

A City Club Report on Ballot Measure 63

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STATE OF OREGON MEASURE 63:

Exempts specified property owners from building permit requirements for improvements valued at/under 35,000 dollars.

Measure 63 would allow property owners of residential and farm properties to make improvements under \$35,000 in value to their real property without obtaining a building permit or the approval of any governmental entity. Proponents of the measure argue that the current building permit system is too complicated, unevenly enforced, and intrusive in the lives of Oregon's citizens. They believe that it negates the fundamental right of owners to do as they wish with their own property. Measure 63 seeks to protect subsequent owners of an improved property by requiring sellers to obtain professional guarantees of proper electrical installation and to disclose non-permitted work at the time of sale.

Central to the argument of both proponents and opponents of Measure 63 is the question of safety. The measure's lead sponsor asserts that the expense and delay of obtaining a permit and undergoing inspections discourages homeowners from fixing household hazards. He argues that passage of this measure will encourage those repairs and, thus, increase safety. Further, he notes that many small projects that fall within the scope of Measure 63 are often being undertaken without building permits at present, and that legalizing such activity will not increase hazards. Opponents of the measure fear that eliminating inspections from many residential improvements will in fact lead to an increase in hazards and resultant injuries. Measure 63 eliminates inspections of natural gas-line extensions, gas appliance hook-up, plumbing and sewer connections, structural stability work, and other potentially dangerous projects that may fall under the \$35,000 threshold.

Your committee believes that the measure as written has serious inconsistencies and is likely to have significant unintended consequences. The lead sponsor pledged to work on drafting solutions to problems in cooperation with the Legislature if the voters enact Measure 63. Your committee is tasked, however, with evaluating the measure as written.

Your committee unanimously recommends a "NO" vote on Measure 63.

City Club membership will vote on this report on Friday, October 17, 2008. Until the membership vote, City Club of Portland does not have an official position on this report. The outcome of this vote will be reported in the City Club Bulletin dated October 31, 2008 and online at www.pdxcityclub.org.

INTRODUCTION

Ballot Measure 63 will appear on the ballot as follows:

EXEMPTS SPECIFIED PROPERTY OWNERS FROM BUILDING PERMIT REQUIREMENTS FOR IMPROVEMENTS VALUED AT/UNDER \$35,000 DOLLARS.

RESULT OF "YES" VOTE: "Yes" vote exempts farm and residential real property owners from applicable state and local building permit requirements for improvements valued at \$35,000 or less.

RESULT OF "NO" VOTE: "No" vote requires farm and residential real property owners to comply with applicable state/local building permit requirements for improvements valued at under \$35,000.

SUMMARY: Current law requires owners of residential real property or farm property to comply with applicable state and local building permit requirements when making improvements to real property. Measure creates exemption for residential real property and farm property owners from applicable state and local building permit requirements for improvements when the total value of improvements made within a calendar year does not exceed 35,000 dollars. Measure requires improvements to comply with applicable setback requirements and height limitations. Requires property owners to disclose improvements made without building permits to prospective buyers. Requires electrical wiring made to improvement covered by measure to be performed or approved by licensed electrical contractor. Amount of exemption increases annually to adjust for inflation. Measure supersedes conflicting state and local laws. Other provisions.

Estimate of Financial Impact

The measure will reduce local government revenue between \$4 million and \$8 million each year. The measure will reduce state government revenue between \$450,000 and \$750,000 each year.

The measure will reduce local government spending between \$4 million and \$8 million each year. The measure has no effect on state government spending.

(The caption and summary were prepared by the attorney general and certified by the secretary of state.)

City Club's Board of Governors chartered this study to analyze Measure 63 and assist Club members and the public to better understand the implications of the measure and to recommend a "yes" or "no" vote. The eleven members of your committee were screened for conflicts of interest and public positions on the subject of the measure. The study was conducted during August and September 2008. Committee members interviewed proponents and opponents of the measure, including building code and public safety professionals from state and local levels, and reviewed relevant state statutes and administrative rules.

BACKGROUND

EXPLANATION OF MEASURE 63

Ballot Measure 63 is a statutory ballot measure placed on the ballot by citizen initiative. On May 5, 2008, the Oregon Secretary of State announced that the measure had sufficient signatures to qualify for the November ballot. A total of 82,769 valid signatures was required. The initiative's supporters submitted 127,755 signatures, 83,869 of which, or 65.65 percent, were determined to be valid.

Measure 63 would exempt owners of residential and farm properties from inspection by any government office or agency for improvements to an existing structure that equal less than \$35,000 in value, that do not add a story to all or part of an existing structure, and that otherwise comply with reasonable, uniformly applied setbacks and height restrictions. The measure would also exempt farm owners from governmental approval for building new farm structures not for human habitation and that are worth less than \$35,000 in value. The measure would require homeowners to disclose any non-permitted work to subsequent owners. Electrical work would no longer require a permit (either as part of a project worth up to \$35,000, or as the project up to \$35,000), but would require certification from a licensed electrical contractor that they have inspected the work and stand by the work as though they had performed the work themselves. The measure's \$35,000 cap would be an annual limit, and the cap would be adjusted for inflation.

Measure 63 would not, however, exempt any project from *compliance* with the state building code. Rather, the measure would eliminate the *enforcement authority* of the government agencies responsible for devel-

oping and enforcing the code. As a result, all projects would still be required to conform to the code, but there would be no mechanism to verify conformity. Proponents believe that the passage of the measure will liberate homeowners from an onerous burden, thus making it more likely that they will undertake repairs of their property that increase its value and safety.

EVALUATION OF PRO AND CON ARGUMENTS

Your committee divided the arguments of Measure 63's proponents and opponents into six principal areas: property rights, safety, property transfer, liability, law v. implementation, and unintended consequences. Your committee then analyzed each of these arguments and came to conclusions of its own.

PROPERTY RIGHTS

PRO: The ability of property owners to do what they want with their own property is a fundamental right that has historically defined our state and our nation. We have allowed government regulation to go beyond reasonable guidelines to micro-management of the most basic rights and pleasures of home ownership. We can trust our fellow citizens to police themselves; it is in their own financial and personal interest to do safe work. The current system is frustrating, inconsistent, expensive, and time-consuming for homeowners and small contractors, and it is the right of citizens of the state to change the system of government regulation when they believe that their rights are being unnecessarily curtailed.

CON: Building codes set minimum standards for safety, and requiring inspection and permitting to enforce them constitutes

a minimal intrusion on property rights. Measure 63 diminishes the community's right to ensure the safety of a building's present and future occupants and that of its neighbors. Since building permits are the means by which county assessors keep up with increased property valuations resulting from improvements, Measure 63 will also harm

the public's ability to ensure a level field for tax assessment and property values. It will also encourage people to avoid the permitting process in order to avoid paying higher taxes.

COMMITTEE CONCLUSION: Personal freedom and protecting property rights are important considerations when assessing the burden of governmental regulation. However, the collective right to safety, to consistency and fairness in the assessment of taxes, and to enforcement of building codes to

protect the character and value of a community must not be abandoned in the name of individual rights of action and property.

Your committee heard much anecdotal evidence that the permitting process can be unfair, time consuming, and focused on trivialities. Your committee recognizes that the process of obtaining permits and inspections for home improvements is one of the

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most commonly encountered examples of government regulation experienced by many citizens, and that it can easily seem unnecessarily complex and prescriptive.

The feeling that Oregonians are not free, for the most part, to take on minor repairs or improvements is in part the result of a lack of information. There are a great many minor improvements and repairs that do not need a permit. Those that do need a permit present potential safety concerns. While there is a need for greater consistency and better communications by those who enforce the building codes, your committee does not agree with the authors of Measure 63 that exemption from the process is a fundamental freedom. In addition, your committee is concerned about validating — in the name of personal freedom — what is now an illegal means of avoiding accurate assessment and taxation of property.

SAFETY

PRO: Measure 63 does not exempt homeowners from complying with building codes and their safety requirements. It only exempts homeowners from obtaining governmental approval for minor improvements. Many people currently perform this kind of work without permits, and government should not penalize them for their attempt to improve the safety and value of their property. People will build safe structures and make safe improvements as it is in their interest to do so. In the aggregate, people will be safer under Measure 63 because today many improvements and repairs that could and should be completed by homeowners remain undone since do-it-yourselfers and small

contractors would rather do nothing than endure the process of obtaining a permit and undergoing inspections. Once freed from the current process, homeowners will fix cracked foundations, rotted stairs and falling decks. By placing a limit on the value of improvements, large projects are excluded from this measure, as is the initial construction of a new residence. By retaining setback and height restriction requirements, Measure 63 ensures that the character of the neighborhood will be preserved. Most house fires are caused by faulty electrical work, and the measure protects against this with the provision requiring certification by qualified electrical contractors. If other safety issues

need to be addressed, the Legislature can address them.

CON: The requirement that homeowners obtain permits prior to construction is the primary method of ensuring compliance with building codes. Homeowners and contractors receive instruction

during permitting and inspection that helps them follow codes, including updates on code changes and safer construction processes and products. Once work is completed, it is difficult to check for compliance. There are no exceptions in Measure 63 for gas, structural, plumbing or septic systems, so long as these stay below the measure's value cap. Nor, for projects under the limit, does it allow inspections of furnaces, fireplaces, wood stoves, or gas water heaters. All of these are sources of home fires and of carbon monoxide and natural gas leaks.

COMMITTEE CONCLUSION: Your committee believes that safety is the most important issue raised by Measure 63 and one that has

“...your committee is concerned about validating — in the name of personal freedom — what is now an illegal means of avoiding accurate assessment and taxation of property.”

not been adequately addressed in the measure or by its lead sponsor's testimony.

The chief purpose of the codes and the work of building inspectors and officials is to protect the public. How many more injuries and deaths would occur and what other costs would be incurred without building-code enforcement? There is no data to prove the negative, although your committee did hear testimony from a retired fire official about one relevant case in point. He testified that fires and fatalities in Oregon dropped dramatically after inspection was first required for wood-burning

stoves almost 30 years ago. Witnesses from public safety agencies and others who oppose the proposed exemption recounted a number of other examples of danger to homeowners, neighbors, and first responders.

Though Measure 63 calls for a contractor seal of approval for electrical work, there is no protection against unscrupulous contractor endorsements without inspection. Measure 63 asks every citizen to assume that his or her neighbor is at least as qualified at construction as a licensed contractor, without any means of verification before a potentially unsafe project is completed.

The potentially hazardous areas noted above are not necessarily related to the cost or value of a home improvement project, and your committee has been unable to find a single jurisdiction in the nation that has a comparably broad exemption from permits and inspection based simply on dollar value rather than inherent safety issues.

PROPERTY TRANSFER

PRO: Measure 63 provides safeguards for buyers by requiring disclosure of non-permitted work at the time of sale. There is nothing in the measure that prevents government authorities from requiring documentation of any work done for the purposes of tax assessment and downstream buyer notification. The market will determine if non-permitted work has a negative impact on value, and informed buyers can decide if they will accept whatever risks may be associated with non-permitted work.

CON: Measure 63 does not require homeowners to document non-permitted work. It requires only that homeowners notify potential buyers of any non-permitted work. It lacks detail as to what form such a notification would take and what information would be required as part of the notification. Potential purchasers

would have to rely on whatever voluntary and non-standard documentation the homeowner thought would satisfy a potential buyer. Buyers will not have reliable information about work done on a home and will have less assurance that work was properly done. Indeed, buyers may not even know of the requirement that non-permitted work be disclosed. Much of the value of improvements and maintenance comes from the standard expectation of what steps were taken to complete the work, including verification by building permit and inspection. Replacing a rotted porch may improve the home's appearance, but future buyers also expect the new porch to be structurally sound.

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Uncertainty increases risk, and this additional risk could, according to insurance officials, affect individual and/or statewide insurance rates. Insurance companies might either underwrite to exclude non-permitted work or ask for disclosure of such non-permitted work, which might lead to issues regarding voiding of policy for lack of full disclosure.

It is unclear what impact Measure 63 might have on the ability of mortgage lenders to adequately evaluate the value of property for sale. It is reasonable to assume that lenders would be less likely to make loans for new purchases or refinancing agreements in jurisdictions where compliance with code could not be assumed.

COMMITTEE CONCLUSION:

Measure 63's lead sponsor responds to serious concerns about the measure's potentially negative impact on real estate property transfer by citing the free market's ability to provide adequate incentives and the local government's ability to impose a formal method of documenting non-permitted improvements. Your committee finds neither of these arguments sufficient to allay our concerns.

Home ownership is considered a highly desirable aspect of the American lifestyle. Many steps, including requiring various disclosures, have been incorporated into the process of real estate acquisition so that the average person without expensive legal counsel may buy a home with a high degree of confidence.

Your committee finds that neither Measure 63's weak disclosure provisions nor the operation of market factors (e.g. homes with non-permitted work histories perhaps costing somewhat less) are sufficient to reduce the uncertainties and risks that it would introduce into the purchase of existing homes. And this is no time to add more problems to a troubled housing market that has become accessible to fewer buyers in recent months and years. Finally, we cannot rely on the possibility of future local regulation to cure

the defects in the measure now before the state's voters.

LIABILITY

PRO: Measure 63 does not affect anyone's liability. Having work permitted does not currently indemnify property owners from liability, and the agencies that do permitting are not liable for work that they have permitted.

CON: The current permitting process provides a measure of assurance that the construction work is performed correctly, which should result in less litigation over construction problems. While there may not be an affirmative defense for contractors if they have obtained proper permitting for a project, the current system does allow insurers and courts to determine more readily who is liable for damages in cases of failure or loss of value, and this in turn keeps down the cost of litigation to homeowners, insurance companies and the public. Any increase in the risk of litigation will lead to an increase in the already high cost of contractor liability

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insurance, which will in turn result in an increase in the price of the services contractors provide.

COMMITTEE CONCLUSION: Your committee concludes that Measure 63 will increase the amount and costs of construction litigation and related insurance costs that ultimately reach homeowners.

Your committee did not have the time or resources for an exhaustive search of case law on liability and indemnification, but attorneys on, and consulted by, your committee believe that even if inspections and/or permits do not completely indemnify contractors or do-it-yourselfers, there is no doubt that securing the approval of a permitting agency would be an important part of any legal defense in construction litigation, as the presumption would be that the work was completed according to code. Absent a permit, and the assumption that the work was done to code, a plaintiff would be better able to rebut any contention of the defense that a contractor's work was standard.

If insurance providers cannot rely upon a uniform system of inspection and permitting, they will have less confidence that the properties they insure are built to code and less confidence in the safety of the property, likely resulting in the need to calculate a higher risk and thus leading to higher premiums. If construction litigation were to increase as a result of Measure 63 – and certainly the notification provisions alone are likely to result in litigation – then insurance premiums will rise accordingly to cover increased cost.

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LAW V. IMPLEMENTATION

PRO: Measure 63 recognizes that non-permitted work is currently being performed and, at the very least, the measure will require that the first subsequent buyer of the home will be made aware that non-permitted work has been done. The building code is too complex and, in parts, contradictory, and the details of enforcement depend on the jurisdiction and the inspector looking at the project. People are frustrated with the implementation of the building code and are capable of meeting the spirit and letter of the code without government action.

CON: If the standards in the building code are needed, the assurance of enforcement is also needed. United States history – and current experience in places like earthquake-ravaged areas of China – demonstrates that building construction standards, well

enforced, are needed for community safety. Some jurisdictions, notably Portland, already allow the most common, low-risk projects, without inspections or permits. If citizens are frustrated with code enforcement, reform of policy execution is a better solution than eliminating the only way that the code can be enforced.

COMMITTEE CONCLUSION: If additional exemptions from building codes are necessary, they should be addressed directly within the context of good public policy. Exemptions should be made based on safety considerations, not on the basis of the cost or value of the project.

FISCAL IMPACT

PRO: Any financial loss to state and local governments is minimal compared to the freedom gained by homeowners and the potential for greater expenditures on building materials and services. Any loss of revenue will be offset by reduced expenditure on staff and related expenses as departments shrink to meet reduced demand.

CON: The loss of \$4-8 million for local government and \$500,000 to state government per year might be offset by reduced workload and staffing, but these estimates represent only the impact of reduced permitting fees. The greater fiscal impact will occur in the assessment of property values, because tax authorities use building permits as a trigger for reassessment and as a means of evaluation less intrusive than physical inspection. Significant value could be added to a property over the years without a proper accounting with tax assessors, resulting in an inequitable distribution of the property tax burden. Those who obtain permits will see their assessed value rise relative to those who do not obtain permits.

COMMITTEE CONCLUSION: Your committee finds that savings from reduced staff and related expenses will likely offset the loss of fee revenue to local and state government under Measure 63. Your committee also anticipates, however, that there will likely be a significant loss of local revenue over time due to the increase in improvements that occur without permits, which will escape property tax assessment. The measure's lead sponsor has suggested that local tax authorities could develop alternative requirements for notifying tax assessors about improvements, but this would likely then lead to more expense for physical inspection by assessors. It also seems likely to your committee that there will be an increase in the use of governmental

services, such as fire and emergency medical services, as unskilled homeowners tackle more complex, interactive systems.

UNINTENDED CONSEQUENCES

The specific intentions of the author of a statutory measure are not the definitive elements that will guide interpretation of the law by those who will enforce it or render legal judgments on its meaning. A measure that is vague or contradictory at passage is even more subject to unintended interpretations than one that is specific and internally consistent.

It appears that Measure 63 might produce the unintended result of removing the current building permit exemptions for farm and agricultural structures not inhabited by humans when those structures are valued at more than \$35,000. The language of the measure is consistent in referring to the farm exemption. The initiative specifically refers to "farm property" in section 1, section 1(a), and again in section 1(g). Section (h) also states that the act "supersedes any pre-existing, state... law ... with which it conflicts." In addition, the first paragraph of the explanatory statement submitted by the petitioners specifically references existing "farm structures" and "new farm structures that will not be lived in by people."¹

The lead sponsor of Measure 63 told your committee that existing law excluding uninhabited farm structures altogether would remain unchanged. However, the language specifically seems to include farm property in the exemption, and it states that the measure supersedes all prior laws with which it conflicts. In short, Measure 63 may very well impose building codes and inspection requirements where they do not currently exist on agricultural buildings.

Attorneys consulted by your committee point out another apparently unintended consequence of Measure 63. According to section 1(a), the measure only applies to “parcels.” A parcel of land is created by partition. A partition is the creation of two or three parcels within one year.² In Oregon, most properties are “lots.” A lot is created by subdivision rather than partition.³ Anyone whose property is a “lot” rather than a “parcel,” therefore, will not be able to use this law. This language in section 1 and 1(a) appears to rob the measure of most of its intended effect, which is to exempt all residential property regardless of how the lot was created.

Measure 63 also leaves unanswered a host of questions relating to who is eligible to receive the benefit of the exemption. The lead sponsor of the measure told your committee that he only intended resident-owners to be eligible for the exemption, but in zoning terms, rental properties are residential properties, so do exemptions apply to rental properties under this measure? If so, is the cap for each “unit,” single address, or building? Work on rental properties could be completed without permits and inspections, leaving renters subject to unsafe conditions.

Measure 63 could also open the door to litigation over current height restrictions. Section 1(b)(ii) of the measure includes language that requires height restrictions to be “reasonable” and “uniformly applied.” Section 1(b) does explicitly prohibit adding additional stories to existing structures, but it does not prohibit extensions of existing

stories if such an extension does not violate existing setbacks or height restrictions.⁴

Your committee is concerned that Measure 63 reaches beyond the building code and may exempt home improvements from compliance with other important state and local codes. Section (h) of the measure declares that it supersedes any pre-existing, state, local or regional government laws, rules, codes, ordinances or other enforceable government actions with which it conflicts. This statement is coupled with the language in Section 1 that the “owner...shall not be required

to obtain a building permit or otherwise obtain the approval of *any government entity* in order to make minor improvements” (emphasis added).⁵ Your committee interprets these combined sections to mean that projects under this measure are exempt from every regulatory regime below the federal level. This would

“Several witnesses noted that by arranging work calendars and billings, a project costing more than \$100,000 could conceivably be done over a 14-month period—lacking permits—without violating the proposed law.”

include zoning regulations, historical districts, environmental conservation districts as well as other local permitting authorities. Your committee is aware of examples of modest remodeling projects that could fall under one or more of these types of regulation. For instance could a homeowner create a multi-family unit in an area zoned for single-family residences, or create a business space—such as a repair shop—in a residential zone? Your committee interprets the language above to expressly allow such actions. Furthermore, without being able to require building permits, local governments would be unaware of such violations in the case of exempted projects that fall below the \$35,000 cap.

It appears that Measure 63 may also result in exempting remodeling projects that cost several times its \$35,000 limit. The threshold for exemption in Measure 63 is \$35,000 in each calendar year. Several witnesses noted that by arranging work calendars and billings, a project costing more than \$100,000 could conceivably be done over a 14-month period—lacking permits—without violating the proposed law.

Finally, it is unclear to your committee by what measure—“total value” or “cost”—the \$35,000 cap is to be evaluated. Section 1 (a) characterizes “minor improvements” as those not exceeding \$35,000 in “total value.” According to section 1 (g), however, “minor improvements” are those in which “the cost...does not exceed \$35,000.”⁶ These are very different measurements. The author of Measure 63 told your committee that the cap was to be measured in assessed value. If the measure is cost, is labor included? If the measure is assessed value, how would the cap be enforced if homeowners are not required to obtain permits? In either case, who verifies that the project is above or below the cap before construction begins? Your committee was unable to find definitive answers to these questions.

Measure 63, as written, largely relies on future action by the Legislature to correct deficiencies in the measure, rather than offering voters a clear, well-drafted initiative with fully developed provisions that would allow them to accurately assess the merits of the measure.

SUMMARY OF CONCLUSIONS

Your committee concludes the following:

PROPERTY RIGHTS: The right of property owners to do what they want with their own property does not rise above the right of individuals to be safe in their neighborhoods or to purchase real property with some assurance that modifications meet standards contained in the building code and certified by inspection.

SAFETY: The imposition of safety standards in the form of building codes, and the enforcement of such codes, has made residential construction and modification safer. The removal of enforcement for modifications will likely result in substandard modifications to structures, which in turn would lead to increased casualties.

PROPERTY TRANSFER: Shifting from recorded and enforced standards for construction modification to the “free marketplace” – let-the-buyer-beware – offers little assurance that properties will meet code at the time of sale. Such a marketplace dynamic will be of limited use to home purchasers.

LIABILITY: Measure 63 will likely increase the frequency and cost of construction litigation and related insurance costs. These costs will ultimately reach all homeowners.

LAW vs. IMPLEMENTATION: If additional exemptions from building codes are desirable, they should be addressed directly within the context of good public policy. Exemptions should be made based on safety considerations, not on the basis of the cost or value of the project.

FISCAL IMPACT: Savings from reduced staff and related expenses will likely offset the loss of fee revenue to local and state government under Measure 63. There will likely be a significant loss of local revenue over time, however, due to the increase in intermitted improvements that escape property tax assessment. Substandard improvements will likely also increase the use of fire departments and other tax-supported services.

UNINTENDED CONSEQUENCES: The vague and contradictory language of Measure 63 may have unintended consequences related to farm structures, litigation, and a variety of other property-related issues.

RECOMMENDATION

Your committee unanimously recommends a “NO” vote on Measure 63.

Respectfully submitted,

Jim Barta
Linda Craig
Maitri Dirmeyer
Bill Harris
Sally LaJoie
Paul Millius
Nick Orfanakis
Travis Sanford
Jeff Schwaber
Margaret Van Valkenburg
Mike Greenfield, chair

David Cannon, research advisor
Tony Iaccarino, research & policy director

WITNESSES

Tim Birr, Former Division Chief, Tualatin Valley Fire and Rescue

Chris Crean, Attorney, Beery Elsner Hammond LLP

Tim Gauthier, Secretary, Oregon Chapter National Electrical Contractors Association

Mark Long, Administrator, Oregon Building Codes Division, Oregon Department of Consumer and Business Services

Cagney McClung, Agent, Windemere/Cronin & Caplin Realty Group

Bill Sizemore, Author and Chief Sponsor, Measure 63

Guy Sperb, Director, City Building Codes Division, Oregon City

H. Joe Tabor, Chair, Libertarian Party of Oregon

Chris West, Vice President, Pac/West Communications

Terry Whitehall, Plan Section Review Manager, City of Portland

Bill Sizemore is the author and lead sponsor of Measure 63. Your committee made every effort to find other advocates of the measure but could not find organized advocates for the measure or individuals, other than the lead sponsor, who were willing to appear before your committee or speak on the record to committee members.

CITATIONS

- 1 “Text of Measure 63,” at <http://www.sos.state.or.us/elections/>.
- 2 Oregon Revised Statutes, 92.010.
- 3 Ibid.
- 4 “Text of Measure 63,” at <http://www.sos.state.or.us/elections/>.
- 5 Ibid.
- 6 Ibid.

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http://www.cbs.state.or.us/bcd/rules_statutes/compilations/oar_compilation_bcd.html

Oregon Electrical, Plumbing, and Mechanical Permits Online.
<https://buildingpermits.oregon.gov/>

A City Club Report on Ballot Measure 65

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STATE OF OREGON MEASURE 65:

Changes general election nomination processes for major/minor, independent candidates for most partisan offices.

Measure 65 would alter the way Oregon voters advance candidates from the spring primary to the fall general election for partisan state, county, and city offices and its congressional delegation. In the present "semi-closed" primary, parties choose their own nominees for the general election; the major parties conduct primaries, while the minor parties can use other systems, including a nominating convention. Under the "top two" system proposed by this measure, all voters would receive the same primary ballot and would be free to vote for any candidate seeking to advance to the general election, irrespective of the voter's or the candidate's party affiliation, if any. Only the two candidates receiving the highest number of votes at the primary election would advance to the general election. Those two candidates might be from the same political party, from different parties, or report no party affiliation at all. Measure 65 also requires that vacancies in the general election ballot and in elected offices be filled without regard to party affiliations.

The arguments made "for" and "against" Measure 65 raise important questions about constitutional associational rights, partisanship, fairness, and the electorate's investment in a party system that has long been dominated by two major parties. Proponents of the measure aim to increase voter participation, give unaffiliated voters more choices in the primary process, and reduce excessive partisanship without impairing the parties' associational rights. Opponents contend that this measure is unfair because it interferes with the ability of each party to advance its own candidate to the general election and because many voters might not have a representative of their chosen party appear on the general election ballot. Polling data indicates that the idea of an "open primary" is popular with the electorate, yet party leaders in Oregon believe that the measure would substantially diminish the participation and influence of all parties, especially minor parties.

While the committee's members would support most, if not all, of the proponents' broader goals, your committee was not persuaded that the proposed reform would measurably achieve its principal aims of increasing voter participation and fairness and reducing excessive partisanship.

Your committee unanimously recommends a "NO" vote on Measure 65.

City Club members will vote on this report on Friday, October 17, 2008. Until the membership votes, City Club of Portland does not have an official position on this report. The outcome of this vote will be reported in the City Club Bulletin dated October 31, 2008 and online at www.pdxcityclub.org.

INTRODUCTION

Ballot Measure 65 will appear on the ballot as follows:

CHANGES GENERAL ELECTION NOMINATION PROCESSES FOR MAJOR/MINOR PARTY, INDEPENDENT CANDIDATES FOR MOST PARTISAN OFFICES.

RESULT OF "YES" VOTE: "Yes" vote changes general election nomination processes for most partisan offices; all candidates run in single primary; top two primary candidates compete in general election.

RESULT OF "NO" VOTE: "No" vote retains the current party primary election system, retains procedures for the nomination of minor political party and independent candidates to the general election.

SUMMARY: Currently, major parties nominate candidates to general elections through party primaries; minor parties, independents nominate candidates directly to general election. Multiple candidates for office may appear on general election ballot. Measure changes those nomination processes for most partisan offices, including United States Senator; Congressional Representative; Governor; Secretary of State; State Treasurer; Attorney General; State Senator; State Representative; any state, county, city, district office that is not nonpartisan/for which law authorizes political party nominations to general election. Primary ballots contain all prospective candidates; elector may vote for candidate regardless of elector's, candidate's party affiliation. Only top two candidates in primary compete in general election. Primary, general election ballots must contain candidates' party registration, endorsements. Eligible person, regardless of party affiliation, may fill vacancy. Other provisions.

Estimate of Financial Impact

The measure requires one-time spending by both state and local government of approximately \$100,000 total for computer programming changes. The measure requires approximately \$100,000 every two years in additional state government spending for the primary election voter's pamphlet. The measure requires approximately \$227,000 every two years in additional local government spending for primary ballot printing and postage. The measure does not affect the amount of funds collected for state or local government.

(The caption and summary were prepared by the attorney general and certified by the secretary of state.)

City Club's Board of Governors chartered this study to analyze Measure 65 and assist Club members and the public to better understand the implications of the measure and to recommend a "yes" or a "no" vote. The eleven members of your committee were screened for conflicts of interest and public positions on the subject of the measure. The study was conducted during August and September 2008. Committee members interviewed proponents and opponents of the measure, elected officials, scholars, opinion researchers, and major and minor party representatives. Your committee also reviewed relevant articles and texts, voter polling and participation data, and other material.

BACKGROUND

EXPLANATION OF BALLOT MEASURE 65

Currently, Oregon conducts a “semi-closed” primary in which the Democratic and Republican parties hold primary elections that are open only to registered members of the parties, though any eligible voter may register with either party up to 21 days before the primary. The winner of each party’s primary appears on the general election ballot. Minor parties do not hold their own primaries, but are able to place candidates on the general election ballot by filing qualifying documents with the Secretary of State and settling on a process for choosing their candidates, usually by holding a convention. Voters may also write in other candidates.

Measure 65 would establish a system in which all registered Oregon voters would receive the same ballot for the spring primary, listing all candidates for major offices: U.S. Senator and Representative, Governor, Secretary of State, Treasurer, Attorney General, and State Legislator; and for partisan county, city and district offices. The measure calls these “voter choice offices.” For each voter choice office, a voter could vote for any one candidate regardless of the voter’s or the candidate’s party affiliation. Voters would not be restricted to voting for a member of their own party in the primary, nor would they need to be registered with a party to participate in the primary. A candidate’s party affiliation, if any, would be listed on the ballot, along with any party endorsements the candidate has received. The two candidates with the highest number of votes, regardless of party affiliation, would advance to the general election in November, and would be the only candidates listed on that ballot for that office. This system would not apply to the presidential primary and would not alter

election procedures for designated nonpartisan offices.

Although the proposed law is titled the “Open Primary Act of 2008,” the system being proposed is more commonly designated a “top two” primary. In a true “open primary,” a voter may choose any party ballot at the time of the primary election, with the candidate receiving the most votes from each party advancing to the general election as that party’s nominee. By contrast, under Measure 65, voters could choose any candidate for any “voter choice office,” without any limit by party affiliation; only the two candidates receiving the most votes – and no more than two candidates – would advance to the general election. These two candidates might be from the same party, from two different parties, or possess no party affiliation. These two candidates would simply “qualify” for the general election; there would be no designated party “nominees.”

Measure 65 includes provisions for filling vacancies in the ballot that occur between the primary and the general election, and for filling vacancies in offices filled by such elections. In the elections process, if at least three candidates stood for the primary election, a vacancy is filled by the candidate who received the next highest number of votes in the primary election. There is no provision for filling the vacancy if there were only two candidates in the primary election; presumably, the remaining candidate would run unopposed. For vacated offices that are filled by appointment, the present law requires that the appointee be a member of the same party as the official being replaced. By contrast, the measure provides that the vacancy be filled by an otherwise eligible person regardless of that person’s party affiliation or the affiliation

of the person who had been elected. There are also some time limits to these provisions that relate to the practical aspects of revising election ballots.

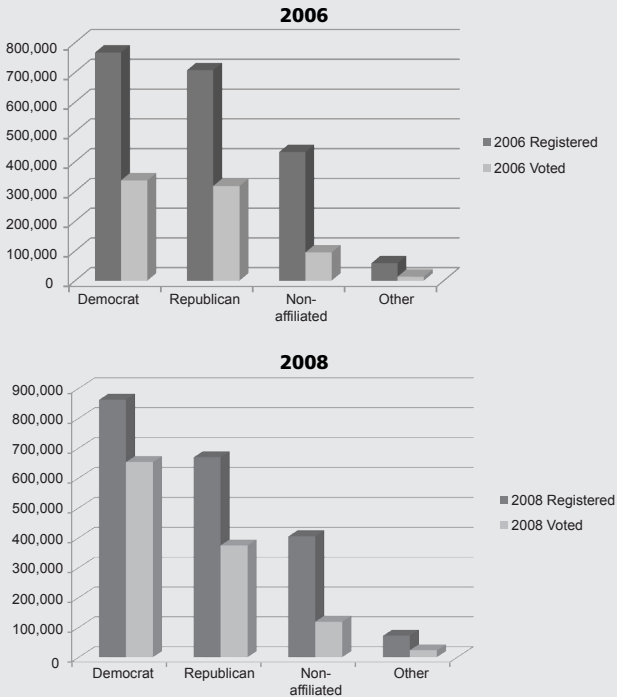
CURRENT MAKE-UP OF OREGON VOTERS

As Measure 65 is intended to increase participation in the primary of voters affiliated with minor parties, or who prefer to remain unaffiliated, your committee reviewed recent data on voter registration and participation. The data below comes from the 2006 and 2008 primary elections. It is important to remember that each primary election offers a unique mix of high- and low-interest races that appeal to different segments of the electorate.

The two election cycles reported here show a modest increase in the total number of registered voters and some movement among the party registrations, which may be at least in part explained by the fact that 2008 contained a presidential primary election.

For a longer term view, between 1994 and 2006, there was a slight decline in the percentage of voters who were registered Democrats. During that same period, the percentage of voters who registered as Republicans remained fairly steady. There was an increase in the percentage of non-affiliated voters and a slight increase in voters registered with other parties.

Oregon Party Registration and Voter Participation 2006 & 2008 Primaries



Source: Portland State University Population Research Center

According to the 2008 data, 24 percent of Oregon’s currently registered voters are not affiliated with either the Republican or Democratic parties. The minor party registrations are distributed among the Libertarian, Pacific Green, Constitution, and Independent parties. By comparison, recent reports put the percentage of registered voters not affiliated with either of the two major parties at the national level, at approximately 35 percent.¹ The proponents of the measure argue that many of these voters pass on participating in the vote on issues and nonpartisan offices

in the primary because they feel left out of the nominating process for partisan offices. According to this argument, the measure would benefit such voters by allowing them to participate in the primary election without having to re-register with one of the major parties.

TYPES OF PRIMARY ELECTIONS

A “primary election” is a method by which candidates advance to a general election. There are six main types of primaries in the United States:

Closed Primary

Voters may vote in a party’s primary only if they are registered members of that party. Changes in registration are allowed some time before the election with different time limits specific to each state. Approximately 13 states conduct a version of this type of primary, including New York.

Semi-Closed Primary

Voters must register with a party in order to vote in the primary, but party registration is easier to change than in the closed primary. In some states, voters may change party registration as late as primary election day. Approximately 15 states have a semi-closed primary, including Oregon.

Semi-Open Primary

Voters may vote in any single primary, but must publicly declare which party’s primary they will participate in before entering the voting booth. Approximately 10 states use this type of primary, including Ohio and Texas.

Open Primary

Voters receive the same ballot, and may vote in whichever party’s primary they wish. However, once the voter picks a specific candidate, the voter must then only select candidates for that same party for all other contests, except nonpartisan contests.

Blanket Primary

Voters receive the same ballot and may vote for any candidate from any party in each office. For example, the voter may vote for a Republican for governor and a Democrat for U.S. Senate. When all ballots are counted, the top vote-getter from each party moves on to the general election. This type of primary, also known as a “jungle primary,” was only used in a few states, including, recently, in Washington. It has been ruled unconstitutional by the U.S. Supreme Court because it violates First Amendment associational rights. The Court has held that, under the First Amendment, the parties cannot be compelled to allow non-members to participate in the selection of party nominees.

Top Two Primary

Voters receive the same ballot and may vote for any candidate for each office. The two candidates receiving the most votes advance to the general election, regardless of their party affiliation. The top two primary does not apply to the presidential primary. This type of primary, also known as the “nonpartisan” or “run-off” primary, went into effect in Washington in 2008 and is the type proposed by Measure 65. A slightly different version of the top two primary has been in use in Louisiana for many years.

WASHINGTON'S EXPERIENCE WITH THE TOP TWO PRIMARY

On August 19, 2008, Washington conducted its first top two primary. This development has been followed in Oregon because the Washington primary is similar to the one that would result from passage of Measure 65.

Washington used a blanket primary system from 1935 to 2003. But in 2003, the Ninth Circuit Court of Appeals struck down that system in *Democratic Party of Washington State v. Reed*. The Ninth Circuit decision followed the 2000 U.S. Supreme Court decision in *California Democratic Party v. Jones* that found California's blanket primary unconstitutional. In both *Jones* and *Reed*, and other cases in other states, the courts held that blanket primaries unconstitutionally impinge on political parties' First Amendment rights of association because they take the selection of party nominees out of the hands of the political parties.²

Washington voters overwhelmingly passed an initiative for a top two primary in 2004. In the new system, the top two vote-getters for each office, regardless of party preference, were to advance to the general election. The measure as passed was immediately challenged in the courts by Washington's Republican Party. That case was contested all the way to the U.S. Supreme Court, which decided in early 2008 that Washington's top two primary, at least as proposed, was not unconstitutional. In *Washington State Grange v. Washington State Republican Party* the Supreme Court found that the proposed primary would not unduly interfere with parties' rights of association. The Washington system tested in that case was distinguished by the Court from the unconstitutional blanket primary because the system does not "nominate" candidates based on party affiliation. The candidates' party affiliations will appear

on the ballot, but they advance based solely on votes cast and face each other only as the "qualified" candidates, not as the "nominees" of particular parties. The Republican Party, when challenging the system, argued that such a ballot would be so confusing that the system would unconstitutionally impact party and voter rights. The U.S. Supreme Court held that these arguments were speculative and premature until an election had actually proceeded under the system. The opinion left open the possibility for future court action based on results of the Washington primary as it is carried out.³

The Washington Secretary of State reported that 42.6 percent of registered voters participated in the August 19 primary. By comparison, 39 percent of registered voters participated in the 2004 Washington primary, and 45 percent participated in the 2006 primary.⁴ So, on the issue of impact on voter participation, the first Washington experience is inconclusive. The reports also show that only one party will be represented in the general election in about one-quarter of the 124 races for state legislative seats, but in some of these races only one party was represented in the primary. There will be five races where a minor party candidate or a candidate with no party affiliation will be on the general election ballot, but in some of those races the minor party candidate was in a primary field of only two candidates.⁵ Again, the results of a single election cannot tell much about the long-term impact of such a change on voter participation and the types of candidates who advance to the general election.

ARGUMENTS PRO AND CON

ARGUMENTS ADVANCED IN FAVOR OF MEASURE 65

Proponents of Measure 65 made the following arguments in support of the measure:

- Removing limits on primary ballot access based on party affiliation will increase voter participation.
- Non-affiliated voters are excluded by the present primary system and are less likely to participate in the spring election for that reason.
- The top two primary will reduce excessive partisanship by opening the primary to all registered voters, thus weakening the influence of diehard partisans who vote in disproportionate numbers during the primary.
- A top two primary is more fair than the present system because it gives voters the freedom to vote for the best candidate, regardless of party affiliation.
- Because elections are publicly funded, the voter's ability to vote for a candidate should not be based on party affiliation.
- The top two primary system will decrease motivation for "strategic voting."
- The top two primary system will encourage the political boldness, innovation, and creative thinking necessary to tackle major public policy challenges.
- Passage of this measure will increase the number of moderate candidates and discourage extremism.

ARGUMENTS ADVANCED AGAINST MEASURE 65

Opponents of Measure 65 made the following arguments in opposition to the measure:

- Partisanship is a positive and fundamental aspect of our political system and most voters prefer to be identified with a party. This measure undermines that system.
- The top two primary will not increase voter participation in the primary election and will decrease it in the general election.
- Party members should be able to choose their own nominees for the general election.
- Measure 65 violates the constitutional rights of the parties to associate freely; as a result, litigation is likely to follow its passage and delay its enactment.
- Measure 65 will significantly decrease the chance for minor-party candidates to make the general election, thus weakening the minor parties.
- Under the measure, the primary election result is more vulnerable to manipulation from "strategic" voting.
- The top two primary will not reduce excessive partisanship in the Legislature.

- The top two system will discourage innovation and boldness in the candidates.
- When the primary election results advance two candidates from the same party, there will be less voter participation in the fall general election from those whose parties are not represented.
- The top two primary will necessarily cause candidates to spend more on campaigns since the stakes in the primary will be much higher.
- Oregon's present system works well and is highly regarded. Reform should not be undertaken just for reform's sake.

DISCUSSION

FIRST AMENDMENT RIGHTS AND THE PARTY SYSTEM

At the heart of the debate over Measure 65 is the question of who ought to be in control of the primary process – the parties or the voters. The proponents identify this as “the fundamental premise” of their campaign. They want to see a primary election process that fosters the participation of all voters, irrespective of party affiliation. They also want all voters to have the opportunity to choose among all candidates, similarly irrespective of party affiliation. The measure would wholly remove from the parties control over who advances to the general election, even though proponents claim not to intend an attack on party organizations. The principal opposition to the measure is from the party organizations and their representatives. They see the measure as threatening the role of parties in many ways, but they are particularly reluctant to lose control over selection of party nominees. Their position is bolstered by court decisions substantiating the parties’ right to organize and to exclude non-members from the nomination process. In the system as proposed by Measure 65, all voters would have access to the full range of candidate choices available in the primary election. This raises questions about the constitutionality of the measure in light of the parties’ First Amendment rights.

A political party has a constitutional right under the First Amendment to limit participation in the selection of a party nominee to its declared members. The blanket primary violates this principal and so was ruled unconstitutional in the 2000 case, *California Democratic Party v. Jones*. As previously stated, the “blanket primary” is the form in which all voters may vote for any candidate, regardless

of the voters’ affiliation, but the outcome of the primary is that the leading vote-getters for each party face each other as their party nominees in the general election. The Court in *Jones* reasoned that the blanket primary at issue presented “a clear and present danger” that the party’s nominee would be determined by voters who were not affiliated with the party. The Court was persuaded in particular by statistical evidence from California and Washington that substantial numbers of voters “crossed over” to vote for a candidate with a different party affiliation than the voters’ own. The rule to be taken from *Jones*, and similarly-decided cases from other states challenging the blanket primary, is that the parties are entitled by the First Amendment to restrict voting for party nominees to their own members. In light of the First Amendment right of free association, the parties cannot be compelled to include non-members in the selection of party nominees. That rule is violated in a system where the candidate of each party who wins the most votes from all the voters becomes the party’s candidate.⁶

That rule may not be violated by a top two primary when all the voters can vote for any candidate in the primary and the candidates advance based on the number of votes they receive without being identified as party “nominees.” That is the change wrought by the March 2008 decision in *Washington State Grange v. Washington State Republican Party*. In that case, the Supreme Court held that the proposed primary would not unduly interfere with parties’ associational rights because voters do not “nominate” candidates based on party affiliation; rather, candidates advance based solely on votes cast.⁷ Hence, the decision in *Grange* is a sign that some sort of top two primary could survive a constitutional

challenge. However, the *Grange* opinion still leaves open the possibility that the actual experience of Washington's system could be challenged again in federal court on the basis that it results in an unconstitutional limit on parties' rights.

Your committee believes that the litigation history of Washington's measure (and of other states' systems) is one indication of the likelihood that Oregon's measure, if passed, would face similar court challenges. Scholars and lawyers are waiting to see what Washington's actual experience with the top two primary indicates about the constitutionality of the system and about its impact on voter participation, partisanship, and the other broader issues raised by this reform.

PARTY ROLES AND PARTISANSHIP

Parties play an important role in American politics. In *Politics, Parties, and Elections in America*, the political scientist John F. Bibby writes that the fundamental role of parties in a democratic society is to act as "intermediaries or linkage mechanisms between the mass of the citizenry and their government. Parties function as institutions to bring scattered elements of the public together, to define objectives, and to work collectively to achieve those objectives through governmental policy."⁸ But parties depend on the loyalty of their voters and candidates. Those who support Measure 65 believe that the need for party support drives candidates to the more extreme positions of their parties.

The proponents of Measure 65 testified that one of their important goals is to reduce excessive partisanship, which they see as interfering with effective government in Oregon. In this context, "excessive partisanship" is defined as the circumstance where adherence to party loyalty and priorities takes precedence over broader public needs. The proponents are not claiming to mount a

challenge to the party system; to the contrary, the campaign's leaders are all former elected officials with a breadth of experience in partisan politics. They believe, however, that the current system feeds excessive partisanship and discourages bold ideas, innovation and creativity. They argue that the top two system will reduce excessive partisanship by encouraging candidates to appeal to a wide array of primary voters, not just to party stalwarts. They say these candidates will, in turn, be moderate and more productive as legislators and elected officials.

Opponents of the measure disagree with the proponents on a number of these points. Your committee heard witnesses argue that robust partisanship is beneficial to the political process, stimulating voters and attracting citizen participation. In their view, such partisanship fosters creativity and innovation, while a more nonpartisan climate generates candidates who are so concerned with "appealing to the middle" that they are unable or unwilling to risk proposing bold, but possibly unpopular, solutions to vexing public policy challenges. Moreover, as noted by one witness, the role of government should not be about promoting moderation.

Officials of both major parties argued that the passage of Measure 65 would not lead to improved collegiality in the Legislature because extreme divisions at the state level are largely a reflection of what is happening between the parties at the national level. Academic witnesses agreed and testified that the new system may create further polarization in regions or on issues where one party currently dominates. Professor Paul Gronke of Reed College specifically identified societal developments, rather than the current primary system, as the key driver of excessive partisanship. He pointed to research suggesting that Americans are increasingly choosing to segregate themselves into politically

homogeneous and like-minded communities – and that voters in such areas are electing candidates who share their narrow points of view. Both Professor Gronke and Professor Bill Lunch, of Oregon State University, persuasively referred to research on versions of the top two system in other states and other countries, substantiating concerns that a top two system can become “a contest between extremes.” They note that in top two systems, moderate voters run the risk of diluting their influence by spreading their votes among numerous moderate candidates, thereby allowing a minority of diehard supporters of extreme candidates to advance their candidates to the general election.

Your committee agrees that partisanship is healthy for the political process but remains unconvinced that Measure 65 will have significant impact on the excessive partisanship that creates polarization at the legislative level. Your committee agrees with witnesses who testified that polarization can be traced to societal and national party developments, rather than the current primary system, and sees little chance of significant change until national forces are moderated.

VOTER PARTICIPATION

The petitioners argue that Measure 65 will increase voter participation. Proponents base their prediction of higher voter turnout on the contention that non-affiliated voters pass on the primary election process because they cannot vote for major party nominees. They argue that when each voter can vote for any candidate in the primary, more will participate, and higher participation in the primary will mean better candidates in the general election. They point to a high level of public support for some form of “open primary.” And they point to the 100,000-plus signatures they gathered from supporters to qualify this measure for the ballot. The propo-

nents’ polling indicates the general concept of an “open primary” appeals to nearly three-quarters of Oregon’s voters. The news coverage and editorials on this subject refer to broad support for making state primaries more “fair”; and polling indicates that voters think it is unfair that non-affiliated voters cannot vote in the major party primaries. The favorable response in these polls to the specific provisions of Measure 65 has been closer to 48 percent.

The proponents’ own polls indicate that all voters are feeling disillusioned with the current state of politics. In the polling, the non-affiliated voters were not any more dissatisfied than those registered with the two major parties. These polling results are consistent with the testimony of the academic witnesses interviewed by your committee, who asserted that (a) independent or non-affiliated voters tend to be new to the process or less interested in politics and the issues and (b) there is no evidence suggesting these voters are better informed than major party voters or more apt to vote in the top two primary proposed by this measure.

Recent polling validates a general perception that voters do not understand the electoral process. They follow party politics but do not have a deep understanding of the party positions. They do not display the deep commitment to voting rights that is displayed in other countries. Elections officials who testified agree. Pollsters argued the ballot measure will not change that fact and acknowledged that this measure may initially make the situation worse. Party officials agreed and argued that voters will be confused by the initiative, which may result in lower voter turnout. Academic witnesses told your committee it is likely that voting patterns will differ in a top two primary and concurred that the top two primary will be confusing.

Witnesses noted that the top two primary is more likely to decrease participation in the general election than increase it. With only two candidates advancing to the general election, multiple parties will not have a candidate in the fall election. Those voters who feel unrepresented by the two candidates who advance to the general election may decide not to vote just as the proponents say some voters decide not to vote in the primary now.

From this evidence, your committee concluded that passage of Measure 65 is not likely to increase voter participation; to the contrary, it may decrease participation overall.

MINOR PARTIES

Typically, minor parties are organized around specific issues. They have had an important impact on mainstream politics and the major parties by drawing attention to issues such

as the abolition of slavery, women's suffrage, prohibition, anti-trust legislation, and environmental conservation. Despite this role, minor parties tend to remain at the edges of the established major parties, both in terms of membership and financial resources. Only once in American history has a minor party become a major party – when, in the mid-nineteenth century, controversies over slavery led to the collapse of the Whig Party and the elevation of the Republican Party to major party status. However, minor parties have sometimes been viewed as spoilers, enabling the election of more extreme major party candidates, or of one party's candidate over another's, by drawing voters away from the candidate who would otherwise be the frontrunner.

“...your committee concluded that passage of Measure 65 is not likely to increase voter participation; to the contrary, it may decrease participation overall.”

Currently, minor parties achieve participation in Oregon's election process by meeting certain statutory requirements, including gathering signatures from registered voters. Provided they meet these requirements, their nominees will necessarily appear on the general election ballot alongside the major party candidates.

Proponents assert that a top two primary would invigorate minor parties to campaign more actively for votes and to campaign earlier in the season in order to gain a foothold among voters. Theoretically, a minor party candidate has the same chance in a top two primary as major party candidate to advance

to the general election. The proponents believe that equal and open access to the primary will work to the advantage of the minor parties.

Opponents are concerned that a top two system would expose the minor

parties to outsiders who might influence the candidate selection process without necessarily supporting the party's platform. A top two system could encourage minor parties to moderate their positions for the purpose of appealing to more mainstream voters. This could contribute to moderating the process as the proponents contend, but may also produce less innovative and bold ideas.

Most witnesses were convinced that minor party candidates would be unlikely to advance to the general election for two reasons: the prohibitive costs of running two major campaigns and the changes to filing deadlines for primary candidates that would inhibit the minor parties from recruiting candidates. Minor parties often recruit

candidates from the ranks of disenchanted members of the major parties, but would have more difficulty finding candidates in the top two system. Representatives of both major and minor parties thought the top two system would weaken the minor parties.

Your committee reviewed primary election results from other states showing that minor party and independent candidates rarely place first or second in the general election. One expert on ballot access surveyed multiple primaries — open, blanket, and top two — in Washington,

California, Louisiana and Minnesota. In the rare case when a minor party candidate placed first or second, that candidate was nearly always either the only candidate in the primary or one of two.⁹

At present, as long as the minor party meets other procedural requirements, that party is guaranteed to have its nominee in the general election.

Minor parties, like the major parties, will be guaranteed a spot on the primary ballot under Measure 65. While minor parties have a theoretical chance of winning a spot on the general election ballot for any given voter choice office under Measure 65, that chance is plainly less than the guarantee of the present system. For that reason, your committee was persuaded that there is a danger that minor party participation and access to the general election ballot would materially decrease in a top two system.

STRATEGIC VOTING

“Strategic” voting refers to voting based on a premise other than advancing the voter’s choice for the best candidate. Strategic voting involves casting votes in the primary not necessarily for the preferred candidate of the voter, but rather for a candidate who would be less competitive than the preferred candidate if both advanced to the general election. When it involves casting votes for a candidate of a party other than the voter’s party of choice, this is also called cross voting

and vote raiding.

A recent widely-reported example of potential strategic voting would be the call from notable conservative Rush Limbaugh to encourage Republicans to participate in the 2008 Democratic primaries to advance Hillary Clinton, whom many conservatives believed would be a weaker opponent to the Republican nominee. Strategic voting is perceived

as a potential problem in elections because it affects the predictability of outcomes and can produce unintended or anomalous election results.¹⁰

The counterpart to strategic voting is “sincere” voting — that is, remaining committed to the voter’s most preferred candidate. It is worth noting that sincere voting, too, can mean crossing party lines if the voter believes the best candidate is affiliated with a different party. Reasonable people can disagree on the propriety of “strategic” versus “sincere” voting. In considering the issue in the context

“Minor parties, like the major parties, will be guaranteed a spot on the primary ballot under Measure 65. While minor parties have a theoretical chance of winning a spot on the general election ballot for any given voter choice office under Measure 65, that chance is plainly less than the guarantee of the present system.”

of Measure 65, your committee did not settle on a position on the rightness or wrongness of that method of exercising voting rights.

Strategic voting can already occur under Oregon's current primary system. It is fairly easy for a voter to switch party registration to vote strategically in a party primary. However, the voter who does so for one race is able to vote only for the candidates consistent with the voter's new registration; that voter gives up the right to participate in the outcome of other races consistent with the voter's preferred party.

Measure 65 broadens the opportunity for strategic voting. One could engage in strategic voting in any race without jeopardizing one's ability to vote for one's preferred candidate in any other race in that particular election. As a result, the nature of voting would change in a significant way. A candidate would only have to come in second to advance to the general election. Past patterns from our current system where one winner in each party advances might not be a reliable indicator of future voting patterns and results. Some voters might not be as concerned about putting a favored candidate over the top in the primary, but would instead worry more about which two candidates would be in the general election.

While the measure's system creates more opportunity for strategic voting, it could also discourage strategic voting because there is also less assurance that a candidate from one's own party will advance. A voter would have to decide between voting for a preferred candidate or a strategic candidate. And because it could work both ways, there is no clear evidence identifying which or how many voters in any given election would vote strategically for a weaker candidate. There are numerous voting choice scenarios, given the preference of a voter, that voter's

expectations about how strong different candidates are, and whether that voter will vote for a particular candidate regardless of that candidate's chances of winning.

Although some fear strategic voting would allow voters to sabotage another party's candidates, the witness testimony and research presented to your committee did not support that conclusion. It is true that under Measure 65 a voter would be free to vote for any candidate, regardless of the affiliation of either the voter or the candidate. The court in the *Jones* case was persuaded by statistics that many voters exercised that freedom in California elections under its blanket primary. But there was no effort in that case – or in any evidence presented to your committee – to distinguish between voters voting based on sincere preferences and those making other strategic choices. Strategic voting could theoretically increase, but the system also creates downward pressure on that choice so that one's preferred candidate wins in the general election. Your committee was not persuaded that strategic voting would play an increased role in a top two primary.

MONEY SPENT ON ELECTIONS & CAMPAIGNS

Proponents argue that Measure 65 would result in an overall reduction in government spending on the elections process by reducing printing, mailing and other processing costs. It would eliminate the multiple forms of ballots in the primary because all voters would receive the same ballot. And, while the number of candidates in the primary would no doubt make the voters' pamphlet thicker and costlier, the general election edition would likely be slimmer since all the races would be limited to two candidates.

The state's official fiscal impact statement for Measure 65 concludes that the measure will cause a modest increase in state spending of

approximately \$327,000 every two years. It appears to ignore the fact that most of the cost of elections occurs at the county level.

Some of the opposition to Measure 65 is based on the claim that it will substantially increase the cost of campaigning. Opponents of Measure 65 argue that a top two primary would require candidates and their supporters to spend significantly more money during the primary election campaign than they currently do. Witness Blair Bobier, a member of the advisory board of the Pacific Green Party of Oregon, stated

that Measure 65 would make primary campaigns longer and more expensive because candidates would need to win over a larger number of disparate constituencies, not just their own partisans. Witness Jeston Black, public affairs lead staff for the Oregon Education Association, stated that the OEA views Measure 65 as creating two full-blown elections, which would result in longer, costlier election cycles. For that reason, the OEA opposes this measure. Because primary campaigns would cost more, witness Meredith Wood Smith, chair of the Democratic Party of Oregon, argued that one effect of the measure would be to increase the influence of “big money” in campaigns.

Witness Richard Burke of the Libertarian Party of Oregon stated that minor parties would have a difficult time raising enough money to compete with Democratic and Republican candidates in the primary. Minor parties believe it would be much harder to raise enough funds

to get noticed in a top two primary with all other candidates on the ballot.

Your committee was convinced by the arguments that a top two primary would likely increase the costs of running for office because it would increase the cost for each candidate participating in the primary. Your committee was persuaded that overall campaign spending is more likely to go up with the advent of a top two primary. As one witness put it, candidates would essentially be forced to run two general election campaigns.

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FILLING VACANCIES WITHOUT REGARD TO PARTY

Measure 65 is also aimed at lessening the reliance on party affiliation when it comes to filling vacancies. Under the measure, any vacancy in the election for a voter choice office occurring between the spring primary

and the fall general election would be filled by the next highest vote-getter in the spring primary, irrespective of the party affiliation of the replacement or of the person being replaced. There is no provision within the measure for filling a vacancy if only two candidates appeared in the primary; presumably, the remaining candidate would have no opposition in the general election.

More significantly, the measure also changes the system for filling vacancies in voter choice offices after an election. The current election system requires that a replacement for a partisan office that, according to law is filled by appointment, be filled by a person of the same political party as the person vacating the office. Under Measure 65, a vacancy

in a voter choice office could be filled by any person otherwise eligible, regardless of the person's affiliation or lack of affiliation with a political party.

Several witnesses pointed out that the Legislature relies on party affiliation to organize committees and consolidates leadership in each house with the party winning the most seats in the latest election. Those witnesses object to the proposed change for filling vacated offices because, with the proposed changes, control of the Legislature and other influential local or state offices could swing from one party to the other at the whim of the person exercising appointment authority. The present system provides continuity based on voter choice in a way that the proposed system would not.

Your committee believes that the risk presented of a dramatic shift in party dynamics and control that was not voter-directed is unacceptable.

CONCLUSIONS

Your committee concludes the following:

- Reducing excessive partisanship that inhibits effective government is a worthy goal, as is increasing voter participation, but Measure 65 will not likely advance these goals.
- National party developments and societal changes, rather than the current primary system, are responsible for the nomination of excessively partisan candidates.
- The state should not structure its election processes in an attempt to secure a predetermined end: that certain types of candidates, such as “moderate” or “extreme” candidates, are more or less likely to be elected. Those choices should be left to the voters.
- Political parties have traditionally relied on primary elections to determine their nominees in the general election. If Measure 65 passes, no party would be guaranteed representation on the general election ballot.
- Primaries that require parties to include non-members in the selection of party nominees are subject to First Amendment challenges because parties are entitled by the First Amendment’s freedom of association to choose party nominees without outside influence.
- It is much less likely that minor parties will successfully advance candidates to the general election for voter choice offices under the proposed system, leading to a decline in the role of minor parties in Oregon.
- The general election should include representation of all qualified parties, as plurality of parties is a good thing.
- Passage of Measure 65 is not likely to increase voter participation; to the contrary, the evidence that it may decrease participation in the general election is persuasive. Limiting the general election to two candidates may result in some of Oregon’s qualified political parties being left out of the general election. Voters affiliated with those unrepresented parties would be less likely to participate.
- If Measure 65 passes, it will likely increase the cost of campaigning because primary candidates will need to reach more voters in order to be successful. When campaigns get more expensive, the influence of large campaign donors and special interest groups will likely increase.
- There is no way to tell whether “strategic” voting is likely to be a more or less significant factor in a “top two” primary than under the present system.
- The measure’s method of filling vacancies by appointment could cause dramatic swings in party control of offices or the Legislature that were not intended by the voters. The present system provides continuity consistent with voter choice.

RECOMMENDATION

Your committee unanimously recommends a “NO” vote on Measure 65.

Respectfully submitted,

Steve Baron

Steve Bloom

Jan Christensen

James Gorter

John Leeper

Ruth Radford

Sam Sadler

B. J. Seymour

Eli Van Camp

Wynne Wakkila

Leslie S. Johnson, chair

Mary Jane Aman, research adviser

Tony Iaccarino, research & policy director

WITNESSES

Blair Bobier, Advisory Board, Pacific Green Party of Oregon
Jeston Black, Campaign/Research Consultant, Oregon Education Association
Richard Burke, Member, Libertarian Party of Oregon
Carolyn Harris-Crowne, Chair, City Club Study Committee on Partisanship in the Oregon
Legislature
Adam Davis, Partner, Davis, Hibbitts & Midghall, Inc.
Ted Ferrioli, Senator, State of Oregon
Paul Gronke, Professor, Political Science Department, Reed College
Jeff Grossman, Chair, Platform Committee, Oregon Republican Party
Phil Keisling, Former Secretary of State, State of Oregon; Co-Chief Sponsor, Measure 65
Bill Lunch, Chair, Political Science Department, Oregon State University
Heidi Hartzell, Former Elections Director, Linn and Benton Counties
Norma Paulus, Former Secretary of State, State of Oregon; Co-Chief Sponsor, Measure 65
Barbara Roberts, Former Governor, State of Oregon
Meredith Wood Smith, Executive Director, Democratic Party of Oregon
H. Joe Tabor, Chair, Libertarian Party of Oregon
Seth Woolley, Secretary, Pacific Green Party of Oregon

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Notes:

Notes:

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City Club of Portland

901 SW Washington St., Portland, OR 97205

503-228-7231 | 503-228-8840 fax

info@pdxcityclub.org | www.pdxcityclub.org