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## INTERDEPARTMENTAL MEMORANDUM

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**DATE:** August 26, 2019

**TO:** Lane County Board of Commissioners

**FROM:** Stephen Dingle, County Counsel and Sara Chinske, Assistant County Counsel

**SUBJECT:** Referral of Aerial Spray Measure/Potential 294.100 liability-Response to Information submitted by attorney Dan Meek

### QUESTIONS PRESENTED:

1. Do County Commissioners enjoy absolute immunity from claims brought pursuant to ORS 294.100?
2. Does the Oregon Tort Claims Act (OTCA) provide protection for county commissioners against a claim brought pursuant to ORS 294.100?

### SHORT ANSWER:

1. No.
2. No.

This memorandum is being prepared in response to material submitted to the Board by attorney Daniel Meek on behalf of individuals asking the Board to refer their Aerial Spray Measure as an ordinance. The response from Mr. Meek is contained in two memorandums: *Immunity of Public Officials for Legislative Actions* (May 20, 2019)<sup>1</sup> and *Analysis of Interdepartmental Memorandum* (July 2, 2109)<sup>2</sup> by Stephen E. Dingle, Lane County Counsel, to the Lane County Board of Commissioners (August 7, 2019).

<sup>1</sup> Hereinafter “*Immunity Memorandum*”. A copy of the memorandum is attached as Exhibit “A”.

<sup>2</sup> Hereinafter “*Analysis Memorandum*”. A copy is attached as Exhibit “B”.



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The issues raised by Mr. Meek will be addressed in the following order:

1. The order the issues appear in *Immunity of Public Officials for Legislative Actions* (May 20, 2019); and,
2. Then the order the issues appear in *Analysis of Interdepartmental Memorandum (July 2, 2109)*<sup>3</sup> by Stephen E. Dingle, Lane County Counsel, to the Lane County Board of Commissioners (August 7, 2019).

## **DISCUSSION:**

### *Immunity of Public Officials for Legislative Actions (May 20, 2019)-Legislators Have Absolute Immunity Under The US Constitution For Legislative Acts*<sup>4</sup>

Mr. Meeks states in his *Immunity Memorandum* that legislators have absolute immunity under the United States Constitution for legislative acts. He asserts the immunity of legislators (including county commissioners) is absolute, and although he attributes this statement to the United States Supreme Court, he offers no citation to a specific holding from a case in support of that assertion.<sup>5</sup>

Article I, Section 6 of the United States Constitution contains the “Speech or Debate Clause” (Clause) which serves to protect the independence, integrity, and effectiveness of the legislative branch by barring executive or judicial intrusions into the protected sphere of the legislative process.<sup>6</sup> The Clause has been interpreted as providing Members of Congress (Members) with general immunity from liability for all “legislative acts” taken in the course of their official responsibilities.<sup>7</sup>

This “cloak of protection” shields Members from “intimidation by the executive” or a “hostile judiciary” by protecting against either the executive or judicial powers from being used to improperly influence or harass legislators through retaliatory litigation.<sup>8</sup> This overarching immunity principle has traditionally been

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<sup>3</sup> *Ibid.*

<sup>4</sup> *Immunity Memorandum* at pp. 1-6.

<sup>5</sup> *Ibid.* at p. 1.

<sup>6</sup> *Understanding the Speech or Debate Clause*, at p.1, Congressional Research Service, Todd Garvey Legislative Attorney (December 1, 2017); *See United States v. Helstoski*, 442 U.S. 477, 491 (“This Court has reiterated the central importance of the Clause for preventing intrusion by [the] Executive and Judiciary into the legislative sphere.”).

<sup>7</sup> *Ibid. See Eastland v. United States Servicemen’s Fund*, 421 U.S. 491, 502-3 (1975)(“Thus we have long held that, when it applies, the Clause provides protection against civil as well as criminal actions, and against actions brought by private individuals as well as those initiated by the Executive Branch.”).

<sup>8</sup> *Ibid. See United States v. Johnson*, 383 U.S. 169, 181 (1966); *Gravel v. United States*, 408 U.S. 606, 617 (1972); *Miller v. Transamerican Press, Inc.*, 709 F.2d 524, 528 (9<sup>th</sup> Cir. 1983).



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viewed as advancing the primary purpose of the Clause: that of preserving the independence of the legislative branch.<sup>9</sup>

Mr. Meeks seems to suggest in his *Immunity Memorandum* that the text of the Speech or Debate Clause of the United States Constitution refers to county commissioners.<sup>10</sup> Although the text of the Speech or Debate Clause refers only to “Senators and Representatives” and therefore clearly applies to actions by any Member of Congress, it is well established that protections of the Clause generally apply equally to congressional staff.<sup>11</sup> The Clause has been found to extend to the actions of a Member’s personal staff as well as to committee staff, including those in the position of chief counsel, clerk, staff director, and investigator.<sup>12</sup> The protections of the Speech or Debate Clause of the United States Constitution have never been found to extend to county commissioners.

Mr. Meeks relies upon a single Ninth Circuit case (*Kaahumanu v. County of Maui*) in order to illustrate his point that legislators are absolutely immune from liability for their legislative acts under Title 42, Section 1983 of the United States Code.<sup>13</sup> The Civil Rights Act of 1871 is a federal statute, numbered 42 U.S.C. § 1983, that allows individuals to sue the government for civil rights violations. It applies when someone acting “under color of” state-level or local law has deprived a person of rights created by the United States Constitution or federal statutes.

Mr. Meeks offers the following quote from the *Kaahumanu* decision in support of his argument: “[L]egislators are absolutely immune from liability under §1983 for their legislative acts.”<sup>14</sup> Mr. Meeks goes on to list the four factor test formulated by the Ninth Circuit to determine whether an action is legislative: (1) “whether the act involves *ad hoc* decision making, or the formulation of policy”; (2) “whether the act applies to a few individuals, or to the public at large”; (3) “whether the act is formally legislative in character”; and (4) “whether it bears all the hallmarks of traditional legislation.”<sup>15</sup>

The four factor test was applied in *Kaahumanu*, and the court found that legislative immunity did not apply to the county council and its members under §

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<sup>9</sup> *Ibid.*

<sup>10</sup> *Immunity Memorandum* at p. 1.

<sup>11</sup> *Understanding the Speech or Debate Clause*, at p.10, Congressional Research Service, Todd Garvey Legislative Attorney (December 1, 2017); *See Gravel*, 408 U.S. at 616-17.

<sup>12</sup> *Ibid.*

<sup>13</sup> *Immunity Memorandum* at pp. 1; *citing Kaahumanu v. County of Maui*, 315 F.3d 1215 (9<sup>th</sup> Cir. 2003).

<sup>14</sup> *Ibid.* *See Kaahumanu* at 1219.

<sup>15</sup> *Ibid.* *Citing Kaahumanu* at 1220. *See also Bechard v. Rappold*, 287 F.3d 827, 829 (9<sup>th</sup> Cir. 2002)(*quoting San Pedro Hotel v. City of Los Angeles*, 159 F.3d 470, 476 (9<sup>th</sup> Cir. 1998); and *Bogan v.Scott-Harris* 523 U.S. 44, 55 (1998)).



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1983 because the challenged action was non-legislative.<sup>16</sup> The county council in *Kaahumanu* denied a conditional use permit for conducting commercial wedding business on beach-front residential property. An argument can certainly be made in the present case that a vote by the Board to refer an ordinance to the ballot would not be protected by legislative immunity because the act is non-legislative in nature.<sup>17</sup>

Mr. Meeks assumes the act of voting by the Board to refer an ordinance to the ballot is protected by legislative immunity without having done a legal analysis under the Ninth Circuit four factor test. Even if the act of voting were protected by legislative immunity, Mr. Meeks ignores the purpose and reach of ORS 294.100 as it would apply in this case. Liability under ORS 294.100 is not conditioned upon the act (legislative or non-legislative) that results in the misuse of public funds; it is conditioned upon an analysis of the legality of the expenditure of public funds.

*Immunity of Public Officials for Legislative Actions (May 20, 2019)-Oregon Public Officials Are Immune From Personal Liability For Carrying Out Discretionary Functions, Such As Referring Measures To the Ballot*<sup>18</sup>

Mr. Meeks claims public officials are absolutely immune from liability for their legislative acts which includes absolute immunity for all discretionary decisions made by public officials leading up to and after those legislative acts.<sup>19</sup> Again, assuming after an actual legal analysis that a vote to refer an ordinance to the ballot constitutes a legislative act, Mr. Meeks ignores the fact that ORS 294.100 is a waiver of such immunity in regards to the expenditure of public funds as a result of that vote.

Article IV, section 24 of the Oregon Constitution allocates the power to waive sovereign immunity to the legislature, not to the courts.<sup>20</sup> Article IV, section 24 of the Oregon Constitution does not bar the state from holding itself immune from suit.<sup>21</sup> It also does not bar the state from partially waiving its immunity by general law, which is it what it has done with both the Oregon Tort Claims Act and ORS 294.100.<sup>22</sup>

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<sup>16</sup> *Kaahumanu* at 1223-24.

<sup>17</sup> The analysis of whether or not an act is legislative in nature is beyond the scope of this memorandum, but can be made available if requested by the Board for future discussions.

<sup>18</sup> *Ibid.* at pp. 6-8.

<sup>19</sup> *Immunity Memorandum* pp. 1-9.

<sup>20</sup> *Hale v. Port of Portland*, 308 Or. 508, 513 (1989).

<sup>21</sup> *Ibid.* at 517.

<sup>22</sup> Another example is ORS 192.680, the Oregon Public Meetings Law, which is discussed later in this memorandum.



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Under Mr. Meeks' theory, there is no limit to the types of legislative and discretionary acts the Board may take. According to Mr. Meeks, any and all legislative acts taken by the Board and the discretionary decisions that precede or follow those acts enjoy absolute immunity under Oregon law. Mr. Meeks fails to acknowledge that ORS 294.100 is a partial waiver of immunity by the legislature that allows individuals to hold public officials accountable for the misuse of public funds – regardless of the decision making process that led to the misuse of funds.

In fact, ORS 294.100(2) states that public officials shall be civilly liable if the expenditure constitutes malfeasance in office or willful or wanton neglect of duty. This standard of conduct contained in statute discounts Mr. Meeks' theory that essentially anything goes when engaging in a legislative act. A claim under ORS 294.100 is not a tort to which discretionary or legislative immunity might apply.<sup>23</sup> A public official can, therefore, be held personally liable to taxpayers for having taxpayers incur the cost of an election when the public official knows the measure sent to voters is not a measure on which voters may lawfully vote.

Local governments have broad powers subject only to constitutional or preemptive statutory prohibitions.<sup>24</sup> Whether a particular expenditure is authorized is more often answered in the affirmative, courts have proceeded to consider whether the government action, even though authorized, conflicted with some other law or constitutional provision.<sup>25</sup> The expenditure of public funds for an election to vote on a measure that is clearly preempted by both state and federal law would likely constitute malfeasance or willful or wanton neglect of duty by a public official under ORS 294.100.

There are three questions to consider in determining whether or not an expenditure of public funds is legal under ORS 294.100.<sup>26</sup>

First, does any authority exist for the expenditure? This inquiry speaks directly to the text of the statute and seeks to ascertain whether there is authority (for instance, by statute or ordinance) for such an expenditure and, if so, whether the expenditure comports with the authorized purposes and amounts.

Second, does the expenditure, while authorized generally, violate another statute or ordinance that specifically forbids it?<sup>27</sup>

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<sup>23</sup> See *Gugler v. Baker County Educ. Service Dist.*, 86 Or App 549 (1987)(board adopted allegedly unlawful budget using allegedly unlawful procedures); *Bear Creek Valley Sanitary Authority ex rel. Bashaw v. Hopkins*, 53 Or App 212, 219 n. 6 (1981)(board adopted allegedly unlawful "construction costs formula").

<sup>24</sup> *Burt v. Blumenauer*, 299 Or. 55, 61 (1985).

<sup>25</sup> *Ibid.* at 61-62.

<sup>26</sup> *Ibid.* at 71-72.

<sup>27</sup> *Ibid.*



The third inquiry is very similar to the second and asks by which authority the expenditure was made. This contemplates that an authorizing local ordinance may be preempted by a state statute.<sup>28</sup>

Although the Board may have general authority to refer an ordinance to the ballot, the specific provisions contained in state and federal law preempting a local authority to regulate in this area control over the general law authorizing the referral.<sup>29</sup> Therefore, a public official may have the authority to refer the ordinance, but referring the ordinance with the knowledge that the purpose and intent of the measure is clearly and specifically preempted by state and federal law would likely create civil liability under ORS 294.100 for the expenditure of funds to hold the election. A public official could also be held civilly liable for the expenditure of public funds resulting from litigation for either the enforcement, or non-enforcement, of the measure if it were to pass.

In other words, Mr. Meeks' argument that public officials have zero liability for any and all legislative or discretionary acts is simply not true. In adopting ORS 294.100, the Oregon Legislature partially waived the immunity to allow taxpayers to recoup public funds that have been misused for a public official's legislative act without the public official being able to claim absolute immunity for that act.

*Immunity of Public Officials for Legislative Actions (May 20, 2019)-Oregon Public Officials Are Automatically Indemnified Under ORS 30.285 For Any Liability That Might Possibly Result From Their Official Actions*<sup>30</sup>

Mr. Meek asserts that Oregon Public Officials are automatically indemnified for any liability that might possibly result from their official actions.<sup>31</sup> He restates this argument in his *Analysis Memorandum*.<sup>32</sup> Mr. Meek claims that the OTCA provides the Board protection pursuant to its general representation and indemnification terms and the discretionary immunity it provides.

While Mr. Meeks offers a number of arguments in favor of his position, he did not address the question that was posed by the Board: Do members of the Lane County Board of Commissioners face potential individual and personal liability for actions related to the referral of the Aerial Spray Measure? One statute that imposes individual and personal liability is ORS 294.100.<sup>33</sup>

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<sup>28</sup> *Ibid.* at 72-73.

<sup>29</sup> *Ibid.* at 59.

<sup>30</sup> *Ibid.* at pp. 8-9.

<sup>31</sup> See *Ibid.* at pp. 6-9.

<sup>32</sup> See *Analysis Memorandum* at p. 5

<sup>33</sup> Another is the Oregon Public Meetings Law which will be discussed in more detail later in this memorandum.



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The Oregon Court of Appeals has clearly and unambiguously answered this question in the affirmative:

As we noted in our former opinion, applying the indemnification provisions of the OTCA to plaintiff's taxpayer action under ORS 294.100 renders the taxpayer action a useless endeavor, because, if defendants are found to be liable for the allegedly misspent funds, Multnomah County would be liable to itself for the wrongful expenditures and would have to cover the defendants' legal expenses. A holding that a taxpayer action is a tort claim within the OTCA would thus effectively repeal ORS 294.100, a task that only the legislature could appropriately perform. *For those reasons, we conclude that, in enacting and amending OTCA, the legislature did not intend to include a taxpayer action brought under ORS 294.100 within the meaning of a "tort" as that term is used in the OTCA.* [Emphasis supplied].<sup>34</sup>

When it comes to claims brought pursuant to ORS 294.100, the OTCA affords no protection against individual liability.

*Analysis of Interdepartmental Memorandum (July 2, 2109)*<sup>35</sup> by Stephen E. Dingle, Lane County Counsel, to the Lane County Board of Commissioners (August 7, 2019)<sup>36</sup>

There may well be cases that are unreported where public officials settled the matter. It is also possible that since the safe harbor provision of acting pursuant to advice from legal counsel the clients have followed the advice of their lawyer and have not been sued.

One example of a case where personal individual liability was found was the Lane County case, *Eleanor Dumdi v. Rob Handy et. al.*<sup>37</sup> The case involved an alleged violation of the Oregon Public Meetings Law. The complaint also alleged a violation of ORS 192.680(3) and (4). Those statutes provide that if the violation of the public meetings law is intentional or "willful" the public official may be held personally liable for any amount paid by the public body, which occurred in the *Dumdi* case.

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<sup>34</sup> *Burt v. Blumenauer*, 87 Or App 263, 265 (1987). In its opinion the Court noted ORS 294.100 predated the OTCA by 30 years. *Ibid.* ORS 294.100 was passed by the legislature in 1953.

<sup>35</sup> "Analysis Memorandum". A copy is attached as Exhibit "B".

<sup>36</sup> *Ibid.* at pp. 1-2.

<sup>37</sup> *Eleanor Dumdi and Edward Anderson v. Rob Handy, Peter Sorenson, Bill Fleenor, and the Lane County Board of Commissioners*, Lane County Circuit Court case 16-10-02760. A copy of the opinion is attached as Exhibit "C".



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The *Dumdi* case is significant for a number of reasons. First, there was no finding by a court in advance of the lawsuit holding that “serial meetings” violated the Oregon Public Meetings Law. In fact, the court pointed out that there was no “bright line” for the defendants.<sup>38</sup> Second, there was an opinion by County Counsel prior to the case that serial meetings violated, at a minimum, the spirit of the Oregon Public Meetings Law. Third, the act that resulted in the violation was arguably a legislative act, adopting a second supplemental budget. Finally, the court found the conduct to be willful and imposed personal liability. The *Dumdi* court defined willful as “acting with a conscious objective to violate [a] particular [provision of law].”<sup>39</sup> In this instance, the provision of law would be the preemption of local action discussed in detail below and in the earlier opinion prepared by County Counsel on this matter.

*Analysis of Interdepartmental Memorandum (July 2, 2109)*<sup>40</sup> by Stephen E Dingle, Lane County Counsel, to the Lane County Board of Commissioners (August 7, 2019) Charter Amendment<sup>41</sup>

The discussion referencing a request for the Board to refer the measure as an amendment to the Lane County Charter was only in response to some individuals that were making that request; they may or may not be a part of this group or they may have been inaccurate or unclear in their request. The point of that portion of the memorandum was to point out that such an action would be an example of an action not authorized by law, and to the extent that any costs were incurred by the County, any commissioner in the majority voting to refer the matter would be personally liable under 294.100.

To the extent that Mr. Meek’s request is based upon what he hopes will happen with the law, the opinion of County Counsel is based upon what is currently the law, which includes the decisions by Lane County Circuit Court Judges Rasmussen and Chanti, and the Oregon Court of Appeals.

*Analysis of Interdepartmental Memorandum (July 2, 2109)*<sup>42</sup> by Stephen E. Dingle, Lane County Counsel, to the Lane County Board of Commissioners (August 7, 2019)-Immunity and Indemnification- Ordinances<sup>43</sup>

Mr. Meek argues that it is impossible for members of the Board to be sued for the “unlawful” expenditure of funds because: (1) without a ruling from a court before the referral that the substance of the referral is unconstitutional or otherwise

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<sup>38</sup> *Dumdi, supra* at 34-35.

<sup>39</sup> *Dumdi, supra* at 37-41.

<sup>40</sup> *Analysis Memorandum* at pp. 1-2.

<sup>41</sup> *Ibid.* at pp. 2-3.

<sup>42</sup> *Ibid.*

<sup>43</sup> *Ibid.* at p. 3-4.



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prohibited by law, (2) the potential doctrine of “upward preemption” may protect the Board and, (3) there is no published case holding a commissioner liable for improperly referring a measure. Each of these arguments will be addressed in that order. With regard to the first point, the *Dumdi* decision is clearly contrary.

For another example, consider this hypothetical: A Board of Commissioners following all of the appropriate procedures required by its charter and state law adopts an ordinance. The ordinance purports to confiscate without any legal process or just compensation all residents’ property whose last name begins with “A”. In the process of passing the ordinance, legal expenses and other public funds are expended. The Board is sued under ORS 294.100 for the costs and attorney fees. Mr. Meek would argue the Board is not liable because no court ruled before they adopted the ordinance that it was unconstitutional, even though any first year law student would know such an ordinance was obviously unconstitutional.

There are multiple ways that the Board could enact legislation that is “unlawful” and among those ways is referring legislation that is preempted by state, federal or international law. A brief summary and explanation of Oregon preemption law will provide a better framework for understanding the arguments in this area.

In Oregon, local governments have substantial independent lawmaking authority.<sup>44</sup> <sup>45</sup> Local lawmaking authority is primarily derivative of the 1906 “home rule” amendments to the Oregon Constitution.<sup>46</sup> As the Oregon Court of Appeals explained in *Thunderbird*, the primary purpose of the home rule amendments was to empower locals to decide how to organize their local governments and to create local laws pursuant to the municipal corporation’s charter.<sup>47</sup> However, local governments do not have complete lawmaking autonomy; their lawmaking authority is subject to restrictions based on competing state laws. This restriction is referred to as “preemption.”

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<sup>44</sup> LEAGUE OF OREGON CITIES, LEGAL GUIDE TO OREGON’S STATUTORY PREEMPTIONS OF HOME RULE (2017), [HTTP://WEBCACHE.GOOGLEUSERCONTENT.COM/SEARCH?Q=CACHE:74jX9BMD5TOJ:WWW.ORCITIES.ORG/PORTALS/17/PUBLICATIONS/NEWSLETTERS/BULLETIN/STATUTORYPREEMPTIONSUMMARY11-17-17.PDF+&CD=12&HL=EN&CT=CLNK&GL=US](http://webcache.googleusercontent.com/search?q=cache:74jX9BMD5TOJ:www.orcities.org/portals/17/publications/newsletters/bulletin/statutorypreemptionsummary11-17-17.pdf+&cd=12&hl=en&ct=clnk&gl=us).

<sup>45</sup> See ORS 203.035 (stating “the governing body or the electors of a county may by ordinance exercise authority within the county over matters of county concern, to the fullest extent allowed by Constitutions and laws of the United States and of this state”).

<sup>46</sup> See Or. Const. art. XI, § 2 and art. IV, § 1. See also *Ashland Drilling, Inc. v. Jackson Cty.*, 168 Or App 624, 634 (2000) (explaining local “home rule” authority derives from art. XI, § 2 and art. IV, § 1 of the Oregon Constitution).

<sup>47</sup> *Thunderbird Mobile Club, LLC v. City of Wilsonville*, 234 Or App 457, 469–70 (2010); *City of La Grande v. Pub. Employees Retirement Bd.*, 281 Or 137, 142 (1978) (providing a summary of the history of home rule in Oregon, and subsequent evolution of state’s preemption doctrine in the case law).



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Addressing preemption, the Oregon Supreme Court in *City of La Grande* stated “[T]he validity of local action depends, first, on whether it is authorized by the local charter or by a statute . . . [, and] second, on whether it contravenes state or federal law.”<sup>48</sup> Thus, the first question is whether the local government has the authority to make the law in question. And the second question is whether such a local law conflicts with (i.e., is *preempted* by) the state’s laws.

Regarding local lawmaking authority, that power is understood to be very broad. The “home rule authority of local governments enables them to enact reasonable regulations to further local interests with respect to public health, safety, and welfare.”<sup>49</sup> And, according to the Oregon Supreme Court, “[i]n recent times, the judicial interpretation [is] that local governments have broad powers subject only to constitutional or preemptive statutory prohibitions.”<sup>50</sup>

As for preemption, the Oregon Supreme Court in *La Grande* set forth the threshold analysis as follows: “[T]he first inquiry must be whether the local rule in truth is incompatible with the legislative policy, either because both cannot operate concurrently or because the legislature meant its law to be exclusive.”<sup>51</sup> In *La Grande*, the court not only set forth the preemption analysis, but also refers to the two main types of preemption: express preemption and implied preemption. Express preemption “occurs when the Legislature enacts a law that specifically prohibits or limits local policy choices on the same subject.”<sup>52</sup>

Implied preemption “occurs when the Legislature has not expressly preempted local policy authority, yet there exists a conflict between state and local law [] [e]ssentially the ability to comply with both the state and local law in that specific field is impossible.”<sup>53</sup>

The court in *Thunderbird* explained those two types of preemption in the specific context of local civil regulations,<sup>54</sup> stating “a chartered [local government] can enact substantive policies in an area also regulated by state statute unless the local regulation is ‘incompatible’ with state either in the sense of being ‘clearly’ preempted by *express* state law or because ‘both state law and local law cannot

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<sup>48</sup> *City of La Grande*, 234 Or at 142.

<sup>49</sup> Or. Atty. Op. No. OP-2003-2 at 2 (Sept. 12, 2003) (citing *City of Eugene v. Miller*, 318 Or 480, 491 n.12 (1994)).

<sup>50</sup> *Id.* at 3 (Sept. 12, 2003) (citing *Burt v. Blumenaur*, 299 Or 55, 61 (1985)).

<sup>51</sup> *Id.* at 148.

<sup>52</sup> LEAGUE OF OREGON CITIES, *supra* note 1, at 5.

<sup>53</sup> *Id.*

<sup>54</sup> Here it is important note that state/local preemption is treated differently in the criminal context. If a local criminal law is inconsistent with a state criminal law, then that local law is presumptively invalid. See *Thunderbird Mobile Club, LLC*, 234 Or App at 476 (citing to *City of Portland v. Dollarhide*, 300 Or 490, 501 (1986)).



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operate concurrently.”<sup>55</sup> Thus, if a state statute’s language reveals express or clearly manifested intention to be exclusive, then analysis ends.<sup>56</sup> But if there is no express intent to preempt, analysis must proceed to determining whether a local law can operate concurrently with the state law.<sup>57</sup> In making this determination, “[i]t is reasonable to interpret local enactments, if possible, to be intended to function consistently with state laws, and equally reasonable to assume that the legislature does not mean to displace local civil or administrative regulation of local conditions by a statewide law unless that intention is apparent.”<sup>58</sup> If a local enactment is found to be incompatible with a state law, then state law preempts the local law.<sup>59</sup>

As a final note, whether a local law created under home rule authority is preempted is partially a function of the subject matter of that local law. A thorough exploration of each discrete subject category is beyond the scope of this memorandum. However, a general overview of subject-specific preemption is set forth in the report cited in the ensuing footnote.<sup>60</sup>

Local governments have substantial authority to promulgate their own laws. However, that authority is restricted where a state law preempts the local law. A state law may either expressly or impliedly preempt the local law. A local law is presumably not in conflict with state law unless the two cannot operate concurrently. Lastly, determinations of preemption may be partially a function of the particular subject matter involved in the local law.

The next argument advanced by Mr. Meek involves a concept he describes as “upward preemption” or “reversed preemption”. First County Counsel should say that he is not familiar with a legal doctrine called “upward preemption” and have been unable to locate any legal authority in Oregon for this legal concept.<sup>61</sup> It is believed it is intended to convey the opposite of the traditional preemption doctrine. Traditionally preemption runs downward: the federal government passes a law that preempts state and local action, the state passes a law that preempts local action. Presumably “upward preemption” would be the authority of a local government to preempt state, federal and international law.

What Mr. Meeks has not addressed is not that the proposed ordinance may or may not have constitutional issues, but that it is preempted by Oregon state law. As was

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<sup>55</sup> *Thunderbird Mobile Club, LLC*, 234 Or App at 471 (emphasis added).

<sup>56</sup> Or. Atty. Op. No. OP-2003-2 at 3 (Sept. 12, 2003) (citing to *City of La Grande*, 234 Or at 148.)

<sup>57</sup> *Id.*

<sup>58</sup> *City of La Grande*, 234 Or at 148.

<sup>59</sup> *City of La Grande*, 234 Or at 148.

<sup>60</sup> LEAGUE OF OREGON CITIES, *supra* note 1, at 9–15, Appendix A.

<sup>61</sup> It appears that Mr. Meek recognizes it is a novel legal concept: “We cannot find out whether upward preemption is legal, unless and until ordinances asserting it are adopted (by voters) and challenged in the courts.” *Analysis Memorandum*, at page 3.



# LANE COUNTY OFFICE OF LEGAL COUNSEL

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discussed in the original memorandum on this subject the proposed ordinance is preempted by the Farming and Forest Practices Act.<sup>62</sup> The argument by those making the threat of litigation is simple: By voluntarily referring an ordinance when not required by law and the ordinance is clearly preempted by state law, the costs associated with the referral and any subsequent attorney fees are a waste of public funds triggering ORS 294.100.

Mr. Meeks lack of understanding of the application of ORS 294.100 is demonstrated by his statement regarding the potential liability of voters if they voted for the Aerial Spray Measure (something that has never been argued by County Counsel). ORS 294.100 makes it unlawful for any “public official” to expend money in excess of the amount provided by law or different purpose than provided by law. “Public Official” is defined in ORS 244.020(15) and includes elected and appointed public employees; voters are not within the definition. And, as has been repeatedly stated voters have the right to refer unconstitutional measures or measures preempted by federal or state law, but that does not mean elected officials can do so the same without risking personal liability.

*Analysis of Interdepartmental Memorandum (July 2, 2109) by Stephen E. Dingle, Lane County Counsel, to the Lane County Board of Commissioners (August 7, 2019)-Immunity and Indemnification<sup>63</sup>*

*See Discussion supra under Immunity of Public Officials for Legislative Actions (May 20, 2019)-Oregon Public Officials Are Automatically Indemnified Under ORS 30.285 For Any Liability That Might Possibly Result From Their Official Actions.*

## **CONCLUSION:**

County Counsel’s opinion is unchanged and remains that individual commissioner liability exists if the Board votes to refer the Aerial Spray Measure as an ordinance.

## **RECOMMENDATIONS**

County Counsel’s first recommendation is that the Board decline to refer the ordinance as requested. Instead, the Board could encourage the measure’s supporters to collect signatures in support of an initiative to place the ordinance on the ballot. The referral of an ordinance, as opposed to a charter amendment, avoids the requirement that the measure comply with ORS 203.725(2) (the separate vote requirement). Supporters should also be encouraged to support legislative efforts

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<sup>62</sup> For a more detailed discussion of this issue see *Potential Individual Liability for Lane County Board of Commissioners: Referral of Initiative Measures* at pp. 10-14.

<sup>63</sup> *Analysis Memorandum* at p.5



# LANE COUNTY OFFICE OF LEGAL COUNSEL

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like SB 368 (2019) which would assure that any proposed charter amendment comply with all constitutional procedural requirements *before* petitions are circulated.

A second recommendation that would protect the County and individual commissioners would be to request a bond. If the proponents are as confident of their legal arguments as they seem to be, the Board could, as a condition of any referral, ask them to post a bond sufficient to cover any award of costs and attorney fees expended in defense of the referral and the ordinance itself.<sup>64</sup>

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<sup>64</sup> The Lincoln County Counsel's office has expended about 150 hours of attorney time dealing with various aspects of the Lincoln County version of the Aerial Spray Measure which was adopted by the voters as an ordinance. This does not include the opposing side's attorney fees or additional costs like the \$10,000 bill from the Oregon Department of Forestry for hand spraying which ODF said was caused by the ordinance.

## IMMUNITY OF PUBLIC OFFICIALS FOR LEGISLATIVE FUNCTIONS

Daniel Meek  
Attorney  
May 20, 2019

This whole concept of public official liability for voting to adopt laws (or even put measures on the ballot) is unfounded. Consider what the legislatures of Alabama and about 10 other states are doing right now. They are adopting anti-abortion laws that are clearly unconstitutional under *Roe v. Wade*. Why are they not all being sued and being forced to pay large sums of money to those suing them? Because the concept of such liability is baseless.

The proponents of the "local legislators are liable" theory have not cited even one case where such damages were awarded.

### LEGISLATORS HAVE ABSOLUTE IMMUNITY UNDER THE U.S. CONSTITUTION FOR LEGISLATIVE ACTS

The immunity of legislators (including county commissioners) from damages liability does not depend on any statute (although in Oregon it is also established by statute). It is absolute, says the US Supreme Court. Referring a measure to the ballot is without question a legislative act.

Consider these recent cases in the Ninth Circuit:

Legislative immunity protects legislative acts at the federal, state, and local levels. See *Comm. to Protect our Agric. Water*, 235 FSupp3d at 1164 [ED Cal 2017].

*Allen v. Kramer*, 2019 WL 932029, at \*16 (ED Cal Feb 26, 2019), report and recommendation adopted, 2019 WL 1370358 (ED Cal Mar 26, 2019).

"[L]egislators are absolutely immune from liability under § 1983 for their legislative acts." *Kaahumanu v. County of Maui*, 315 F3d 1215, 1219 (9th Cir 2003). The Ninth Circuit applies a four-factor test to determine whether an act is legislative: "(1) whether the act involves ad hoc decisionmaking, or the formulation of policy; (2) whether the act applies to a few individuals, or to the public at large; (3) whether the act is formally legislative in character; and (4) whether it bears all the hallmarks of traditional legislation." *Id.* at 1220 (internal quotation marks omitted). "The first two

factors are largely related, as are the last two factors, and they are not mutually exclusive." *Cnty. House v. City of Boise*, 623 F3d 945, 960 (citing *Kaahumanu*, 315 F3d at 1220). In addition, "the inquiry into whether the officials' actions were legislative must be 'stripped of all considerations of intent and motive.'" *Id.* (quoting *Bogan v. Scott-Harris*, 523 U.S. 44, 55 (1998)).

*Mauck v. McKee*, 2018 WL 5906085, at \*4 (ND Cal Nov 9, 2018).

Local government officials are entitled to legislative immunity for their legislative actions, whether those officials are members of the legislative or the executive branch. *Bogan v. Scott-Harris*, 523 US 44, 5455, 118 SCt 966, 140 LEd2d 79 (1998). This immunity extends both to claims for damages and claims for injunctive relief. *Supreme Ct. of Va. v. Consumers Union of the U.S., Inc.*, 446 US 719, 73233, 100 SCt 1967, 64 LEd2d 641 (1980). Accordingly, we must decide whether the lease and sale of Community House to the BRM was an act within the sphere of legislative activity. *Bogan*, 523 US at 54, 118 SCt 966.

*Cnty. House, Inc. v. City of Boise, Idaho*, 623 F3d 945, 959 (9th Cir 2010).

Moreover, the question of the intent of the individual defendants is strictly off-limits in the legislative immunity analysis. As instructed by the Supreme Court, our inquiry into whether the officials' actions were legislative must be "stripped of all considerations of intent and motive." *Bogan*, 523 US at 55, 118 SCt 966.

The privilege would be of little value if [legislators] could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of a pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives.

*Tenney v. Brandhove*, 341 US 367, 377, 71 SCt 783, 95 LEd 1019 (1951).

We consider four factors in determining whether an act is legislative in its character and effect: "(1) whether the act involves ad hoc decisionmaking, or the formulation of policy; (2) whether the act applies to a few individuals, or to the public at large; (3) whether the act is formally legislative in character; and (4) whether it bears all the hallmarks of traditional legislation." *Kaahumanu*, 315 F3d at 1220 (citation and internal quotation marks omitted).

*Cnty. House, Inc. v. City of Boise, Idaho*, 623 F3d at 960 (9th Cir 2010).

In discussing the long-standing tradition of legislative immunity, the Supreme Court has emphasized that the freedom of legislators to make decisions without worrying about personal liability is necessary to protect the citizens--not just the legislators:

These privileges are thus secured, not with the intention of protecting the members against prosecutions for their own benefit, but to support the rights of the people, by enabling their representatives to execute the functions of their office without fear of prosecutions, civil or criminal.

*Tenney*, 341 US at 37374, 71 SCt 783 (citation and quotation marks omitted). The decisions about how to further the City's laudable goal of fighting homelessness is a prime example of the need to allow city council members the freedom to make important and difficult discretionary decisions without fear of being personally sued for doing so.

*Cnty. House, Inc. v. City of Boise, Idaho*, 623 F3d at 963 (9th Cir 2010).

The individual members of the City Council are afforded absolute legislative immunity for discretionary acts performed within their legislative capacity. See *Bogan v. Scott-Harris*, 523 US 44, 46, 118 SCt 966, 140 LEd2d 79 (1998); also *Tenney v. Brandhove*, 341 US 367, 71 SCt 783, 95 LEd 1019 (1951). The rationale for absolute legislative immunity is to ensure that the discretion to legislate is not inhibited or distorted by fear of judicial interference. *Bogan*, 523 US at 52, 118 SCt 966. In *Bogan*, the Supreme Court expressly recognized that the same privilege extends to local legislators acting within the legislative sphere. 523 US at 46, 118 SCt 966.

When determining the nature of a legislative act, the decision "turns on the nature of the act, rather than on the motive or intent of the official performing it." *Bogan*, 523 US at 54, 118 SCt 966. While members of a legislative body may engage in both legislative and ministerial functions, the authority to do so does not affect the analysis of whether or not a given act is legislative. Actions that are "integral steps in the legislative process" or bear "all the hallmarks of traditional legislation" are within the bounds of legislative immunity. *Bogan*, 523 US at 5556, 118 SCt 966. Decisions encompassing discretion and policymaking, including services to constituents, are considered "integral steps." *Bogan*, 523 US at 55, 118 SCt 966. Activities within the sphere of legislation are distinguished from ministerial duties, which are not afforded immunity. Ministerial acts are those that are mandatory or not within the discretionary function of the legislator. *Bogan*, 523 US at 50, 118 SCt 966. In the Ninth Circuit,

determining whether an act is legislative involves a two-part analysis: "(1) whether the act involves ad hoc decisionmaking, or the formulation of policy; and (2) whether the act applies to a few individuals, or to the public at large." *Bechard v. Rappold*, 287 F3d 827, 829 (9th Cir 2002).

*Thornton v. City of St. Helens*, 231 F Supp 2d 1019, 1024 (D Or 2002).

Plaintiffs' state law claim for tortious interference with contract, brought pursuant to the Oregon Tort Claims Act, also fails. ORS 30.265(3) provides, in part:

Every public body and its officers, employees and agents acting within the scope of their employment or duties, \* \* \* are immune from liability for: \* \* \* (c) Any claim based upon the performance of or the failure to exercise or perform a discretionary function or duty, whether or not the discretion is abused.

As discussed above, the defendants' actions in enacting Ordinance No. 2808 fall within their discretionary functions. In enacting the ordinance, the defendants made policy choices and selected a process to achieve a particular end. That is the essence of a discretionary decision. See *Hutcheson v. City of Keizer*, 169 OrApp 510, 51819, 8 P3d 1010 (2000) (citing *Mosley v. Portland School Dist. No. 1J*, 315 Or 85, 91, 843 P2d 415 (1992)). Plaintiffs do not allege that defendants failed to follow the procedures established in Ordinance No. 2808; rather, they complain that the process established by the ordinance is "contrary to the approval followed by all other cities in the state of Oregon." Complaint, 12. That may be so, but that choice is within defendants' discretion.

*Thornton v. City of St. Helens*, 231 F Supp 2d at 1026 (D Or 2002).

Legislators are absolutely immune from liability for their legislative acts. *Bogan v. Scott-Harris*, 523 US 44, 46, 118 SCt 966, 140 LEd2d 79 (1998). This immunity extends to the legislative acts of state and local legislators, even in suits brought pursuant to 42 USC 1983. *Id.* at 49, 118 SCt 966. For immunity to attach, the allegedly unlawful action must have been a legislative function. *Id.* at 5152, 118 SCt 966.

*Thornton v. City of St. Helens*, 425 F3d 1158, 1163 (9th Cir 2005).

The OTCA, Or.Rev.Stat. 30.260 to 30.300, insulates public employees and public bodies from " '[a]ny claim based upon the performance of or the failure to exercise or perform a discretionary function or duty, whether or

not the discretion is abused.' " *Tennyson v. Children's Servs. Div.*, 308 Or 80, 775 P2d 1365, 1370 (1989) (citation omitted). Oregon courts define "discretionary function" as an action that

involves room for policy judgment or the responsibility for deciding the adaptation of means to an end, and discretion in determining how or whether the act shall be done or the course pursued.... [I]nsofar as an official action involves both the determination of facts and simple cause-and-effect relationships and also the assessment of costs and benefits, the evaluation of relative effectiveness and risks, and a choice among competing goals and priorities, an official has discretion to the extent that he has been delegated responsibility for the latter kind of value judgment.

*McBride v. Magnuson*, 282 Or 433, 578 P2d 1259, 126-61 (1978) (quotation marks and citations omitted).

While the line between protected discretionary acts and unprotected ministerial acts is not always clear, the question in this case is not a close one. The City's decision, expressed in two ordinances, to establish a formal process for reviewing renewal applications presents a classic example of a discretionary act, as that decision involved an exercise of judgment on a matter of policy made by the body that had the authority to act. See *Ramirez v. Haw. T & S Enters.*, 179 OrApp 416, 39 P3d 931, 93234 (2002); *Sager v. City of Portland*, 68 OrApp 808, 684 P2d 600, 60305 (1984). The Thorntons cannot escape the force of the OTCA by arguing that the application of Ordinances 2808 and 2832 was tortious. If the ordinance is contrary to state law (a question we were not called on to consider), the City is immune under section 30.265(3)(f). *Burke v. Children's Servs. Div.*, 288 Or 533, 607 P2d 141, 148 (1980). If the ordinance is consonant with state law, the City is immune because "'acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable.'" *Smith v. Cooper*, 256 Or 485, 475 P2d 78, 85 n. 3 (1970) (quoting *Dalehite v. United States*, 346 US 15, 36, 73 SCt 956, 97 LEd 1427 (1953)); see also *Ramirez*, 39 P3d at 933. The Thorntons do not complain that City officials or employees applied the ordinances in bad faith or with malice, cf. Or.Rev.Stat. 30.265(3)(f), that the ordinances were applied negligently or that City employees otherwise intentionally interfered with their contractual relationships. Because the ordinances were applied under apparent authority of law and any harm to the Thorntons flows from the original, discretionary act, the OTCA bars the Thorntons' state law claim.

*Thornton v. City of St. Helens*, 425 F3d at 1168-69 (9th Cir 2005).

It is well established that legislators are absolutely immune from civil suit for actions taken in their official lawmaking capacity. *Bogan v. Scott-Harris*, 523 US 44, 4849, 118 SCt 966, 140 LEd2d 79 (1998); *Harlow v. Fitzgerald*, 457 US 800, 807, 102 SCt 2727, 73 LEd2d 396 (1982). The Supreme Court has extended legislative immunity to officials outside of the legislative branch who perform quasi-legislative functions. *Bogan*, 523 US at 55, 118 SCt 966; see also *Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency*, 440 US 391, 405, 99 SCt 1171, 59 LEd2d 401 (1979). Legislative immunity extends both to claims for damages and claims for injunctive relief. *Cnty. House, Inc. v. Boise, Idaho*, 623 F3d 945, 959 (9th Cir 2010).

*Cascadia Wildlands v. Kitzhaber*, 911 F Supp 2d 1075, 1081 (D Or 2012).

**OREGON PUBLIC OFFICIALS ARE IMMUNE FROM PERSONAL LIABILITY FOR CARRYING OUT DISCRETIONARY FUNCTIONS, SUCH AS REFERRING MEASURES TO THE BALLOT.**

We have found no case in which such liability has ever been imposed on a public official in Oregon for referring a measure to the ballot. Oregon public officials are immune from personal liability for carrying out discretionary functions, such as referring measures, under ORS 30.365, which states:

(5) Every public body is immune from liability for any claim for injury to or death of any person or injury to property resulting from an act or omission of an officer, employee or agent of a public body when such officer, employee or agent is immune from liability.

(6) Every public body and its officers, employees and agents acting within the scope of their employment or duties, or while operating a motor vehicle in a ridesharing arrangement authorized under ORS 276.598, are immune from liability for:

- (a) Any claim for injury to or death of any person covered by any workers' compensation law.
- (b) Any claim in connection with the assessment and collection of taxes.

- (c) Any claim based upon the performance of or the failure to exercise or perform a discretionary function or duty, whether or not the discretion is abused.
- (d) Any claim that is limited or barred by the provisions of any other statute, including but not limited to any statute of ultimate repose.
- (e) Any claim arising out of riot, civil commotion or mob action or out of any act or omission in connection with the prevention of any of the foregoing.
- (f) Any claim arising out of an act done or omitted under apparent authority of a law, resolution, rule or regulation that is unconstitutional, invalid or inapplicable except to the extent that they would have been liable had the law, resolution, rule or regulation been constitutional, valid and applicable, unless such act was done or omitted in bad faith or with malice.

Note that ORS 30.365(6)(c) immunizes public officials from any claim based upon the performance of a discretionary function or duty, whether or not the discretion is abused.

The legislature did not define the term "discretionary function or duty," and this court has struggled with the concept over the years. The result of that struggle, however, is an extensive body of case law refining the concepts. Briefly, the decision of a governmental official, employee, or body is entitled to discretionary immunity if a governmental person or entity made a policy choice among alternatives, with the authority to make that choice. Discretionary immunity does not apply, however, to "routine decisions made by employees in the course of their day-to-day activities, even though the decision involves a choice among two or more courses of action."

***Westfall v. Oregon Dep't of Corr.***, 355 Or 144, 157, 324 P3d 440 (2014) (citations omitted).

A governmental actor performs discretionary functions and duties when exercising delegated responsibility for making decisions committed to the authority of that particular branch of government that are based on assessments of policy factors, such as the social, political, financial, or economic effects of implementing a particular plan or of taking no action.

***Turner v. State***, 359 Or 644, 653, 375 P3d 508 (2016).

Recognizing those tensions, this court has explained that the legislature used the words "discretionary function or duty" to exempt governmental entities from liability only for "certain types of decisions, namely, those that require supervisors or policy makers to assess costs and benefits, and to make a choice among competing goals and priorities." *Vokoun v. City of Lake Oswego*, 335 Or 19, 31, 56 P3d 396 (2002) (citing *McBride v. Magnuson*, 282 Or 433, 437, 578 P2d 1259 (1978)). *Accord, Mosley v. Portland School Dist. No. 1J*, 315 Or 85, 89, 843 P2d 415 (1992).

*Hughes v. Wilson*, 345 Or 491, 496, 199 P3d 305, 307, 2008 WL 5246056 (2008).

**OREGON PUBLIC OFFICIALS ARE AUTOMATICALLY INDEMNIFIED UNDER ORS 30.285.FOR ANY LIABILITY THAT MIGHT POSSIBLY RESULT FROM THEIR OFFICIAL ACTIONS.**

**30.285 Public body shall indemnify public officers; procedure for requesting counsel; extent of duty of state; obligation for judgment and attorney fees.**

(1) The governing body of any public body shall defend, save harmless and indemnify any of its officers, employees and agents, whether elective or appointive, against any tort claim or demand, whether groundless or otherwise, arising out of an alleged act or omission occurring in the performance of duty.

(2) The provisions of subsection (1) of this section do not apply in case of malfeasance in office or willful or wanton neglect of duty.

\* \* \*

6) Nothing in subsection (3), (4) or (5) of this section shall be deemed to increase the limits of liability of any public officer, agent or employee under ORS 30.260 to 30.300, or obviate the necessity of compliance with ORS 30.275 by any claimant, nor to affect the liability of the state itself or of any other public officer, agent or employee on any claim arising out of the same accident or occurrence.

These provisions were explained in *Welker By & Through Bradbury v. Teacher Standards & Practices Comm'n*, 152 Or App 190, 953 P2d 403 (1998), *vac'd sub nom. Welker ex rel. Bradbury v. Teachers Standards & Practices Comm'n*, 332 Or 306 (2001):

Those OTCA indemnity provisions insulate employees and nonemployee "agents" of public bodies from personal financial responsibility for injuries resulting from conduct within the course and scope of their duties. In so doing, the indemnity statutes embody and effectuate two fundamental public policies. First, they encourage qualified persons to accept public employment. Second, they encourage the zealous execution of public functions, duties, and responsibilities.

*Id.*, 152 OrApp at 199.

# ANALYSIS OF INTERDEPARTMENTAL MEMORANDUM (JULY 2, 2019) BY STEPHEN DINGLE, LANE COUNTY COUNSEL, TO THE LANE COUNTY BOARD OF COMMISSIONERS

Daniel Meek  
Attorney  
August 7, 2019

This is an evaluation of the Interdepartmental Memorandum (July 2, 2019) by Stephen Dingle, Lane County Counsel, to the Lane County Board of Commissioners (hereinafter "Dingle Memorandum").

It is instructive that no one has cited a single instance of a government official being found liable in any way for:

1. the consequences of a measure that the government official voted to put on the ballot; or
2. the expenditure of public funds to place a measure on the ballot that is later determined to be not entirely constitutional in substance.

The Dingle Memorandum (and attachments) cite no such Oregon case and no case from any of other state. If this liability is a problem, why has it never occurred? My search of the national Westlaw database has also found no such case.

The Dingle Memorandum cites a few cases regarding public official liability. *Burt v. Blumenauer*, 299 Or 55, 699 P2d 168 (1985), addressed the unauthorized spending of government funds to **advocate for** a ballot measure, which might have violated ORS 260.432 (prohibits requiring a public employe to promote or oppose the adoption of a measure"). And the measure at issue was an initiative, not a referral by any government body. There was no issue of any liability for having referred a measure to the ballot. And the judicial record does not show that any liability was ever imposed on any government official, anyway. The case was remanded to Circuit Court for determination of the facts. There is no report of any liability ever being imposed.

*Porter v. Tiffany*, 11 Or App 542, 502 P2d 1385 (1972), concluded that the EWEB commissioners had unlawfully expended public funds to support one ballot measure and to oppose a different measure. The 1968 measure was a bond authorization referred by the commissioners. The 1970 measure was an initiative to delay construction of a nuclear power plant. Again, there was no liability for having placed the bond measure on the ballot.

*Bear Creek Valley Sanitary Auth. ex rel. Bashaw v. Hopkins*, 53 Or App 212, 631 P2d 808 (1981), *review denied*, 292 Or 108 (1981), was a taxpayer suit against the directors of the Authority for having spent money raised by a bond sale for unauthorized purposes. Again, there was no liability for having placed the bond measure on the ballot. And there is no indication that the directors suffered any liability at all.

The Dingle Memorandum cites *Belgarde v. Linn*, 205 Or App 433, 134 P3d 1082 (2006), *review denied*, 341 Or 197 (2006). The Court of Appeals allowed the Multnomah County Commissioners to shield themselves from liability with an "advice of counsel" defense. The Commissioners had authorized county personnel to issue same-sex marriage licenses, even though same-sex marriage was unlawful at the time (and the licenses were therefore void), according to the Oregon Supreme Court in *Li v. State of Oregon*, 338 Or 376, 110 P3d 91 (2005). Again, no ballot measure was involved, and the Commissioners suffered no liability.

*State ex rel. Moltzner v. Mott*, 163 Or 631, 97 P2d 950 (1940), had nothing to do with any ballot measure. Nor did *Bahr v. Marion Cty.*, 38 Or App 597, 590 P2d 1240 (1979).

## **Charter Amendments**

As instructed in your email, I am not addressing the part of the memo about referring county charter amendments. But the Dingle Memorandum makes no sense there. If the Commission proposes a county charter amendment, then (under the Dingle theory of county clerk authority), the Lane County Clerk is responsible for keeping it off the ballot, if it proposes more than one amendment. So, if the measure is so "flawed," the Clerk would not allow it on the ballot. Hence, no Commissioner liability is even possible.

The Dingle Memorandum relies upon the various holdings (all subject to reversal by the Oregon appellate courts) on the Clerk's authority to disqualify

measures for the ballot on "multiple amendment" (also know as "separate-vote") grounds. If those court decisions are upheld, then it is the responsibility of the Clerk to keep offending measures off the ballot. If those court decisions are not upheld, then Dingle's entire rationale disappears, because the rationale depends upon the conclusion that the aerial spraying and community self-government measures are multiple amendments requiring separate votes.

## **Ordinances**

This part of the Dingle Memorandum (pp. 10-15) also does not make sense. If, indeed, Oregon and federal laws preempt local laws, then no one can be harmed by a local law that asserts upward preemption. If no one can be harmed, there is no liability for placing the measure on the ballot (even if such liability existed as a concept).

We cannot find out whether upward preemption is legal, until and unless ordinances asserting it are adopted (by voters) and challenged in the courts. If upward preemption is not legal, then (as noted above) no one can be harmed, so no liability can arise. If upward preemption is legal, then there is no basis for asserting that the Commissioners took *ultra vires* action in placing the measure on the ballot.

The same is true, if the liability of the Commissioners is for unlawful expenditure of funds. One cannot know if the measure is "unlawful," until it is enacted and reviewed for substantive constitutionality by the courts. As Dingle concedes, Oregon courts do not have jurisdiction to determine the substantive constitutionality of measures, before they are enacted.

The parties further agree that the secretary's preelection review authority to ensure compliance with the constitution does not extend to reviewing measures for substantive constitutionality. That is, the secretary may not refuse to certify an initiative merely because the secretary believes that the substance of the measure, if enacted, would violate either the state or the federal constitutions. Neither may a court prevent a measure from appearing on the ballot because of general constitutional concerns. See, e.g., *State ex rel Fidanque v. Paulus*, 297 Or. 711, 716, 688 P.2d 1303 (1984) ("[N]either the court nor the Secretary of State could review the merits of the proposed initiative for its constitutionality before enactment[.]"); cf. *Foster v. Clark*, 309

Or. 464, 471, 790 P.2d 1 (1990) (courts "may not inquire into general questions of constitutionality" before the election).

***Geddry v. Richardson***, 296 Or App 134, 144, 437 P3d 1163, 1169 (2019).

If the measure is found substantively constitutional, then Dingle's argument collapses. If it is found not substantively constitutional, that does not mean that there is any liability of the Commissioners for referring it to the ballot. If it meant that, surely there would be one case on point in Oregon or in the United States in all of recorded history.

Note that the Dingle argument is that Commissioners are personally liable (either for damages to persons harmed or for unlawful expenditure of public funds), if they place on the ballot a measure that is eventually found by the courts to be constitutionally unsound in some way. The courts of Oregon and other states have struck down such adopted ballot measures (either statutes or ordinances) for substantive unconstitutionality literally thousands of times. Dingle points to not even one instance in which the referring legislators were held personally liable to anyone for having referred a substantively unconstitutional measure to voters.

There is no such process as that conceived of in the Dingle Memorandum. Say that the Commissioners refer the aerial spraying measure to the ballot. According to Dingle, someone can sue the Commissioners for spending government money on doing that. Why has no such suit ever been filed in the history of Oregon? Determining whether the government spending is "unauthorized," under the Dingle theory, would require a determination that the measure is substantively unconstitutional. Yet, as recited in ***Geddry*** above, the courts have no jurisdiction to rule on the substantive constitutionality of a measure prior to its adoption by the voters.

If voters adopt the measure, are the voters then personally liable to pesticide companies, if the measure is later found to be less than entirely constitutional? That is the logical result of the Dingell analysis (and makes as much sense).

Commissioners are authorized by law to place measures on the county ballot. Thus, in doing so they cannot violate ORS 294.100, whether or not a measure they refer to the ballot is eventually found to lack full constitutional validity.

## **Immunity and Indemnification**

Nothing in the Dingle Memorandum refutes my previous memo (attached) regarding public official immunity for performance of discretionary functions and policy choices or the indemnification of public officials for such functions provided by state law. Obviously, deciding to refer a particular measure to the county ballot is a discretionary function and a policy choice.

The Dingle Memorandum fails to address my earlier memo in any way, except to assert that the Oregon Tort Claims Act (OTCA) "excludes actions by a public official that constitute 'malfeasance in office' or 'willful and wanton neglect of duty.'" First, that does not address the absolute immunity of legislators for legislative acts provided by the U.S. Constitution and documented in my earlier memo. Second, it does not address the statutory immunity of Oregon officials for discretionary acts or policy choices under ORS 30.265. Third, it only applies to whether the official is also indemnified by ORS 30.285 for any potential liability. He is indemnified, unless his action constitutes "malfeasance in office or willful or wanton neglect of duty." ORS 30.285(2). That statute has never applied to the action of a legislator in voting to refer a measure to the ballot, and the Dingle Memorandum does not explain how that outcome could be reached. It cannot be malfeasance in office" or "willful and wanton neglect of duty" to refer a measure to the ballot, particularly when the substantive constitutionality of the measure cannot be addressed by the courts prior to its enactment by voters, as indicated in *Geddry*, above.

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JAN 18 2011

Circuit Court For Lane County, Oregon  
BY *[Signature]*

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

ELEANOR S. DUMDI,  
EDWARD M. ANDERSON,  
  
Plaintiffs,  
  
v.  
  
ROB HANDY, PETER SORENSON,  
and BILL FLEENOR, individuals, and  
LANE COUNTY BOARD OF  
COMMISSIONERS, a governing  
body of Lane County Oregon,  
  
Defendants.

Case No. 16-10-02760

Findings of Fact and  
Conclusions of Law

The above matter came on for trial on December 8 through 10, 2010. The court heard the sworn testimony of witnesses, received exhibits and considered the arguments of counsel. The court sets out below its findings of fact and conclusions of law on the issues raised in the pleadings and at trial, including its opportunity to evaluate the credibility of the witnesses.

Findings of Fact

Lane County, Oregon, a political subdivision of the State of Oregon, is governed by a five member Board of Commissioners [hereinafter the "Board"]. At all times relevant to this proceeding, the Board was comprised of Rob Handy, Peter Sorenson and Bill Fleenor, all individual defendants in this case, as well as Faye Stewart and Bill Dwyer [hereinafter "Handy", "Sorenson", "Fleenor", "Stewart" and "Dwyer" respectively]. Each of the five individual commissioners are elected from districts, each district representing one part of a five part division of the County. An

1 affirmative vote of at least three commissioners is required to take any formal action  
2 by the Board. Dwyer testified at trial that commissioners regularly speak to each  
3 other about county business.

4 Lane County's administration is generally located in the "CAO", which stands  
5 for County Administrative Offices. Each commissioner has an office in that area.  
6 Lane County government is managed by an appointed administrator who is  
7 accountable to the Board. At all times relevant to this proceeding, Jeff Spartz was  
8 the Lane County Administrator [hereinafter "Spartz"]. Lane County also employs  
9 attorneys in the County Counsel's office. At all times relevant to this proceeding,  
10 that office was managed by Liane Richardson who held the position of County  
11 Counsel for Lane County [hereinafter "County Counsel"]. One of County Counsel's  
12 responsibilities was to provide legal advice to the Board regarding the conduct of  
13 county business.

14 Handy first assumed the office of commissioner in January 2009. At the time  
15 of trial, Fleenor was concluding his first four year term as a commissioner. He did not  
16 run for re-election his term is set to expire in January 2011. The evidence did not  
17 establish when Stewart first assumed the office of commissioner, but his service  
18 included all periods relevant to this proceeding. At the time of trial, Dwyer had been  
19 a commissioner for approximately 12 years. Sorenson has been a commissioner since  
20 1997. During the year 2009 Sorenson acted as the Board Chair. In addition to  
21 presiding over the meetings of the Board, he set the agenda. Sorenson has  
22 substantial prior governmental experience, including serving in the Oregon Legislature.  
23 Sorenson is also an attorney who has worked with the Oregon Public Meetings law,  
24 ORS 192.610, *et. seq.*

25 At issue in the present case is the Lane County budget for fiscal year 2009-  
26 2010. In particular, plaintiffs challenge the actions of the individual defendants and  
27 the Board leading up to the adoption of Fiscal Year 2009-2010 Supplemental Budget

1 #2, adopted on December 9, 2009 [hereinafter "Supplemental Budget #2"].  
2 Specifically, plaintiffs are aggrieved by the inclusion in that amended budget of 1.7  
3 FTE (full time equivalents) which money was used and/or intended to be used<sup>1</sup> to  
4 fund a one-half time assistant for each commissioner.<sup>2</sup> The particular posture of this  
5 case involves plaintiffs' complaint about the events surrounding re-allocation of funds  
6 to be used for these particular positions. Supplemental Budget #2 was adopted with  
7 Handy, Sorenson and Dwyer voting to adopt and Stewart and Fleenor voting to  
8 oppose adoption.

9 The public funds involved in Supplemental Budget #2, which were reallocated  
10 to these particular positions, had already been allocated to be spent in Lane County's  
11 2009-2010 budget year, albeit for different purposes/positions. That occurred with  
12 the adoption of the 2009-2010 Lane County Budget on June 24, 2009. Exhibit 302.

13 The individual plaintiffs are each Oregon electors and taxpayers domiciled in  
14 Lane County, Oregon. The individual plaintiffs oppose the expenditures contained in  
15 Supplemental Budget #2, and in particular each oppose the decision to expend  
16 taxpayer money to hire new office support staff for Lane County Commissioners.  
17 The individual plaintiffs believe Lane County is facing a budget crisis and cannot  
18 afford basic services, including keeping criminals in jail.

19 The particular positions, which would be funded by the 2.5 FTE, have been  
20 called by several titles. The official title for the position is "Constituent Service  
21 Aide."<sup>3</sup> For all purposes in this case, the position will hereinafter be referred to by

22 \_\_\_\_\_  
23 <sup>1</sup>Not all commissioners have filled or intended to fill the position for their particular assistant.

24 <sup>2</sup>A total of 2.5 FTE's was necessary to fully fund the positions (five .5 FTE positions).  
25 Because there was already .8 FTE in the budget for an un-filled position, that .8 FTE could be used  
26 for this purpose. It was necessary to only create an additional 1.7 FTE to fully fund these positions.

27 <sup>3</sup>It is unclear how this could have been the official title of the position before December 9,  
2009, as neither that title nor any reference to "commissioner aide" or "commissioner assistant"  
appears in any Lane County budget document this court has seen or heard about.

1 the court as a "commissioner aide." Commissioner aides, or something similar to the  
2 positions created and funded in Supplemental Budget #2, have previously existed as  
3 a part of Lane County Government, but those positions were eliminated in previous  
4 years' budget processes when they were not funded. When Lane County  
5 Commissioners last had commissioner aide positions available was not established by  
6 the evidence.

7 Plaintiffs' complaint is focused on the events surrounding the adoption of  
8 Supplemental Budget #2. However, their evidence addresses the Lane County budget  
9 process for 2009-2010 starting in the early spring of 2009. The general budget  
10 process, for the adoption of the annual budget, begins in the spring of each year with  
11 the county's Budget Committee. That is a process of several meetings culminated  
12 by the approval of a budget that is a recommendation to the Board. The Board then  
13 goes through a process wherein they may make adjustments to the approved budget  
14 (within limits) culminating in the adoption of the annual budget by the Board by July  
15 1 of each year.

16 In Lane County, the Budget Committee is comprised of five county citizens and  
17 the five elected commissioners. Each Lane County Commissioner nominates a  
18 particular individual for the Budget Committee who is then presented to the Board.  
19 The Board, in a formal action, then decides on the appointment of that individual to  
20 the annual Budget Committee for that particular year. As part of the 2009-2010 Lane  
21 County budget process, the individual defendants appointed: Sorenson - Alice  
22 Kaseberg; Fleenor - Cindy Land; and, Handy - Rose Wilde [hereinafter "Kaseberg",  
23 "Land" and "Wilde" respectively]. Those appointees were formally appointed to the  
24 2009-2010 Lane County Budget Committee by the Board.

25 In the conduct of its business, the Board has adopted a set of rules. Exhibit  
26 33. Those rules include provisions relating to the formal conduct of Board business  
27 as well as rules concerning individual board members' direction to staff whereby

1 requested staff time would exceed 15 minutes, *i.e.*, the "15-minute Rule." Exhibit  
2 33, page 9. As it relates to all time periods relevant to this case and the budget  
3 process described in the evidence, that 15 minute rule was uniformly not enforced  
4 by either the Board, county administration nor staff.<sup>4</sup>

5         Shortly after taking office as commissioner, Handy believed that the position  
6 of commissioner aide was needed. That view was shared by both Sorenson and  
7 Fleenor. Spartz was aware Sorenson, Handy and Fleenor were interested in adding  
8 commissioner aides to the 2009-2010 budget. Fleenor had the assistance of Diane  
9 Burch as his assistant and, except for the fall of 2009, paid for the cost of her  
10 services out of his personal funds. After taking office, Handy had the assistance of  
11 Phyllis Barkhurst, on a "volunteer" basis [hereinafter "Barkhurst"]. Barkhurst had  
12 formerly acted as Handy's campaign chairman when he was elected commissioner.  
13 She did many things to assist the new commissioner including very fundamental  
14 actions like helping him set up his office, obtaining office furnishings, getting money  
15 for office supplies, answering phones and setting up a constituent response system.  
16 At no time was Barkhurst an employee of Lane County. Barkhurst helped Handy  
17 select the computer he wanted. Barkhurst was Handy's close and trusted aide. She  
18 would be in the CAO on a regular basis. Other county employees were confused  
19 about her role in county administration/government. Barkhurst had access to Handy's  
20 county office and email. Although she maintained her own email account, Barkhurst  
21 would send emails in her name using Handy's county email account.<sup>5</sup> She would

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22  
23         <sup>4</sup>It would appear that the lack of enforcement of this Board order goes beyond the issues of  
24 this case and includes, at least, budget matters generally. As an example, Christine Moody testified  
25 that Fleenor included in 2009-2010 Supplemental Budget # 1, a resident deputy position that was not  
approved previously by the Board.

26         <sup>5</sup>In a rather strange discussion at trial, it was pointed out to Handy that in his deposition he  
27 stated that Barkhurst had no permission to use his county email and had not done so. He was shown  
an email where she had used his email address, exhibit 34. His testimony concluded, however, with  
the statement that his deposition testimony about her use of his email was true. That statement is

1 request, on Handy's behalf, action by the county's employees. At times, she sent  
2 emails on Handy's county email account in his name (as if he had written them). Her  
3 testimony at trial indicated that the emails she sent in his name were "his words."  
4 In addition, using her own email account, Barkhurst would send emails on items she  
5 was assisting Handy with. She would also deal with other commissioners on Handy's  
6 behalf. At times, Barkhurst shared her thoughts and opinions with other  
7 commissioners if she thought her opinions would be helpful to them. Further,  
8 Barkhurst would do things at the request of Sorenson. While testifying, she  
9 acknowledged the possibility that she also had assisted Fleenor.

10         Barkhurst had a background in politics. She had worked for Oregon Attorney  
11 General Hardy Myers, in a political capacity. In addition to never being employed at  
12 Lane County, she had never served on a county committee. She had never served  
13 on any entities' budget committee and had no experience with county budgeting.  
14 Barkhurst had no local budget law experience as of the spring of 2009. She had  
15 some "informal" Public Meetings law training. With that background, Barkhurst  
16 undertook to help Handy with the 2009-2010 Lane County budget process.  
17 Barkhurst testified that process began in February 2009. Barkhurst further testified  
18 her primary focus was to look at old budgets in order to get a deeper understanding  
19 that would be helpful in developing the next fiscal year's budget.

20         The formal process for considering including the position of five commissioner  
21 aides in the 2009-2010 Lane County Budget began on April 1, 2009, when Barkhurst  
22 sent an email to county staff using Handy's county email. Exhibit 34. That email  
23 stated:

24                     "Hi Jenn:  
25 \_\_\_\_\_

26 simply not credible, and his credibility is in question on other issues as well, as discussed below. To  
27 the extent that Handy's trial testimony states or suggests that Barkhurst acted independently of  
Handy's delegation of authority in any regard as discussed in this decision, such testimony or  
suggestion is also not credible.

1 "Could you please prepare an add package for the BCC Program  
Budget/010 account for 2009-2010 that reflects these two items:

2 "1) 2.50 FTE (5 people at .5FTE), level 3 of the administrative Tech  
position (benefits for staff, not for family)

3 "\* \* \* \*

4 "Please let me know if you have any questions.

5 "Thanks

6 "Phyllis Barkhurst, at the request of Commissioners Sorenson and Handy"

7 That request ultimately made its way into the formal proposed budget to be  
8 considered by the Budget Committee. Also in consideration as part of that proposed  
9 budget was the position of "Intragovernmental Affairs Coordinator." That position is  
10 described in Exhibit 35. The Intragovernmental Affairs Coordinator position survived  
11 the Budget Committee and Board budget adoption process and was included in the  
12 County's 2009-2010 approved budget at .8 FTE. Despite being approved for 2009-  
13 2010, that was the position that went unfilled and in part funded the 2.5 FTE  
14 commissioner aide positions approved on December 9, 2009, as part of Supplemental  
Budget #2.

15 In addition to her other efforts, Barkhurst assisted Handy with "BIG."<sup>6</sup> BIG is  
16 the acronym for Budget Interest Group. For no apparent reason, it also was referred  
17 to as "Book Club." Book Club was a phrase that Sorenson primarily used. This group  
18 is hereinafter referred to as "BIG." BIG was a gathering of individuals, which by May  
19 2009 might consist at any one time of Handy, Sorenson, or Fleenor and/or their  
20 respective Budget Committee appointees, Kaseberg, Land and Wilde, as well as  
21 Barkhurst.<sup>7</sup> There was a conscious effort made to not have more than two  
22 commissioners nor any more than five members of the Budget Committee at any BIG

23  
24  
25 \_\_\_\_\_  
26 <sup>6</sup>In her testimony at trial, Land described Barkhurst as the "facilitator" of these meetings.

27 <sup>7</sup>Both Handy and Barkhurst testified at trial that Barkhurst kept Handy informed of what was  
occurring at BIG meetings.

1 meeting.<sup>8</sup> All of the participants knew those numbers were important because to  
2 exceed them meant that there was a quorum of either the Board or the Budget  
3 Committee, hence a "public meeting."<sup>9</sup> Spartz was aware a group was meeting  
4 outside the regular budget process. Initially, he had seen them meeting in the CAO  
5 conference room late in the afternoon. The participants Spartz observed most  
6 frequently in the meetings were Kaseberg, Wilde and Land. He also observed  
7 Barkhurst in the meetings. He thought he had seen a commissioner sitting in on a  
8 meeting. Spartz never saw more than five Budget Committee members in attendance  
9 at any meeting he observed.

10 According to Handy's testimony, the concept of BIG developed out of meetings  
11 he had with his appointee, Wilde. Handy testified that Kaseberg became involved  
12 at Sorenson's request. From there it expanded to include Land, Fleenor's Budget  
13 Committee appointee. Barkhurst became the de-facto coordinator of BIG. See  
14 Exhibits 74 and 75. Handy testified that he did not want these meetings to be the  
15 usual "dog and pony show." He never explained his use of the phrase specifically,  
16 but the clear implication is a criticism of what he considered to be the usual Budget  
17 Committee presentations. BIG never included Stewart or Dwyer nor their Budget  
18 Committee appointees.

19 While BIG was active at the same time as the county's budget process, BIG  
20 further evolved. According to a May 5, 2009, email from Barkhurst to Sorenson and  
21 Handy, a conflict was already developing in the budget process. Exhibit 48. That

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22  
23 <sup>8</sup>Barkhurst testified at trial that she did not understand quorum rules to apply to email  
24 communications. Handy's trial testimony as to his ignorance about the Oregon Public Meetings law  
25 and an Oregon Attorney General's Handbook does not suggest he was so ignorant of the law that  
26 he did not understand the complications that would arise if a quorum of either the Board or the  
27 Budget Committee met in this context.

26 <sup>9</sup>At some point in the BIG meeting process, Kaseberg testified that she tried to even modify  
27 her email practices so as to make sure she was sending her messages to a number of participants that  
would be less than a quorum of the budget committee.

1 conflict included the issue of the funding of additional jail beds. Barkhurst made the  
2 following suggestion in her May 5 email:

3                   \*\* \* \* \*  
4                   "I am suggesting that the BIG be the place where the strategizing occurs  
5                   along with the budget committee meetings and any meetings where two of you  
6                   can gather and discuss  
7                   \*\* \* \* \*

8 Exhibit 48, page 1. Handy responded to Barkhurst's message with approval. There  
9 is no indication of Sorenson's response to this message, but he continued to  
10 participate in BIG. BIG meetings continued to occur after May 5, 2010, up until May  
11 19, 2010. May 19 was the date of the 2009-2010 Budget Committee's final meeting  
12 where the budget was approved by that group and forwarded to the Board for its  
13 consideration.

14           Although BIG was active and meeting regularly during the same time frame as  
15 the county's formal Budget Committee process, BIG met with less formality. BIG  
16 members did get assignments to work on between meetings, primarily in formulating  
17 questions to be asked regarding county budget items. No evidence was presented  
18 that BIG or its members ever prepared or kept meeting minutes. Participation was  
19 limited to those previously described and, although BIG met in public places, like in  
20 the restaurant of the Hilton Hotel, it was never a public process. The public was not  
21 invited to participate in BIG. None of the commissioners involved with BIG considered  
22 it to be a public meeting within the context of ORS 192.610 *et. seq.* Despite the lack  
23 of formality, certain documents developed as part of the BIG process in addition to  
24 email messages between members. The preponderance of evidence shows that those  
25 documents were prepared by Barkhurst.

26           The BIG documents are variations of a spread sheet containing items under  
27 consideration or proposed for consideration by the county's Budget Committee.  
28 Exhibits 77, 78, 90 and 93. The spread sheet includes costs associated with each  
29 item. Fund numbers and the necessary FTE's are set out. Unusual for a budget type

1 document is a column for "YES" and "NO" which represents a consensus of all of the  
2 participants of BIG as to whether there are six votes either in favor of (YES) including  
3 them in the final budget or opposed to including them (NO) in the final budget. Like  
4 preparing the document, the person tallying the votes was Barkhurst.<sup>10</sup> Barkhurst  
5 explained the "YES" "NO" indications on the spread sheet to a county staff person,  
6 Christine Moody, and compared it to knowing how a member of the United States  
7 Congress would vote before a vote was taken.<sup>11</sup> Christine Moody [hereinafter  
8 "Moody"] was, until December 2009, a Senior Budget Analyst for the county. In  
9 December 2009 she became the county's Budget Manager. In those positions,  
10 Moody was intimately familiar with budget documents of the county. These spread  
11 sheet documents were circulated to members of BIG up to and including the May 19,  
12 2009, Budget Committee meeting where they formed the basis for the motion that  
13 modified the approved budget by those additions or deletions.

14 Without regard to what Budget Committee members were doing generally, the  
15 time period immediately before May 19, 2009, was a busy time for BIG members and  
16 the BIG process.<sup>12</sup> Much of that activity involved communications between BIG  
17 members solidifying the understanding as to what was the agreement they had  
18

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19 <sup>10</sup>Barkhurst's trial testimony equivocated on this issue. She did not deny it was her work, but  
20 claimed a lack of recollection of the document. Further testimony generally demonstrated a lack of  
21 memory on many actions that her emails demonstrated she took. Despite her memory problem at  
22 trial, Barkhurst definitely remembered at trial that she did a head count to see where people stood  
before the May 19 vote. Her efforts at trial to distance herself from this work product were not  
credible.

23 <sup>11</sup>To the extent that the Fleenor's and Handy's trial testimony disclaimed knowledge of and/or  
24 participation in this process of vote counting, that testimony is not credible. Sorenson was not asked  
25 that question.

26 <sup>12</sup>Although there is no evidence that the suggestion ever came to fruition, as of May 11, 2009,  
27 Sorenson was so satisfied with the BIG process that he suggested that the group continue to meet  
into June 2009, at the same time that the approved budget would be being considered by the Board.  
Exhibit 73. That email was sent to Kaseberg, Wilde, Land, Handy and Barkhurst.

1 reached. On May 12, 2009, at 3:09 a.m., Barkhurst sent an email noting a BIG  
2 meeting would occur "Wednesday" at 5:30 p.m. at the Hilton.<sup>13</sup> Exhibit 75. That  
3 email also summarized some of the pending issues. Barkhurst stated:

4 \* \* \* \*

5 "The plan for this meeting is to use the CA's budget as a default  
6 document for you to bring your lists of additions, deletions, and revisions that  
7 you would like to see happen as part of this budget.

8 "Also part of the discussion will be the projected cuts from H & HS and  
9 your opinion on the items that you want more info on and/or want to see  
10 receive general fund support in lieu of some or all of the cuts that are being  
11 projected.

12 \* \* \* \*

13 *Id.* The earliest dated spreadsheet of the BIG work is dated May 13, 2009. Exhibits  
14 77 and 78.

15 By May 17, 2009, Land was concerned that the "list" she received was not the  
16 same as her recollection from Wednesday. Exhibit 88. By May 18, 2009, Land was  
17 meeting with Barkhurst at 1:00 p.m.<sup>14</sup> *Id.* On May 18, 2009, Fleenor sent a morning  
18 email to Barkhurst and Sorenson expressing a concern about needed additional  
19 Budget Committee and BIG meetings to allow the rhetoric to settle down. Exhibit 83.  
20 Fleenor proposed in that message holding "two 'mini' BIG meetings (with 5 members  
21 per meeting), back to back, this Wednesday to re-position ourselves for the heavy lift  
22 on Thursday." *Id.* Also on May 18, 2009, Fleenor sent Handy an evening email  
23 summarizing the agreement on the budget issues. Exhibit 91. Fleenor also forwarded  
24 that email to Land, who in turn forwarded it to Kaseberg. Land characterized the list  
25 as a "compromise." *Id.* That same email, Exhibit 91, was forwarded by Handy on  
26 the morning of May 19, 2009, to Barkhurst and Sorenson. By 11:30 a.m. on May  
27 19, 2009, the day of the scheduled final meeting of the Budget Committee, Barkhurst  
sent an email to Land, Kaseberg and Wilde with the subject "after checking in with

---

<sup>13</sup>This court takes notice that May 12, 2009, was a Tuesday.

<sup>14</sup>Land confirmed in her trial testimony that this meeting took place, but indicated she had no current memory of what was discussed.

1 everyone last night." Exhibit 96. That email began "[h]ere is the last list of agreed  
2 upon items with six votes for the meeting tonight." *Id.* The last BIG spread sheet is  
3 dated May 19, 2009. Exhibits 90 and 93. According to Barkhurst, that list was  
4 complete "\* \* \*" although the Resource Development Analyst position may be taken  
5 off after the commissioners contact me at lunch time." Exhibit 96. Almost  
6 immediately, Land responded to Barkhurst with concerns. Exhibit 97. In addition, on  
7 May 17, 2009, Fleenor had sent Kaseberg a message encouraging her to stay the  
8 course in the face of the "\* \* \*" Register Guard's need to exploit controversy to sell  
9 advertising." Exhibit 69. In the face of questions she raised about priorities among  
10 the various issues the budget process was weighing, Fleenor encouraged her to  
11 "[s]tay strong and focused on staying true to basic principles versus political  
12 expediency." *Id.* Those words of encouragement were echoed by Barkhurst in an  
13 email to Land, Kaseberg and Wilde on May 19, 2009:

14                   "\* \* \* \* \*"  
15                   "I am working on talking points for those who want a few bullet points  
16                   on specific items. I will share those with you too.  
17                   "On the rumor front, the room will most likely be packed tonight with  
18                   angry jail bed voices - - as I keep reminding Rob - - this is ***sound and fury*** time!  
19                   And then it will be over.  
20                   "Thanks!  
21                   "Phyllis"

22 Exhibit 96 [bold and italics in original] .

23                   Without regard to all of the issues that were agreed upon modifications to the  
24 county's budget by BIG, commissioner aide funding was always part of the package  
25 that BIG agreed would be included in the changes. That package, including  
26 commissioner aides, became a part of the approved budget at the Budget Committee  
27 meeting on May 19, 2009. Exhibit 1. The motion as set out in the BIG spread sheet  
was approved. *Id.*, at page 11. The vote was six in favor and four opposed. All six  
BIG members voted in favor. Stewart, Dwyer and their respective Budget Committee  
appointees voted against. Land voted in favor of the motion despite continuing to

1 express concerns into the afternoon of May 19, 2009. Exhibit 100.

2 The manner of the conduct of the vote and motion on May 19, 2009, is  
3 important to plaintiffs. The motion that included commissioner aides in the budget  
4 was clearly scripted from the spread sheet developed at BIG. Exhibit 2.<sup>15</sup> The order  
5 of items, their being added or removed from the budget as listed on the May 19 BIG  
6 spread sheet, Exhibit 93, tracks identically with the motion made by Fleenor and  
7 seconded by Wilde at the Budget Committee's final meeting. Exhibit 1, page 10.  
8 However, BIG's achievement of enacting the budget changes it agreed on, including  
9 the commissioner aide positions, was not without controversy. Essentially, it became  
10 a political discussion of sacrificing jail beds in favor of commissioner aides.<sup>16</sup>

11 Both the manner of how the adjustments became a part of the budget as well  
12 as the specific inclusion of the commissioner aide positions in the budget approved  
13 by the budget committee continued to be the subject of some controversy. By May  
14 27, 2009, Fleenor had a change of heart and expressed his position on the budget  
15 issues and community discussion in an editorial opinion piece published in the Eugene  
16 Register Guard. Exhibit 300. In that op-ed piece, regarding the issue of the  
17 commissioner aide positions, Fleenor stated:

18 \* \* \* \*

19 "Why add part-time assistants for commissioners? I pay for my assistant  
20 (more than \$50,000 out of my own pocket) so I can provide a high level of  
21 constituent services. Some commissioners are struggling with the workload  
22 of assisting their constituents through this very difficult period - that is why I  
23 voted for modest staffing. But I hear the outcry - the symbolism is like CEOs  
24 flying in private jets. I apologize for being insensitive and will vote to reallocate  
25 these funds.

26 \* \* \* \*

---

27 <sup>15</sup>This exhibit is comprised of several video files. Although the entire (five plus hours) May 19 meeting is available to watch and listen to, the issues that this court found important were set out in a sub-file entitled "May 19, 2009 Clips." Those include the events surrounding the motion to approve the budget amendments, the vote and the comments of committee members.

<sup>16</sup>Although this references the tenor of one part of the continuing political discussion, the financial impact of the two choices was clearly not a dollar trade-off.

1 *Id.*, page 1.<sup>17</sup> In fact, by the time the budget was adopted by the commissioners on  
2 June 24, 2009, the commissioner aide positions were not included. Those positions  
3 were removed from the budget in a five to zero vote taken at a meeting of the Board  
4 on June 17, 2009. Exhibit 3, page 5. Fleenor made the motion. Although Fleenor's  
5 public position was to remove the commissioner aides from the 2009-2010 budget,  
6 his private position continued to recognize their importance. In an email to Barkhurst  
7 on May 31, 2009, he advocated:

8 \* \* \* \* \*

9 "I would also support trying to add back commissioner assistants for the  
FY 2010-11 budget year, when there is less heat."

10 Exhibit 104, page 2.

11 At the same time that the Board was finalizing the 2009-2010 budget, there  
12 was another issue they were dealing with as a result of the conduct of the May 19,  
13 2009, Budget Committee meeting. That was a public records request from the  
14 Eugene Register Guard newspaper concerning the activities and communications of  
15 the commissioners leading up to the budget approval. The compilation of those  
16 documents produced, Exhibit 143, resulted in a cautionary email being sent from  
17 County Counsel to her clients, the Board, and Spartz on June 4, 2009.<sup>18</sup> That email  
18 stated (in its entirety):

19 "I've mostly completed the public records request from Matt Cooper  
20

---

21 <sup>17</sup>The evidence does not show how much Fleenor paid for Diane Burch's services (Fleenor's  
22 assistant) except as claimed in the op-ed piece. However, for August, October and November 2009,  
23 the evidence shows that Fleenor was receiving reimbursement from the county for at least \$1,800 per  
24 month for the monthly cost of Burch's assistant services as a claimed "constituent services" expense.  
25 Exhibit 115. There was no explanation provided at trial as to how this expense was paid during a  
period when the commissioner aide positions (formally "constituent service aide") were not a part of  
the 2009-2010 adopted budget.

26 <sup>18</sup>It is important to note that, in general, a string of email communications or the messages and  
27 responses is read from back to front or bottom to top. The earliest messages will appear at the end  
of the string or on the last page and the last or latest message will appear first in multiple  
communications or where there are multiple pages.

1 regarding Commissioner Sorenson's, Fleenor's and Handy's emails from  
2 January until May. I have provided Matt Cooper one packet of documents and  
I've told him that I'll have the rest done by this afternoon or tomorrow.

3 "This is difficult for me to say, as being the bearer of bad news is never  
4 appreciated, but I need to let you know that there are emails that I think will  
5 look very badly for the county, and for the three Commissioners if Matt decides  
6 to pursue them. There may not have been technical violations of the quorum  
laws, but the spirit of the rules appears to have been violated on several  
occasions. I'm copying all five Commissioners on this email, as well as County  
Administrator Spartz, because Mr. Cooper may contact commissioners outside  
of the three whose emails he requested."

7 Exhibit 105, page 3. County Counsel's perceived criticism was not well received by  
8 Fleenor nor Sorenson.

9 Responding to County Counsel, Fleenor suggested "[t]hanks - I'm sure if  
10 somebody wanted to look hard enough they can find a 'violation of the spirit' of just  
11 about anything." Exhibit 105, page 3. The next morning Fleenor further responded  
12 and said "I can state no deliberations toward a conclusion ever occurred. If I'm not  
13 mistaken, fact gathering and exchanging ideas would be considered a prudent form  
14 of governing." Exhibit 105, page 2. He dismissed the Register Guard's efforts as "\*  
15 \* \* a witch hunt driven by political motives." *Id.* For her part, County Counsel took  
16 a much more direct approach to Fleenor and his two responses to her original email.  
17 On June 5, 2009, she wrote:

18 "Commissioner - I an [sic] not a stupid person. \* \* \* \*  
19 "I've reviewed the emails, and I believe the RG's attorneys will see  
20 enough evidence there to allow reporters to state that the three of you were  
21 deliberating; not necessarily via email, but via a combination of meetings and  
22 emails. Whether all three of you were in the room at the same time is  
23 irrelevant to whether or not the spirit of rules was being violated. I believe  
they will come to the determination that you were using Phyllis as a conduit to  
try and avoid the public meetings law. The same arguments can be made in  
regards to a quorum of the budget committee. From County Counsel's  
perspective, these actions will be difficult to defend \* \* \* \*  
\* \* \* \* My advice is this: do not try and circumvent the rules."

24 Exhibit 105, page 1.

25 Sorenson also responded negatively to County Counsel's initial warning about  
26 the disclosure of records pursuant to the request. Exhibit 106. He suggested she  
27 had the wrong perspective. Sorenson wrote:

1 "[Addressing County Counsel's perceived failure to provide  
2 commissioners copies of what was produced] I [sic] would like you to look at  
3 this from your client's point of view.

4 "here [sic] you provide information to the news media, thereby  
5 blindsighting [sic] the elected officials of the county you represent. this [sic]  
6 engenders the view that you really don't look at it from the county's view, only  
7 the view of the media making the inquiry."

8 Exhibit 106, page 1 and 2. County Counsel was equally more direct in her response  
9 to Sorenson's message. She wrote:

10 "Commissioner, your email feels like retaliation for my compliance with  
11 a public records request. I take that very seriously. Not only did I previously  
12 offer to give copies to the commissioners, I kept you up to date on the request.  
13 I never heard from you personally regarding this request. The only  
14 communications I received were some from Commissioner Fleenor and Joe  
15 regarding how time-consuming dealing with this request would be. If a client  
16 does not respond to my communications, I cannot help them."

17 Exhibit 106, page 1. As of the effective date of the fiscal year 2009-2010 budget  
18 on July 1, 2009, it was clear to Sorenson, Fleenor and Handy that County Counsel  
19 viewed their conduct in the activities leading up to the adoption of that budget as  
20 potentially violating the Public Meetings law.

21 Without regard to his role in the May 2009 consideration of the commissioner  
22 aide positions, Handy took the lead in securing those positions as part of  
23 Supplemental Budget #2. On August 18, 2009, Handy reached out to Barkhurst in  
24 an email seeking her further help on budget issues. Exhibit 108, page 1. Stating  
25 "Fleenor is pushing - to spend more LC \$ on things," Handy wanted Barkhurst's  
26 view "\* \* \* on a general timeline you may feel ready to implement the Constituent  
27 Service staff for commissioners." *Id.* Concerning Fleenor's proposed spending,  
28 Handy stated "I'd like to tell him no more adds until he helps us get the staff put in  
29 the budget." *Id.*

30 Responding to Handy's request for assistance (after clarifying which budget  
31 item the money was being spent from) Barkhurst stated "I'll be ready to present info  
32 to you and Pete by the middle of next week - how do you want me to do this?"  
33 Exhibit 108, page 1. Handy responded "[y]ou tell us how you want to do it, let's get

1 it scheduled, thank you. Fleenor has lots of ideas that require dough and he is looking  
2 everywhere for it. Nothing is safe from him." *Id.*

3 On September 14, 2009, Moody responded to Handy's request for information  
4 about the costs associated with "Office Support Assistant" positions including a  
5 comparison of the cost of full time positions and one-half time positions. Exhibit 109.  
6 Apparently, there would be a cost savings associated with a full time person working  
7 part time for two commissioners because it would not duplicate the costs of benefits  
8 and supply/work space. *Id.* It was Moody's work that included the commissioner  
9 aide positions in the proposed Supplemental Budget #2 at the request of Handy.<sup>19</sup>  
10 In the lead up to the process of commissioner aides being considered by the board  
11 as part of Supplemental Budget #2, Moody had personal conversations with Handy,  
12 Sorenson and Fleenor about those positions. The manner in which commissioner  
13 aides were presented for consideration in Supplemental Budget #2 was identical to  
14 how they had been presented in May 2009, *i.e.*, five .5 FTEs, one for each  
15 commissioner, even though a lower cost alternative had been discussed.

16 The 2009-2010 Budget Committee's role in the budget process ended on May  
17 19, 2009, with the approval of the proposed 2009-2010 budget. In addition, despite  
18 Sorenson's suggestion that BIG may have a role after the 2009-2010 budget was  
19 approved by the Budget Committee, there was no evidence presented that BIG ever  
20 met after May 19, 2009. After May 19, Land continued to provide volunteer  
21 assistance and advice to Fleenor, however, her role after that date was as a volunteer  
22 in his initial campaign effort to seek re-election to the position of commissioner.  
23 Barkhurst's post May 19 role as a volunteer assistant to Handy as commissioner was

24 \_\_\_\_\_  
25 <sup>19</sup>Although Moody testified she informed Handy that a Board order would be necessary to  
26 include the commissioner aide positions in the supplemental budget, there was no evidence presented  
27 at trial that such an order was ever made or even discussed by the Board. That fact did not go un-  
noticed when Supplemental Budget #2 was enacted, as it was mentioned in a comment by Stewart  
after the vote.

1 not directly addressed by the evidence. However, it is a reasonable inference that her  
2 role in that capacity was significantly reduced. Barkhurst however, continued to  
3 provide assistance as described above as well as assistance to Handy in his dealing  
4 with the politics of including assistants in Supplemental Budget #2.

5 On October 19, 2009, Barkhurst sent Handy a memo on "Talking Points"  
6 related to the politics of funding assistants for the commissioners. Exhibit 110. In  
7 general terms, those talking points would point out the benefit to commissioners as  
8 well as county residents if the commissioner aide positions were available. It appears  
9 those talking points were part of a forwarded message string sent from Handy to  
10 Fleenor. *Id.*, page 2. Moody testified that she entered the commissioner aide  
11 positions in Supplemental Budget #2 documents on November 25, 2009.

12 On December 4, 2009, the Eugene Register Guard published the Notice of  
13 Supplemental Budget Hearing. Exhibit 308. On December 9, 2009, the Board met  
14 for the required public hearing on Supplemental Budget #2. No member of the public  
15 appeared to speak on the subject of any proposed changes in the budget. Exhibit 6,  
16 page 1. Handy moved and Dwyer seconded a motion to approve Supplemental  
17 Budget #2, which contained the commissioner aide positions. The budget  
18 amendment was adopted on a vote of three to two. Sorenson, Handy and Dwyer  
19 voted to approve and Fleenor and Stewart voted no.

20 On December 11, 2009, Handy sent a message to Barkhurst describing the  
21 events leading up to the vote on December 9 as well as the vote itself. Handy wrote:

22 \* \* \* \* \*

23 "I tossed and turned all night before, getting up a few times to review  
24 my moves and conversations come morning. When I woke up to the RG  
25 demagouging [sic] on the front page and in the editorial, I was breathless for  
26 a moment, then thoroughly determined to kick ass and get after it. When I got  
27 to CAO, I could see Dwyer was there. So, for the second time this year, I  
came in and knocked everyone over with my booming voice ragging the RG for  
trying to intimidate some Commissioners about how they should make their  
budget decisions. Zimmer was in Dwyers [sic] doorframe chatting with him,  
my voice almost knocked her over and she shrunk off somewhere. After  
strongarming him the afternoon before after the Management Team at PW (and

1 sharing your work for him and Janet - he liked it!), I put it to him bluntly. I  
2 needed his support, was he still with me. He said yes. I told him I would  
3 make the motion, would he second. he [sic] said yes. I said not just for  
'discussion' but for support, yes? he [sic] said yes. Faye could hear the whole  
4 conversation in the next room - doors were open.

5 "Then, I dipped into Faye's office, told him I knew he was not  
6 supporting this, but I set this up, so that he could direct his funds toward Jeff  
7 if he wants. He seemed appreciative. Dwyer poked his head in Faye's, told  
8 me, and he wanted me to come back into his office. he [sic] said, just vote -  
9 don't say anything. He said when you have the votes lined up, just vote, don't  
10 give the press any further fodder, by getting into debates and arguments. I  
11 told him that knowing you were with me, I would do that.

12 "Wrapped around with Pete, he is still amazed I am working with Dwyer  
13 successfully. He's still telling me Dwyer is going to screw me, then fuck me.  
14 I told him turn to me first after Christine's intro, so I could make the motion  
15 immediately. Despite having spent an hour with Pete the afternoon before  
16 (including ½ hour with Christine and I), he asked how I planned to insert this  
17 into the budget. I said PETE-IT'S ALREADY IN THERE YOU FOOL!-THEY  
18 HAVE TO TAKE IT OUT!

19 "It was all relatively quick and painless. Faye complained and asked  
20 Christine how this got stuck in the supplemental, which commissioner did it.  
21 She handled it adroitly, without naming names. FS said he would not hire  
22 assistants. Mia's work with Fleenor was effective. He made his speech,  
23 emphasis on returning his share to the general fund, mentioned that he funded  
24 constituent aides out of his pocket because they were important, but that the  
25 timing of this was wrong. Went to Pete 'let's go to a vote.' No one showed  
26 up for the public hearing.

27 "Pete is on cloud nine. I don't think it has set in yet for me. Press  
crawled over it, Pete did all of the media requests, he is on message. Sue  
Palmer filling in for Matt Cooper this week-yea! You should read her piece in  
Thursday's paper-how refreshing!  
" \* \* \* \* "

Exhibit 112, pages 1-2 [capital letters in original].

In his trial testimony, Handy addressed his comments in Exhibit 112. Handy  
claimed in his testimony that Exhibit 112 was intended to be humorous; some attempt  
at private humor. Handy's trial testimony admitted these "meetings" took place, but  
he also took issue with how he had characterized the discussions in his email. In his  
trial testimony, Handy also claimed a lack of memory as to who made the motion on  
December 9, 2009, for approval of supplemental budget #2. Regarding specific  
statements he made in Exhibit 112, Handy repeatedly described them at trial as an  
embellishment or embellishments of the facts. Handy specifically denied, in his trial  
testimony, that he orchestrated the vote for the approval of Supplemental Budget #2.  
When confronted at trial, Handy did admit that the events surrounding the vote to

1 approve Supplemental Budget #2 played out exactly as he had described them in  
2 Exhibit 112. Handy denied speaking to Fleenor before the December 9 vote.

3 Having had the opportunity to carefully review all of the evidence presented in  
4 this matter, this court accepts that the manner of presenting the description of  
5 activities by Handy in Exhibit 112 could be characterized as an effort at self-  
6 grandiosity. After all that occurred, he obviously had reason to boast as the matter  
7 was now a *fait accompli*! The salty language suggests it was a message meant for  
8 a close and trusted friend. He may have had reason to share his success with his  
9 friend, but nothing suggests that the events portrayed as occurring were made up.  
10 Any claim by Handy that the actual events he described as occurring in Exhibit 112  
11 are somehow made-up or exaggerations is not credible.

12 The Supplemental Budget #2 calendar, Exhibit 400, indicates that by November  
13 25, 2009, the proposed supplemental budget needed to be sent to the Register Guard  
14 for publication. For some unexplained reason, that notice for publication was faxed  
15 to the newspaper on December 1, 2009, for publication on December 4. Exhibit 307.  
16 That December 4 publication date conforms with the calendar's schedule. Exhibit  
17 400.

18 Handy, Sorenson and Fleenor were aware that Supplemental Budget #2 would  
19 re-allocate funds to allow the employment of commissioner aides.<sup>20</sup> Although the  
20 exact date Sorenson and Fleenor became aware of that fact is unclear, it was  
21 certainly several weeks in advance of the scheduled meeting on December 9. Handy  
22 was aware Fleenor would not be supporting the proposed enactment in the vote on  
23  
24

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25  
26 <sup>20</sup>Fleenor's trial testimony to the effect that he first learned of the inclusion of commissioner  
27 aide positions in Supplemental Budget #2 on December 9 is not credible. It is directly refuted by the  
fact that his campaign workers were communicating about his position on the matter on December  
8. It is further refuted by Moody's testimony about a conversation she had with him. Exhibit 111.

1 December 9,<sup>21</sup> On December 8, Handy and Sorenson met to discuss the issue of  
2 enacting Supplemental Budget #2. A portion of that discussion included the  
3 participation of Moody, who explained the budgetary issues as they related to  
4 including the positions of commissioner aides as 2.5 FTE<sup>22</sup>. Handy knew Sorenson  
5 was supporting the enactment of Supplemental Budget #2 including the commissioner  
6 aide positions. Handy knew that he needed three votes for the enactment. As of  
7 December 8, his December 11 missive, Exhibit 112, suggests he only had two, his  
8 and Sorenson's.<sup>23</sup> On the morning of December 9, Handy approached Dwyer in his  
9 office confirming his support for the enactment of Supplemental Budget #2.<sup>24</sup> That  
10 was a follow-up to a conversation the two had the day before on the subject of  
11 including commissioner aides in the supplemental budget. On December 9, Handy

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12  
13 <sup>21</sup>There was no evidence that Fleenor's position was ever a surprise or even a secret. Handy's  
14 August 18, 2009, email makes it clear that Fleenor's Fall 2009 spending priorities did not include the  
15 commissioner aide positions and Handy needed to take action. Moody testified Fleenor told her,  
16 shortly before the December 9 meeting, that he was concerned about how Handy and Sorenson felt  
17 about the fact that he wasn't planning on supporting the commissioner aide positions in the  
18 supplemental budget. Handy admitted in trial testimony that both he and Barkhurst knew Fleenor's  
19 position.

18 <sup>22</sup>There is additional evidence of these events, confirming Handy's narrative in Exhibit 112.  
19 The testimony of Moody confirms that this Handy-Sorenson-Moody meeting took place and lasted  
20 20 minutes in her estimation. A part of that discussion involved the choice between temporary  
21 compared to permanent positions for the commissioner aides. The significance of that discussion,  
22 according to Moody, was that the temporary positions had no "FTE", but would be limited to  
23 working 1040 hours per year.

22 <sup>23</sup>At least through Fleenor's inner circle, it appears there was more confidence that Handy had  
23 the three votes at least as early as December 8. In an email on that December 8 date, Land, now a  
24 Fleenor campaign volunteer wrote to the campaign general message board "I understand that Rob  
25 & Pete want assistants and the political cover to do it, and with Dwyer they'll have the three votes  
26 necessary." Exhibit 111, page 1. Dwyer's earlier commitment is also described by Handy in Exhibit  
27 112, when Handy says he asked Dwyer when he first arrived on December 9 "was he [Dwyer] still  
with me" clearly indicating a prior commitment. *Id.*

26 <sup>24</sup>Handy's trial testimony that he did not ask for Dwyer's support is not credible. Handy  
27 needed to confirm that support on December 9 - to make sure that Dwyer was not intimidated by the  
Register Guard article Handy had read.

1 wanted Dwyer to not only make the motion, but to vote in favor of enactment.<sup>25</sup>  
2 Dwyer agreed. Dwyer wanted the enactment voted on with the least amount of  
3 public discussion. Also on the morning of December 9, Handy was aware that  
4 Stewart would not support the enactment, but Handy informed Stewart in his office  
5 that the budget was structured in a way so as to allow Stewart's use of the money  
6 in a manner other than the hiring of an assistant.<sup>26</sup>

7 The conclusion of Handy's December 9 pre-public meeting efforts included a  
8 final meeting with Sorenson, in Sorenson's office. Handy made sure Sorenson knew  
9 that Dwyer had agreed to support the enactment of Supplemental Budget #2. Handy  
10 made sure Sorenson knew to get to him immediately after Moody's presentation so  
11 that the motion could be made immediately. Sorenson may not have shared Handy's  
12 belief that Dwyer would actually vote in favor of enacting Supplemental Budget #2  
13 when it came time to vote. The conduct of the Board meeting on December 9, so far  
14 as it concerns the presentation and enactment of Supplemental Budget #2, went  
15 exactly as Handy had orchestrated it in the few days before. Exhibit 7<sup>27</sup>. Handy was  
16 pleased that Moody did not give his name for the public meeting record as the person  
17 who had requested that the commissioner aide positions be included in the

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18  
19 <sup>25</sup>Although the specifics of what was overheard did not corroborate exactly what was said,  
20 Mellissa Zimmer's testimony was sufficiently specific to indicate she overheard at least a part of this  
conversation. Ms. Zimmer is the Board's Secretary.

21 <sup>26</sup>Stewart's trial testimony indicated that Handy actually asked Stewart if he would support  
22 the positions and that Stewart said no. Perhaps Handy was looking for more support than he  
23 described in his email. It is also possible that Stewart interpreted Handy's approach and the  
24 suggestion of an alternate use for the money by Stewart as a request for support. This court believes  
Stewart was credible when he testified to his understanding of Handy's approach as a request for  
support that morning, as that could be a matter of interpretation from a particular point of view.

25 <sup>27</sup>This exhibit received at trial, a USB thumb drive, is corrupted according to the court's  
26 technical staff. Staff reported the data, if recoverable, could not be recovered with the tools on hand.  
27 Upon notice of the defect, plaintiffs' attorney provided a replacement DVD disk containing the  
excerpted portions of video from the December 9, 2009, Board meeting. The DVD has been viewed  
by the court. Both items have been kept and are part of the court's exhibits.

1 supplemental budget. To the extent that Handy has denied in trial testimony that he  
2 "orchestrated" the December 9 vote on the enactment of Supplemental Budget #2,  
3 that denial is not credible. That is exactly what he did.

4         Neither the Budget Committee nor BIG played any part in the processes leading  
5 up to or included in the enactment of Supplemental Budget #2. Although Fleenor did  
6 not vote to support adoption of Supplemental Budget #2, he took advantage of the  
7 opportunity it afforded him and hired an assistant. His efforts in doing so created  
8 some consternation among county administrative staff because he was not following  
9 county procedures for "fair and open competition" for the position. Exhibit 126.  
10 Although not clearly stated in the trial testimony, a reasonable inference from Melissa  
11 Zimmer's testimony, that Fleenor has had the same assistant for four years, is that  
12 Diane Burch got the job. She was the person Fleenor privately funded - expensed to  
13 the county - as his aide.

14         The present case was filed on February 5, 2010, within 60 days of the  
15 enactment of Supplemental Budget #2. Plaintiffs' First Request for Production of  
16 Documents Directed to Defendant Bill Fleenor was dated February 19, 2010. Exhibit  
17 138. Fleenor was aware of that request. This request was disputed and various  
18 other requests for documents from defendants, including Fleenor, were made. In his  
19 deposition on September 20, 2010, because of a personal computer hard drive failure  
20 in July or August 2009, Fleenor testified that had been unable to produce requested  
21 documents from his personal computer. He testified, however, that the failed hard  
22 drive was still available. On October 21, 2010, within 30 days of his deposition as  
23 provided in ORCP 39F(2), Fleenor corrected his deposition and then wrote that the  
24 hard drive failed on April 19, 2010, had been replaced and the failed drive had been  
25 discarded. Exhibit 130. Several of the emails in the time frame of this case reflect  
26 that Fleenor used a non-county email address. See Exhibit 74. That email address  
27 was info@kimillia.com. Fleenor's campaign "whiteboard" communication system and

1 its stored messages were apparently also not available, according to Fleenor.

2 In addition to Fleenor's problem with his personal computer hard drive, issues  
3 arose with respect to his "Outlook" calendar after this case was filed. Before this  
4 case was filed, his calendar was maintained on the county system and accessible to  
5 several individuals, including Zoanne Gilstrap, Lane County Administrative Services  
6 Supervisor [hereinafter "Gilstrap"]. Gilstrap testified that she had seen entries related  
7 to Book Club in various calendars, including Fleenor's. After this case was filed,  
8 Gilstrap observed that references to Book Club had been removed from Fleenor's  
9 calendar and then she no longer had access to that calendar. Gilstrap also observed  
10 Book Club meetings in the CAO conference room. One of Gilstrap's responsibilities  
11 was to supervise the employees who work in the CAO, including the persons who  
12 worked at the front desk. One of the front desk people she supervised in the period  
13 after the case was filed was Rudy Chavarria [hereinafter "Chavarria"].

14 An incident occurred on June 30, 2010, between Chavarria and Fleenor. A  
15 portion of the incident was observed by Gilstrap. She could see Fleenor and  
16 Chavarria in the CAO conference room, where they had gone at Fleenor's request and  
17 Fleenor had closed the door. Chavarria interpreted Fleenor's approach and comments  
18 as suggesting Chavarria was now somehow involved in the present case. The incident  
19 confused Chavarria and was very upsetting to him. In addition, the incident was  
20 upsetting to Gilstrap. The next day, based on what she had seen and that Chavarria  
21 had reported to her, she made notes of the incident. Those notes are Exhibit 120.  
22 Chavarria felt he was being pressured by Fleenor after Fleenor received some  
23 information that Chavarria was going to be a witness in the case. As he was leaving  
24 the contact, Fleenor said to Chavarria that he should remember that he "hadn't seen  
25 anything." In their conversation, Fleenor poked Chavarria in the chest as he spoke  
26 to him. Gilstrap got involved because she was worried about what effect the  
27 conversation was having on Chavarria. The next day, Fleenor approached Chavarria

1 to apologize to him. Fleenor told Chavarria that he didn't mean to scare him and  
2 shook Chavarria's hand. At that point Fleenor reminded Chavarria to tell the truth.  
3 Although the incident obviously upset and disturbed Chavarria, he testified at trial  
4 that it did not affect his trial testimony, which was truthful.

5 Several county employees testified that they had observed Fleenor, Handy and  
6 Sorenson in a county office or conference room together at various times.<sup>28</sup> In one  
7 particular occasion, the testimony indicated that the three of them met with Eugene  
8 Mayor Kitty Piercy in a commissioner's office.<sup>29</sup> Fleenor, Handy and Sorenson each  
9 testified that the three of them had never been together in any one room/office in the  
10 CAO and that the three of them did not meet with Mayor Piercy in the CAO. Mayor  
11 Piercy was not a witness. Regarding any of the observed "meetings" between the  
12 three individual defendants or any two of them as observed by any county employee,  
13 none of the witnesses to those meetings were aware of any subject that the  
14 commissioners were discussing beyond the hearing of a single word or two. In  
15 particular, other than discussed above, no witness testified they were aware of a  
16 commissioners' discussion(s) including the subject of commissioner aide positions in  
17 the general county budget in the spring of 2009 nor the supplemental budget in  
18 December 2009.

#### 19 Conclusions of Law

20 Oregon Public Meetings law is set out in ORS 192.610 *et.seq.* The policy of  
21 these provisions is set out in ORS 192.620 which states:

22 "The Oregon form of government requires an informed public aware of  
23 the deliberations and decisions of governing bodies and the information upon

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24 <sup>28</sup>No witness who testified that they participated in any BIG meeting nor any witness who  
25 testified that they observed any BIG/Book Club meeting occurring indicated that they observed any  
26 three of the participating commissioners in the same meeting at the same time.

27 <sup>29</sup>The witnesses' testimony differed as to which commissioner's office the meeting took place  
in.

1 which such decisions were made. It is the intent of ORS 192.610 to 192.690  
2 that decisions of governing bodies be arrived at openly."

3 Plaintiffs alleged in their Second Amended Complaint that "[b]etween April of 2009  
4 and December 9, 2009, defendants Sorenson, Handy and Fleenor met privately on  
5 multiple occasions to deliberate toward decisions ultimately contained in *FY 2009-*  
6 *2010 Supplemental Budget #2.*" *Id.*, page 5, paragraph 17 [italics in original].

7 Oregon Public Meetings law further provides in ORS 192.630(1) that "[a]ll  
8 meetings of the governing body of a public body shall be open to the public and all  
9 persons shall be permitted to attend any meeting except as otherwise provided by  
10 ORS 192.610 to 192.690." As used in Oregon Public Meetings law, "meeting" is  
11 defined to mean:

12 " \* \* \* the convening of a governing body of a public body for which a  
13 quorum is required in order to make a decision or to deliberate toward a  
14 decision on any matter. 'Meeting' does not include any on-site inspection of  
15 any project or program. 'Meeting' also does not include the attendance of  
members of a governing body at any national, regional or state association to  
which the public body or the members belong."

16 ORS 192.610(5). As to the actual vote and decision process on December 9, 2009,  
17 as depicted in Exhibit 7, the parties agree that process was a lawful public meeting.  
18 The disputes in this case surround the events leading up to that vote, *i.e.*, a claim of  
19 improper deliberations and pre-public meeting decision making. Oregon Public  
20 Meetings law does not define deliberate or deliberations. Merriam-Webster's  
21 Collegiate Dictionary, 10<sup>th</sup> Ed. [hereinafter "Webster's"], defines "deliberate" as "to  
22 think about and discuss issues carefully" and "to think about deliberately and often  
23 with formal discussion before reaching a decision." It also provides a definition of  
24 "deliberation" as "a discussion and consideration by a group or persons of the  
25 reasons for and against a measure." *Id.*

26 Defendants raise two legal issues related to the events presented in the  
27 evidence concerning the 2009-2010 budget process. The first of those issues is the

1 statute of limitations applicable to these proceedings set out ORS 192.680(5) and  
2 raised as an affirmative defense by all defendants. That statute provides "[a]ny suit  
3 brought under subsection (2) of this section must be commenced within 60 days  
4 following the date that the decision becomes public record." *Id.* ORS 192.680(2)  
5 provides:

6 "Any person affected by a decision made by a governing body of a  
7 public body may commence a suit in the circuit court for the county in which  
8 the governing body ordinarily meets, for the purpose of requiring compliance  
9 with, or the prevention of violations of ORS 192.610 to 192.690, by members  
10 of the governing body, or to determine the applicability of ORS 192.610 to  
11 192.690 to matters or decisions of the governing body."

12 The statute of limitations defense attacks plaintiffs evidence surrounding the events  
13 leading up to and including the May 19, 2009, Budget Committee approval and the  
14 Board's June 24, 2009, adoption of the 2009-2010 Lane County budget. That legal  
15 theory also was the basis for defendants' trial objections to that evidence.

16 As to any claim by plaintiffs that the deliberations occurring by BIG and/or the  
17 Budget Committee in relation to approval of the proposed budget and/or any claim  
18 that deliberations by the Board in relation to adoption of the 2009-2010 budget  
19 constitute a continuing process culminating in the adoption of Supplemental Budget  
20 #2, this court agrees with defendants.<sup>30</sup> This court rejects any such continuing  
21 process argument. This court has previously stated and re-affirms here that plaintiffs'  
22 evidence, to the extent it only proves that there were improper deliberations toward  
23 the Budget Committee's approval of the budget in May 2009 and/or the Board's  
24 adoption of the Budget in June 2009, would not be sufficient to establish improper  
25 deliberations in the adoption of Supplemental Budget #2. This court is satisfied that  
26 the earlier two actions by the public bodies were separate decisions under ORS  
27 192.610(1) and that the statute of limitations on those two actions expired some time

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<sup>30</sup>This is the argument that plaintiffs make on page 11 of Plaintiffs Trial Memorandum.

1 in July and August 2009 pursuant to ORS 192.680(5), as defendants' claim.

2 As is more specifically discussed below, a plaintiff's right of action derived  
3 from ORS 192.680(2) includes the right to require compliance with the statutory  
4 scheme, prevent violations of it or seek a determination that is applicable to matters  
5 or decisions of the governing body. A "meeting" of the governing body requires at  
6 least a quorum of the governing body making or deliberating toward a decision. A  
7 decision is:

8 " \* \* \* any determination, action, vote or final disposition upon a  
9 motion, proposal, resolution, order, ordinance or measure on which a vote of  
a governing body is required, at meeting at which a quorum is present."

10 ORS 192.610(1). While this court agrees with defendants' claims regarding the  
11 statute of limitations on those earlier events, as this court has previously ruled, that  
12 does not mean the evidence surrounding those events should not have been  
13 presented in this trial. As stated on multiple occasions, that evidence was within the  
14 scope of the pleadings. Further, as is more fully explained below, that evidence has  
15 direct relevance on at least two issues in this case.

16 The second legal issue defendants pled as an affirmative defense is a lack of  
17 standing on the part of plaintiffs to challenge the decision to include the commissioner  
18 aide positions in Supplemental Budget #2. Standing to make a claim under Oregon  
19 Public Meetings law is derived from ORS 192.680(2). In the context of that  
20 argument, defendants were careful to not stipulate that plaintiffs, or either of them,  
21 would testify that, because they were opposed to expenditures in Supplemental  
22 Budget #2, *i.e.*, commissioner aide positions, they were thereby "adversely affected"  
23 by the Board's decision to adopt that supplemental budget. See Plaintiffs' Second  
24 Amended Complaint, page 2, paragraph 8.

25 Initially, while recognizing the sparsity of appellate interpretation by Oregon  
26 courts concerning the Oregon Public Meetings law, the Oregon Court of Appeals  
27 decided *Harris v. Nordquist*, 96 Or App 19, 771 P2d 637 (1989), and included in a

1 discussion of the case the issue of "standing" in the context of a claim under ORS  
2 192.610 to 192.690. Although an earlier version of the statute examined in *Harris*  
3 was organized differently, the verbiage concerning standing is virtually identical. In  
4 *Harris*, plaintiffs were a labor organization which included as members employees and  
5 residents of the Phoenix-Talent School District. Defendants were the district, its  
6 board of directors, the superintendent and the board clerk. The issue was alleged  
7 secret meetings of a quorum of the board in various restaurants where it was alleged  
8 they discussed and decided district issues. In *Harris*, those defendants contended  
9 "that it is necessary for a plaintiff to allege specifically that he has been affected by  
10 a decision of the governing body in order to have standing and that the plaintiffs have  
11 no such allegation." *Id.*, 96 Or App at 22. In resolving the question of plaintiffs'  
12 standing to bring the complaint, the court in *Harris* stated:

13 "Although a literal reading of the first phrase of the statute might support  
14 defendants' contention, that interpretation would run counter to the clear  
15 policy of the statutory scheme to keep the public informed of the deliberations  
16 and decisions of governing bodies and of the information on which decisions  
17 are made. ORS 192.620. That is not to say that ORS 192.080(1) permits just  
18 anyone to bring an action. To have standing, one must be affected by a  
19 decision, if one is made, and, if that is the case, the statute, read as a whole,  
20 authorizes the commencement of an action. If, for example, it were necessary  
21 to allege that a specific decision had been made that affected the plaintiff, it  
22 would be too late to bring an action 'for the purpose of requiring compliance  
23 with' the law; the decision would have been made. Although a decision may  
24 be voided, the statute provides that the court 'shall not' void it, if other  
25 equitable relief is available, and it is difficult to perceive what other effective  
26 relief would be available, if the decision is an accomplished fact.

27 "The same is true with respect to an action brought 'for the prevention  
of violations' of the law. That cannot be accomplished with respect to a  
decision that has already been made, unless the court voids that decision; yet,  
the courts are told not to do that, except as a last resort. Furthermore, an  
action may be commenced to determine the applicability of the law to  
'decisions of the public body;' it seems clear that, to maintain an action for  
that purpose, there need not have been a decision affecting the plaintiff.  
Considering the statute as a whole, we conclude that the statute contemplates,  
at least, that any person who might be affected by a decision that might be  
made has standing to see that the decision is made in compliance with the  
Open Meetings Law.

"Plaintiffs allege that they are residents of the district, that some  
members of OSEA are its employees and that at least some of them are  
taxpayers in the district; they also allege that all of them are 'vitaly interested  
in all manner of decisions made by Defendants and the input, comments and

1 deliberations incident to such decisions by school board members,  
2 administrators and advisers whose counsel members seek preparatory to make  
3 decisions.' They also allege that defendants are not complying with the Open  
4 Meetings Law, referring to specific instances of 'secret' meetings attended by  
a quorum of the board. That is enough to show that plaintiffs are affected by  
defendants' decisions and to permit them to maintain this action seeking  
compliance with the law. \* \* \* \*"

5 *Id.*, 96 Or App at 22-23. As stated in *Harris*, standing is a threshold issue for the  
6 court.

7 Defendants in the present case take a slightly different approach to the  
8 standing question as it relates to plaintiffs claims here. Essentially, they argue: (1)  
9 the decision to expend the funds included in Supplemental Budget #2 was a decision  
10 made in the adoption of the 2009-2010 budget in June 2009; (2) there is no new  
11 consideration of money expenditures in relation to the commissioner aide positions  
12 as that money was actually available to be expended as of July 1, 2009, albeit for  
13 a different position and different purposes - it was still part of the budget for the  
14 board; (3) therefore, defendants' conclude that because the money was previously  
15 authorized to be expended and there was no new money nor increased total  
16 expenditures involved, plaintiffs could not have been affected by the enactment of  
17 Supplemental Budget #2.

18 In plaintiffs' Second Amended Complaint, they initially sought: (1) a judgment  
19 declaring that defendants made the decision to adopt Supplemental Budget #2 in  
20 violation of the Public Meetings law making that decision in private meetings; (2)  
21 invalidating the enactment of Supplemental Budget #2; (3) an injunction restraining  
22 defendants from future violations of the Public Meetings law; (4) a judgment for their  
23 costs and attorney fees; and (5) a judgment for personal joint/several liability by the  
24 individual commissioner defendants for attorney fees based on the claim that their  
25 actions were willful violations of the Public Meetings law. The previous sentence  
26 refers to the past tense because this court, in ruling on Defendants' Motion for Partial  
27 Summary Judgment, entered partial summary judgment in favor of defendants on

1 plaintiffs' request for this court to invalidate the enactment. This court determined  
2 that question was moot as of July 1, 2010, and signed an order on November 23,  
3 2010, allowing the motion for partial summary judgment. *A/so see* this court's letter  
4 opinion dated October 25, 2010, page 3. Plaintiffs' remaining claims are what this  
5 court is obligated to decide. It is in the context of those remaining questions that this  
6 court examines plaintiffs' standing.

7 In resolving this issue, this court looks again at the policy for this statute that  
8 the court recognized in *Harris*. That court stated "\* \* \* that interpretation would run  
9 counter to the clear policy of the statutory scheme to keep the public informed of the  
10 deliberations and decisions of governing bodies and of the information on which  
11 decisions are made." *Id.*, 96 Or App at 22. At its essence, defendants argument  
12 would mean that no person could be "affected," as used in ORS 192.680(2), by a  
13 decision of the Board related to any future decision on the budget after its adoption,  
14 so long as the decision did not include new money being expended. In defendants'  
15 view, apparently no person could be affected by the decision to adopt Supplemental  
16 Budget #2. This court concludes that is too narrow a reading of the meaning of  
17 "affected."

18 Returning to *Harris*, the kernel this court derives from that decision as to the  
19 meaning of "affected" is "the statute contemplates, at least, that any person who  
20 might be affected by a decision that might be made has standing to see that the  
21 decision is made in compliance with the Open Meetings Law." *Id.*, 96 Or App at 22.  
22 To have an affect, or be affected, "implies the action of a stimulus that can produce  
23 a response or reaction." Webster's. The dispute in this case now surrounds the  
24 actions of the Board members leading up to what was adopted as Supplemental  
25 Budget #2. Defendants produced no evidence to refute plaintiffs' claims that they  
26 opposed those expenditures, and particularly the inclusion of commissioner aide  
27 positions in the budget. They have a reason they oppose those expenditures, that

1 being a belief that the money should be spent on other county priorities.

2 The important part of the statutory policy in the context of this case is the  
3 obligation to allow the public to be informed of the decisions and deliberations of the  
4 governing body. Defendants' position would exempt a huge portion of decision  
5 making from that policy. In *Harris*, the claim the court rejected was the claim that the  
6 lack of an allegation of a specific decision meant that plaintiffs could not have been  
7 "affected." Here, by plaintiffs' alleging specific actions leading up to the decision to  
8 adopt Supplemental Budget #2, defendants somehow translate the "affect" of the  
9 decision on plaintiffs to be well beyond the right plaintiffs shared under the statute  
10 with other Lane County citizens to simply be informed of the decisions and  
11 deliberations.<sup>31</sup>

12 In Supplemental Budget #2, the Board's action was a decision to eliminate a  
13 position created in June 2009 at .8 FTE. An additional expenditure of \$20,000 from  
14 another previously approved source was combined with the .8 FTE added to 1.7 FTE  
15 to create the total 2.5 FTE necessary to fund five one-half time commissioner aide  
16 positions. Simply because the expenditure of funds is authorized for a particular  
17 purpose in the budget does not mean they must be expended for that or any other  
18 purpose. The Board could have not used those funds or could have allocated them  
19 in the 2009-2010 budget year for a purpose plaintiffs supported. Because the matter  
20 was properly before the board as a "decision," that being the question of whether or  
21 not to adopt a proposed supplemental budget, the Public Meetings law required that

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22  
23 <sup>31</sup>It is hard to understand how this court could find no standing for plaintiffs to challenge a  
24 specifically identified decision and seek to enforce the statutory obligations of the Public Meetings  
25 law surrounding that decision when the court in *Harris* found standing by similarly situated plaintiffs  
26 to enforce compliance with Public Meetings law without regard to any particular decision being  
27 identified. That may be a particular way defendants in the present case view *Harris* as wrongly  
decided, as they stated. In fact, that ultimately was the downfall of the plaintiffs in *Harris*. They did  
not prevail because they could not produce any evidence that the quorum of defendants' board was  
deliberating as opposed to information gathering as a group. *Id.*, 96 Or App 25.

1 the actions of the governing body on the question presented were required to be  
2 taken in compliance with those laws. Plaintiffs have produced sufficient facts to  
3 demonstrate they have standing to challenge the actions of the Board and the  
4 individual defendants in the decision that ultimately was the adoption of Supplemental  
5 Budget #2.

6 Defendants raise the issue of how a meeting occurs in the context of the  
7 evidence presented. ORS 192.670 recognizes that a "meeting" occurs outside of a  
8 quorum of the governing body in the same room, face to face. It states:

9 "(1) Any meeting, including an executive session, of a governing body  
10 of a public body which is held through the use of a telephone or other  
11 electronic communication shall be conducted in accordance with ORS 192.610  
12 to 192.690.

13 "(2) When telephone or other electronic means of communication is used  
14 and the meeting is not an executive session, the governing body shall make  
15 available to the public at least one place where the public can listen to the  
16 communications at the time it occurs by means of speakers or other devices.  
17 The place provided may be a place where no member of the governing body  
18 of the public body is present."

19 *Id.* Defendants argue that it is not clear that Oregon Public Meetings law applies to  
20 email communication. In distinguishing an email communication, they argued "[t]he  
21 statute gives no indication that a 'meeting' occurs when members of the governing  
22 body send one another written letters - there is no principled reason why a 'meeting'  
23 should arise when members send a copy of the same letter electronically."  
24 Defendants Rob Handy, Peter Sorenson and Bill Fleenor's Trial Memorandum  
25 [hereinafter "Individual Defendants' Trial Memorandum"], Page 5. The last  
26 amendment to ORS 192.670 occurred in 1979. 1979 Oregon Laws, Chapter 361,  
27 section 1. There was no evidence presented when the concept of email was created  
or when it became common knowledge what an email was, but this court concedes  
that it seems unlikely that the legislature conceived of email in its present form in  
1979. That being said, it does not mean the law as written is not broad enough to  
encompass email communication as a possible manner of deliberation by the

1 governing body of a public body at this time.<sup>32</sup> According to Webster's, published  
2 in 1999, "electronic" means "relating to or utilizing devices constructed or working  
3 by the methods or principles of electronics; implemented on or by means of a  
4 computer." Without regard to defendants' argument as to how the email  
5 communication is used, *i.e.*, in lieu of a written letter or like a short telephone  
6 message, this court concludes that email is a means of communication and is an  
7 "electronic communication" as that term is used in ORS 192.670(1). With regard to  
8 this court's decision about the events surrounding the December 9, 2009, adoption  
9 of Supplemental Budget #2, that conclusion is probably of no consequence to this  
10 court's decision.

11 The question now posed for this court is whether the evidence shows that it  
12 is more likely true than not true that the defendants, including at least a quorum of  
13 the Board, conducted a meeting or meetings in violation of Oregon Public Meetings  
14 law in either deliberating on or deciding on the adoption of Supplemental Budget #2.<sup>33</sup>  
15 Broken down, that question determines: (1) did at least three members of the Board;  
16 (2) make a decision or deliberate toward deciding Supplemental Budget #2; (3) in any  
17 setting that was private and was not open to the public.

18 In addressing the above question, this court has struggled with the view that  
19 there ought to be some bright line rule that can be identified by the court for the  
20 benefit of these defendants as well as others that may be concerned about this  
21 question. In the context of the case before this court, this court is satisfied that a  
22 continued search for a bright line rule is a fool's errand. Further, and more  
23

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24 <sup>32</sup>Based on the evidence presented in the present case, this court rejects defendants' analogy  
25 to email as the equivalent of a letter. As the various emails show, they are far more like the normal  
26 back and forth in conversation than correspondence in letter form. There is the opportunity for  
immediate viewing and response. That in fact occurred in several emails in this case.

27 <sup>33</sup>This definition of "preponderance" of evidence is derived from the 2009 version of UCJI  
14.02.

1 importantly, it is unnecessary in order to answer the questions raised in this case.  
2 In the present case, it is this court's conclusion that it is certainly more likely true that  
3 defendants engaged in a process that involved at least a quorum of the board  
4 deliberating toward and deciding on the adoption of Supplemental Budget #2 in  
5 private and in meetings that were not open to the public. In answering this basic  
6 question, this court looks only to the evidence of the actions of defendants after June  
7 24, 2009.

8 From about August 2009, the evidence is clear that Handy was almost single-  
9 minded in his determination to pursue inclusion of commissioner aides in the Lane  
10 County budget, including the 2009-2010 budget year. He had the support of  
11 Sorenson, who shared his view that commissioner aides were needed. No matter  
12 who else participated in the process individually, this issue was obviously owned by  
13 Handy. He brought in his trusted aide, Barkhurst, to assist and together they put the  
14 package together for Moody. Moody, as a county staff member, included it in the  
15 supplemental budget proposal.<sup>34</sup> If that were all of the evidence plaintiffs' presented,  
16 they could not prevail as there is nothing wrong up until that point.<sup>35</sup> As *Harris*  
17 makes clear, the fact that multiple commissioners constituting a quorum of the Board  
18 may be together in one place, discuss county business while together, have personal  
19 agendas on matters they consider important, and are even pursuing those issues by  
20 seeking the support of fellow commissioners is not, of itself, a violation of Oregon  
21 Public Meetings law.

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23 <sup>34</sup>Moody's motives here are not really in question and her actions are certainly not a part of  
24 any decision making, but this court is troubled as to why she felt obligated to essentially cover for  
25 Handy when she was asked specifically by Stewart at the public meeting on December 9, 2009, for  
26 the name of the commissioner who inserted the commissioner aide positions back in the supplemental  
budget. It is clear that, on December 9, Moody was protecting Handy.

27 <sup>35</sup>This court sees no connection between any violation of unenforced Board rules, Exhibit 33,  
and a Public Meetings law violation.

1           There comes a point however, when these issues rise to the level of a matter  
2 that is pending for decision by the board. In the present case, that date can be  
3 specifically identified and is certainly no later than December 1, 2009. That is the  
4 date that the issue of proposed Supplemental Budget #2 was sent to the Eugene  
5 Register Guard for publication. At that point, it was clear or should have been clear  
6 to all involved, that what was proposed as Supplemental Budget #2 was going to be  
7 decided by the Board on December 9, 2009. The county even publishes a calendar  
8 so everyone involved in the process knows when a final action is expected to take  
9 place. Exhibit 400. As of December 1, there is no question that there was a  
10 "proposal" pending before the Board on the question of adoption of Supplemental  
11 Budget #2 within the meaning of ORS 192.610(1). Even looking at December 1,  
12 there is no evidence this court saw that would indicate that a Public Meetings law  
13 violation had taken place as of that date in relation to Supplemental Budget #2.

14           Whether it was Handy alone, and he was clearly the one out front pushing this  
15 matter, or Handy working with Sorenson, the matter couldn't just be allowed to run  
16 its course at the public meeting on December 9. It is obvious that it was extremely  
17 important that the matter be resolved as Handy envisioned the outcome for that date.

18           The evidence is clear that between December 1 and December 9, the fate of  
19 Supplemental Budget #2 was decided outside the public meeting context. Handy, in  
20 the lead, made sure that he had the votes lined up. That process was wrapped up  
21 during the afternoon of December 8 and was confirmed by Handy on the morning of  
22 December 9, just prior to the "public meeting." That occurred in a series of  
23 discussions among Handy, Sorenson, Dwyer and Stewart. The primary participants  
24 were Handy and Sorenson, but Dwyer and even Stewart participated in the process  
25 in violation of the Public Meetings law. The evidence did not show that any three  
26 commissioners were ever in the same room at the same time talking about this  
27 matter. That does not mean that the continuing multiple conversations were not a

1 deliberation. All involved knew that a quorum of the board was working toward a  
2 final decision outside of the public meeting context. Just like in May 2009 when the  
3 votes of a quorum were being tracked, Handy was counting them in December. In  
4 effect, the public meeting vote on December 9 was a sham. It was orchestrated  
5 down to the timing and manner of the vote so as to avoid any public discussion. The  
6 defendants' purpose in that regard was clear - to avoid adverse public comment or  
7 criticism as that appears to be how a quorum of the Board viewed the Register  
8 Guard's reporting on the subject. Stewart may not have been working toward the  
9 same goal as Handy, but it is obvious he knew what was happening at least as late  
10 as in the office on the morning of December 9, before the public meeting. Why  
11 Dwyer chose to involve himself in the non-public deliberations process is not at all  
12 clear, but he clearly did involve himself.

13 This court concludes that plaintiffs have proven their case that defendants  
14 violated the Public Meetings law in relation to the adoption of Supplemental Budget  
15 #2. The question now presented is whether the conduct of any of the three  
16 individual defendants, Handy, Sorenson or Fleenor constituted "willful misconduct"  
17 in relation to the violation(s) that occurred. ORS 192.680(4). If that conduct was  
18 willful misconduct, they are jointly and severally liable individually for attorney fees  
19 and costs ordered to be paid by the public body. *Id.*

20 The parties do not agree on what constitutes "willful misconduct." Oregon  
21 Public Meetings law does not define that phrase. Neither party suggests the  
22 legislative history of the statute offers any guidance. In an attorney disciplinary  
23 proceeding, the Oregon Supreme Court has examined the meaning of "willfully" in the  
24 context a contempt finding under ORS 33.015(2) compared to the mental state of  
25 "intent" as used by the American Bar Association's *Standards for Imposing Lawyer*  
26 *Sanctions*. In *In re Chase*, 339 Or 452, 121 P3d 1160 (2005), the court stated "\*  
27 \* the two definitions do not equate: 'willfulness' under ORS 33.015(2) does not

1 require the conscious purpose that describes 'intent' in the ABA Standards." *Id.*, 339  
2 Or at 457. The ABA Standards defined "intent" as "the conscious objective or  
3 purpose to accomplish a particular result."<sup>36</sup> *Id.*

4 In *Chase*, the court further directed its attention to *State ex rel Mikkelsen v.*  
5 *Hill*, 315 Or 452, 847 P2d 402 (1993) and the application of the willfulness standard  
6 in a Chapter 33 contempt proceeding. *Mikkelsen* was a criminal contempt proceeding  
7 for failure to pay child support.<sup>37</sup> The underlying issue in that case was whether  
8 inability to pay was a burden the state must overcome in proving willfulness or an  
9 affirmative defense. The court in *Mikkelsen* decided inability to pay was not an  
10 element of the offense. Characterizing the meaning of willfulness from *Mikkelsen*, the  
11 court in *Chase* stated "'proof that a party had knowledge of a valid court order and  
12 failed to comply with that order' establishes a finding of 'willfulness' under ORS  
13 33.015(2)." *Chase*, 339 Or at 457.

14 Defendants did submit authority on this issue. They argue "willful" is "\* \* \*  
15 synonymous with 'intentional.'" Individual Defendants Trial Memorandum, page 8.  
16 Defendants cite another attorney discipline case in support of their assertion, *In re*  
17 *Gatti*, 330 Or 517, 8 P3d 996 (2000). In the context of the court's decision to

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18  
19 <sup>36</sup>This court would note that the ABA Standards definition of "intent" is virtually identical to  
20 the Oregon criminal law definition of that term in ORS 161.085(7) "\* \* \* a person acts with a  
conscious objective to cause the result or to engage in the conduct \* \* \*."

21 <sup>37</sup>Although plaintiffs in the present case did not submit any authority for the definition of  
22 "willful" they felt was applicable to this proceeding, they did argue that it should be the standard  
23 courts in Oregon have applied in the remedial context, not in a punitive setting. This court has not  
24 found that Oregon courts have applied a different definition to willful conduct or different standard  
25 of "willfulness" in the remedial as compared to punitive contempt context. Rather, in the context of  
26 punitive contempt as well as remedial contempt where a jail sanction is sought, the law imposes on  
27 the state the burden of proof of "beyond a reasonable doubt." ORS 33.065(9) and 33.055(11).  
Remedial contempt without a jail sanction requires proof by a "clear and convincing evidence"  
standard. ORS 33.055(11). In fact, a defendant in a punitive contempt case is afforded all of the  
constitutional protections available to a criminal defendant, except the right to a jury trial. ORS  
33.065(6). As the discussion continues above, however, depending on the context, Oregon courts  
have applied different standards to "willful."

1 discipline a lawyer for "\* \* \* willful deceit or misconduct \* \* \*" pursuant to ORS  
2 9.527(4), the court in *Gatti* stated "[w]illful deceit or misconduct is synonymous with  
3 intentional deceit or misconduct. It is conduct that is intended to cause a particular  
4 result." *Id.*, 330 Or 529. The Supreme Court relied in *Gatti* on its earlier decision in  
5 *In re Morris*, 326 Or 493, 953 P2d 387 (1998), on this issue. *Morris* was also cited  
6 in support of defendants' position. This definition of willful is consistent with the  
7 Oregon Supreme Court's interpretation of "willful" in the context of a violation of the  
8 Oregon Code of Judicial Conduct. *In re Gallagher*, 326 Or 267, 951 P2d 705 (1998).  
9 In *Gallagher*, the court stated "[i]n this context, the court has defined a 'willful' act  
10 to mean an act done with a conscious objective of causing the result or acting in the  
11 manner contrary to the applicable rule." *Id.*, 326 Or at 269.

12 In the context of Unlawful Trade Practices, ORS 646.605 *et seq.*, subsection  
13 (1) of that section includes the following definition:

14 "A willful violation occurs when the person committing the violation  
15 knew or should have known that the conduct of the person was a violation."

16 That statutory definition is more in line with the court's interpretation of "willful" in  
17 the context of ORS Chapter 33 contempt.

18 Willful misconduct in the context of a Public Meetings law violation could  
19 require that it be proven that the person acted with a conscious objective to violate  
20 those particular statutory provisions. That is defendants' position. The burden this  
21 court assumes plaintiffs' would support is that they are required to prove that the  
22 person had knowledge of the law's requirements and thereafter failed to follow those  
23 requirements. In the context of this court's conclusions, it will be left to a higher  
24 court to decide which burden must be met if that court believes that decision needs  
25 to be made. Under either standard, this court is convinced that the question is clearly  
26 answered as to each individual defendant, albeit differently.

27 With regard to Fleenor, there is a conspicuous absence of evidence that he

1 participated in any way (not simply--not in any meaningful way) in the efforts to avoid  
2 the requirements of the Public Meetings law in the adoption of Supplemental Budget  
3 #2. His position - that he would not vote to include commissioner aides in the  
4 supplemental budget - was well known and known early on. In fact, according to  
5 Handy's own words, Fleenor's efforts to look for other uses for unspent money was  
6 one of the precipitating factors encouraging Handy to act. Essentially, the only  
7 testimony or evidence as to further actions by Fleenor was Moody's conversation  
8 with him about the supplemental budget before it was enacted. In addition, he  
9 showed up at the meeting and voted no.

10 On this issue, it becomes clear why plaintiffs would like to bootstrap Fleenor's  
11 conduct from the events of April and May 2009 so as to view them as a continuing  
12 deliberation on Supplemental Budget #2. Plaintiffs' argue "\* \* \* the same  
13 deliberations that led the Defendants to initially fund the assistants in the proposed  
14 budget in May informed their decision to finalize funding for the assistants in the  
15 supplemental budget in December." Plaintiffs' Trial Memorandum, page 11. As  
16 stated above, this court simply disagrees that the events are somehow a continuing  
17 deliberation.

18 There can be no question Fleenor knew exactly what was happening on  
19 December 9, 2009. That is established through Land's December 8, 2009, email.  
20 This court notes with interest that, while criticizing the enactment of the supplemental  
21 budget on December 9, stating the timing was wrong (Exhibit 6, page 2), by  
22 December 23, 2009, Fleenor was causing consternation among county staff with his  
23 pronouncements about already having decided who he was hiring to fill the position.  
24 That may be seen as hypocritical, but it is not evidence of participation in the scheme  
25 to avoid the Public Meetings law under either standard set out above.<sup>38</sup> The evidence

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26  
27 <sup>38</sup>Although not specifically raised, in the context of this case, this court would not accept that simply showing up and voting in the public meeting as a member of the Board is a willful violation

1 is insufficient to establish that Fleenor acted wilfully in violating the Public Meetings  
2 law in the events surrounding the adoption of Supplemental Budget #2. Fleenor is  
3 entitled to a judgment dismissing him as an individual defendant in this case.

4 With regard to Handy, there is equally no question that his organization of the  
5 scheme to enact Supplemental Budget #2 was willful under either standard discussed  
6 above. Although this court may have felt that plaintiffs could have produced the  
7 evidence in lesser detail, as it relates to Handy, the evidence from the earlier Spring  
8 2009 budget process weighs directly on his mental state in the events surrounding  
9 the enactment of Supplemental Budget #2. As stated previously, this court rejects  
10 his efforts to suggest his ignorance of the Public Meetings law's requirements.  
11 Warranting particular emphasis here is County Counsel's written reaction to the Board  
12 and then to Handy personally about her opinion of the activities she was aware of  
13 from the emails produced in response to the Register Guard's public records  
14 request.<sup>39</sup> Even ignoring County Counsel's very pointedly critical commentary to him  
15 personally in her second email, her first email to the Board and Spartz made it clear  
16 there was a problem. It was clear County Counsel viewed with great concern the  
17 conduct of the group Handy was working with. In addition, she expressed her view  
18 that others were likely to view that conduct as a violation of the statute. Judging  
19 from Handy's response, he is not a person who tolerates being criticized. At that  
20 point, whether he agreed or disagreed, Handy clearly understood that the county's  
21 attorney believed there was a problem that needed to be avoided.

22 Except for the meeting process, Handy's efforts in the adoption of  
23

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24 of the statute, even with prior knowledge of a scheme of this nature, if the member has voted no. A  
25 much closer question is raised if the person would vote in favor of the question, *i.e.*, consistent with  
the scheme, and the willfulness standard is consistent with its application in ORS Chapter 33.

26 <sup>39</sup>This court would note that Handy had to know, at the time of County Counsel's emails in  
27 June 2009, that County Counsel did not even know of the full extent of the activities of Handy  
himself, Fleenor, Sorenson, Barkhurst nor even BIG.

1 Supplemental Budget #2 followed the blueprint from the Spring of 2009. There is  
2 simply no question that the evidence establishes that Handy's conduct was willful as  
3 that term is used in ORS 192.680(4).

4 Although Sorenson was not the person out front on the issue of including  
5 commissioner aide positions in Supplemental Budget #2, this court concludes that the  
6 evidence shows, under either definition of willfulness set out above, he did willfully  
7 violate the Public Meetings law as well. Like Handy, Sorenson's early support of  
8 some proposal to include the commissioner aide positions in the supplemental budget  
9 is not in any way a violation of the Public Meetings law. However, the evidence  
10 shows that Sorenson's conduct was fully supportive and participatory in Handy's  
11 scheme. Not only was he the third and a necessary vote, his vote was organized and  
12 decided in the private discussions that took place. He needed to go along with the  
13 scheme in order to get the issue addressed and the vote taken with the least amount  
14 of public discussion. As the Chair of the Board, he was able to accomplish that task -  
15 and he did so.

16 Like Handy, he didn't heed the message from County Counsel either. He knew  
17 what had gone on in the Spring of 2009 and he knew County Counsel's opinion  
18 about that conduct in relations to the Public Meetings law.<sup>40</sup> Further, he is a lawyer  
19 who had worked with the law. Sorenson acted in concert with Handy and someone  
20 he really didn't trust, Dwyer, to make the decisions about Supplemental Budget #2  
21 outside of the public meeting and to conduct the meeting so as to simply confirm  
22 what had been agreed to, in the exact manner it was agreed it would take place.  
23 Sorenson's conduct was wilful as that term is used in ORS 192.680(4).

24 Based on the findings of fact and conclusions of law set out above this court  
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26 <sup>40</sup>There is a strong implication that his use of "Book Club" was a purposeful attempt to  
27 disguise the true nature of BIG's activities, which he knew were within the scope of the Public  
Meetings law.

1 makes the following determinations in this case. Plaintiffs are entitled to a judgment  
2 containing a declaration: (1) that defendant Board made the decision to adopt  
3 Supplemental Budget #2 in violation of ORS 192.610 to 192.690; and, (2) that  
4 defendant Board violated ORS 192.630(2) and ORS 192.670 by conducting private  
5 meetings. Plaintiffs are entitled to request their attorney fees and costs pursuant to  
6 ORCP 68. Plaintiffs are likewise entitled to a judgment against Handy and Sorenson  
7 individually, awarding any attorney fees and costs jointly and severally against them  
8 individually pursuant to ORS 192.680(4). Defendant Fleenor is entitled to a judgment  
9 of dismissal as an individual defendant.

10 Under plaintiffs second claim for relief they seek an "injunction restraining each  
11 defendant named herein from violating ORS 192.610 to 192.690." Second Amended  
12 Complaint, page 12. In support of their claim, plaintiffs allege:

13 "Defendants' violations of Oregon public meeting laws have been  
14 regular, sustained and are ongoing. The violations alleged herein are the result  
15 of intentional disregard of the law or willful misconduct by a quorum of the  
16 members of the governing body, including specifically Handy, Sorenson and  
17 Fleenor. Defendants will continue to violate Oregon Public Meeting laws in the  
18 absence of injunctive relief."

19 Second Amended Complaint, Paragraph 43, page 10.

20 Plaintiffs have proven those allegations, except as described above concerning  
21 intentional or willful misconduct by Fleenor in December 2009. This is the second  
22 issue plaintiffs raised where the evidence concerning defendants' conduct in the  
23 Spring of 2009 is relevant and bears directly on this court's decision. While it does  
24 not weigh in the decision on whether defendants violated the Public Meetings law in  
25 the events leading to adoption of Supplemental Budget #2, it is clear that it is more  
26 likely true than not true that the scheme involved in the approval of the 2009-2010  
27 Lane County Budget on May 19, 2009, also violated Oregon Public Meetings law.  
It is so obvious that it is more true that this court won't set out its analysis of the  
facts on that conclusion. This court concludes that that conduct was willful as well,

1 under either standard described above.

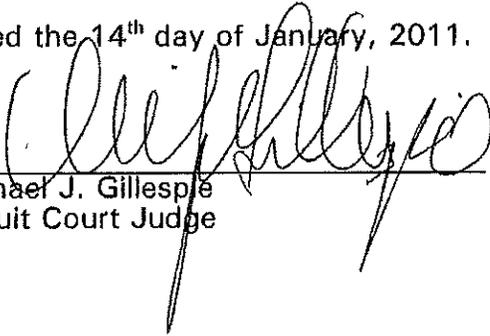
2 This court is unable, based on the evidence received, to formulate terms of an  
3 injunction and will conduct an additional hearing, with briefing and argument on the  
4 terms of an injunction plaintiffs will be obligated to initially propose. That injunction  
5 would not include Fleenor, based both on his dismissal as an individual defendant as  
6 well as on the fact that he is no longer a member of the Board.

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8 Dated the 14<sup>th</sup> day of January, 2011.

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Michael J. Gillespie  
Circuit Court Judge

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