



DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL

February 24, 2005

Mr. Lane Shetterly, Director
Oregon Department of Land Conservation and Development
635 Capitol Street NE Suite 150
Salem, Oregon 97301-2540

Re: Oregon Ballot Measure 37

Dear Mr. Shetterly:

You have asked that we address two questions concerning 2004 Oregon Ballot Measure 37. Your first question concerns sections 8 and 10 of the measure, which provide that certain entities may elect to waive (“modify, remove, or not apply”) a law as an alternative to paying compensation to a property owner. Generally, you want to know if a waiver under Measure 37 is personal to the current owner of the property or runs with the land. That is, does the waiver remain if the current owner conveys the property to a new owner?

The short answer to your first question is that when a public entity finds that there is a valid claim for compensation under Measure 37, but elects to provide relief by “not applying” the law, that relief is personal to the current owner of the real property. If the current owner conveys the property before the new use allowed by the public entity is established, then the entitlement to relief will be lost. We also consider the result where the public entity elects to “modify or remove” the law that was the basis for a valid claim. In general, where the law being modified or removed is a law that the public entity would otherwise be required to have in place (as a result of some other law or legal requirement), we believe that Measure 37 authorizes the public entity to modify or remove the law only to the extent required to provide relief to a current owner with a valid claim under the measure. This means that even where a public entity provides relief by modifying or repealing a law, in cases where the public entity is otherwise legally required to have that law in place, it may do so only so as to provide relief to the current owner.

Your second question is whether a public entity’s decision to “modify, remove, or not apply” a law under section 8 of Ballot Measure 37 may be made on a “blanket” basis, that is whether a public entity may decide in advance that all claims that involve a particular law, or that involve owners who acquired their property after a particular date, or some other subset of the potential universe of claimants, will be granted relief. The short answer to this question is that Measure 37 authorizes public entities to “modify, remove, or not apply” the law only after the

affected owner has established his entitlement to relief. In other words, before deciding to grant relief to a Measure 37 claimant, a public entity must determine at least that:

- the claimant acquired the affected property before the law in question was adopted;
- the law restricts the use of the property in question;
- the law reduces the fair market value of the property in question;
- the law is not one that regulates activities that are commonly and historically recognized as a public nuisance;
- the law is not one that protects public health and safety; and
- the law is not required to comply with federal law.

To determine if Measure 37 applies, the public entity will have to consider facts specific to the particular property at issue and its present owner. As a result, the short answer is that we do not believe public entities may adopt rules or ordinances or other laws that provide “blanket waivers” of laws under Ballot Measure 37.

Analysis

When interpreting a statutory provision adopted through the initiative process, the Oregon Supreme Court applies the same methodology that it applies to the construction of a statute. *Stranahan v. Fred Meyer, Inc.*, 331 Or 38, 61, 11 P3d 228 (2000); *PGE v. Bureau of Labor and Industries (PGE)*, 317 Or 606, 612 n 4, 859 P2d 1143 (1993). The objective is to determine the intent of the voters who pass the measure. “The best evidence of the voters’ intent is the text of the provision itself.” *Roseburg School Dist. V. City of Roseburg*, 316 Or 374, 378, 851 P2d 595 (1993). In interpreting the text, we consider statutory and judicially developed rules of construction “that bear directly on how to read the text,” such as “not to insert what has been omitted, or to omit what has been inserted,” and to give words of common usage their plain, natural and ordinary meaning. *PGE*, 317 Or at 611; ORS 174.010. However, the meaning of the terms in a measure cannot be assessed in isolation from the context in which the measure’s drafters used those words. *See PGE*, 317 Or at 610-11. The Oregon Supreme Court, however, is unlikely to conclude analysis of an initiated measure at the first level of review. *Stranahan*, 331 Or at 64.

The second level of review is an examination of the history of the provision. The history of an initiated provision includes information available to the voters at the time the measure was adopted that discloses the public’s understanding of the measure. *Ecumenical Ministries v. Oregon State Lottery Comm.*, 318 Or 551, 560 n 8, 871 P2d 106 (1994). Sources of such information include the ballot title, explanatory statement and arguments for and against the measure included in the Voters’ Pamphlet as well as contemporaneous news reports and editorials on the measure. *Id.* The extent to which these sources of information will be considered depends on their objectivity, as well as their disclosure of public understanding of the measure. *Stranahan*, 331 Or at 65 (citing *LaGrande/Astoria v. PERB*, 284 Or 173, 184 n 8, 586 P2d 765 (1978)).

If, after considering the text, context and history of the measure, the intent of the voters remains unclear, we may resort to judicial rules of construction to resolve any remaining uncertainty. *PGE, 317 Or at 612 n 4.*

1. Transferability of Measure 37 Relief

Your first question concerns whether a public entity's decision to modify, remove or not apply a law is personal to the owner making the claim or whether the grant of non-monetary relief runs with the land. In other words, when a public entity provides non-monetary relief to the present owner of property by waiving a law to allow a use of the property, what happens if the owner conveys the property to a new owner? We conclude that the relief is personal to the owner making the claim. In reaching that conclusion, we consider three potential answers: (1) Measure 37 only authorizes waiver for the present owner making the claim; (2) Measure 37 only authorizes waiver that runs with the land; or (3) Measure 37 grants the public entity making the decision on waiver the discretion to determine its duration. Nothing in Measure 37 expressly answers these questions, so we must discern the voters' intent, beginning our analysis with the measure's text.

Sections (8) and (10) of the measure authorize certain public entities to grant a waiver from a law that would otherwise require the payment of compensation.¹ Subsection (8) provides that:

"Notwithstanding any other state statute or the availability of funds under subsection (10) of this act, in lieu of payment of just compensation under this act, the governing body responsible for enacting the land use regulation may modify, remove, or not to apply [*sic*] the land use regulation or land use regulations ***to allow the owner to use the property for a use permitted at the time the owner acquired the property.***" (emphasis added).

Section (10) provides that:

"* * * Notwithstanding the availability of funds under this subsection, a metropolitan service district, city, county, or state agency shall have discretion to use available funds to pay claims or to modify, remove, or not apply a land use regulation or land use regulations pursuant to subsection (6) of this act. If a claim has not been paid within two years from the date on which it accrues, ***the owner shall be allowed to use the property as permitted at the time the owner acquired the property.***" (emphasis added.)

Subsection (11)(C) defines "[o]wner" as "the ***present*** owner of the property, or any interest therein." (emphasis added.)

¹ For every law, there is of course a public body that already has authority independent of Measure 37 to amend or repeal it, e.g., the Legislative Assembly for statutes.

The highlighted language is the only text concerned with the nature of the non-monetary relief authorized by the measure. Standing alone, it only provides authority for a public entity to waive a law to the extent necessary to allow an otherwise prohibited use by the "present" owner, i.e., the owner at the time the exemption is granted. In other words, this language only authorizes a public entity to make exemptions personal to the owner making the claim.

We also consider the immediate context of this text. Sections (8) and (10) of the measure provide three means for a public entity to waive a law. An authorized public entity may (1) "modify," (2) "remove," or (3) "not apply" the law. The plain, natural and ordinary meaning of "modify" best suited to the circumstances is "lessen the severity of : MODERATE . . . <traffic rules were *modified* to let him pass - Van Wyck Brooks>." WEBSTER'S THIRD NEW INT'L DICTIONARY 982 (unabridged ed 1993)1452. None of the definitions of "remove" is ideally suited to the circumstances, but "eliminate" comes the closest. *Id.* at 1921. To "apply" a rule of law is "to put [it] in effect : IMPOSE." *Id.* at 105.

The first two means of providing non-monetary relief - modifying or removing the law - appear to entail making a change in the law itself. That is, the ordinary meaning of how a public entity would "modify" a law would be for the public entity to amend the law. Similarly, the ordinary meaning of how a public entity would "remove" a law would be for the public entity to repeal it. How the law was amended or repealed would seemingly determine whether that action was personal to the current owner or permanent. For example, one way to grant John Doe non-monetary relief for his property on Maple Drive would be to modify the law to provide that "this law shall not affect the real property at 111 Maple Drive, Anytown, Oregon." On its face, a modification taking that form would have the effect of making the law not apply to the property irrespective of its ownership.² Moreover, to make the law begin applying again once it was acquired by a new owner, the public entity would need to repeal or amend the decision to remove or modify the law, which would seemingly entitle the new owner to relief in his own right. And if that owner were then granted the same type of modification, the owner that followed him would likewise be entitled to relief, and so on.

By contrast, if a law were modified to provide that "this law shall not affect any real property at 111 Maple Drive, Anytown, Oregon *that is owned by John Doe*," the exemption would be limited to the owner making the request for compensation and the property would again be subject to the original law upon its acquisition by a new owner, absent independent grounds for an exemption. In sum, the first two means of modifying or removing the law so that it does not apply to a property could be accomplished either by actions that are personal to the current owner or by actions that run with the land. The fact that either is technically possible means that this context does not shed any light one way or the other on whether the voters intended non-monetary relief to be personal to the present owner or to run with the land.

The third means of non-monetary relief - to "not apply" the law - presumably has a different meaning than the first two. ORS 174.010. As noted above, the ordinary meaning of

² Similarly, the law could be repealed in whole or in part (as to particular property or as to a particular person). As discussed below, we do not believe Measure 37 authorizes a public entity to repeal a law that it is required by other law to have in place (except, perhaps, with regard to a specific, valid, Measure 37 claim).

“apply” is to put something into effect or to impose or enforce it. Thus, it appears that the intended meaning of “not applying” a law in this context is to stop enforcing it in a way that does not involve repealing or amending the law. Instead, the relevant public entity is authorized simply to not give effect to an existing law, *i.e.*, to discontinue enforcing it. This construction also is consistent with the text of section (4), which entitles the present owner to compensation if a law “continues to be enforced against the property” 180 days after he submitted a claim. Therefore, if the third means were used, as long as the present owner continues to own the property, the public entity would stop enforcing or applying the law to the property. However, the law would otherwise continue unaltered, and if the present owner conveys the property to a new owner the public entity would have no lawful basis for not enforcing it if the conditions that created the right to relief under Measure 37 ceased to exist, *e.g.*, if the property were acquired by someone who was not entitled to an exemption in his own right. For that reason, to “not apply” a law would necessarily be personal to the owner submitting the claim.³

Although the text and context of the measure strongly suggest that the voters intended that non-monetary relief be personal to the present owner of the property, we also review the history of the measure to determine if it sheds any light on your question. We turn first to the Voters’ Pamphlet, which is the primary source for Measure 37’s history. The ballot title states that “Governments must pay owners, or forgo enforcement, when certain land use restrictions reduce property value.” The explanatory statement declares that “government must pay owner reduction in fair market value of affected property interest, or forgo enforcement. Governments may repeal, change or not apply restrictions in lieu of payment; if compensation not timely paid, *owner* not subject to restrictions.” (emphasis added.)

The arguments in favor include 40 submissions, although the last two are apparently ironic and intended to discourage “yes” votes. Slightly more than half of the arguments discuss the perceived adverse effects of land use laws in the abstract. Except as discussed below, none sheds any light on the question at hand. Slightly fewer than half are statements about how land use laws are preventing a specific owner from putting his or her property to some particular current use. All of those specific concerns could be remedied either by a decision that is personal to that owner or one that ran with the land, with the possible exception of several owners who expressed dissatisfaction with not being able to subdivide their property and give parcels to descendents, sell them to third parties, or both. Allowing an owner to subdivide property by not applying a prohibition would do him no good, of course, unless the subdivision remained lawful after its transfer to one or more new owners. Existing laws generally allow new owners to perpetuate non-conforming uses that were lawful when instituted, but it is not certain whether all would apply to a decision under Measure 37. *See, e.g.*, ORS 215.130.⁴ None of the

³ Measure 37’s context includes related statutes that were already on the books at the time of its approval by the voters. *See Stranahan v. Fred Meyer, Inc.*, 331 Or 38, 62 n15, 11 P3d 228 (2000). The breadth of Measure 37 results in a very large number of existing statutes that are related to Measure 37. We have not found anything in those statutes bearing directly on whether a Measure 37 exemption was intended by the voters to be personal or to run with the land.

⁴ ORS 215.130 provides in relevant part:

arguments in favor addresses whether subsequent purchasers would acquire the rights, or step into the shoes, of owners covered by the measure. Likewise, no argument directly mentions the effect of laws on a property's resale value, although one argument states that they restrict the use of home equity to fund owners' retirements. The latter implies an adverse effect on resale value, which might be recognized by discerning voters as a problem that would only be remedied if the exemptions ran with the land. On the other hand, an argument in favor of the measure by the chief petitioners expressly states that if an owner entitled to Measure 37 compensation conveys her property, that will establish a new "date of acquisition" for purposes of determining what laws may give rise to a claim. This is a clear statement that the chief petitioners expected that the relief available under the measure depends on when the current owner acquired the property -- that the relief is personal to the current owner. If the current owner is eligible for relief, but sells the property, then only laws adopted after the new owner acquired the property create a right to relief.⁵ The arguments in opposition include nothing that bears on this issue.

Measure 37 received considerable attention in the state's newspapers, but none of the articles or editorials we have seen discuss whether a decision to grant non-monetary relief would be personal or run with the land. Like the Voters' Pamphlet, the newspaper commentary we have reviewed does not address whether subsequent purchasers would acquire the rights, or step into the shoes, of owners covered by the measure. The same appears to be true of the television advertising on this measure.

"(5) The lawful use of any building, structure or land at the time of the enactment or amendment of any zoning ordinance or regulation may be continued. Alteration of any such use may be permitted subject to subsection (9) of this section. Alteration of any such use shall be permitted when necessary to comply with any lawful requirement for alteration in the use. Except as provided in ORS 215.215, a county shall not place conditions upon the continuation or alteration of a use described under this subsection when necessary to comply with state or local health or safety requirements, or to maintain in good repair the existing structures associated with the use. A change of ownership or occupancy shall be permitted." (emphasis added.)

This statute allows the continuation of uses that have been made unlawful by a subsequent change in the law. But if a decision to grant non-monetary relief under Measure 37 is personal to the owner, uses covered by a decision would be made unlawful not by a change in the law but by a change in ownership, which does not come under ORS 215.130. Therefore, voters whose decision to support the measure was motivated by the arguments about subdivision restrictions presumably expected either that a decision to grant non-monetary relief would run with the land or that existing law would not require that a subdivision be undone upon the property's sale. Additional legislation may be needed to implement that intent.

⁵ The argument in the Voters Pamphlet states:

~If the current owner sells an interest in her property, so long as the current owner still has a current possessory interest, or a reversionary interest in the property, the provisions of Ballot Measure 37 apply using the date the current owner acquired the property. Only if a current owner sells all of her interest in a piece of property does the date of acquisition change for purposes of determining what regulations are subject to Ballot Measure 37 protections."

Voters' Pamphlet, Volume 1 - State Measures, Oregon Vote by Mail General Election, November 2, 2004, at page 113. Argument in Favor furnished by Dorothy English, Barbara Prete and Eugene Prete.

In conclusion, the phrases "to allow the owner to use the property for a use permitted at the time the owner acquired the property" and "the owner shall be allowed to use the property as permitted at the time the owner acquired the property," together with the definition of "owner" as "the present owner of the property, or any interest therein" are the only text that directly addresses whether a decision to grant non-monetary relief by "not applying" or modifying or removing a law applies to the present owner or to the property. Those phrases specify the minimum that a public body *must* do to avoid paying compensation, i.e. modify, remove or not apply the law to allow *present owner* to use the property as permitted at the time the *present owner* acquired it. Absent independent authority to amend, repeal or otherwise disregard the law at issue, *see* note 1 *supra*, we believe that those phrases also specify the maximum that a public body *may* do to avoid paying compensation. This interpretation is reinforced by other text, namely, the three means by which government may stop the law from applying, as the third means could never be used if all decisions to grant non-monetary relief were intended to run with the land. The measure's history is generally consistent with this interpretation as well and provides no justification for an interpretation at odds with the plain meaning of the measure's text.

Where a local government has discretion concerning whether or not to adopt the ordinance, local government may have authority to modify or repeal that ordinance with regard to both present and future property owners. However, where local government has adopted an ordinance to implement a requirement of state or federal law, Measure 37 authorizes that local government to waive the ordinance only as to the present owner of the property.⁶ We therefore conclude that Measure 37 only authorizes government bodies to "modify, remove or not to [*sic*] apply" a law (as an alternative to compensation) that the government is otherwise required to apply where that decision is personal to the current owner of the property.

2. "Blanket Waivers"

Some local governments have expressed an intention to repeal laws in response to Ballot Measure 37, either on a wholesale basis (as applied to all persons and property) or on a more limited basis (for example, as applied to all owners of real property acquired before the effective date of the law in question). If a locally adopted law is required by state law, then subsections (8) and (10) permit a local body to *modify, remove or not apply* the law only with respect to a valid Measure 37 claim. That is, Measure 37 authorizes a public entity to modify, remove or not apply a local law that is required by state law only as to owners who have established valid claims under the measure. Cities or counties that repeal or amend local ordinances that are required by state law on a broader basis are, we believe, acting in violation of state law.

An owner establishes a valid Measure 37 claim only if the authorized public entity determines that a series of conditions are met, including:

⁶ ORS 197.646 generally requires a local government to amend its comprehensive plan and land use regulations to implement new land use statutes and land use goal and rules of the Land Conservation and Development Commission (LCDC).

- The public entity has enforced the law;
- The law restricts the use of private real property or any interest therein
- The law has the effect of reducing the fair market value of the claimant's property or any interest therein
- The owner of the property has made a written demand to the public entity
- The law was enacted after the date the claimant acquired the property
- The law does not restrict or prohibit activities commonly and historically recognized as public nuisances under common law;
- The law does not restrict or prohibit activities to protect public health and safety
- The law is not required to comply with federal law.

If any of those conditions is not satisfied, relief is not authorized by Ballot Measure 37. If the law or laws in question are ones that a city or county was required to adopt by state law, the city or county may not repeal or amend those laws except to the extent authorized by the measure. As a result, any ordinance that purports to waive otherwise applicable laws that are required by state law, without providing for the determinations set forth above to be made, is beyond the authority provided by Ballot Measure 37 and likely violates the state law that would otherwise require the local government to have the local law in question in place.

In the arena of land use, ORS 197.646 generally requires local governments to amend their comprehensive plans and land use regulations to implement new or amended statewide planning goals and rules, and land use statutes (such as ORS ch. 215). As a result, if a county were to "modify, remove or not apply" its own ordinance adopted to implement state law in response to a valid written demand made under Ballot Measure 37, it could do so only if it first determined that all of the conditions required for a claim to be valid and entitled to relief have been met.⁷

If you have any questions about this advice, please do not hesitate to contact me. The nature of this advice is necessarily general, and there may be aspects of existing state or local laws that require additional analysis as we work through questions arising from the implementation of this measure.

Very truly yours,



Stephanie Striffler
Special Counsel to the Attorney General

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⁷ We expressly do not address whether such an action by a city or county would entitle a property owner to carry out a use. That question is beyond the scope of this advice.