument on February 3, 2017. On February 16, 2017, Plaintiff filed a *Motion to Strike Defendants' Motion for Summary Judgment*. On February 21, 2017, Intervenor Defendants filed a *Response to Plaintiff's Motion to Strike*. On February 16, 2017, Plaintiff filed a *Reply in Support of the Motion to Strike*.

No trial dates are pending.

Opinion

I. Because Intervenor Defendants' *Motion to Dismiss* under ORCP 21 A was not timely filed, it is denied.

ORCP 21 A sets out several grounds upon which a party may move to dismiss an action due to a deficiency in the pleader's claim. ORCP 21 A(8) allows a party to move for dismissal for failure to state ultimate facts sufficient to constitute a claim for relief. Alternately, if a case has been filed past the date set by a statute of limitations, the defendant may move to dismiss under ORCP 21 A(9).

Notably, a "motion to dismiss making any of these defenses shall be made before pleading." ORCP 21 A. Put another way, a motion to dismiss under either ORCP 21 A(8) or ORCP 21 A(9) must be filed before a defendant files their answer. ORCP 21 A. A motion under ORCP 21 must be denied as untimely if filed after a responsive pleading. In this case, Intervenor Defendants filed their *Motion to Dismiss* under ORCP 21 on December 12, 2016, three days after filing their *Answer*. Consequently, their ORCP 21 *Motion to Dismiss* is untimely and must be denied.

Intervenor Defendants raised the affirmative defenses of subject matter jurisdiction, failure to state a claim, failure to commence within time authorized by statute within their December 9, 2016 *Answer*. Although raising these affirmative defenses assists in preservation, raising those defenses in a responsive pleading does not constitute a motion under ORCP 21. A motion is different than a responsive pleading. ORCP 13 A provides that "pleadings are the written statements by the parties of the facts constituting their respective claims and defenses." By contrast, an "application for an order is a motion." ORCP 14 A. Thus, Intervenor Defendants have adequately preserved their affirmative defenses under ORCP 21 A by alleging them in their answer, even if the answer cannot function as a motion.

In sum, because Intervenor Defendants filed their ORCP 21 *Motion to Dismiss* after their *Answer*, this Court denies those motions as untimely.

II. Intervenor Defendants' untimely *Motion to Dismiss* cannot be treated as a Motion for Summary Judgment.

At the hearing on the parties' motions, Intervenor Defendants orally moved for summary judgment, requesting the Court treat Intervenor Defendants' *Motion to Dismiss* as a motion for summary judgment.¹ ORCP 14 B requires that "Every motion, unless made during trial, shall be in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought." ORCP 14 A. However, ORCP 12 B allows the Court to disregard any error or defect in the proceedings "which does not affect the substantial rights of the adverse party." ORCP 12 B. Thus, this Court must consider whether it may treat Intervenor Defendants' *Motion to Dismiss* as a motion for summary judgment.

¹ Note, however that "A motion for summary judgment is not the appropriate procedure to raise the issue of whether a pleading failed to state a cause of action issue" under ORCP 21 A. *Richards v. Dahl*, 289 Or 747, 752, 618 P2d 418, 421 (1980).

Oregon Courts have repeatedly held that, “it is improper to grant summary judgment *sua sponte*.” *MacLand v. Allen Family Trust*, 207 Or App 420, 426–27, 142 P3d 87, 91 (2006). However, Oregon Courts,

have treated a motion to dismiss, even one limited to the pleadings, as a motion for summary judgment when the parties themselves treated the motion to dismiss as a motion for summary judgment. *See L.H. Morris Electric v. Hyundai Semiconductor*, 203 Or App 54, 61–63, 125 P3d 1 (2005), *rev. den.*, 341 Or 140, 139 P3d 258 (2006) (treating motion to dismiss brought under ORCP 21 B (judgment on the pleadings) as a motion for summary judgment where both parties submitted evidence outside the pleadings, without objection, and the trial court relied on that evidence in its ruling); *Kelly v. Olinger Travel Homes, Inc.*, 200 Or App 635, 641, 117 P3 d 282 (2005) (same); *cf. Greeninger v. Cromwell*, 127 Or App 435, 439, 873 P2d 377 (1994) (court improperly treated motions for summary judgment as motions to dismiss absent parties' consent).

MacLand, 207 Or App at 426–27. The question therefore is whether all parties adequately treated Intervenor Defendants’ *Motion to Dismiss* as a motion for summary judgment.

ORCP 47 describes detailed procedures for summary judgment, including time limitations and requirements for affidavits and counter-affidavits. Under summary judgment, the moving party has the burden to show that there is no genuine issue of material fact. ORCP 47. By contrast, a motion to dismiss for failure to state ultimate facts sufficient to constitute a claim or for failure to commence within statute of limitations is directed only at the face of the pleading. *See* ORCP 21 A. When moving for dismissal under ORCP 21 A(8-9), a party cannot submit affidavits or other evidence outside the pleadings to show why a complaint fails.

Only where an ORCP 21 A motion is accompanied by supporting affidavits and exhibits relating to matters outside the pleadings may the court, upon its discretion, convert a motion to dismiss to a motion for summary judgment under ORCP 47C. *See Macland*, 207 Or App at 426–429 (courts can treat a motion to dismiss as a motion for summary judgment when the parties themselves treated the motion to dismiss as a motion for summary judgment).

In this case, the parties did not treat the Intervenor Defendants’ *Motion to Dismiss* as a motion for summary judgment. Intervenor Defendants’ *Motion to Dismiss* was accompanied by exhibits describing events contained within Plaintiff’s *Appeal of Failure to Conduct Review of Proposed Charter Amendments*. However, the motion was not accompanied by supporting affidavits pertaining to matters outside the pleadings. Neither Plaintiff’s nor Defendant’s *Responses to Intervenor Defendants’ ORCP 21 Motion to Dismiss* were accompanied by any affidavits or exhibits. Plaintiff’s and Defendant’s *Responses* dispute the *Motion to Dismiss* using ORCP 21 procedures, rather than responding to the motion under the mechanisms allowed by ORCP 47.

Intervenor Defendants’ *Motion to Dismiss* cannot be procedurally rescued by reinterpreting it as a motion for summary judgment. The Court cannot convert the ORCP 21 motion into an ORCP 47 motion because the parties have not adequately treated Intervenor Defendants’ *Motion to Dismiss* as a motion for summary judgment. To do so now would adversely affect adverse parties’ substantial rights. *See* ORCP 12 B. Thus, this Court does not construe Intervenor Defendants’ untimely *Motion to Dismiss* as a motion for summary judgment.

III. Both Defendants' and Intervenor Defendants oral motions for summary judgment are denied as procedurally lacking.

At hearing on the parties' motions, Defendants and Intervenor Defendants orally moved for summary judgment under ORCP 47. ORCP 47 provides in great detail the procedural mechanisms by which summary judgment is obtained. ORCP 12 A provides that "Every motion, unless made during trial, shall be in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought." Defendants' oral motion complied neither with the general guidelines for motions practice under ORCP 12 B nor the stringent requirements under ORCP 47 for obtaining summary judgment. Consequently, the Court denies Defendants' and Intervenor Defendants' February 3, 2017 oral *Motions for Summary Judgment*.

IV. This Court denies Plaintiff's *Motion to Strike Intervenor Defendants' Cross-Motion for Summary Judgment* and *Motion to Strike Defendants' Cross-Motion for Summary Judgment*.

In this case, Defendants and Intervenor Defendants each filed cross motions for summary judgment after the date designated by the Court's scheduling order. Although these belated filings did not comply with the Court's scheduling order, this tardiness is not fatal. ORCP 12 B allows the Court to disregard any error or defect in the proceedings "which does not affect the substantial rights of the adverse party." Any party may file a motion for summary judgment unless trial is scheduled within sixty days ORCP 47 C. In this case, no trial dates have been scheduled.

Thus, despite the Court's December 14, 2016 scheduling order, both Defendant and Intervenor Defendants' cross motions for summary judgment are timely under ORCP 47. Plaintiff was provided twenty days to respond to Defendants and Intervenor Defendants' cross motions for summary judgment. The record reflects that all parties provided extensive briefing and oral argument prior to this Court's ruling. The Court denies Plaintiff's *Motions to Strike Defendants' and Intervenor Defendants' Cross-Motions for Summary Judgment*.

V. These procedural matters having been dealt with, the Court now turns to the parties' cross motions for summary judgment. In considering the parties' cross motions for summary judgment, this Court must evaluate whether ORS 203.725 applies to Lane County, and if so, what obligations are imposed by the statute.

Under the Oregon Constitution, Oregon voters are afforded substantive rights to conduct initiatives and referendums. Or Const, Art IV §2(b). The initiative power is the power of qualified voters to propose new legislation. *Id.* The referendum power is the power of qualified voters to approve or reject any act, or part of an act, of the Oregon Legislature. *Id.* § (3)(a). Under Article VI, §10 of the Oregon Constitution, otherwise known as the "home rule" constitutional amendment, the right to conduct initiatives and referendums is applicable "to the legal voters of every county relative to the adoption, amendment, revision or repeal of a county charter."

Broadly speaking, there are four steps for a prospective petition to become an enacted charter amendment. First, the petitioner shall file a prospective petition with the county clerk. ORS

250.165(1). The process for submitting a prospective petition is described further in ORS 250.165. Next, the county clerk makes the constitutional determination of whether the prospective petition complies with the same subject rule. ORS 250.168(1). If the county clerk determines that the prospective petition complies with the same subject rule, the county clerk authorizes circulation of the petition, and follows the process under ORS 250.175 for preparation of the ballot title. ORS 250.168(2). The county clerk shall also publish a statement that the initiative measure has been determined to meet the constitution's same subject rule requirement. ORS 250.168(1). After the requisite number of signatures are obtained, as either described by the county charter or by ORS 250.205, the initiative is filed with the county clerk for signature verification. ORS 250.215. After the signatures are verified, the measure is then voted on at the next statutorily available election. ORS 250.251.

While voters have the substantive right substantive rights to conduct initiatives and referendums, the legislature retains the power to regulate the manner in which those substantive rights are executed. *See* Or Const, Art VI, § 10 (“The Legislative Assembly shall provide by law a method whereby the legal voters of any county, by majority vote of such voters voting thereon at any legally called election, may adopt, amend, revise or repeal a county charter.”).

Under Article VI §10 and ORS 203.720, a county may choose to follow one of two general frameworks governing the exercise of initiative or referendum powers. *See* ORS 203.720 (allowing counties to develop methods to adopt, amend, or revise a charter); *see also* ORS 250.155(1) (allowing county charters to provide alternate methods for the exercise of initiative or referendum powers). A county may be designated as a “non-home rule” county, and decide to follow general state statutes found in ORS 250.155 through 250.185 to administer the exercise of initiative or referendum powers. ORS 250.155(2).

Alternately, a county may elect to become a “home rule” county, and thereby design their own process for the exercise of initiative or referendum powers. ORS 250.155(1). Under home rule generally, “[T]he county charter and legislative provisions relating to the amendment, revision or repeal of the charter are deemed to be matters of county concern and shall prevail over any conflicting provisions of ORS 203.710 to 203.770 and other state statutes.” ORS 203.720.

However, ORS 203.720 also provides an exception to the general rule that matters of county concern or relating to amending the county charter take precedence over state statutes. Under this exception, even where the exercise of initiative or referendum powers is governed by home rule provisions in a county charter, the exercise of those powers remain subject to state statute when “specifically provided by conflicting state statutes first effective after January 1, 1961.” ORS 203.720.

Lane County generally operates as a “home rule” county. Lane County Home Rule Charter Preamble; Chapter II § 6. Because Lane County generally operates under “home rule,” the terms of the county charter and legislative provisions relating to the amendment, revision or repeal of the charter generally prevail over state statutes, unless an exception specifically applies. ORS 203.720.

The Lane County Charter provides that “elections on local matters will be decided applying state laws on the subject, unless legislation adopted pursuant to the Lane County Charter provides to

the contrary.” Lane County Home Rule Charter Chapter VI § 29(1) and (2). Lane County has adopted Lane Code 2.625(1), which provides the manner of conducting initiatives, referendums, and elections. Specifically Lane Code 2.625(1) dictates that initiatives, referendums, and elections “shall be as provided with respect to County measures for non-Home Rule counties under State law.” Thus, although Lane County generally operates as a “home rule” county, Lane County’s exercise of initiative or referendum powers remains governed by the procedures found in ORS 250.155 through 250.235. Consequently, Lane County acts as if it were a “non-home rule” county for purposes of exercising its initiative and referendum powers.

ORS 203.725, which sets forth the separate vote and single subject rules, falls within ORS Chapter 203, which addresses “home rule” procedures. Given that ORS 203.720 allows county charter to prevail over state law, and that Lane County’s Charter and Lane Code dictate that initiatives, referendums, and elections shall be governed by procedures found in ORS 250.155 through 250.235, it would appear as if ORS 203.725 was inapplicable to Lane County. However, the legislature expressly dictated that the provisions of ORS 203.725 preempt all county charters, providing,

(3) Notwithstanding any county charter or legislation enacted thereunder, this section shall apply to every amendment of a county charter and shall take precedence and prevail over any conflicting provisions in a county charter or in legislation enacted thereunder.

ORS 203.725 was enacted in 1983. As noted above, ORS 203.720 allows a state statute to preempt county charters when (1) the legislature specifically provides for preemption and (2) the prevailing state statute was enacted after 1961. Thus, ORS 203.725(3) specifically preempts all county charter provisions and imposes a mandatory requirement that any proposed amendment to a county charter must comply with the separate subject and separate vote rules.

Accordingly, ORS 203.725 applies to Lane County’s Charter amendment process. A proposed amendment to Lane County’s Charter that does not comply with the two requirements of ORS 203.725 may not lawfully appear on the ballot.

VI. The duties of the Lane County Clerk to certify compliance with ORS 203.725 ripen at different times depending on whether one examines compliance with the “single subject” or the “separate vote” rules.

The subject of this litigation, the “single subject” and “separate vote” rules, are codified within ORS 203.725. The rules represent an effort to ensure that voters are allowed to decide separately upon each subject of a proposed law or amendment, so that each vote represents a voters will as to one change. *See Armatta v. Kitzhaber*, 327 Or 250, 272, 959 P.2d 49, 61 (1998) (discussing Art. XVII, § 1 of the Oregon Constitution, which provides a separate subject and vote requirements for proposed amendments to the Constitution) (disagreed with on other grounds). Specifically, ORS 203.725(1)-(2) provide,

(1) A proposed amendment to a county charter, whether proposed by the county governing body or by the people of the county in the exercise of the initiative power, shall embrace but one subject and matters properly connected therewith.

(2) When two or more amendments to a county charter are submitted to the electors of the county for their approval or rejection at the same election, they shall be so submitted that each amendment shall be voted on separately.

Although the single subject and separate vote rule concern the same aim, the latter “imposes a more stringent standard than does the single subject requirement,” and in effect, encompasses the less stringent single subject rule within its scope. *Armatta*, 327 Or at 272. Indeed, “a proposed amendment that satisfies the broad standard for embracing a single subject nonetheless may violate the separate-vote requirement.” *Id.* at 277, 959 P2d at 64. In evaluating whether a requirement satisfies the separate vote rule,

we do not search simply for a unifying thread to create a common theme, thought, or purpose from a melange of proposed ... changes. Instead, we inquire whether, if adopted, a proposal would make two or more changes ... that are substantive and are not closely related. If so, the proposal violates the separate-vote requirement ... because it would prevent voters from expressing their opinions as to each proposed change separately.

Meyer v. Bradbury, 341 Or 288, 296–97, 142 P3d 1031, 1036 (2006).

The separate vote rule as set forth by the Oregon Supreme Court involves a three step analysis, and focuses on the particular changes made to the governing document. First, the one must identify “the changes, both explicit and implicit, that a proposed measure purports to make to the” charter amendment. *Id.* at 606. Second, if there are multiple changes, it must be determined “whether they are ‘substantive’” changes. *Id.* Third, if there are substantive changes, then it must be determined whether they are closely related. *Id.*

Notably, ORS 203.725 is silent regarding when the duties to determine compliance with single subject and separate vote requirement arise. Nothing in ORS 203.725 imposes a deadline by which the county clerk must act in reviewing proposed initiatives for compliance with ORS 203.725.

However, ORS 250.168 describes the specific obligations of county clerks in reviewing a prospective petition for an initiative measure for compliance with the single subject rule, although the statute does not address the separate vote requirement. As discussed above, Lane County elections are governed by procedures found in ORS 250.155 through 250.235. Thus, the single subject rule as described in ORS 203.725(1) is satisfied when a county clerk follows the rules set out in ORS 250.168.

ORS 250.168 describes the specific obligations of county clerks in reviewing for compliance with the one subject rule as a constitutional evaluation, and provides a procedural framework for that determination. ORS 250.168 mandates that, “Not later than the fifth business day after receiving a prospective petition for an initiative measure, the county clerk shall determine in writing whether the initiative measure meets the requirements of section 1 (2)(d), Article IV, and section 10, Article VI of the Oregon Constitution.” ORS 250.168(1). Those constitutional provisions require compliance with the single subject rule.

Neither Oregon Constitution Article IV section 1(2)(d) nor Article VI, section 10 are notably loquacious in prescribing the required contents of an initiative petition. Oregon Constitution Article IV section 1(2)(d) articulates in relevant part:

An initiative petition shall include the full text of the proposed law or amendment to the Constitution. A proposed law or amendment ... shall embrace one subject only and matters properly connected therewith.

Similarly, Article VI, section 10 of the Oregon Constitution provides the minimum constitutional requirements for an initiative petition to be circulated:

To be circulated, referendum or initiative petitions shall set forth in full the charter or legislative provisions proposed for adoption or referral. Referendum petitions shall not be required to include a ballot title to be circulated.

Unlike Oregon Constitution Article XVII, section 1, which discusses the process for amending the constitution and imposes a single vote requirement on proposed constitutional amendments, there is no constitutional provision requiring a proposed charter amendment to comply with the separate vote rule.

Thus, under the ORS 250.168 mandate, all a county clerk must certify prior to the signature circulation of a proposed initiative in Lane County is that (1) the proposed initiative states the full provisions for proposed adoption and (2) the proposed amendment embraces one subject only. This reading of ORS 250.168 is supported by the title of the statute – “One Subject Determination.” The decision to certify a proposed initiative for circulation is a constitutional determination, and ORS 203.725(1)’s mandate requiring compliance with the one subject rule is executed by the enabling statute – ORS 250.168.

By contrast, the separate vote mandate of ORS 203.725(1) is not constitutionally required in the context of charter amendments and exists only as a creature of statute. The county clerk’s mandate to confirm that a proposed initiative complies with the constitution does not encompass any duty to confirm the proposed initiative complies with the separate vote rule in ORS 203.725(2).

ORS 203.725 (2) does not explicitly proscribe any procedural mechanisms a county clerk must follow to ensure compliance with the separate vote rule. Put another way, ORS 203.725(2) is not self-executing, and no other statute executes its separate vote mandate. However, the text of ORS 203.725(2) is instructive as to the timing of when the “one vote” mandate arises as applied to a proposed charter amendment. ORS 203.725(2), which contains the separate vote rule, requires:

When two or more amendments to a county charter are submitted to the electors of the county for their approval or rejection at the same election, they shall be so submitted that each amendment shall be voted on separately.

ORS 203.725(2) (emphasis added).

As described above, there are firm procedural thresholds for when a proposed amendment to a county charter may be submitted to the voters for approval. There are many steps required for a proposed initiative to become an enacted charter amendment, and the duties of a county clerk with respect to county elections are a “series of decisions.” *Ellis v. Roberts*, 302 Or 6, 13, 725 P2d 86, 890 (1986) (describing the duties of the Secretary of State with respect to ballot measures as a “a series of decisions”); *see also State ex rel. Fidanque v. Paulus, supra*, 297 Or at 716 n. 5, 688 P2d 1303; *see also OEA v. Roberts, supra*, 301 Or at 232–35, 721 P2d 833.

The county clerk does not have a duty to ensure that the proposed amendment satisfies the separate vote rule until, at a minimum, the proposed initiative has validly been circulated for signatures, those signatures have been verified, and the proposed amendment is “submitted to the electors of the county for their approval or rejection” under a vote. ORS 203.725(2). The earliest point in which the proposed amendment must satisfy the one vote rule is when it is submitted to the voters. *Id.* Consequently, a county clerk acting under ORS 250.168 is not required certify that a proposed initiative complies with the separate vote provision of ORS 203.725(2) prior to approving it for signature circulation. ORS 203.725(2) does not impose a duty upon county clerks to do any type of review of a charter amendment petition prior to the start of signature gathering, or during the signature gathering process.

In sum, when a proposed initiative is submitted to the county clerk, the only non-discretionary duty that ripens is the duty to review for single subject compliance under ORS 250.168. At that moment, the single subject rule in ORS 203.725(1) is satisfied if a county clerk follows the procedures in ORS 250.168. The separate vote rule in ORS 203.725(2) is not implicated until later in the process. The duty to review for compliance with the separate vote rule does not ripen until signatures have been verified and the proposed amendment is submitted to the voters.

Because ORS 203.725 describes two standards a proposed petition must comply with– the single subject and the same vote rules – this Court separately analyzes Plaintiff’s legal claim to determine whether Defendants violated any duty to conduct review for compliance with ORS 203.725.

VII. Because Defendants fulfilled their obligation as a matter of law with regards to reviewing the petition for compliance with the one subject rule, Plaintiff is not entitled to summary judgment in relation to ORS 203.725(1). Defendants’ and Intervenor Defendants’ *Motions for Summary Judgment* are granted in part with respect to Plaintiff’s claim under ORS 203.725(1).

With the foregoing legal framework in mind, this Court now examines the process for filing an appeal challenging the decision making of an elected official. When an aggrieved party files a claim against an election official regarding a decision, rule, or order, ORS 246.910(3) confers subject matter jurisdiction on the Circuit Court. Under ORS 246.910(1), “any person adversely affected by” any “act or failure to act” or “any order, rule, directive or instruction made” by “a county clerk ... or any other county ... official under any election law” may “appeal therefrom to the circuit court for the county in which the act or failure to act occurred.” Under Oregon law, any registered voter qualified to vote in the affected county has standing to commence an appeal under ORS 246.910(1). In this case, it is uncontested that Plaintiff is a Lane County registered

voter. Plaintiff alleges they have been aggrieved by Defendants' failure to conduct pre-circulation review of whether three proposed initiatives' comply with both the one subject rule of ORS 203.725(1).

Summary judgment in Oregon is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. ORCP 47 C. There is no genuine issue as to any material fact if, "based upon the record before the court viewed in a manner most favorable to the adverse party, no objectively reasonable juror could return a verdict for the adverse party on the matter that is the subject of the motion for summary judgment." *Id.* A "material" fact under this standard is one that might affect the outcome of a case.

Plaintiff's *Appeal of Failure to Conduct Review of Proposed Charter Amendments* shapes the contours of whether Plaintiff, Defendants, or Intervenor Defendants are entitled to judgment as a matter of law. In his *Appeal of Failure to Conduct Review of Proposed Charter Amendments*, Plaintiff "prays for judgment against defendants directing them to comply with the County's duty to conduct pre-election review of pending charter amendments for compliance with ORS 203.725, and to do so at a reasonable time in light of voters' statutory rights to challenge defendants' determination." Although this prayer is couched in the format of a prayer for declaratory judgment, it requests a form of injunctive relief. Namely, the prayer requests an order requiring directing Defendants to comply with their duties to review pending charter amendments for compliance with ORS 203.725.

In considering the parties cross motions for summary judgment, the question is whether Plaintiff is, as a matter of law, entitled to an order requiring directing Defendants to comply with their duties to pending charter amendments for compliance with ORS 203.725(1). To comply with the single subject mandate, a county clerk in Lane County must follow the single subject review procedures outlined in ORS 250.168. Under the ORS 250.168, all that a county clerk must certify prior to the signature circulation of a proposed initiative in Lane County is that (1) the proposed initiative states the full provisions for proposed adoption and (2) the proposed amendment embraces one subject only.

Here, it is uncontested that Defendants followed the ORS 250.168 review procedures and have approved the proposed initiatives for signature gathering. Defendants certified the proposed measures for compliance with the single subject rule in ORS 250.168, and Oregon Constitution Article IV section 1(2)(d), and Article VI, section 10. Defendants approved the signature gathering. Thus, necessarily, Defendants have complied with the one subject requirement within ORS 203.725(1) by reviewing the proposed measures for compliance with ORS 250.168, and Oregon Constitution Article IV section 1(2)(d), and Article VI, section 10. Defendants have not violated any duty as a matter of law. Therefore, Plaintiff is not entitled to an order requiring directing Defendants to comply with their duties to pending charter amendments for compliance with ORS 203.725(1).

Consequently, Plaintiff is not entitled to summary judgment, and their *Motion for Summary Judgment* is denied with respect to their claim for relief under ORS 203.725(1). With respect to

Plaintiff's claim for relief under ORS 203.725(1), both Defendants' and Intervenor Defendants' *Motions for Summary Judgment* are granted.

VIII. Because Defendants' duty to review for compliance with the separate vote provision does not ripen until the proposed amendment is to be submitted to the voters, Plaintiff's claim under ORS 203.725(2) is not justiciable, and is therefore dismissed under ORCP 21 G(4).

In considering the parties written cross motions for summary judgment, the Court must consider whether, as a matter of law, Plaintiff is entitled to an order requiring directing Defendants to comply with their duties to pending charter amendments for compliance with ORS 203.725(2). It is uncontested that Defendants declined to review the proposed measures for compliance with the separate vote provision in ORS 203.725(2) prior to certifying the proposed measures for circulation. The charter amendments have yet to obtain the requisite number of signatures to be submitted for a vote, and those signatures have yet to be verified. Thus, none of the proposed charter amendments are eligible to be voted on.

ORS 203.725(2) does not impose duty upon county clerks to conduct a separate vote review of a charter amendment petition for compliance with the separate vote rule prior to the start of signature gathering. Instead, the earliest time that the proposed amendment must satisfy the separate vote rule is when the proposed amendment is "submitted to the electors of the county for their approval or rejection" under a vote. ORS 203.725(2). Because the proposed charter amendments have neither gathered sufficient signatures nor been submitted to voters, Defendants have not violated election duties as county clerks under ORS 203.725(2). Indeed, no duty to review a proposed charter amendment's compliance with ORS 203.725(2) has yet ripened.

Because the county clerks' duty to review a proposed amendment is not ripe until the proposed amendment is submitted to the electors, this aspect of the case is not ripe for review. Because the separate vote portion of this case is not ripe for review, Plaintiff is not entitled to summary judgment.

Within the doctrine of justiciability, ripeness refers to the requirement that there be an actual injury to the individual invoking the judicial power, as opposed to a hypothetical injury. *Beck v. City of Portland*, 202 Or App 360, 122 P3d 131 (2005). The test for whether a claim is ripe and therefore justiciable is whether an actual existing state of facts threatens a party's legal rights. *Brown v. Oregon State Bar*, 293 Or 446, 449, 648 P2d 1289, 1292 (1982).

Whether a claim is justiciable is a jurisdictional question, properly understood as an issue of a trial court's subject matter jurisdiction over a claim. *Beck*, 202 Or App at 367–68. Ripeness is an issue that is jurisdictional in nature and may be raised at any time. Mere speculation that an event might occur, does not confer the Court subject matter over a case. *Id.* When a case is not ripe, the Court lacks subject matter jurisdiction over the issue. A Court has a duty on its own motion to refuse to proceed and must dismiss the action if the alleged facts do not give the Court subject-matter jurisdiction. ORCP 21 G(4).

The facts as they exist at present do not provide this Court subject matter jurisdiction over the merits of the separate vote aspect of this case. There is no way of knowing whether sufficient

signatures will be gathered and verified on any of the proposed petitions. It is merely hypothetical whether the county clerks' duty to review any proposed amendments for compliance with the separate vote rule will ever ripen. There is no way of knowing whether, at the time any proposed amendments are submitted to the voters, if the county will have conducted review for compliance with the separate vote rule. It is merely hypothetical whether or not the county clerks will fulfill their duty to review.

Thus, because the present facts raise only hypothetical issues about the separate vote rule rather than ripe disputes, this Court lacks subject matter jurisdiction and dismisses this portion of the case pursuant to ORCP 21 G(4). Additionally, because it is improper to "to grant summary judgment for lack of subject matter jurisdiction," this Court denies Defendants' and Intervenor Defendants' *Motions for Summary Judgment*. *Spada v. Port of Portland*, 55 Or App 148, 150, 637 P2d 229, 230 (1981).

In sum, the separate vote aspect of Plaintiff's claim under ORS 203.725(2) is not justiciable because 1) the county clerks do not have a present duty to review for compliance with the separate vote mandate; 2) their duty will not ripen unless and until sufficient signatures are gathered, signatures are verified, and the proposed amendment is ready to be submitted to the voters; and 3) there is no way of knowing whether the county clerks will at that point decline to or conduct any reviews for compliance with the separate vote rule. Thus, because Plaintiff's claim under the separate vote provision of ORS 203.725(2) is not ripe, this Court dismisses that portion of the claim pursuant to ORCP 21 G(4).

Order

The Court holds that ORS 203.725 applies to Lane County's Charter amendment process. The Court finds as a matter of law that the Defendants have not violated the single subject provision in ORS 203.725(1) because they have previously conducted a single subject review under ORS 250.168, section 1 (2)(d), Article IV, and section 10, Article VI of the Oregon Constitution. The Court dismisses the remainder of Plaintiff's claim under ORS 203.725(2) because the Defendants do not yet have a present duty to review the proposed amendments for compliance with the separate vote rule. The County Clerk's duty to review a proposed charter amendment's compliance with the separate vote rule in ORS 203.725(2) arises when sufficient signatures are gathered, those signatures are verified, and the proposed amendment is ready to be submitted to the voters. Until that duty ripens and the Defendants either decide to or decline to act, it is merely hypothetical whether a justiciable controversy will ever exist.

IT IS HEREBY ORDERED that Intervenor Defendants' *Motion to Dismiss* under ORCP 21 A(8) & ORCP 21 A(9) is hereby DENIED.

IT IS HEREBY ORDERED that Defendants' oral motion for *Motion for Summary Judgment* is DENIED.

IT IS HEREBY ORDERED that Intervenor Defendants' oral *Motion for Summary Judgment* is DENIED.

IT IS HEREBY ORDERED that Plaintiff's *Motion to Strike Intervenor Defendants' Motion for Summary Judgment* is DENIED.

IT IS HEREBY ORDERED that Plaintiff's *Motion to Strike Defendants' Motion for Summary Judgment* is DENIED.

IT IS HEREBY ORDERED that Plaintiff's *Amended Motion for Summary Judgment* is DENIED.

IT IS HEREBY ORDERED that Defendants' *Motion for Summary Judgment* is GRANTED IN PART, as pertaining to the portion of Plaintiff's claim under ORS 203.725(1)'s single subject rule.

IT IS HEREBY ORDERED that Defendants' *Motion for Summary Judgment* is DENIED IN PART, as pertaining to the portion of Plaintiff's claim under ORS 203.725(2)'s separate vote rule.

IT IS HEREBY ORDERED that Intervenor Defendants' *Motion for Summary Judgment* is GRANTED IN PART, as pertaining to the portion of Plaintiff's claim under ORS 203.725(1)'s single subject rule.

IT IS HEREBY ORDERED that Intervenor Defendants' *Motion for Summary Judgment* is DENIED IN PART, as pertaining to the portion of Plaintiff's claim under ORS 203.725(2)'s separate vote rule.

IT IS HEREBY ORDERED that the portion of Plaintiff's claim relating to Defendants' compliance with ORS 203.725(2)'s separate vote rule is DISMISSED pursuant to the Court's authority under ORCP 21 G(4).

IT IS FURTHER ORDERED that Defendants shall prepare a limited judgment of dismissal which shall, by reference, incorporate this Opinion and Order.

SIGNED:

Signed: 3/9/2017 09:25 AM

A handwritten signature in black ink, appearing to read 'Karsten H. Rasmussen', with a large, sweeping flourish at the end.

Karsten H. Rasmussen, Circuit Court Judge

Prepared by: Molly R. Silver