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

In the Matter of:

Case No. 1404-05077

**Validation Proceeding to Determine
the Regularity and Legality of
Metro's Contracts and Decisions in
Connection with the Oregon
Convention Center Hotel**

**METRO COUNCIL'S MOTIONS
FOR SUMMARY JUDGMENT**

**ORAL ARGUMENT
REQUESTED**

Time required for argument: 90 minutes
Telecommunication requested: No
Offices more than 25 miles from Courthouse: No
Court reporting services requested: Yes

Petitioners Metro and the Metro Council acting in its capacity as the governing body of Metro are represented by William F. Gary and C. Robert Steringer of HARRANG LONG GARY RUDNICK P.C., 1001 SW Fifth Avenue, 16th Floor, Portland, OR 97204, and by Alison Kean, METRO ATTORNEY, 600 NE Grand Avenue, Portland, OR 97232. Respondents Paige Richardson and Michelle Rossolo are represented by John A. DiLorenzo, Jr., DAVIS WRIGHT TREMAINE LLP, 1300 SW Fifth Avenue, Suite 2400, Portland, OR 97201.

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MOTION NO. 1

The Metro Council moves the Court for an order granting partial summary judgment validating the regularity and legality of its authorization of the issuance and sale of revenue bonds pursuant to Section 10 of the Metro Charter in a principal amount sufficient to generate net proceeds of \$60,000,000, secured by the Transient Lodging Tax Net Revenues, as defined in the Amended IGA, the proceeds of which will be granted to Mortenson Development, Inc., the developer under the Development and Financing Agreement, who in turn will use such proceeds to pay for a portion of costs related to the development and construction of a Hyatt Hotel.

MOTION NO. 2

The Metro Council moves the Court for an order granting partial summary judgment validating the regularity and legality of Metro's award of the Development and Financing Agreement.

MOTION NO. 3

The Metro Council moves the Court for an order granting partial summary judgment validating the regularity and legality of its authorization of the execution of the Development and Financing Agreement by resolution.

MOTION NO. 4

The Metro Council moves the Court for an order granting partial summary judgment validating the regularity and legality of the Development and Financing Agreement, including each related agreement for which a form is attached as an exhibit to the Development and Financing Agreement.

1 **MOTION NO. 5**

2 The Metro Council moves the Court for an order granting partial summary
3 judgment declaring that the actions and contracts discussed in Motions 1- 4 above
4 are not subject to referendum and do not require voter approval in order to be
5 effective. Alternatively, The Metro Council moves the Court for an order granting
6 partial summary judgment as to each action and contract that is not subject to
7 referendum and does not require voter approval in order to be effective.

8 **MOTION NO. 6**

9 The Metro Council moves the Court for an order granting partial summary
10 judgment declaring that the agreements discussed in Motions 1-4 above may not
11 be nullified by initiative petition. Alternatively, The Metro Council moves the
12 Court for an order granting partial summary judgment as to each action and
13 contract that is not subject to nullification by initiative petition.

14 Each of the above motions seeks relief pursuant to ORS 33.710 and ORS
15 33.720. The motions are supported by the following points and authorities, the
16 Declaration of C. Robert Steringer (“Steringer Decl.”), the Court’s file and the
17 pleadings contained therein.

18 **POINTS AND AUTHORITIES**

19 **I. INTRODUCTION.**

20 This matter arises out of the metropolitan region’s efforts over more than
21 20 years to bring more tourism and convention dollars to the region through a
22 vibrant and strong convention center. Early in the development of the Oregon
23 Convention Center, it became apparent that it would benefit and provide enhanced
24 economic benefit to the region if there was an adjacent hotel to serve as a lodging
25 “headquarters” for visitors. A recent study has confirmed that the demand for
26 such a hotel remains, and that significantly more private conventions would come

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JUDGMENT**

1 to Oregon if there were a large, upscale hotel adjacent to the Oregon Convention
2 Center. An adjacent hotel with a dedicated large room block available to
3 conventions will assure meeting planners that key convention attendees can be
4 lodged conveniently, improving the Oregon Convention Center's attractiveness to
5 large conventions. Those planners, although interested in bringing their events to
6 the Portland area, have previously passed over the Oregon Convention Center
7 because of the lack of adjacent, large-block upscale lodging.

8 Metro led the effort to capitalize on the Oregon Convention Center's full
9 potential by promoting the development of a large, upper-scale, adjacent hotel
10 ("the Project"). Metro's lead role in promoting the Project follows from its
11 position as owner and operator of the adjacent Oregon Convention Center, which
12 is one of Metro's core functions under its voter-approved Charter. The Metro
13 Charter empowers Metro with the broadest possible authority to carry out that
14 function: it provides Metro with "all powers that the laws of the United States and
15 this state now or in the future could allow Metro just as if this charter specifically
16 set out each of those powers." Metro Charter, ch. 2 § 9 (emphasis added).

17 Exercising its broad authority, Metro will promote the development of a
18 Hyatt hotel across the street from the Oregon Convention Center through grants of
19 money to the Project developer. Most of that money will be raised by selling
20 revenue bonds, a financing mechanism expressly permitted under the Metro Code.
21 In return, the hotel will be bound to a "Room Block Agreement" in which it agrees
22 to reserve a block of rooms and make them available to convention center patrons
23 under specified terms and conditions. Due to the Hotel Project's anticipated
24 stimulus to the Oregon tourism economy, the State of Oregon, through the Oregon
25 Legislature, has also agreed to grant the project ten million dollars of lottery bond
26 proceeds.

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1 Respondents, supported by a Portland hotel owner who opposes the Project,
2 have sought to derail the Project through litigation. To date, their challenges have
3 been based primarily on the unsound legal theories that Metro lacks the authority
4 to participate as planned in the Project or that parts of the project must be
5 submitted to the voters for approval. Respondents—and whoever is financing
6 their efforts—are fully entitled to their opinions on the merits of the Project.
7 However, they are not entitled to delay a major construction project, impact the
8 bond financing of the Project (which can be impacted by challenges to government
9 action), or make Metro’s participation in the project more expensive than
10 necessary by bringing groundless lawsuits against the Project participants. The
11 legislature has created a statutory process expressly aimed at sparing local
12 governments and their citizens from such tactics. The process, codified at ORS
13 33.710 and ORS 33.720, allows a municipal government such as Metro to obtain
14 judicial validation of the regularity and legality of its actions and contracts in a
15 proceeding resulting in a judgment that creates claim and issue preclusion as to all
16 matters validated.

17 Here, Metro and its Council seek validation of key actions and contracts
18 associated with the Project. As explained in detail below, the Project is fully
19 within Metro’s home-rule authority, particularly its authority to operate and
20 maintain the Oregon Convention Center. The Metro Code expressly allows Metro
21 to use revenue bonds to finance its participation in development projects aimed at
22 advancing Metro’s mission, regardless of whether Metro or a private party will
23 own the property. Similarly, the Metro Charter and Code expressly permit Metro
24 to enter into contracts, such as the Development and Financing Agreement, which
25 defines the roles of Project participants, in furtherance of its functions. No
26 applicable law requires voter approval of any of these actions. The Project is

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1 notable for its size and importance to the local economy, but it is rather ordinary in
2 the sense that it falls squarely within Metro's home-rule authority and uses tools—
3 revenue bonds and contracts—that are expressly available to Metro under
4 governing law and are common in public-private development projects such as
5 this one.

6 Under the undisputed material facts, Metro is entitled to validation of the
7 actions and contracts set out in its amended pleading. Respondents' legal
8 arguments against Metro's actions lack any basis in state law, Metro's Charter or
9 the Metro Code. Accordingly, this Court should grant each of the Metro Council's
10 motions for partial summary judgment.

11 **II. STANDARD FOR SUMMARY JUDGMENT.**

12 Motions for summary judgment are to be granted where “the pleadings,
13 depositions, affidavits, declarations and admissions on file show that there is no
14 genuine issue as to any material fact and that the moving party is entitled to
15 prevail as a matter of law.” ORCP 47C.

16 **III. UNDISPUTED FACTS.**

17 **A. The Project.**

18 The Project grew out of the recognition that, although the Oregon
19 Convention Center has a major statewide and regional economic impact, the
20 absence of an adjacent upscale hotel dedicated to providing large room-block
21 lodging to convention center patrons has prevented the Convention Center from
22 reaching its full economic potential. As far back as 1988, it was recognized that
23 the absence of an adjacent hotel would hamper the Oregon Convention Center's
24 appeal to large convention planners. Steringer Decl., Ex. 1 (Proposed Oregon
25 Convention Center Area Development Strategy) (“Within three to five years of the
26 [Oregon Convention Center]'s opening, the absence of an additional headquarter

1 hotel will restrict the [Oregon Convention Center]’s ability to compete for mid-
2 sized conventions.”). A more recent survey of convention planners confirmed that
3 the Convention Center’s marketability would be improved if an adjacent hotel
4 were constructed. Steringer Decl., Ex. 2 (Hotel Market Impact Study) (“The
5 average score of the respondent’s likelihood of booking the [Oregon Convention
6 Center] under the current conditions was 4.3 out of 10. If a new convention hotel
7 was developed, the average score increased to 7.7, a 79% increase in the
8 likelihood of booking the center over the current conditions.”).¹

9 In January 2012, the Metro Council approved a resolution designating
10 Metro Council President Tom Hughes as lead councilor for investigating the
11 feasibility of the development of a privately owned and privately operated upscale
12 hotel located adjacent to the Convention Center. Steringer Decl., Ex. 3
13 (Resolution 12-4327A). Metro anticipated that it would reach an agreement with
14 other local governments on how to pursue the Project. Steringer Decl., Ex. 3
15 (Resolution 12-4327A Staff Report).

16 In April 2012, the leaders of Metro, Multnomah County, the City of
17 Portland and the Portland Development Commission adopted a “Statement of
18 Principles” that included the goal of pursuing private sector development and
19 ownership of a hotel near the Convention Center, which would assist in marketing
20 the Center for national conventions. Steringer Decl., Ex. 4 (Statement of
21 Principles). They agreed upon this goal because:

22 [M]eeting planners * * * say [the Oregon Convention
23 Center’s] and Portland’s desirability cannot overcome
24 the lack of an immediately adjacent block of at least

25 ¹ Community leaders in Spokane reached the same conclusion and expect a
26 716-room hotel being built across the street from the Spokane Convention Center
to bring new business to the Inland Empire. Steringer Decl. Ex. 5 (newspaper
articles describing the Spokane project).

1 500 hotel rooms reserved specifically for larger
2 conventions. As a result, [the Oregon Convention
3 Center], the community and the men and women who
4 work in the region's hospitality industry lose lucrative
national convention opportunities. In 2011 alone,
Portland lost 30 conventions to other similarly sized
cities and convention centers."

5 *Id.* Pursuant to the Statement of Principles, the Metro Council approved a
6 resolution on April 26, 2012, authorizing the issuance of a Request for Proposals
7 ("RFP") to remedy the lack of adequate lodging. Steringer Decl., Ex. 6
8 (Resolution 12-4346). Metro issued the RFP for the Project the following month,
9 and received two competitive proposals. Steringer Decl., Ex. 7 (Resolution 12-
10 4365 Staff Report). In September 2012, after the proposals had been reviewed and
11 scored according to the evaluation criteria set out in the RFP, Metro decided to
12 commence negotiations with a Mortenson Development/Hyatt development team
13 ("Mortenson Development"). Steringer Decl., Exs. 8, 7 (scoring sheets,
14 Resolution 12-4365).

15 In 2012 and 2013, Metro, the City of Portland and Multnomah County
16 negotiated an amendment to the Visitor Facilities Intergovernmental Agreement
17 ("Amended IGA") to provide for the financing of a portion of the Project. The
18 Amended IGA provides that hotel taxes collected throughout Multnomah County
19 ("transient lodging taxes") may be pledged and used to pay debt service on the
20 revenue bonds Metro plans to issue for the Project. Steringer Decl., Ex. 9, p. 35
21 (Resolution 12-4452 Staff Report). In August 2013, the Metro Council adopted
22 two resolutions—one approving the Amended IGA, and one approving a
23 preliminary agreement with Mortenson Development, Inc. (the "Term Sheet").
24 Steringer Decl., Exs. 9, 10 (Resolutions 13-4452 (Amended IGA) and 13-4453
25 (Term Sheet)).

26 ///

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1 The Term Sheet is non-binding, but was intended to define the approach to
2 the Project and summarize the general business terms for the final agreement to be
3 negotiated and entered into between the Metro Council and Mortenson
4 Development regarding the construction and financing of a Convention Center
5 hotel (hereafter referred to as the “Development and Financing Agreement” or
6 “DFA”). Steringer Decl., Ex. 10 (Term Sheet). The anticipated structure of the
7 Project, as reflected in the Term Sheet, is that Mortenson Development would
8 construct a high-quality, Hyatt-Regency hotel (the “Hyatt Hotel”) adjacent to the
9 Oregon Convention Center and the hotel would agree to reserve a block of rooms
10 and make them available to convention center patrons under certain specified
11 terms and conditions (the “Room Block Agreement”). *Id.* In exchange, Metro
12 would issue revenue bonds in an amount equal to the net present value of the
13 Hyatt Hotel’s projected hotel taxes, to be paid off in accordance with the Amended
14 IGA. *Id.* It is expected that the net present value of the Hyatt Hotel’s projected
15 hotel taxes will result in Metro’s issuance of revenue bonds that will generate net
16 proceeds of approximately \$60 million, which will be granted to Mortenson
17 Development to pay a portion of the development expenses. *Id.* Additionally, the
18 State of Oregon has pledged an additional ten million dollars in lottery bonds to
19 support the Project. Steringer Decl., Ex. 13 (DFA).

20 On May 15, 2014, Metro issued a Notice of Intent to Award, informing all
21 proposers responding to the RFP that Metro intended to award the Development
22 and Financing Agreement to Mortenson Development. Steringer Decl., Ex. 11
23 (Notice of Intent to Award). The notice informed the proposers that they had
24 seven days from the date of the notice to appeal. No appeals were filed. On June
25 26, 2014, the Metro Council adopted a resolution approving the DFA and
26 authorizing its execution. Steringer Decl., Ex. 12 (Resolution 14-4520). The DFA

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1 finalized the terms under which Mortenson Development would develop the
2 Project and cause the construction of the Hyatt Hotel. The DFA also addressed
3 other terms of the deal, in particular the Room Block Agreement and a Deed
4 Restriction, which would be executed prior to closing. Steringer Decl., Ex. 13
5 (DFA). The terms of the DFA are consistent with the terms anticipated in the
6 Term Sheet, including an agreement by Metro to issue revenue bonds, the
7 proceeds of which would be granted to Mortenson Development. *Id.*

8 Also on June 26, 2014, the Metro Council adopted Resolution 14-4531,
9 authorizing the issuance of revenue bonds as required by the DFA. Steringer
10 Decl., Ex. 14.

11 **B. Opposition to the Project.**

12 Respondent Richardson is a spokesperson for the “Coalition for Fair
13 Budget Priorities,” which she says represents the interests of several Portland
14 hotels and others. Steringer Decl. Ex. 15 (Richardson op-ed published in the
15 *Portland Tribune*). Respondent Rossolo likewise is associated with the same
16 Coalition. Steringer Decl. Ex. 16 (Oregonian article 6/19/14). The Coalition has a
17 website opposing Metro’s participation in the Project, particularly the aspect of
18 public financing. Steringer Decl. Ex. 17 (www.ouchportland.com).
19 Representatives of the Coalition, including respondents, have repeatedly
20 publicized their intent to oppose the Project, whether through initiative,
21 referendum or litigation. Steringer Decl. Ex. 18 (newspaper articles).

22 To that end, Respondent Rossolo challenged Multnomah County’s
23 revisions to the Multnomah County Code undertaken in accordance with the
24 Amended IGA. Steringer Decl. Ex. 19 (*Rossolo Amended Complaint*).
25 Respondent Rossolo contended that those revisions were subject to referendum
26 and challenged the Multnomah County Election Division’s determination that the

1 revisions were administrative and thus not subject to referendum. *Id.* This Court
2 agreed that the revisions to the Multnomah County Code were administrative and
3 not subject to referendum. Steringer Decl. Ex. 20 (*Rossolo* opinion). Respondent
4 Rossolo has appealed that decision.

5 After the adjudication of the *Rossolo* matter, Respondent Richardson
6 commenced a declaratory judgment action in the Clackamas County Circuit Court
7 arguing that, under ORS 268.310(4)(a), Metro could not issue revenue bonds in
8 support of the Project without first obtaining voter approval. Steringer Decl. Ex.
9 21 (*Richardson* Amended Complaint). In the alternative, Respondent Richardson
10 contends that if Metro is not constructing a facility, as that term is used in ORS
11 268.310(4)(a), then Metro lacks the authority to provide the financing and issue
12 revenue bonds as contemplated under the Project documents. *Id.* After
13 intervening in this proceeding, Respondent Richardson successfully opposed
14 Metro's attempt to transfer the Clackamas County action to Multnomah County so
15 that it could be consolidated or coordinated with this proceeding. Respondent
16 Richardson's action remains pending in Clackamas County.

17 **C. Commencement of the Validation Proceeding.**

18 Metro and its Council are confident that all actions the Council has taken in
19 connection with the Project are regular and legal. However, the strategy of Project
20 opponents to challenge different aspects of the Project through piecemeal litigation
21 in multiple jurisdictions threatens to slow down the progress of the Project, and
22 substantially increase the cost of the Project to taxpayers. Even though the
23 litigation lacks merit, its very existence may prevent the issuance of an unqualified
24 opinion by bond counsel, which may affect the marketability of the bonds and
25 increase the cost of the financing. To ensure that legal challenges to the Project
26 are given fair consideration in an efficient and effective manner, Metro

1 commenced the present validation proceeding pursuant to ORS 33.710 and ORS
2 33.720 to obtain a judicial examination of the regularity and legality of its
3 governmental actions and contracts relating to the Project. Steringer Decl., Ex. 22
4 (Resolution 14-4519).

5 **IV. ARGUMENT.**

6 ORS 33.710 permits the Metro Council to commence a proceeding in the
7 circuit court for the purpose of “having a judicial examination and judgment of the
8 court as to the regularity and legality” of certain actions, including the
9 authorization of contracts and issuance of bonds. As in this case, when
10 government actions are contested, a validation proceeding under ORS 33.710 and
11 ORS 33.720 provides a mechanism for establishing the validity of actions and
12 contracts that are central to the issuance and pricing of bonds. Despite Metro’s
13 strict compliance with all legal and procedural requirements associated with the
14 authorization of the Project, opponents already have filed two lawsuits in an
15 attempt to delay or derail the Project. As explained in the remainder of these
16 points and authorities, this Court can and should grant summary judgment in
17 Metro’s favor validating the regularity and legality of its actions and contracts in
18 connection with the Project.

19 **A. The Metro Council exercised its home-rule authority to**
20 **authorize the issuance of revenue bonds for the Project without**
21 **a public vote (Motion No. 1).**

22 Motion No. 1 seeks validation of the regularity and legality of the Metro
23 Council’s authorization of the issuance and sale of revenue bonds in support of the
24 Project, pursuant to §10 of the Metro Charter. Metro has broad home-rule
25 authority to take any action not prohibited by state or federal law in connection
26 with its operation of the Oregon Convention Center. Exercising that power, fully
in accordance with the Metro Charter and Code, the Metro Council properly

1 authorized the issuance of revenue bonds in connection with the Project without
2 submitting it to a public vote. The Court, therefore, should grant Metro's Motion
3 No. 1.

4 **1. Metro has broad home-rule authority under its Charter.**

5 Metro is a metropolitan service district organized pursuant to the Metro
6 Charter, which was adopted in accordance with Article XI, § 14, of the Oregon
7 Constitution. The Charter confers broad, general home-rule authority on Metro:
8 "all powers that the laws of the United States and this state now or in the future
9 could allow Metro just as if this charter specifically set out each of those powers."
10 Metro Charter, Ch. 2, § 9 (emphasis added).² The "central object" of home rule
11 authority is to "allow the people of the locality to decide upon the organization of
12 their government and the scope of its powers under its charter without having to
13 obtain statutory authorization from the legislature." *City of La Grande v. Pub.*
14 *Employes Ret. Bd.*, 281 Or 137, 142, 576 P2d 1204 (1978) *adhered to on reh'g*,
15 284 Or 173 (1978).

16 When interpreting the scope of a local government's authority to act, the
17 first question is whether the act is authorized by the government's home rule
18 charter or by statute, and the second question is whether the act "contravenes state
19 or federal law." *Rogue Valley Sewer Servs. v. City of Phoenix*, 262 Or App 183,
20 188, 329 P3d 1 (2014) (quoting *City of Law Grande*, 281 Or at 142). A general
21 grant of authority in a home rule charter provides the local government "the sum
22 total of intramural powers" available to that government. *City of Idanha v.*
23 *Consumers Power, Inc.*, 8 Or App 551, 559-60, 495 P2d 294 (1972). The Metro
24

25 ² The full text of the relevant sections of the authorities governing Metro's
26 powers are set out in the appendix to these motions.

1 Charter contains such a general grant of authority:

2 “When carrying out the functions authorized or
3 assumed under this charter: (1) Metro has all powers
4 that the laws of the United States and this state now or
5 in the future could allow Metro just as if this charter
6 specifically set out each of those powers; (2) the
7 powers specified in this charter are not exclusive; (3)
8 any specification of power in this charter is not
9 intended to limit authority; and (4) the powers
10 specified in this charter shall be construed liberally.”

11 Metro Charter, Ch. 2, § 9. Thus, the Metro Charter is a “‘general powers’ charter,
12 under which the entity assumes all power that could be conferred by state law.”
13 *City of Sandy v. Metro*, 200 Or App 481, 492-93, 115 P3d 960 (2005) (citing
14 Metro Charter, Ch. 2 § 9). Accordingly, when Metro performs an act that a
15 metropolitan service district generally is authorized to perform, Metro is not
16 required to identify a statutory source of authority for its action. *Rogue Valley*
17 *Sewer Servs.*, 262 Or App at 191. Rather, the only relevant question is whether
18 the act is prohibited by state or federal law. *Id.*

19 **2. The Metro Charter and Code authorize Metro to issue
20 revenue bonds without a public vote.**

21 **a. The Metro Charter and Code authorize the
22 issuance of revenue bonds in support of the Project.**

23 The Metro Charter, at Chapter 3, § 10, generally authorizes Metro to issue
24 revenue bonds. More specific legislation regarding Metro’s power to issue
25 revenue bonds is found in the Metro Code.³ Under the Metro Code, as authorized

26 ///

³ Chapter 7 of the Metro Charter authorizes the Metro Council to enact legislation by ordinance. Ordinances are codified in the Metro Code. Metro Code 1.01.030 (“This Code consists of all the general, regulatory and penal ordinances of the Metropolitan Service District as they exist on the date of this ordinance and as they may be adopted from time”).

1 by the Metro Charter, Metro has broad power to issue revenue bonds in
2 furtherance of its functions and operations:

3 "In accordance with Section 10 of the Metro Charter,
4 Metro may issue from time to time revenue bonds for
5 such purposes as are determined by Council to be
6 necessary or appropriate to carry out the functions,
7 duties and operations of Metro. Metro may issue
8 revenue bonds for the purpose of financing such
9 property as Council shall determine is necessary or
10 desirable in order to carry out or assist or advance the
11 carrying out of Metro's function, duties and operations
regardless of whether such property is to be owned by
Metro or any other public or private agency or person
and regardless of whether such property is to be
located within or without the jurisdictional boundaries
of Metro. * * * "

12 Metro Code ("MC") 7.02.040(a). One of Metro's express functions, under both its
13 Charter and generally as a metropolitan service district, is to acquire, develop,
14 maintain and operate public cultural, trade, convention, exhibition, sports,
15 entertainment and spectator facilities. Metro Charter, Ch. 2, §6 (1)(b); ORS
16 268.310(4).⁴ The Project—involving the construction of a high-quality hotel
17 adjacent to the Oregon Convention Center with a Room Block Agreement that will
18 help the Convention Center attract more and larger conventions—falls squarely
19 within Metro's power to operate the Convention Center. Thus, Metro's issuance
20 of revenue bonds in connection with the Project is expressly authorized by MC
21 7.02.040(a). The fact that the Convention Center hotel will be privately owned
22 and operated does not affect that authority: MC 7.02.040(a) expressly grants
23 Metro authority to issue bonds in furtherance of its "functions, duties and
24

25 ⁴ For purposes of brevity, Metro's collective powers will be referred to in
26 these points and authorities as the power to "operate" the Oregon Convention
Center.

1 operations,” “regardless of whether such property is to be owned by Metro or any
2 other public or private agency or person * * *.” MC 7.02.040(a).

3 **b. The Metro Code expressly permits the issuance of**
4 **revenue bonds without voter approval.**

5 MC 7.02.040(a) states:

6 “Prior approval of the electors of Metro shall not be
7 required as a condition precedent to the issuance of
8 any revenue bonds under the Metro Code.”

9 *See also* ORS 268.600 (statutory authority of metropolitan service districts to issue
10 revenue bonds without voter approval). The fact that Metro may issue *revenue*
11 *bonds* without prior voter approval stands in contrast to Metro’s authority to issue
12 *general obligation bonds*, which explicitly requires voter approval before
13 issuance. Metro Charter, Ch. 3, §12. *See also* ORS 268.520(1) (a metropolitan
14 service district’s statutory authority to issue general obligation bonds is limited by
15 a requirement that issuance be authorized at a properly called election).

16 There is no question that the bonds to be issued in support of the Project are
17 revenue bonds, and not general obligation bonds. Thus, Metro’s governing law
18 makes it unmistakably plain that it was fully within the Metro Council’s authority
19 to authorize the issuance of revenue bonds in connection with the Project without
20 a public vote.

21 **3. The Metro Council properly authorized the issuance of**
22 **revenue bonds.**

23 Finally, the Metro Council was required to exercise its authority to
24 authorize the issuance of the Project’s revenue bonds by resolution or ordinance.
25 MC 7.02.110(a). On June 26, 2014, the Metro Council unanimously adopted
26 Resolution 14-4531, authorizing the issuance and sale of revenue bonds, the
proceeds of which will be granted to Mortenson Development to pay for a portion

1 of costs related to the Project. Steringer Decl., Ex. 23. Accordingly, the Metro
2 Council's authorization of the issuance of revenue bonds in connection with the
3 Project was both regular and lawful.

4 **4. ORS 268.310 does not require a public vote on the**
5 **Project's financing.**

6 Notwithstanding the clear authority for Metro's actions under state law, the
7 Metro Charter and the Metro Code, Respondents nevertheless contend that ORS
8 268.310(4)⁵ requires Metro to seek voter approval of the financing plan for the
9 Project. They are incorrect, for at least two independent reasons.

10 *First*, the requirement of voter approval for the financing of an action
11 specified in ORS 268.310(4) applies only when a district relies on the power
12 granted by that statute to take the action in the first place. Metro does not rely on
13 ORS 268.310(4) for the power to participate in the Project. Rather, it is
14 proceeding under the power granted by its own Charter and Code, as permitted by
15 the Oregon Constitution. In fact, the legislature expressly made ORS 268.310
16 "subject to the provisions of a district charter." Therefore, the terms of the limited
17 authority conferred by ORS 268.310 are expressly superseded by the specific
18 authority conferred by the Metro Charter, upon which Metro relied in taking the

19 _____
20 ⁵ ORS 268.310(4) provides as follows:

21 "Subject to the provisions of a district charter, a
22 district may, to carry out the purposes of this chapter:

23 * * *

24 "(4) Acquire, construct, alter, maintain, administer and
25 operate major cultural, convention, exhibition, sports
26 and entertainment facilities. However, unless the
electors of the district first approve the financing of the
facilities, the district shall not:

"(a) Construct new facilities * * *."

1 actions at issue here, which does not require a vote in order for Metro to
2 participate in the Project.

3 *Second*, even if this Court were to find ORS 268.310(4) applicable here,
4 under the plain language of that statute, voter approval of a financing plan is only
5 required when the metropolitan service district is “construct[ing] * * * major
6 cultural, convention, exhibition, sports and entertainment facilities.” A privately
7 constructed, privately owned, and privately operated hotel is not the type of
8 facility contemplated by the statute.

9 Each of those points is explained further in the following paragraphs.

10 a. **ORS 268.310(4) is irrelevant here because Metro is**
11 **issuing revenue bonds pursuant to its home-rule**
12 **authority, not the statute.**

13 ORS 268.310(4) is but one source of authority for metropolitan service
14 districts to build or acquire certain types of facilities. It is not, however, the source
15 of authority upon which Metro relies to issue revenue bonds in connection with
16 the Project. Rather, as described above, Metro acted under the broad grant of
17 power over matters of metropolitan concern set forth in its home-rule Charter and
18 its express power to issue revenue bonds to support its operation of the Oregon
19 Convention Center.

20 Given that Metro is acting under its home-rule authority, ORS 268.310(4)
21 is relevant only if it is clear that the statute was intended to preempt Metro’s
22 ability to act as allowed by its Charter and Code. Preemption will only be found
23 to the extent that (1) the statute and local enactment “cannot operate
24 concurrently,” or (2) the statute contains a “clearly manifested intention that the
25 operation of state law be exclusive” or text expressly stating that the statute has
26 preemptive effect. *Thunderbird Mobile Club v. City of Wilsonville*, 234 Or App
457, 474, 228 P3d 650, *rev. den.*, 348 Or 524 (2010). The fact that a statute

1 occupies a field of regulation has no automatic preemptive effect over a local
2 enactment—the legislative intent to preempt must be explicit. *Rogue Valley Sewer*
3 *Servs. v. City of Phoenix*, 262 Or App 183, 192, 329 P3d 1 (2014).

4 Whenever possible, a court interprets a local law that has been properly
5 enacted pursuant to home rule authority “to be intended to function consistently
6 with state laws.” *City of La Grande v. Pub. Employees Ret. Bd.*, 281 Or 137, 148,
7 576 P2d 1204 (1978) *adhered to on reh'g*, 284 Or 173 (1978). Furthermore, the
8 court assumes “that the legislature does not mean to displace local civil or
9 administrative regulation of local conditions by a statewide law unless that
10 intention is apparent.” *Id.* at 148-49. A local enactment is not incompatible with
11 a statute “simply because it imposes greater requirements than does the state, nor
12 because the ordinance and the state law deal with different aspects of the same
13 subject.” *Thunderbird Mobile Club*, 234 Or App at 474 (quoting *Springfield*
14 *Utility Board v. Emerald PUD*, 191 Or App 536, 541-42, 84 P3d 167 (2004) *aff'd*,
15 339 Or 631 (2005)).

16 Nothing in ORS 268.310(4) is incompatible with Metro’s home-rule
17 powers, and the statute expresses no explicit intent to preempt local laws. As to
18 the former, the statute is, first and foremost, a grant of authority to metropolitan
19 service districts that lack home-rule authority to carry on such activities:

20 “Subject to the provisions of a district charter, a
21 district may, to carry out the purposes of this chapter:

22 * * *

23 “(4) Acquire, construct, alter, maintain, administer and
24 operate major cultural, convention, exhibition, sports
25 and entertainment facilities. However, unless the
26 electors of the district first approve the financing of the
facilities, the district shall not:

“(a) Construct new facilities * * *.”

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1 ORS 268.310(4). The limitation on that statutory power—the requirement for a
2 public vote in certain circumstances—applies only when a metropolitan service
3 district acts to construct new facilities pursuant to that statutory power. In fact, the
4 statute acknowledges that its terms are “[s]ubject to the provisions of a district
5 charter.” Accordingly, the limit on *statutory power* in ORS 268.310(4) cannot be
6 interpreted as incompatible with Metro’s *home rule power* to issue revenue bonds
7 without a public vote.

8 Nor did the legislature express any intent to preempt local laws when it
9 enacted ORS 268.310(4). Rather, the legislature expressly said just the opposite—
10 it made the requirements of ORS 268.310(4) “subject to the provisions of a district
11 charter,” thereby recognizing that a whatever grant of powers or limitations on
12 those powers existing in the district’s charter would supersede the statute, not the
13 other way around. The legislature also makes clear that Charter predominance,
14 rather than preemption, is intended in ORS chapter 268. “A metropolitan service
15 district has full power to carry out the objectives of its formation and the functions
16 authorized pursuant to its charter * * *.” ORS 268.300(1)

17 The plain meaning of the introductory words to ORS 268.310 means that
18 the Metro Charter, not ORS 268.310(4), determines Metro’s authority with regard
19 to the Project. The legislative history of ORS 268.310 confirms this conclusion
20 that the “subject to” introduction to the statute, which was added in 1997, was
21 intended to enable Metro to act in accordance with its Charter without being
22 hindered by contrary statutory provisions in ORS Chapter 268.

23 When it was adopted in 1992, Metro’s home-rule Charter stated that, upon
24 the Charter’s adoption, efforts should be made to conform state laws to the
25 Charter. Steringer Decl., Ex. 24 (Metro Charter 1992). In 1997, the legislature
26 passed HB 3638, which amended ORS 268.310 and other sections of ORS Chapter

1 268. The legislature's purpose in passing that bill was to bring the statutes in line
2 with Metro's Charter. Minutes, House General Government Committee, HB
3 3638, May 2, 1997 (testimony of Representative Larry Sowa). Indeed, the phrase
4 "subject to the provisions of the district charter" was added to the bill in order to
5 "increase[] the flexibility" of that bill's amendments to ORS 268.310. Testimony,
6 House General Government Committee, HB 3638, April 23, 1997, Ex E
7 (statement of Jon Egge, Metro Charter Committee Member). That flexibility was
8 achieved by structuring the amended statute to continue to provide independent
9 authority for certain of Metro powers, so that Metro could continue to operate in
10 the event the Metro Charter is ever revoked. *Id.*

11 The 1997 amendments to ORS 268.310 also added ORS 268.310(6), which
12 appears at the end of the list of enumerated actions that a district may take, and
13 which provides that a district may "[e]xercise jurisdiction over other matters of
14 metropolitan concern as authorized by a district charter." This subsection further
15 demonstrates the legislature's intent to give a district's charter priority over any
16 constraints imposed by ORS Chapter 268.

17 The text, context and legislative history of ORS 268.310, as it was amended
18 in 1997, as well as the recognition of charter preeminence in ORS 268.300(a),
19 demonstrate that the legislature intended for Metro's home-rule power under its
20 Charter to control over any restrictions in ORS 268.310.

21 In sum, ORS 268.310(4) does not require voter approval before Metro can
22 issue revenue bonds to facilitate the Project because Metro is not participating in
23 the Project pursuant to authority conferred by that statute but rather pursuant to
24 authority conferred by the Metro Charter. The provisions of the statute are
25 expressly made "subject to the provisions of a district charter." Accordingly,

26 ///

1 Metro's Charter and ordinances, not ORS 268.310 (4), control and those
2 provisions expressly authorize Metro to issue revenue bonds without a public vote.

3 **b. The vote requirement in ORS 268.310(4) applies**
4 **only to "construction" of certain "facilities," which**
5 **do not include private hotels.**

6 Even if ORS 268.310(4) applied here, the statute's voting requirement is
7 inapplicable by its own terms. ORS 268.310(4) empowers metropolitan service
8 districts to "[a]cquire, construct, alter, maintain, administer and operate major
9 cultural, convention, exhibition, sports and entertainment facilities," but a
10 metropolitan service district cannot "[c]onstruct new facilities" pursuant to that
11 power "unless the electors of the district first approve the financing of the
12 facilities." The requirement of voter approval is inapplicable to the Project
13 because Metro is not "construct[ing] new facilities," as that phrase is used within
14 the context of the statute. Under even the broadest interpretation of that phrase, it
15 cannot be construed to apply to the construction of a privately-built and privately-
16 owned hotel.

17 **i. Metro's participation in the Project is not**
18 **covered by the plain meaning of ORS**
19 **268.310(4).**

20 Under the plain meaning of ORS 268.310(4)(a), Metro is not "constructing"
21 the Hyatt Hotel. *Black's Law Dictionary*, in relevant part, defines "construction"
22 as "[t]he act of building by combining or arranging parts or elements; the thing so
23 built." *Black's Law Dictionary* 332 (8th ed.). Likewise, *Webster's Third New*
24 *International Dictionary* defines "construct," as relevant here, as "to form, make,
25 or create by combining parts or elements." The Development and Financing
26 Agreement makes unmistakably clear that Mortenson Development, not Metro, is
responsible for building the Hyatt Hotel. Metro will not be a party to the contracts

1 with the builder, architect, or engineer on the Project. Steringer Decl., Ex. 13
2 (DFA). Therefore, it cannot be said that Metro is constructing the Hyatt Hotel.

3 The vote requirement in ORS 268.310(4) also is inapplicable to the Project
4 because the Hyatt Hotel is not a “facility” under that statute. The express statutory
5 language regarding the word “facilities” is limited only to the following structures:
6 “major cultural, convention, exhibition, sports and entertainment facilities.” ORS
7 268.310(4). A privately-owned and operated hotel, although across the street from
8 the publicly-owned Oregon Convention Center, is not a convention or
9 entertainment facility.

10 No Oregon case further elucidates the meaning of “convention facility” or
11 “entertainment facility.” However, the plain and ordinary meaning of each word
12 demonstrates that the proposed Hyatt Hotel is neither. *Webster’s Third New*
13 *International Dictionary* defines “convention,” as relevant to this context, as:

14 **2 a** (1) a meeting or coming together by chance or plan
15 of two or more persons (2) the gathering together or
16 union of things (3) the act of summoning before a
17 court or other authority (4) the summoning or
18 convening of an assembly **b** (1) a body or assembly of
19 persons met for some common purpose; *esp*: a formal
and special or regular assembly of delegates or
members of a party or association met to accomplish
some specific civil, social, political, or ecclesiastical
object or for the exchange of ideas, views, and
information of common interest to the group * * *.

20 “Facility” is defined as “something (as a hospital, machinery, plumbing) that is
21 built, constructed, installed or established to perform some particular function or
22 to serve or facilitate some particular end.” Thus a “convention facility” is
23 something constructed to perform the particular function of convening an
24 assembly, gathering, or meeting of persons coming together for planning or
25 meeting purposes.

26 ///

1 Unlike the Convention Center, the Hyatt Hotel will not be owned or
2 operated by Metro or any other public entity. The Hotel will be private, where any
3 member of the public can book a private hotel room. Like any upscale hotel, the
4 Hyatt Hotel will include restaurant and meeting facilities. However, as the DFA
5 makes clear, Metro's purpose in participating in the Project is to secure convenient
6 lodging for participants in events at the Convention Center, not at the hotel. Thus,
7 the primary purpose of the Hyatt Hotel is to provide private temporary lodging,
8 not to host a convention.

9 Likewise, the planned hotel does not qualify as an "entertainment facility"
10 within the meaning of the statute. As noted above, the primary function of the
11 hotel is to lodge guests. While the hotel may also offer other amenities in order to
12 entice the public to stay there, those amenities exist to facilitate lodging, not the
13 other way around. The hotel's primary purpose is to lodge private guests, not to
14 entertain them. Therefore, the Project does not involve the construction of a
15 "facility" as used by ORS 268.310(4)(a) and the voter approval requirement of
16 that statute does not apply.

17 **ii. Legislative history confirms that ORS**
18 **268.310(4) was not intended to apply to**
19 **privately built, owned and operated facilities.**

20 The legislative history to ORS 268.310(4) shows that it was intended to
21 apply only to Metro-built and owned public facilities through which Metro would
22 provide services. Prior to 1992, all of Metro's powers were found in ORS chapter
23 268 because Metro's voters had not yet adopted a home-rule charter. The
24 legislature passed House Bill 3308 in 1977, empowering Metro for the first time,
25 subject to voter approval, to "acquire, construct, alter, maintain, administer and
26 operate major cultural convention, exhibition, sports and entertainment facilities."
Or. Laws 1977 Ch. 782, §5. The Measure Intent Statement for HB 3308, prepared

1 by Senior Legislative Assistant Patricia K. Middelburg, indicates that the facilities
2 under consideration would be those newly built structures through which Metro
3 would supply services. Steringer Decl. Ex. 25 (Measure Intent Statement). The
4 statement identifies the “Problem addressed” by HB 3308 as the fact that the
5 current statutes allowed Metro to supply only the following types of services:
6 “sewerage, solid and liquid waste disposal, control of surface water, public
7 transportation, zoo facilities and other services transferred to the district by
8 agreement with the local governing body.” *Id.* HB 3308 would “expand[] the
9 costs [sic] of services that *the Metropolitan Service District may provide* to
10 include cultural facilities.” *Id.* (emphasis supplied).

11 The emphasis on services in the Measure Intent Statement not only
12 demonstrates that the proposed hotel is not the kind of facility contemplated by the
13 statute, it provides meaningful context to what it means to “construct” such a
14 facility. Because the contemplated facilities were structures through which Metro,
15 as the builder of the facility, would provide services, the act of “constructing”
16 presumes ownership of the structure upon completion. Here, (i) Metro is not
17 building the Hyatt Hotel; (ii) Metro is not providing hotel service, *i.e.*, transient
18 lodging; and (iii) Metro will not own the Hyatt Hotel. Thus, Metro is not
19 constructing a new facility.

20 This services-oriented interpretation finds additional support in the minutes
21 of the legislative committees that considered the bill. When HB 3308 was before
22 the House Committee on Intergovernmental Affairs on June 1, 1977, the minutes
23 reflect the following exchange:

24 REPRESENTATIVE [Mike] RAGSDALE also asked
25 if they [the drafters] intentionally [sic] excluded the
26 ability to contract with private operators. He stated
that they only allowed other public agencies to operate.

1 REPRESENTATIVE [Jim] CHREST explained that
2 there was no discussion to contract with a private
operator. He stated that they were talking about
governmental units.

3 Steringer Decl. Ex. 26 (June 1, 1977, minutes). When the bill was before the
4 Trade and Economic Development Committee, Representative Chrest on June 21,
5 1977, briefly summarized the bill and distinguished it from “another bill sponsored
6 by CHREST which speaks to the situation where private enterprise may want to
7 come in and build a facility such as the one addressed in HB 3307. He said he
8 wouldn’t let that bill interfere with the progress of this one.” Steringer Decl. Ex.
9 27 (June 21, 1977, minutes). The other bill likely was HB 3300, later vetoed by
10 Governor Bob Straub, which sought to secure property tax exemption for privately
11 built sports and public assembly facilities. Steringer Decl. Ex. 28 (Minutes June
12 17, 1977; Final Senate and House Calendar).

13 The legislative history of ORS 268.310(4) demonstrates that a privately
14 owned and operated facility was not within the contemplated scope of the statute.
15 Rather, to “construct a new facility” subject to the statute, Metro was to build and
16 own a structure through which Metro would provide services.

17 ORS 268.310(4) (a) does not require voter approval of the Project because
18 Metro is not building the hotel, will not provide any services of the hotel and will
19 not own the hotel. Therefore, Metro is not “construct[ing a] new facility” under
20 the statute, and the statute’s voter approval provision therefore is inapplicable.

21 The Metro Council’s authorization of the issuance and sale of revenue
22 bonds pursuant to Section 10 of the Metro Charter in support of the Project was
23 both regular and legal. Accordingly, this Court should grant Motion No. 1
24 validating those actions.

25 ///

26 ///

1 **B. Metro properly entered into the Development and Financing Agreement (Motion Nos. 2-4).**

2 Motion 2 seeks validation of the regularity and legality of Metro's award of
3 the Development and Financing Agreement. The DFA was properly awarded to
4 Mortenson Development, approved by the Metro Council for execution, and is a
5 regular, legal contract that this Court should validate pursuant to ORS 33.710 and
6 ORS 33.720.

7 Metro has the express power to contract, which when combined with its
8 power to operate the Oregon Convention Center empowered Metro to enter into
9 the DFA for the Convention Center's benefit. Metro Charter, Ch. 2, §8. *See also*
10 ORS 268.300(1). Metro handles non-legislative matters, such as the approval of
11 contracts and authorization of revenue bonds, by resolution. MC 2.01.080. A
12 majority vote of the Metro Council is sufficient to adopt a resolution. *Id.*

13 Metro complied with all procedural requirements for entering into the DFA.
14 The RFP was unanimously authorized by the Metro Council with Resolution 12-
15 4346, adopted by all four members of the Council present on April 26, 2012.
16 Steringer Decl., Ex. 29 (Minutes of April 26, 2012). Both responses to the RFP
17 were scored in accordance with the evaluation criteria set forth in the RFP.
18 Steringer Decl., Ex. 8 (score sheets). After evaluation, on May 15, 2014, Metro
19 issued a Notice of Intent to Award for the RFP, informing all proposers of Metro's
20 intent to select Mortenson Development's proposal as the most advantageous to
21 Metro and apprising other proposers of their right to appeal the award within
22 seven days of the notice. Steringer Decl., Ex. 11 (Notice of Intent to Award). No
23 appeal was received, and Metro selected the Mortenson Development proposal.
24 Steringer Decl., Ex. 7 (Resolution 12-4365 and Staff Report). As a result of that
25
26

1 selection, negotiations began that resulted in the Term Sheet⁶ and subsequently the
2 DFA. On June 26, 2014, all seven members of the Metro Council voted to approve
3 the DFA and its award to Mortenson Development. Steringer Decl., Ex. 30
4 (Minutes of June 26, 2014). The time for appealing the award of the contract to
5 Mortenson Development has passed, so the Court should grant the Metro
6 Council's Motion No. 2 and validate its award of the contract to Mortenson
7 Development.

8 Motion No. 3 similarly seeks the Court's validation of the Metro Council's
9 approval of the DFA by Resolution 14-4520. All seven members of the Metro
10 Council voted to approve that resolution. Steringer Decl., Ex. 30 (Minutes of June
11 26, 2014). Accordingly, the DFA was properly approved by resolution and the
12 Court should grant Motion No. 3.

13 Finally, Motion No. 4 asks the Court to validate the legality and regularity
14 of the DFA itself, including the anticipated agreements attached as exhibits to the
15 DFA. As discussed throughout these points and authorities, Metro has the
16 authority to contract in order to carry out its power to operate the Oregon
17 Convention Center and took all procedural steps necessary to approve the DFA.
18 Accordingly, the Court should grant Motion No. 4 and validate the legality and
19 regularity of the DFA.

20 ///

21 ///

23 ⁶ The Metro Council initially also sought validation of its approval of the
24 non-binding Term Sheet and of the regularity and legality of the Term Sheet.
25 However, since this action was commenced, Metro and Mortenson Development
26 have entered into the DFA which includes, in a binding agreement, all of the
provisions contemplated by the Term Sheet. Because the DFA effectively
supersedes and implements the Term Sheet, Metro no longer seeks validation of
the Term Sheet.

1 **C. The Metro Council’s actions in connection with the Project are**
2 **not subject to referendum or initiative (Motion Nos. 5-6).**

3 Opponents of the Project already have attempted to refer Multnomah
4 County’s actions related to the Project to the voters. *See* Steringer Decl., Ex. 19
5 (*Rossolo* Amended Complaint). Representatives of the Coalition have indicated
6 they may also seek to disrupt the Project through the initiative process in addition
7 to the pending lawsuits. Steringer Decl., Ex. 16 (Oregonian article dated June 19,
8 2014). The Metro Council’s Motion Nos. 5 and 6 ask the Court to declare that
9 opponents of the planned Hyatt Hotel cannot use the referendum or initiative
10 process to overturn Metro’s actions in entering into the DFA or issuing revenue
11 bonds and obligations related thereto. Such a use of the referendum or initiative
12 powers would violate the Oregon Constitution because this subsequent bond
13 issuance is administrative, not legislative.

14 **1. The Metro Council’s actions at issue are administrative**
15 **rather than legislative in nature, and thus not subject to**
16 **referendum or initiative.**

17 Only legislative acts, as opposed to administrative acts, are subject to the
18 referendum and initiative powers reserved to the people by the Oregon
19 Constitution. *Amalgamated Transit Union-Div. 757 v. Yerkovich*, 24 Or App 221,
20 225, 545 P2d 1401 (1976) (“The courts of this state have consistently held that
21 [the powers of referendum and initiative] may be employed solely to propose or
22 attack measures ‘legislative’ in nature.”). The powers of referendum and initiative
23 are reserved to the qualified voters of each municipality and district by Article IV,
24 § 1(5), of the Oregon Constitution “as to all local, special and municipal
25 *legislation* of every character in or for their municipality or district.” (Emphasis
26 added). Additionally, Article XI, §14(5) of the Oregon Constitution contains a
specific reservation of the initiative and referendum powers to the “legal electors
of a metropolitan service district relative to the adoption, amendment, revision or

1 repeal of a district charter and *district legislation enacted thereunder.*” (Emphasis
2 added).

3 Metro’s actions in entering into the DFA and issuing related revenue bonds
4 are administrative acts not subject to the referendum or initiative powers. These
5 actions constitute the implementation of “established policy.” *State ex rel. Dahlen*
6 *v. Ervin*, 158 Or App 253, 255, *rev den*, 329 Or 357 (1999). They are the
7 culmination of the pre-existing policy decisions laid out in Metro’s home-rule
8 charter and in ORS chapter 268, which sets out Metro’s authority to contract and
9 its ability to operate the Oregon Convention Center. Metro Charter ch. 2,
10 §6(1)(b); ORS 268.300; ORS 268.310(4). Therefore, Metro’s actions related to
11 the DFA and the revenue bonds are administrative acts necessary “to carry out
12 legislative policies and purposes already declared.” *Lane Transit District v. Lane*
13 *County*, 327 Or 161, 167, 957 P2d 1217 (1998) (quoting *Monahan*, 137 Or at
14 584). Neither the referendum process nor the initiative process can be used to
15 interfere with the details of how Metro has chosen to implement its established
16 policies.

17 **2. The use of the initiative process to impair the terms**
18 **of the DFA would violate the Contract Clauses of**
19 **the state and federal Constitutions.**

20 Even if an initiative could be crafted that was legislative in nature, a law
21 passed through the initiative process that impairs the operation of the terms of the
22 DFA would violate the Contract Clauses of the Oregon and United States
23 Constitutions. The Contract Clause of the Oregon Constitution provides: “No * *
24 * law impairing the obligation of contracts shall ever be passed[.]” OR CONST,
25 ART I, § 21. The federal provision provides in relevant part: “No State shall * * *
26 pass any * * * Law impairing the Obligation of Contracts * * *.” U.S. Const., Art.
I, §10. Both the state and federal provisions apply to contracts between private

1 parties and public entities. *See Eckles v. State*, 306 Or 380, 389-90, 760 P2d 846
2 (1988); *Faitoute Iron & Steel Co. v. City of Asbury Park, N.J.*, 316 US 502, 512-
3 513, 62 S Ct 1129 (1942) (considering whether restructuring of bond debt by a
4 city was an impairment of contract under the federal Contract Clause).

5 Under Oregon's Contract Clause, a law is unconstitutional if it substantially
6 impairs an obligation of contract. *See Hughes v. State*, 314 Or 1, 13-14, 838 P2d
7 1018 (1992) (employees' rights of statutory contract "may not be substantially
8 impaired by subsequent legislation"); *Goldsmith v. Brown*, 5 Or 418, 419-20
9 (1875) ("The act of 1870 is a contract, and the act of 1974, in our opinion,
10 seriously impairs the obligations of that contract. * * * [We] can reach no other
11 conclusion than that the act of 1874 is unconstitutional."). The federal Contract
12 Clause also prohibits "substantial impairment" of a government's contractual
13 obligations, although under the federal Contract Clause a law that impairs a
14 contract is not unconstitutional if it furthers a significant and legitimate public
15 purpose. *See Oregon State Police Officers' Ass'n v. State*, 323 Or 356, 365, 918
16 P2d 765 (1996).

17 A substantial impairment of contract occurs when legislation disrupts the
18 reasonable expectation of the parties to the contract. *Allied Structural Steel Co. v.*
19 *Spannaus*, 438 US 234, 245-46, 98 S Ct 2716 (1978). In this case, it is undisputed
20 that Metro has entered into a contract with Mortenson Development. Under the
21 DFA, Mortenson has agreed to build a Hyatt Hotel that will be bound by a Room
22 Block Agreement. For its part, Metro has agreed to grant funds to Mortenson
23 Development, most of which will be raised by selling revenue bonds—funds upon
24 which the construction of the hotel depend. Any law enacted through the initiative
25 process that would alter or eliminate Metro's ability to meet its contractual
26 obligation to provide that financing would substantially impair the rights and

1 obligations under the DFA and would run afoul of the Contract Clauses of the
2 Oregon and United States Constitutions.

3 **3. Any use of the initiative process to interfere with**
4 **agreements with bond holders would violate ORS**
5 **287A.325.**

6 In the DFA, Metro has agreed to issue revenue bonds to help finance
7 Mortenson's development of the Hyatt Hotel, consistent with its authorization to
8 do so under the Amended IGA. In addition to the unconstitutional impairment
9 discussed above, that would result if opponents of the project used the initiative
10 process to interfere with Metro's performance of the DFA, it would violate ORS
11 287A.325 to use the initiative process to interfere with Metro's agreements with
12 the bond holders once the bonds are issued. That statute provides:

13 "An elector-approved initiative or referendum measure
14 that purports to change ordinances or resolutions
15 affecting rates, fees, tolls, rentals or other charges has
16 no force or effect if giving force and effect to the
17 change would impair existing covenants made with
18 existing bond owners."

19 ORS 287A.325(3). The statute's prohibition against using the initiative process to
20 impair a public body's obligations to bondholders arises from the legislature's
21 stated policy that:

22 "It is a matter of statewide concern that certain
23 covenants made by public bodies regarding a pledge of
24 revenues to secure bonds not be impaired by
25 subsequent initiative or referendum measures."

26 ORS 287A.325(1)(a).

The Court should conclude that none of the Metro Council's actions with
regard to the Project are subject to referendum or initiative, and grant the Metro
Council's Motion Nos. 7 and 8 in that regard.

///

1 **V. CONCLUSION.**

2 The validation process of ORS 33.710 and ORS 33.720 provides a means
3 for local governments such as Metro to establish the regularity and legality of their
4 actions when political/legal opposition threatens to derail or unnecessarily increase
5 the expense of important public initiatives. This proceeding presents just such a
6 case. Respondents have publicly claimed that Metro either must submit its
7 financing plan to the voters or, in the alternative, that Metro lacks the power to
8 contribute funds to this Project. Respondents have demonstrated an intent to
9 engage in piecemeal litigation to delay and obstruct the Project. As explained
10 above, their arguments are unfounded. The Court should grant each of the Metro
11 Council's motions for summary judgment, which in combination would resolve all
12 matters the Metro Council seeks to have validated in this proceeding.

13 DATED this 27th day of August, 2014.

14 HARRANG LONG GARY RUDNICK P.C.

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APPENDIX

ORS 268.300

(1) A metropolitan service district has full power to carry out the objectives of its formation and the functions authorized pursuant to its charter and to that end may have and use a seal, have perpetual succession, sue and be sued in its own name, and enter into contracts.

(2) For purposes of its authorized functions, a district may enter into intergovernmental agreements under ORS chapter 190.

ORS 268.310

Subject to the provisions of a district charter, a district may, to carry out the purposes of this chapter:

* * *

(4) Acquire, construct, alter, maintain, administer and operate major cultural, convention, exhibition, sports and entertainment facilities. However, unless the electors of the district first approve the financing of the facilities, the district shall not:

(a) Construct new facilities * * *

(6) Exercise jurisdiction over other matters of metropolitan concern as authorized by a district charter.

ORS 268.600

For the purpose of carrying into effect all or any of the powers granted to metropolitan service districts, a district may from time to time issue and sell revenue bonds without the necessity of the electors of a district authorizing the bonds. * * *

Metro Charter Chapter 2 - Functions and Powers

Section 4. Jurisdiction of Metro. Metro has jurisdiction over matters of metropolitan concern. Matters of metropolitan concern include the powers granted to and duties imposed on Metro by current and future state law and those matters the Council by ordinance determines to be of metropolitan concern. The Council shall specify by ordinance the extent to which Metro exercises jurisdiction over matters of metropolitan concern.

1 **Section 6. Other Assigned Functions.** Metro is also
authorized to exercise the following functions: (1)
2 Acquisition, development, maintenance and operation of: * *
* (b) public cultural, trade, convention, exhibition, sports,
3 entertainment, and spectator facilities* * *

4 **Section 8. Preservation of Authority to Contract.** All Metro
officers shall preserve, to the greatest extent possible, the
5 ability of Metro to contract for all services with persons or
entities who are not Metro employees.

6 **Section 9. General Grant of Powers to Carry Out Functions;**
Construction of Specified Powers. When carrying out the
7 functions authorized or assumed under this charter:
8 (1) Metro has all powers that the laws of the United States
and this state now or in the future could allow Metro just as if
9 this charter specifically set out each of those powers; (2) the
powers specified in this charter are not exclusive; (3) any
10 specification of power in this charter is not intended to limit
authority; and (4) the powers specified in this charter shall be
11 construed liberally.

12 **Metro Charter Chapter 3 - Finance**

13 **Section 10. General Authority.** Except as prohibited by law or
restricted by this charter, Metro may impose, levy and collect
14 taxes and may issue revenue bonds, general and special
obligation bonds, certificates of participation and other
15 obligations. The authority provided under this section
supplements any authority otherwise granted by law.

16 **Section 12. Voter Approval of General Obligation Bonds.**
17 Issuance of general obligation bonds payable from ad
valorem property taxes requires the approval of the voters of
18 Metro.

19 **Metro Code**

20 **2.01.080 Resolutions.** (a) All matters other than legislation
and procedural matters coming before the council and
21 requiring council action shall be handled by resolution.

22 (b) Excluding procedural matters, the affirmative vote of a
majority of the council is required to adopt a resolution.* * *

23 **7.02.040 Issuance of Revenue Bonds.** (a) In accordance with
24 Section 10 of the Metro Charter, Metro may issue from time
to time revenue bonds for such purposes as are determined by
25 Council to be necessary or appropriate to carry out the
function, duties and operations of Metro. Metro may issue
26 revenue bonds for the purpose of financing such property as
Council shall determine is necessary or desirable in order to

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carry out or assist or advance the carrying out of Metro's function, duties, and operations regardless of whether such property is to be owned by Metro or any other public or private agency or person and regardless of whether such property is to be located within or without the jurisdictional boundaries of Metro. * * *Prior approval of the electors of Metro shall not be required as a condition precedent to the issuance of any revenue bonds under the Metro Code.

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CERTIFICATE OF SERVICE

I certify that on August 27, 2014, I served or caused to be served a true and complete copy of the foregoing **METRO COUNCIL'S MOTIONS FOR SUMMARY JUDGMENT** on the party or parties listed below as follows:

- Via CM / ECF Filing
- Via First Class Mail, Postage Prepaid
- Via Email
- Via Personal Delivery

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