



STATE OF OREGON
LEGISLATIVE COUNSEL COMMITTEE

January 26, 2021

Representative Mark Owens
900 Court Street NE H475
Salem OR 97301

Re: Public participation in legislative sessions

Dear Representative Owens:

You asked a series of questions about public participation in a legislative session. Your specific questions and our answers to those questions are set forth below. Because the 2021 regular session is beginning with the Capitol being physically closed to the public, we begin with an overview of the constitutionality of that decision, before turning to your specific questions.

Overview

The starting point of our analysis is Article IV, section 14, of the Oregon Constitution, which provides:

The deliberations of each house, of committees of each house or joint committees and of committees of the whole, shall be open. Each house shall adopt rules to implement the requirement of this section and the houses jointly shall adopt rules to implement the requirements of this section in any joint activity that the two houses may undertake.

Although earlier forms of Article IV, section 14, have been a part of the Oregon Constitution since statehood, the section was amended in 1974 to eliminate secret sessions and ensure that all legislative deliberations be “open”; it was amended again in 1978 to authorize each chamber to adopt rules to implement the requirements of the section.¹ We are not aware of any appellate court cases that have construed the meaning of Article IV, section 14. When there is an absence of case precedent governing the meaning of a provision of the Oregon Constitution, we turn to the analytical methodology the Oregon Supreme Court uses to determine what voters intended when they adopted a proposed amendment, or what the framers originally intended, if the provision has remained unchanged since statehood. Because Article IV, section 14, was modified by voters, the court uses a three-step methodology. The first step considers the text and context of the provision in question. The second step considers the historical evidence behind the provision, which generally is voter pamphlet material. If ambiguity about voter intent remains after considering text, context and historical evidence, general maxims of constitutional construction are used to resolve the ambiguity.²

¹ See Ballot Measure 2 (1974) and Ballot Measure 2 (1978).

² *Stranahan v. Fred Meyer, Inc.*, 331 Or. 38, 56-57 (2000).

Here, the text of the first sentence of Article IV, section 14, is straightforward: all legislative deliberations are to be open. The term “deliberations” means “a discussion and consideration by a number of persons of the reasons for or against a measure.”³ In other words, legislative debate, whether in committee or floor session, constitutes deliberations. The other significant word is “open.” “Open” means, in relevant part, “arranged or governed so as to permit ingress, egress or passage,” “completely free from concealment: exposed to general or particular perception or knowledge,” “not covered,” or “having no concealing cover.”⁴ The first definition of “open” clearly suggests that the Capitol cannot be closed to the public during a legislative session. The remaining three definitions of “open,” however, focus on access to knowledge and the avoidance of concealment. We believe that voters intended the latter meanings of “open,” for two reasons. First, the purpose of legislative deliberations has nothing to do with ingress or egress, but rather concerns the use of knowledge to make decisions that the public ultimately needs to understand. Second, even during routine sessions, there are places the public is not allowed to enter, exit or pass through. The chamber floors or committee room daises are examples. It therefore follows that “open” in Article IV, section 14, does not pertain to ingress, egress and passage.

The second sentence of Article IV, section 14, directs each chamber to adopt rules to implement the requirements of the provision. As you know, House and Senate Rules were adopted during the 2021 organizational session. House Rule 3.07 provides:

3.07 Open Sessions. All deliberations and meetings of the House shall be open to the press and public. The House recognizes that this legislative session is being conducted during a global pandemic in which a novel corona virus has sickened millions of people and taken the lives of at least 300,000 Americans. Because the virus spreads through close personal contact and through the air, the House finds that routine procedures must be modified to preserve health and safety while continuing to satisfy the obligations placed on the Legislative assembly by the Oregon Constitution, including obligations to conduct open deliberations. Accordingly, for this session until circumstances allow a return to historical customs of operation:

(1) All floor sessions and committee meetings must be contemporaneously streamed on the Internet and broadcast on one or more television monitors at a location proximate to the Capitol that is accessible by members of the public, so that the public is able to observe all legislative deliberations.

(2) Any vote cast in a floor or committee vote must be conducted so that the public must be able to visually observe and hear, through the means described in subsection (1) of this section, the member casting the vote.

³ *Merriam-Webster Unabridged Online Dictionary* (visited January 8, 2021).

⁴ *Id.*

(3) (a) Entry to the Capitol shall be limited to authorized personnel unless otherwise declared by the Speaker of the House and President of the Senate pursuant to public health guidance. Accredited representatives of the news media may be physically present in the Capitol during hours that legislative proceedings are taking place. The Speaker of the House and President of the Senate shall prescribe a process for determining if entry to the Capitol should be expanded dependent upon public health conditions. Any changes to chamber rules necessary to implement new entry determinations will follow procedures under House Rule 2.05.

(b) For the purposes of this rule and subject to public health guidance and metrics for Capitol entry and operations, authorized personnel includes: accredited news media, workers contracted with or subcontracted with the Legislature, legislative staff and employees, legislators, Oregon State Police and other law enforcement and safety personnel, officials necessary for the organizing of the legislative session, staff and employees of non-legislative government offices who are tenants of the Capitol.⁵

To summarize, the rules explain the need for keeping the Capitol physically closed—the ongoing COVID-19 pandemic—while also expressly requiring:

- All legislative deliberations, whether in committee or floor session, to be streamed to the public on the Internet at the same time the deliberations are occurring.
- All legislative deliberations to also be contemporaneously broadcast to monitors located on the Capitol steps, to ensure that those members of the public who lack the means to access the Internet are able to observe proceedings.
- All voting to be visually observable or audible by the public through the Internet and television monitors, to ensure that the public knows those who are voting are authorized to vote.
- Any public hearing conducted by a committee to allow members of the public who wish to testify the ability to do so.
- Bona fide members of the press to be in the Capitol to ensure routine reporting of legislative proceedings to the public.

We conclude that the rules retain the qualities of openness that Article IV, section 14, guarantees that the public possess: knowledge about what the legislature is doing and transparency concerning legislative deliberations so that concealment of those deliberations is not possible.

The context of a provision of the Oregon Constitution includes other related provisions of the Constitution.⁶ Article I, section 10, of the Oregon Constitution, is contextually similar to Article IV, section 14, in that it governs how official proceedings of a different branch of government must be conducted. In relevant part, Article I, section 10, provides that “No court shall be secret, but justice shall be administered, openly” In other words Article I, section

⁵ The Senate has adopted a similarly worded provision in their rules.

⁶ *State ex rel. Kaino v. Or. Comm’n on Judicial Fitness and Disability*, 335 Or. 633, 637 (2003).

10, parallels Article IV, section 14, by requiring court proceedings to be conducted “openly.” This is significant because, during this COVID-19 pandemic, Oregon Chief Justice Martha Walters has ordered most judicial proceedings to be conducted using remote means or postponed, with physical access to courthouses curtailed.⁷

The historical record before voters in adopting amendments to Article IV, section 14, includes the 1974 voters’ pamphlet. A review of the voters’ pamphlet for the 1974 amendment to Article IV, section 14, yielded the following statement in support of the amendment: “The people of Oregon will be guaranteed that the Legislative proceedings will stand the test of public scrutiny.”⁸ Legislative rules requiring all legislative proceedings to be contemporaneously streamed over the Internet and broadcast to monitors on the Capitol steps is consistent with what voters intended when acting to ensure that legislative proceedings be subject to “the test of public scrutiny.”

We finally note that the COVID-19 pandemic is without precedent in modern history in this state. To protect the public generally, the Governor has declared a state of emergency and, pursuant to that authority,⁹ issued a series of executive orders that have significantly altered day-to-day routines in this state, including closing business, government and school operations, and banning social gatherings.¹⁰ Several months ago, the Supreme Court heard a challenge to the Governor’s ban on social gathering for worship purposes, and upheld the Governor’s actions.¹¹ In doing so, the court noted that in the circumstances presented by the COVID-19 pandemic, government leaders have taken actions to protect people under constantly changing circumstances. Such decisions inherently involve difficult policy choices that are properly made by the people’s representatives in the legislative and executive branches.¹² The court further noted, however, that court intervention is appropriate when political leaders, in attempting to protect the public in an epidemic, act in an arbitrary or unreasonable manner or go far beyond what is reasonably necessary.¹³ Because the virus that causes COVID-19 is transmitted through the air and between people who are in close proximity, the Legislative Assembly’s decision to keep the Capitol physically closed to the public while requiring contemporaneous broadcast of all legislative proceedings is not an arbitrary or unreasonable decision, and does not go beyond what is reasonably necessary to enable the legislature to make urgent policy decisions pertaining to the state’s response to the virus and other urgent matters.

Specific questions¹⁴

Question 1: What is a “public meeting”?

Answer: The public meetings law, ORS 192.610 to 192.690, contains a definition of public meetings.¹⁵ However, the Legislative Assembly is subject to the open meetings

⁷ Chief Justice Order 20-006 (issued March 16, 2020); *see also* Chief Justice Order 20-047 (issued November 18, 2020) (imposing or continuing in-person restrictions on court operations).

⁸ Argument in Favor of Measure 2, *1974 General Election Voters’ Pamphlet*, at 10.

⁹ ORS 401.165 *et seq.*

¹⁰ Governor’s Executive Orders 20-03 through 20-67 available here: <https://www.oregon.gov/gov/admin/Pages/executive-orders.aspx>. We note that, as of the date of this letter, some restrictions have been eased although the declaration of a state of emergency due to COVID-19 has been extended until March 3, 2021.

¹¹ *Elkhorn Baptist Church v. Brown*, 366 Or. 506 (2020).

¹² *Elkhorn Baptist*, 366 Or. at 509, quoting *South Bay United Pentecostal Church v. Newsom*, 590 U.S. ____, __ (2020)

¹³ *Id.*, 366 Or. at 510.

¹⁴ For clarity, some questions have been reworded.

requirements of Article IV, section 14, of the Oregon Constitution, which takes precedence over ORS 192.610 to 192.690.

Question 2: What type of public participation is required for public meetings?

Answer: The type of public participation that is required in order for the Legislative Assembly to satisfy the open meeting requirements of Article IV, section 14, of the Oregon Constitution, during a public health crisis like the COVID-19 pandemic is described under “Overview” above.

The public meetings law is a series of statutes enacted by the Legislative Assembly that applies to governing bodies of public bodies in this state. In the 2020 first special session, the Legislative Assembly modified the public meetings law to permit governing bodies of public bodies other than State of Oregon governing bodies to hold all meetings by telephone or video conferencing technology or through some other electronic or virtual means. Pursuant to that authority, a public body is not required to provide physical space for the public to attend a meeting, and any public testimony or comment may be taken by telephone, video conferencing, electronic or virtual means, or through written submission.¹⁶ The modifications of the public meetings law enacted during the 2020 first special session are repealed 30 days after the date on which the declaration of a state of emergency issued by the Governor on March 8, 2020, and any extension of the declaration, is no longer in effect.¹⁷

Question 3: Do virtual meetings qualify as public participation under current statutes?

Answer: Yes. For the Legislative Assembly, see the discussion under “Overview” and see House Rule 3.07 and Senate Rule 3.05. For other public bodies, see the answer to Question 2.

Question 4: Is proxy voting for the Legislative Assembly constitutional?

Answer: No. Article IV, section 1, of the Oregon Constitution, vests the legislative power in a Legislative Assembly, consisting of a Senate and a House of Representatives.¹⁸ Only members of the Senate and the House of Representatives may exercise the legislative power by casting votes on legislative measures. House Rule 3.28 expressly prohibits proxy voting.

Question 5: Is limiting the number of legislators on the floor of the House of Representatives or Senate constitutional? If so, how is a call of the chamber handled?

Answer: When a legislative measure is voted on, the Oregon Constitution requires all members of the chamber to be able to cast a vote. The House and the Senate are each authorized to adopt their own rules of proceeding, however, and may modify those rules to

¹⁵ ORS 192.610 (5), which provides: “‘Meeting’ means the convening of a governing body of a public body for which a quorum is required in order to make a decision or to deliberate toward a decision on any matter. ‘Meeting’ does not include any on-site inspection of any project or program. ‘Meeting’ also does not include the attendance of members of a governing body at any national, regional or state association to which the public body or the members belong.”

¹⁶ Section 1, chapter 12, Oregon Laws 2020 (first special session) (Enrolled House Bill 4212).

¹⁷ Section 2, chapter 12, Oregon Laws 2020 (first special session) (Enrolled House Bill 4212).

¹⁸ The legislative power is also exercisable by the people through exercise of the initiative and referendum powers. Article IV, section 1, of the Oregon Constitution.

account for a public health crisis like the COVID-19 pandemic.¹⁹ The House, for example, has expanded what is considered to be within the chamber, to include the side aisles and the third floor galleries.²⁰ House practices have also been modified to remove customary time limits on voting and to lengthen the time a vote is taken, to ensure all Representatives are able to get to the House floor and vote.²¹

Question 6: Is it legal to close off physical access by the public to the Capitol building for committee meetings and floor sessions? How does that impact public participation?

Answer: We conclude that it is legal to limit physical access to the Capitol building during the COVID-19 pandemic, for the reasons described in “Overview” above. Public participation in the legislative process is preserved because House and Senate rules require the public to be able to observe legislative proceedings as the proceedings are occurring, and to be allowed to testify, using electronic means, when legislative committees conduct public hearings.

Question 7: Is it legal or constitutional to prohibit a legislator from meeting with constituents in the legislator’s Capitol building office?

Answer: It would likely be unlawful to prohibit a legislator from communicating with constituents.²² However, in a public health crisis like the COVID-19 pandemic, furnishing the legislator telephones on the legislature’s telephone network, computers, web pages and e-mail accounts on the legislature’s computer network, and the software and equipment to conduct video conference meetings with constituents is likely sufficient to satisfy any inherent duties a legislator has to meet with constituents in the performance of legislative duties.

Question 8: Do any of the measures the Legislative Assembly has taken to physically close the Capitol building in response to the COVID-19 pandemic violate the public meetings law or the open meetings requirements of Article IV, section 14, of the Oregon Constitution?

Answer: No. As discussed above, each chamber of the Legislative Assembly must comply with Article IV, section 14, of the Oregon Constitution, which takes precedence over the public meetings law. For the reasons discussed in “Overview” above, we conclude that the measures that the Legislative Assembly has taken in response to the pandemic are permitted under Article IV, section 14, of the Oregon Constitution.

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

¹⁹ Article IV, section 11, of the Oregon Constitution.

²⁰ House Rule 1.01 (9).

²¹ *Capitol Operations Plan: 2021 Legislative Session*, at 10.

²² We note, however, that under certain circumstances when a legislator is facing allegations of harassment or sexual harassment that creates a hostile work environment, aiding or abetting discrimination, or retaliation, Legislative Branch Personnel Rule 27 may authorize the imposition of interim safety measures that could limit a legislator’s contact with constituents until the allegations are resolved.

city attorney or other retained counsel. Constituents and other private persons and entities should seek and rely upon the advice and opinion of private counsel.

Very truly yours,

A handwritten signature in black ink, appearing to read "Dexter A. Johnson", with a long horizontal flourish extending to the right.

Dexter A. Johnson
Legislative Counsel