BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

MIKE SIEVERS,
Petitioner,

vs.

HOOD RIVER COUNTY,
Respondent,

and

LET THE PEOPLE DECIDE POLITICAL ACTION COMMITTEE, ROD KREHBIEL TOM PENCHOEN and WENDY GRAY,
Intervenors-Respondent.

LUBA No. 2003-200

FINAL OPINION
AND ORDER

Appeal from Hood River County.

David J. Hunnicutt, Tigard, filed the petition for review and argued on behalf of petitioner. With him on the brief was Oregonians in Action Legal Center.

No appearance by Hood River County.

Christopher Winter, Portland, filed the response brief and argued on behalf of intervenors-respondent. With him on the brief was Cascade Resources Advocacy Group.

BASSHAM, Board Chair; BRIGGS, Board Member; HOLSTUN, Board Member, participated in the decision.

REVERSED 03/29/2004

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of ORS 197.850.

Opinion by Bassham.

NATURE OF THE DECISION

Petitioner appeals Ordinance 14-15, an initiative adopted by the county voters that requires voter approval of certain residential development on certain forest lands.

MOTION TO INTERVENE

Let the People Decide Political Action Committee, Rod Krehbiel, Tom Penchoen, and Wendy Gray (intervenors) move to intervene on the side of respondent. There is no opposition to their motion, and it is allowed.

MOTION TO FILE REPLY BRIEF

Petitioner moves to file a reply brief to address (1) a challenge to petitioner's standing raised in intervenors' response brief and (2) an argument in the response brief that the challenged decision is not a "land use decision" subject to the Board's jurisdiction, as that term is defined at ORS 197.015(10). Intervenors do not object to the proposed reply brief, with the exception of the final paragraph, which asserts that even if the challenged decision is not a statutory land use decision, it nevertheless falls within LUBA's jurisdiction as a significant impact test land use decision. Intervenors argue that the petition for review does not assert that LUBA has jurisdiction over the challenged decision under the significant impact test. According to intervenors, petitioner should not be able to assert an entirely new basis for jurisdiction in a reply brief.

We have held that, although all petitions for review must state why the challenged decision is subject to LUBA's jurisdiction, jurisdiction does not become an issue in an appeal until respondents contend that LUBA lacks jurisdiction. *Boom v. Columbia County*, 31 Or LUBA 318, 319 (1996) (allowing reply brief, because the jurisdictional statement required in the petition for review by our rules is not intended to withstand jurisdictional challenge); *Shaffer v. City of Salem*, 29 Or LUBA 592, 594 (1995) (same). Generally, where the petition for review provides a bare or nominal statement of jurisdiction, a reply brief is warranted to address the respondent's jurisdictional

challenge, and that reply brief may fully address the jurisdictional question.[1] Given the nominal character of the jurisdictional statement in the petition for review under our rules, we see no reason to limit the reply brief, or LUBA's resolution of the jurisdictional question, to the bases for jurisdiction stated in the petition for review.

The proposed reply brief is allowed.

MOTION TO TAKE EVIDENCE

Intervenors move to take evidence not in the record, pursuant to OAR 661-010-0045. The proffered evidence is intended to contradict petitioner's claim of standing, which, as relevant here, included petitioner's claim that he is the owner of real property in the county that is potentially subject to future application of the challenged ordinance. The evidence intervenors seek to have LUBA consider indicates that the real property petitioner claims to own is instead owned by "Dwight C. Sievers." In the reply brief, petitioner responds that his legal name is Dwight C. Sievers but that he has used the name Mike Sievers for over 50 years. At oral argument, we understood intervenors to withdraw their challenge with respect to ownership of the real property petitioner claims to own. Accordingly, intervenor's motion to take evidence on that point is moot.

FACTS

Intervenors Gray, Pencheon and Krehbiel were chief petitioners for Hood River County Measure 14-15. The measure was placed on the ballot and, on November 4, 2003, approved by the voters of the county, with 3,193 "yes" votes and 2,001 "no" votes.[2] The summary of Measure 14-15 describes its purpose and intended effect:

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[1] We noted an exception to that general rule in *Casey Jones Well Drilling, Inc. v. City of Lowell*, 34 Or LUBA 263, 265 (1998), which involved a 20-page jurisdictional statement in the petition for review, and a reply brief that simply embellished those arguments. The present case does not involve a jurisdictional statement intended to withstand all challenges, or a reply brief that simply embellishes arguments already made in the jurisdictional statement.

[2] The text of Measure 14-15 states, in full:

"Citizens' Right to Vote on Major Developments, Hood River County Ordinance.

"Currently, the approval of residential developments is by an administrative hearings process that involves the County Planning Department, the County Planning Commission and the Board of County Commissioners. Voter approval is not required for any planning decision made in this administrative process. This ordinance would require that voter approval be required for any residential development that cumulatively totals 25 or more residential units or overnight accommodation units, if the development is to occur on certain forest lands. The forest lands affected by this ordinance are any lands specifically zoned for 'Forest' or 'Primary Forest' uses, or were State or Federal Forest lands as of January 01, 2003. The ordinance would require voter approval whenever the housing development would involve 25 units, whether the approval for the development was the result of one application or a series of applications. It is the intent of the proponents of this Measure that if any part of the proposed ordinance were to be held invalid, that the remaining provisions remain in effect." Record 1.

The results of the November 4, 2003 election were certified by the county elections director on November 17, 2003. On December 8, 2003, petitioner filed the present appeal with LUBA.

"(1) Purpose. The purpose of this measure is to give Hood River County voters a direct voice in major residential development that could affect water resources in the County. Given the importance of a safe and reliable water supply to Hood River County and its economy, voters deserve the right to vote on major housing developments that may affect this valuable resource. This measure only applies to lands specifically zoned for 'Forest' or 'Primary Forest' uses, and State or federal forest lands since these lands play an important role in providing domestic and agricultural water supplies.

"**(2) Definitions**. The following definitions are applicable to this measure:

"(a) 'Major housing development' is defined as a development that includes more than 25 residential or overnight housing units.

"(b) 'Incremental' is defined as occurring in two or more parts.

"**(3) Right to vote on major housing developments affecting lands specifically zoned for Forest uses.** County approval of a 'Major Housing Development,' at one time or as part of incremental approvals, must be sent to the voters of Hood River County for affirmation or denial if the approval is for lands that as of January 1, 2003 were either specifically zoned 'Forest' or 'Primary Forest' uses, or were State or Federal forest lands as of that date.

"**(4) Severability.** It is the intent of the voters that if any part of this measure is held invalid that the remaining provisions shall not be affected." Record 1.

STANDING

Petitioner argues that he has standing to appeal Ordinance 14-15 under ORS 197.830(3), because he is "adversely affected" by the ordinance.[3] According to petitioner, he owns property zoned for forest uses, and Ordinance 14-15 places an additional impediment not found in the county's comprehensive plan or land use regulations on petitioner's ability to site a "major housing development" on his property.

Intervenors dispute that petitioner is "adversely affected" by Ordinance 14-15. Intervenors argue that under current zoning regulations petitioner cannot develop his property with a "major housing development" within the meaning of Ordinance 14-15. According to intervenors, the speculative possibility that current zoning of petitioner's property might change someday to allow a "major housing development," and thus potentially allow application of Ordinance 14-15 with respect to petitioner's property, is not sufficient to establish that petitioner is "adversely affected" by the ordinance within the meaning of ORS 197.830(3).

There is no dispute that petitioner's property is zoned F-1, one of the forest zones subject to Ordinance 14-15. We believe that adoption of additional impediments to residential development of petitioner's property is sufficient to render petitioner "adversely affected" by Ordinance 14-15 within the meaning of ORS 197.830(3), notwithstanding that petitioner does not currently propose residential development and current zoning and other restrictions do not allow for additional residential development of petitioner's property.

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[3] ORS 197.830(3) provides, in relevant part:

> "If a local government makes a land use decision without providing a hearing, except as provided under ORS 215.416 (11) or 227.175 (10), * * * a person adversely affected by the decision may appeal the decision to the board under this section:
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> "(a) Within 21 days of actual notice where notice is required; or
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> "(b) Within 21 days of the date a person knew or should have known of the decision where no notice is required."

Our conclusion that petitioner has standing to appeal Ordinance 14-15 under ORS 197.830(3) makes it unnecessary to address intervenors' contention that petitioner has not established standing to appeal under ORS 197.830(2).

JURISDICTION

Intervenors contend that Ordinance 14-15 is not a "land use decision" subject to LUBA's jurisdiction, as that term is defined at ORS 197.015(10).[4] According to intervenors, Ordinance 14-15 is not a "comprehensive plan provision," a " land use regulation," or a "new land use regulation," and its passage by the voters does not "concern the adoption, amendment or application" any comprehensive plan provision, land use regulation or new land use regulation. Further, intervenors argue, prospective operation of Ordinance 14-15, *i.e.*, future decisions by voters under that ordinance to affirm or overturn county decisions that approve a "major housing development" on forest lands, will not be land use decisions. Intervenors analogize operation of Ordinance 14-15 to city annexations, which may involve two separate decisions: (1) a land use decision by the city governing body that the annexation complies with applicable land use standards, and (2) a decision by the voters to accept or reject the annexation. Such electoral decisions are not land use decisions, subject to LUBA's review. *Heritage Enterprises v. City of Corvallis*, 300 Or 168, 708 P2d 601 (1985) (decision of the voters whether to annex territory is not a land use decision, because the question before the voters is not whether the annexation could be approved under the applicable land use law, but whether the proposal should be adopted at that time). According to

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[4] ORS 197.015(10)(a)(A) defines "land use decision" to include:

> "A final decision or determination made by a local government or special district that concerns the adoption, amendment or application of:
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> "(i) The goals;
>
> "(ii) A comprehensive plan provision;
>
> "(iii) A land use regulation; or
>
> "(iv) A new land use regulation[.]"

intervenors, Ordinance 14-15 simply puts in place a similar two-stage decision process, where the second-stage decision by the voters is not a land use decision.

Intervenor may or may not be correct that voter decisions under Ordinance 14-15 would not constitute land use decisions; however, the immediate question is whether adoption of Ordinance 14-15 itself is a land use decision. Petitioner argues that Ordinance 14-15 is a "new land use regulation" because its purpose is to preserve forest lands, and thus it implements provisions of the Hood River Comprehensive Plan (HRCP) that require preservation of forest lands. For the same reason, petitioner argues, Ordinance 14-15 "concerns" the application of Statewide Planning Goal 4 (Forest Lands), which generally governs preservation and use of forest lands. Further, petitioner argues that Ordinance 14-15 essentially adds additional standards for the siting of a "major housing development" on forest-zoned lands, development that is governed by land use standards in the HRCP and Hood River County Zoning Ordinance (HRCZO). Whether or not the county ultimately codifies Ordinance 14-15 in the HRCZO, petitioner contends that the substance of the ordinance is a "land use regulation" as that term is defined at ORS 197.015(11), because it is a "general ordinance establishing standards for implementing a comprehensive plan."[5]

Our view of the jurisdictional question is informed by the parties' arguments on the merits with respect to the eighth assignment of error. Briefly, petitioner argues in the eighth assignment of error that Ordinance 14-15 is invalid in substance, because it authorizes county voters to effectively nullify certain quasi-judicial land use decisions by the governing body approving an application for a permit to develop land, pursuant to comprehensive plan provisions and land use regulations governing such permit applications. Petitioner argues that operation of Ordinance 14-15 will in all conceivable cases exceed the initiative and referendum powers reserved to the people under Article

[5] ORS 197.015(11) provides:

> "'Land use regulation" means any local government zoning ordinance, land division ordinance adopted under ORS 92.044 or 92.046 or similar general ordinance establishing standards for implementing a comprehensive plan."

IV, section 1(5) of the Oregon Constitution, which petitioner argues is limited to "legislative" matters. Relatedly, we understand petitioner also to argue that Ordinance 14-15 is invalid because it authorizes county voters to approve or deny quasi-judicial land use decisions in a manner contrary to statutory requirements. *See Dan Gile and Assoc., Inc v. McIver*, 113 Or App 1, 5-6, 831 P2d 1024 (1992) (a voter referendum to overturn a zone change decision exceeds constitutional initiative and referendum powers, because it allows the electorate to effectively determine that quasi-judicial land use decisions need not be made in compliance with procedural and substantive requirements of state statutes).

The state statutes referenced in *Dan Giles* are the statutory procedures at ORS 215.402 to 215.437, which govern approval or denial of applications for zone changes and "permits," as that term is defined at ORS 215.402(4). 113 Or App at 4 n 2. As we discuss below, there seems no possible dispute that an application for a "major housing development" within the meaning of Ordinance 14-15 would necessarily involve an application for a "permit" as defined by ORS 215.402(4), and that approval or denial of such an application would be governed by ORS 215.402 to 215.437 and local regulations implementing those statutes. In relevant part, ORS 215.416 provides:

> "(8)(a) Approval or denial of a permit application shall be based on standards and criteria which shall be set forth in the zoning ordinance or other appropriate ordinance or regulation of the county and which shall relate approval or denial of a permit application to the zoning ordinance and comprehensive plan for the area in which the proposed use of land would occur and to the zoning ordinance and comprehensive plan for the county as a whole.
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> "* * * * *
>
> "(9) Approval or denial of a permit or expedited land division shall be based upon and accompanied by a brief statement that explains the criteria and standards considered relevant to the decision, states the facts relied upon in rendering the decision and explains the justification for the decision based on the criteria, standards and facts set forth."

By statute, "approval or denial" of a permit decision *must* be based on "standards and criteria which shall be set forth in the zoning ordinance or other appropriate ordinance or regulation

of the county" and *must* be accompanied by findings that explain the justification for that approval or denial "based on the criteria, standards and facts set forth" in the decision. Ordinance 14-15 appears to authorize approval or denial of a permit decision based not on standards and criteria found in the county's zoning ordinance and similar legislation, as ORS 215.416(8)(a) and (9) mandate, but rather on a standardless vote to affirm or deny the county's prior approval.

We address, below, the merits of petitioner's eighth assignment of error, and intervenors' responses. For purposes of the jurisdictional question, however, we conclude that adoption of a decision-making process that allows quasi-judicial application of the county's land use regulations to be nullified on a case-by-case basis "concerns * * * the application" of the county's land use regulations, within the meaning of ORS 197.015(10)(a). For that reason, we agree with petitioner that adoption of Ordinance 14-15 is a "land use decision" as defined by ORS 197.015(10)(a) and therefore within our jurisdiction.[6]

EIGHTH ASSIGNMENT OF ERROR

Petitioner contends that Ordinance 14-15 is invalid, because it authorizes the county electorate to approve or deny quasi-judicial land use decisions by referendum, and thus exceeds the initiative and referendum powers reserved to the people under Article IV, section 1(5).[7]

The initiative and referendum powers set forth in Article IV, section 1(5) reserve to the electorate the same legislative authority, no more and no less, than that exercised by the governing body. *Allison v. Washington County*, 24 Or App 571, 548 P2d 188 (1976) (comprehensive plan amendment adopted by county commissioners may be referred to the county voters under

[6] Our conclusion that the challenged initiative is a statutory land use decision makes it unnecessary to rule on petitioner's contingent motion to transfer this appeal to circuit court.

[7] Article IV, section 1(5) of the Oregon Constitution states:

> "The initiative and referendum powers reserved to the people by subsections (2) and (3) of this section are further reserved to the qualified voters of each municipality and district as to all local, special and municipal legislation of every character in or for their municipality or district. The manner of exercising those powers shall be provided by general laws, but cities may provide the manner of exercising those powers as to their municipal legislation. * * *"

Article IV, section 1(5)). Under Article IV, section 1(5), however, the initiative and referendum powers are limited to "legislative" matters, and do not allow the electorate to decide "administrative" matters. *Foster v. Clark*, 309 Or 464, 472, 790 P2d 1 (1990). The referendum at issue in *Foster* would have restored the original name to a city street, thus effectively reversing a city ordinance that had renamed the street. The Court held that, because at the time the referendum was proposed the city had adopted and codified a "complete scheme" for renaming streets, the subject of the referendum was "administrative" in nature and therefore beyond the powers granted under Article IV, section 1(5). The difference between "legislative" and "administrative" matters, the court held, is "the distinction between making laws of general applicability and permanent nature, on the one hand, as opposed to decisions implementing such general rules, on the other." *Id.*

Under *Foster*, it is clear that Article IV, section 1(5) does not allow the electorate to make an "administrative" decision, or to overturn a previous administrative decision made under a general legislative scheme. That reasoning was applied to the land use context in *Dan Gile, supra*. In that case, the county governing body approved a zone change, and an opponent initiated a referendum to place the county's land use decision on the ballot. The applicant sought an injunction, which the trial court denied on the grounds that the zone change decision was "legislative" in nature. The Court of Appeals reversed, finding that the zone change decision was not a legislative decision subject to the referendum. In reaching that conclusion, the court relied on the fact that the statutory procedures at ORS 215.402 *et seq*. that governed the disputed zone change decision contemplated a single decision subject to land use standards, unlike the annexation decisions such as those at issue in *Heritage Enterprises*:

> "The annexation and incorporation cases differ in a significant respect from this one. They deal with processes that entail two decisions: A land use decision by the governing body and, assuming that it is affirmative, a later and separate 'political' decision by the voters that does not depend on land use requirements. Conversely, this case involves only one decision—whether to allow the zone change—and it is a land use decision under state law. The clear import of the statutory scheme, generally, and *Heritage Enterprises v. City of Corvallis*, * * * specifically, is that that decision cannot be referred. When the only decision to be made is a land use

> decision, to which specific land use provisions and requirements must be applied, the governing body must, and the electorate cannot, follow the procedures or be confined to the substance of those requirements. * * * In sum, to hold that a land use decision may be referred to the electorate would be the equivalent of holding that it need not be made in compliance with the procedural and substantive requirements of state statutes. As structured by those statutes, it is not a 'legislative' decision of the kind to which the constitutional initiative and referendum rights apply. * * *" 113 Or App at 5-6.

Petitioner argues, and intervenors do not dispute, that a county decision approving a "major housing development" subject to automatic referral under Ordinance 14-15 will be a quasi-judicial "land use decision," subject to compliance with the county comprehensive plan and land use regulations. Under the reasoning in *Dan Gile*, petitioner argues, such county approvals must be decided by the governing body, as state statute requires, and cannot be referred to the voters. Because Ordinance 14-15 cannot operate in accordance with state law or within the bounds of the electorate's referendum powers, petitioner argues, it is invalid on its face and prohibited as a matter of law.

We understand intervenors to concede that, under the reasoning in *Dan Gile*, the voters cannot exercise the referendum powers reserved to the people under Article IV, section 1(5) to approve or reject an "administrative" land use decision made by the county, such as a decision approving a "major housing development." Nonetheless, intervenors distinguish *Dan Gile* on the grounds that any referendum conducted pursuant to Ordinance 14-15 would *not* be authorized by Article IV, section 1(5), but rather would be authorized by Ordinance 14-15. Intervenors cite to *Beal v. City of Gresham*, 166 Or App 528, 998 P2d 237 (2000) and *State ex rel Dahlen v. Ervin*, 158 Or App 253, 974 P2d 264, *rev den* 329 Or 357 (1999), for the proposition that the voters may, consistent with Article IV, section 1(5), adopt a *legislative* scheme or process that provides for automatic referral of future *administrative* decisions to the voters. According to intervenors, the subject matter of a referendum provided by a local legislative scheme is not limited by Article IV, section 1(5).

Beal involved a challenge to a city council resolution that acquiesced in a state agency parkway siting decision. The plaintiff argued that the resolution was inconsistent with a city charter provision, enacted by initiative several years earlier, that in relevant part required that city voters approve the location and general design of certain transportation projects, prior to city acquiescence in another governmental agency's road decision. The Court of Appeals held that the city charter provision was "municipal legislation" within the meaning of Article IV, section 1(5) because it established a procedure for determining the city's position with respect to certain transportation projects. That procedure was "legislative" for purposes of Article IV, section 1(5), the court held, even though the decisions that procedure produces may be "administrative." 166 Or App at 537. The court therefore rejected the city's claim that the charter provision was enacted in violation of Article IV, section 1(5). *Id.*

Dahlen involved an initiative to amend the county charter to establish new requirements for siting of community corrections facilities, and to set up a procedure to require that existing nonconforming facilities to be removed. The county elections official refused to place the initiative on the ballot, on the grounds that it was "administrative" in nature because it authorized processes for undoing previous siting decisions. The trial court agreed, and dismissed the writ of mandamus. The Court of Appeals reversed the trial court, stating

> "The motives of the sponsors of the initiative, including their apparent desire to overturn a specific siting decision, are not relevant to whether the initiative that they sponsored is administrative or legislative; that distinction is based on the initiative's legal effect if it is adopted. Likewise, the county's argument that the proposed initiative would conflict with state land use laws or other existing law misses the point. That the initiative might be invalid if adopted, something on which we express no opinion, does not determine whether it is legislative or administrative in nature. Similarly, and contrary to defendant's apparent suggestion, there is nothing improper about an initiative changing an existing legislative framework by substituting another; that, after all, is the purpose of much legislation. The issue is whether the proposed initiative addresses issues of general applicability and permanent nature; this one does." 158 Or App at 257.

Intervenors contend, based on *Beal* and *Dahlen*, that Ordinance 14-15 is properly viewed as legislative in nature, because it establishes a law of "general applicability and permanent nature,"

notwithstanding that the framework it establishes refers administrative matters to a vote by the electorate and thus results in administrative decisions. According to intervenors, the voters may legislatively expand the use of the referendum within their municipalities beyond that permissible under Article IV, section 1(5).

We agree with intervenors that Ordinance 14-15 is legislative in nature, for purposes of Article IV, section 1(5). While it adopts procedures for rendering "administrative" decisions, adoption of administrative procedures is a legislative function, as *Beal* and *Dahlen* indicate.

A more difficult question is intervenor's further contention that the voters may legislatively expand the use of the referendum beyond that permissible under Article IV, section 1(5), *i.e.*, the voters may reserve to themselves the ability to refer, vote on and decide "administrative" matters, as long as such votes are pursuant to a legislatively adopted scheme and not pursuant to direct application of referendum powers under Article IV, section 1(5). *Beal* is perhaps some authority for that contention. *But see Heritage Enterprises*, 300 Or at 172 (a referendum on an annexation proposal pursuant to city charter cannot be used for "administrative" matters, only "legislative" decisions). However, even if intervenors are correct on that point (which we do not decide), the question still remains whether Ordinance 14-15 is "invalid," as petitioner claims, because its substantive provisions are inconsistent with or have been preempted by the statutory scheme governing approval and denial of land use permit decisions.

Beal did not address whether the scheme at issue in that case was invalid, possibly because there was no contention in that case that results of voter referenda under the city charter would be contrary to any statute or other lawful requirement. *Dahlen* also did not address that issue, presumably because the posture of that case involved only the question of whether the initiative should be placed on the ballot. Importantly, however, the court "express[ed] no opinion" on whether the initiative, if adopted, would be invalid because its future application would violate state land use laws. 158 Or App at 257; *see also Beal*, 166 Or App at 537 n 6 (characterizing *Dahlen* as stating that "the fact that local legislation is preempted by state law does not mean that it is not

municipal legislation"). Other cases involving Article IV, section 1(5) support the view that even if an initiative or referendum involves "municipal legislation" and thus may be placed on the ballot and enacted by the voters, that initiative may nonetheless be invalid or unenforceable because its substance is preempted by state or other law. *See Advocates for Effective Regulation v. City of Eugene*, 160 Or App 292, 981 P2d 368 (1999) (portions of initiative enacted by voters held to be invalid because preempted by state statute); *Boytano v. Fritz*, 131 Or App 466, 886 P2d 31 (1994), *aff'd* 321 Or 498, 901 P2d 835 (1995) (initiative that proposes "municipal legislation" may be placed on the ballot, notwithstanding that it may be unconstitutional or preempted by state law, and unenforceable if enacted).

Generally, a local law will be considered preempted if it is "incompatible" with state or federal legislative policy, that is, if local and state or federal law cannot operate concurrently or if the state legislature or Congress intended to preempt the local enactment. *LaGrande/Astoria v. PERB*, 281 Or 137, 148-49, 576 P2d 1204, *adhered to on reh'g* 284 Or 173, 586 P2d 765 (1978). We understand petitioner to argue that Ordinance 14-15 cannot operate concurrently with the statutes governing land use "permit" decisions at ORS 215.402 *et seq.*, which require in relevant part that approval or denial of a permit application be based on (1) standards in the county's land use regulations, and (2) findings that explain the justification for the decision based on the criteria, standards and facts set forth in the decision. As we suggested in our jurisdictional discussion, Ordinance 14-15 appears to apply exclusively to quasi-judicial "permit" decisions subject to the statutory requirements of ORS 215.402 to 215.437. We cannot conceive of a circumstance where approval or denial of "major housing development" in a forest zone for purposes of Ordinance 14-15 would not constitute a "permit" as defined by ORS 215.402. That being the case, we agree with petitioner that Ordinance 14-15 is incompatible with, and is therefore preempted by, state statute. Under Ordinance 14-15, approval and denial of some permit applications would be based on standardless, unexplained, up or down votes by the electorate, rather than on applicable land use

standards and findings explaining why the proposal complies with or fails to comply with those standards.

Intervenors' argument to the contrary is based on an analogy to annexations. As intervenors point out, by statute and pursuant to *Heritage Enterprises* annexations can occur as two separate decisions, one by the governing body that the proposed annexation complies with all applicable standards, including land use standards, and another decision by the electorate. *Id.*; *see generally* ORS 222.111 to 222.183. In such circumstances, the governing body's decision is a land use decision appealable to LUBA, but the subsequent vote of the electorate whether to annex territory is not a land use decision. *Heritage Enterprises*, 300 Or at 172-73. According to intervenors, Ordinance 14-15 simply puts in place a similar two-stage decision process, where the first-stage decision by the governing body is subject to the requirements of ORS 215.402 to 215.437 and that decision may be appealed to and reviewed by LUBA, but the second-stage decision by the voters is not subject to ORS 215.402 to 215.437, not appealable to LUBA, and not subject to review for compliance with any land use standards. We understand intervenors to contend that such a scheme is consistent with ORS 215.402 to 215.437, because the governing body's decision and findings in such circumstances satisfy the requirements of the statute.

Intervenors' analogy is not persuasive. First, annexation decisions are not "permits" governed by ORS 215.402 to 215.437 or the statutory analogue applicable to cities. Second, annexation decisions are comprehensively governed by statute, which expressly provide for referral of certain annexation proposals to the electorate. There is no comparable statutory authority to make land use permit decisions by vote of the electorate. Indeed, the annexation context is very much *sui generis*, and the reasoning in cases such as *Heritage Enterprises* is, accordingly, not readily applicable outside that context. Third, as discussed above, ORS 215.416(8) and (9) require that "approval or denial" of a permit application be based on land use standards and findings relating the decision to those standards. At least where the electorate overturns a governing body approval, and thus "denies" the permit application, it is simply impossible to conclude that that

"denial" was based on "standards and criteria" in the zoning ordinance and findings explaining why the application does not comply with those standards. Even where the electorate affirms a governing body approval, at best one can conclude that "approval" of the permit application was based in part on standards and criteria set forth in the county's ordinance and related findings, and in part on unexpressed, unexplained, unpromulgated considerations that do not constitute "standards and criteria" at all, within the meaning of ORS 215.416(8)(a). In short, we disagree with intervenor that the existence of the county governing body's decision approving a permit saves subsequent application of Ordinance 14-15 with respect to that permit from incompatibility with the statutory scheme governing approval or denial of permits.

The eighth assignment of error is sustained.

FIRST THROUGH SEVENTH ASSIGNMENTS OF ERROR

The first through seventh assignments of error argue from various perspectives that adoption of Ordinance 14-15 is a post-acknowledgment plan amendment or new land use regulation subject to statutory procedures at ORS 197.610 and 197.615 and similar comprehensive plan procedures and requirements governing adoption of comprehensive plan and zoning ordinance amendments. Petitioner contends that the county erred in failing to adopt Ordinance 14-15 pursuant to these statutory and plan procedures and requirements.

In sustaining the eighth assignment of error, we concluded that operation of Ordinance 14-15 is preempted by state law, and it is therefore invalid or, at least, unenforceable. Under these circumstances, we see no purpose in resolving the parties' contentions about whether adoption of Ordinance 14-15 is subject to statutory and plan procedures governing adoption of comprehensive plan amendments and new or amended land use regulations.

We do not resolve the first through seventh assignments of error.

CONCLUSION

Because Ordinance 14-15 cannot operate consistently with state law, and is preempted by state law, it "violates a provision of applicable law and is prohibited as a matter of law." OAR 661-010-0071(1)(c). Accordingly, reversal is the appropriate disposition.[8]

The county's decision is reversed.

[8] Petitioner notes that Ordinance 14-15 has a severability clause, but argues that the ordinance has only one operative provision, section 3, and that there is nothing of substance to save by severance if that operative provision is found to be unlawful. *See* n 2. Intervenors do not dispute otherwise. We do not see that the severability clause has any effect on the disposition of this appeal, based on our conclusion that operation of Ordinance 14-15 under section 3 is incompatible with state law. We leave open the possibility that the county could choose to apply the severability clause to salvage other sections of Ordinance 14-15.