



STATE OF OREGON
LEGISLATIVE COUNSEL COMMITTEE

April 21, 2015

Senator Ted Ferrioli
Senate Republican Leader
900 Court Street NE S323
Salem OR 97301

Re: Vote requirements for legislative referrals of bills that increase taxes

Dear Senator Ferrioli:

You asked whether a measure that raises revenue is exempt from the three-fifths majority vote requirement of Article IV, section 25 (2), of the Oregon Constitution, if the measure is referred to voters for approval.

Short Answer

A bill that raises revenue is not exempt from the three-fifths majority vote requirement of Article IV, section 25 (2), solely because the measure is referred to the voters for approval. However, a proposed constitutional amendment that is referred to the people by joint resolution is not subject to the three-fifths majority vote requirement.

General Discussion

Bills that are legislatively referred

Article IV, section 25 (2), provides that “[t]hree-fifths of all members elected to each House shall be necessary to pass bills for raising revenue.” This is an exception to the general rule that a majority of all members elected to each chamber is required to pass a bill. See Article IV, section 25 (1), of the Oregon Constitution. The exception was referred to voters by the Legislative Assembly in 1995 and adopted by voters in the May 1996 primary election.¹

Article IV, section 1 (3)(c), of the Oregon Constitution, reads as follows:

(c) A referendum on an Act may be ordered by the Legislative Assembly by law. Notwithstanding section 15b, Article V of this Constitution, bills ordering a referendum and bills on which a referendum is ordered are not subject to veto by the Governor.

This provision grants authority to the Legislative Assembly to order a referendum on “an Act” and then goes on to except from the general veto power granted to the Governor “bills”

¹ See House Joint Resolution 14 (1995), which was referred to voters as Ballot Measure 25 (1996).

ordering a referendum and bills on which a referendum is ordered” (emphasis added). In *Herbring v. Brown*, 92 Or. 176 (1919), the court considered the difference between “bill” and “act” in the context of an earlier version of section 1, Article IV. The court held that the term “bill” refers to a measure presented to the Legislative Assembly for enactment and that an “act” means a bill that has been enacted by the Legislative Assembly. *Herbring*, 92 Or. at 182. It follows that, in order to be the subject of a referendum, a measure must first be legislatively enacted.² Once enacted by the Legislative Assembly, the referred bill does not become law until approved by the voters. *Portland Pendleton Motor Trans. Co. v. Heltzel*, 197 Or. 644, 647 (1953). Legislative enactment is that process set forth in Article IV, section 25, that requires a vote in each house in order to pass a bill. Therefore, a bill containing a referendum clause is still a bill, and must be passed by the Legislative Assembly in the manner provided by Article IV, section 25.

Article IV, section 1 (3)(c), of the Oregon Constitution, makes no distinction between passage of a bill under the normal rule (majority vote) and bills passed under the rule applicable to bills for raising revenue (three-fifths vote). In either event, the bill must be passed in the manner otherwise provided in the Constitution. Consequently, there is no reason why a bill that raises revenue and that is referred to the people for approval would have a different vote requirement than is applicable to bills that are not referred.

Proposed constitutional amendments that raise revenue

By contrast, our answer changes if the measure proposing to raise revenue is a joint resolution proposing an amendment to the Oregon Constitution. A joint resolution is the form in which the Legislative Assembly proposes amendments, the power to adopt being vested solely in the people. *Rowley v. City of Medford*, 132 Or. 405, 414 (1930). The reason our answer changes is because a joint resolution proposing an amendment to the Oregon Constitution is not a bill. *Herbring*, 92 Or. at 182. By its terms, Article IV, section 25 (2), applies only to bills for raising revenue. Therefore, the three-fifths vote requirement of section 25 (2) does not apply to a joint resolution proposing an amendment to the Oregon Constitution, even if the proposed constitutional amendment enacts a tax.

Conflicting legislative history

The three-fifths vote requirement in Article IV, section 25 (2), was proposed by the Legislative Assembly by passage of HJR 14 (1995), and approved by voters in the 1996 primary election. In the debate over whether the Legislative Assembly should pass HJR 14 and thereby refer the proposed constitutional amendment to voters, there is some legislative history that suggests that the Legislative Assembly did not intend to have the three-fifths vote requirement apply to bills the Legislative Assembly was referring to the voters for approval. Specifically, in a committee hearing considering HJR 14 (the measure that ultimately became section 25 (2)), Senator Shirley Gold asked Representative Ray Baum (appearing as a witness in support of the measure) if the three-fifths majority requirement would apply to referrals made by the Legislative Assembly to the voters. Representative Baum stated that the three-fifths vote would not apply.³ At no other point in any committee or floor debates on HJR 14, or in the 1996 Voters’ Pamphlet or contemporaneous news accounts of the proposed amendment is there any other mention of the three-fifths vote requirement not being applicable to legislative referrals.

² We note in passing that although the first sentence of Article IV, section 1 (3)(c), refers to the Legislative Assembly’s referring an Act to the people, the second sentence clearly contemplates the referral of a bill that has been passed by the Legislative Assembly. If this were not the case, the provision exempting the bill from the Governor’s veto power would be superfluous.

³ Senate Rules and Elections Committee hearing, May 24, 1995.

Legislative Counsel has been aware of this dialogue between Senator Gold and Representative Baum since voters adopted the measure in 1996. In our view, however, this one exchange of words in a committee hearing does not overcome the plain meaning of Article IV, section 25, that bills for raising revenue—whether referred or not—must receive a three-fifths vote for passage. Under the rules of construction that currently apply to constitutional provisions, only if the intent of the voters in enacting the provision is not clear from the text and context of a legislatively referred constitutional provision is the history of the provision considered. *Ecumenical Ministries v. Oregon State Lottery Comm'n*, 318 Or. 551, 559 (1994). That said, historical analysis of the provision should be considered, unless the text and context of the provision reflect the intent of the voters so clearly that no alternative reading of the provision is possible. *Coultas v. City of Sutherlin*, 318 Or. 584, 590 (1994). It is certainly arguable that no possible alternative reading of section 25 (2) is possible. However, assuming for the sake of argument that a court would consider the history of section 25 (2), the sources of that history consist of voters' pamphlet materials and contemporaneous news articles, but do not include statements made by legislators in hearings on the matter. *Shilo Inn Portland/205, LLC v. Multnomah County*, 333 Or. 101, 129-130 (2001). Accordingly, the dialogue between Senator Gold and Representative Baum described above would not be considered in determining the intent of voters in adopting section 25 (2).

Please let us know if we can be of any further assistance in this matter.

The opinions written by the Legislative Counsel and the staff of the Legislative Counsel's office are prepared solely for the purpose of assisting members of the Legislative Assembly in the development and consideration of legislative matters. In performing their duties, the Legislative Counsel and the members of the staff of the Legislative Counsel's office have no authority to provide legal advice to any other person, group or entity. For this reason, this opinion should not be considered or used as legal advice by any person other than legislators in the conduct of legislative business. Public bodies and their officers and employees should seek and rely upon the advice and opinion of the Attorney General, district attorney, county counsel, city attorney or other retained counsel. Constituents and other private persons and entities should seek and rely upon the advice and opinion of private counsel.

Very truly yours,



Dexter A. Johnson
Legislative Counsel