

Multnomah County Attorney's Office
501 S.E. Hawthorne Blvd., Suite 500
Portland, Oregon 97214

PHONE: 503.988.3138
FAX 503.988.3377



MEMORANDUM

To: Derrick Tokos, Principal Planner

From: Sandy Duffy, Assistant County Attorney

Re: All Measure 37 Land Divisions Are Facially Invalid

Date: June 8, 2006

INTRODUCTION:

A substantial portion of the Measure 37 claims being submitted to Multnomah County are for partitions or subdivisions. MCC 27.530(O) authorizes the Planning Director to determine whether a claim is invalid on its face and to recommend to the Board of County Commissioners that the claim be denied. The question this memorandum addresses is whether claims for land divisions are invalid on their face. This memorandum is intended as guidance for the Planning Director and the land use planners who are reviewing Measure 37 claims.

Set out below is the County's legal analysis addressing whether partitioning and/or subdividing land is a "use" of land which is subject to the provisions of Measure 37 and whether development rights gained through a waiver are personal to the claimant are transferable to a purchaser of a subdivided parcel. If the development rights are not transferable, there has been no "... reduc[tion in] the fair market value of the property," which is required for a valid Measure 37 claim.

DISCUSSION:

A. County land division regulations do not restrict the owner's "use" of the property.

The meaning of the term "use" in the Measure is a critical factor in determining the validity of claims, as well as the governing bodies' authority to pay compensation or to waive¹ regulations. Section (1) of the Measure requires compensation from the County if it enforces an ordinance that "restricts the *use* of private real property."

As an alternative to paying compensation, the Measure, in Section(8) authorizes the governing body to: "...modify, remove or not to [sic] apply 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."

If the county land division regulations (MCC 33.7700 – 33.8035) are a *use* restriction, the Board may pay compensation or waive the regulations which would allow Measure 37 claimants to partition or subdivide their parcels.

(1) Land division ordinances as land use regulations in Measure 37.

The proponents of the Measure give import to the fact that the Measure defines "land use regulation" in subsection (11)(B) as including "land division ordinances." First, land division ordinances do not specify how a property is to be *used*. Land division ordinances set out the requirements for and procedures to partition or subdivide parcels of land.

Second, on February 24, 2005, the Attorney General's Office issued a Measure 37 letter-opinion to Lane Shetterly, Director of DLCD. That letter-opinion makes it very clear that a

¹ Waiver is a term used in this memorandum in lieu of the Measure 37 language which authorizes the governing body to "modify, remove or not to [sic] apply the land use regulation..."

waiver is valid only if a *series* of conditions are met², including: “The law [county code] restricts the use of private real property or any interest therein,” and “The law [county code] has the effect of reducing the fair market value of the claimant’s property or any interest therein.” Inclusion of a type of regulation within the definition of “land use regulation” does not necessarily mean that it is a “use” regulation which restricts the use and diminishes the value of property, giving rise to a Measure 37 claim.

Finally, the two sections of the Measure (the definitions and the requirement that a restriction in use diminish the value), must be read in context and effect must be given to both, if possible. The general definition provision will not take precedence over the substantive provision requiring a restriction in *use* and a diminution in value to prove a valid claim under the Measure.³

(2) Interpreting the word “use.”

When construing a statute, the court’s task is to determine the intent of the legislature. The best indication of legislative intent is the text of the statute. Only if the court finds the text is ambiguous will the court analyze the legislative history of the statute. *PGE v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d 1143 (1993); ORS 174.010. The same analysis applies whether the statute was enacted by the legislature or through the initiative process. *Stranahan v. Fred Meyer, Inc.*, 331 Or 61; 11 P3d 228 (2000).

The term “use” is undefined in the Measure which means it is to be interpreted in its common, everyday meaning. The common meaning of “use,” in the context of land use

² The same holds true for a determination to pay compensation. There must be a valid Measure 37 claim which meets the same series of conditions.

³ ORS 174.020(2) “When a general and particular provision are inconsistent the latter is paramount to the former so that a particular intent controls a general intent that is inconsistent with the particular intent.”

regulations, includes such uses as: rural residential use, commercial use, farmland use, forestland use, industrial use, community service use.⁴ Those broad categories of uses are subdivided into more specific uses in the zoning code. For example, rural residential allowed uses include: raising and harvesting of crops, raising livestock and honeybees, and family day care.⁵ All of these uses can take place on a parcel of land without subdividing the parcel.

The common dictionary definition of the word “use” is:

“The act of using or the state of being used.” Webster’s New Universal Unabridged Dictionary, Second Edition, (Dorset and Baber 1989).

The legal definition of the word “use” is:

“The application or employment of something; esp., a long-continued possession and employment of a thing for the purpose for which it is adapted, as distinguished from a possession and employment that is merely temporary or occasional <the neighbors complained to the city about the owner’s use of the building as a dance club>.” Black’s Law Dictionary, Seventh Edition, West Group, St. Paul Minn., (1999).

Both of these definitions contemplate active employment of the land for a specific purpose. The acts to subdivide land (applying for a land use permit, obtaining a title report, obtaining a survey, recording a plat) do not involve the employment of land. Subdividing is preparation for a use of the land, but is not, itself, a use.

Other than *MacPherson*⁶, there are no cases to date interpreting the language of Measure 37, however, the Court of Appeals, in *Parks v. Tillamook County*, 11 Or App 177 (1972),

⁴ This is a representative sample of some of the uses contained in MCC Chapter 33; there are many others but none of them include partitions or subdivisions.

⁵ These are examples from MCC Chapter 33.

⁶ *MacPherson v. Department of Administrative Services*, 340 Or 117, 130 P3d 308 (2006) found Measure 37 to be constitutional.

recognized that platted but undeveloped land is not regarded as a “use” in zoning law.⁷ It follows that the process of subdividing land would not be a “use” of land either.

(3) The Attorney General concludes Measure 37 rights are not transferable.

The Attorney General’s letter-opinion to the Director of DLCD also reviews the voter’s pamphlet statements for voter intent on transferability of Measure 37 relief. Some of that discussion may be relevant as legislative history of voter’s intent on whether the Measure was intended to allow subdivision of qualified parcels. It states:

The arguments in favor include 40 submissions ...slightly more than half of the arguments discuss the perceived adverse effects of land use laws in the abstract... 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 descendants, 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. [non-conforming use statute – footnote omitted] None of the 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 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

⁷ At 196.

property, then only laws adopted after the new owner acquired the property create a right to relief. (Emphasis added.)

The opinion, in a footnote to this quoted section, which related to the non-conforming use statute (ORS 215.130), questions whether Measure 37 implementing ordinances, adopted by local governments, can confer non-conforming use status upon transferred properties. The footnote states:

"This statute [ORS 215.130] 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 an [sic] 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." (Page 6.) (Emphasis added.)

This footnote implies that the voter's pamphlet "legislative history" probably includes an intent to perpetuate a legal use of the property upon transfer, but it does not fit into the nonconforming use statute because the trigger is sale, not change in land use laws. This footnote seems to suggest that the nonconforming use statute (ORS 215.130) could be amended by the legislature to add the sale of Measure 37 properties as creating a nonconforming use.

In light of the Attorney General's letter-opinion, the *Parks* case, common land use parlance, the dictionary definitions of "use," and the failure of the Measure to specifically authorize partitions or subdivisions in zones where those actions are prohibited, this Court should interpret Measure 37 to exclude a subdivision or partition of land as a "use" of land.

B. A “diminished value” relies on an erroneous assumption of transferability.

Even assuming an owner’s evidence of value is legally sufficient to support a finding in his/her favor, it is erroneously predicated on an assumption that the owner can sell his/her properties with Measure 37 historical rights to use the property intact.

If Measure 37 rights do not transfer with the sale of a property, the property has only the value it will have in the hands of the purchaser with *current* applicable regulations.

(1) Regulatory Relief is Personal to the Present Owner

Regulatory relief under ORS 197.352 is personal to the present owner of the property. When the County finds that a claimant meets the standards for relief under ORS 197.352, the County may, in lieu of compensation, waive land use regulations “to allow *the owner* to use the property for a use permitted at the time *the owner* acquired the property.” ORS 197.352 (8) (emphasis added). The statute then defines “owner” as the “present owner of the property.” ORS 197.352 (11)(C). Therefore, the regulatory relief authorized by the statute as an alternative to compensation is personal to the present owner.

This conclusion is consistent with the advice the Oregon Attorney General (“AG”) has given to State agencies. In a letter dated February 24, 2005, to the Director of the Department of Land Conservation and Development, the AG writes that a decision “to ‘not apply’ a law would necessarily be personal to the owner submitting the claim.” The letter cites to and relies on arguments made by the proponents of the statute that were presented in the Voters Pamphlet:

“[A]n 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 for relief.”

Any rights obtained by and owner pursuant to a state waiver or a county waiver are personal to the owner with Measure 37 rights and may not be transferred to subsequent owners. Because a subsequent owner would acquire the property subject to all laws in effect on the date the subsequent owner acquired it, the subsequent owner would not acquire a “buildable lot.”

Property owners who are making Measure 37 claims to Multnomah County are claiming that they are entitled to compensation in some identified amount based on an assertion that they can divide the property into some specific number of “buildable lots.” The core of this claim is the assertion that, absent zoning regulations enacted after date of owner acquisition, the claimant could divide the property into some specified number of “buildable lots.” However, as noted above, any rights obtained pursuant to a claim filed under ORS 197.352 are personal to the claimant and do not transfer with the property. Accordingly, a purchaser of a lot from a Measure 37 owner will acquire the property subject to all laws currently in effect and current laws do not allow new dwellings on the lots in contravention of the current regulations.⁸

Because the lots cannot be sold as residential building sites, they have no real market value for residential use and regulations that prohibit their creation do not reduce the property’s value.

(2) Plaintiff cannot divide land because land division is not a “use”.

⁸ State and local laws allow new dwellings in commercial forest zones only under very limited circumstances – none of which would apply to the subdivision lots created pursuant to this claim. *See e.g.* ORS 215.705, 215.720, 215.730, 215.740 and 215.750; Multnomah County Code (“MCC”) 33.2220, 33.2225, 33.2230, 33.2235 and 33.2240.

See Section A(3) above. (The Attorney General concludes Measure 37 rights are not transferable.)

If Measure 37 rights do not run with the land, then Plaintiff's property has no enhanced value in the eyes of a potential purchaser and no diminution in value attributable to current regulations.

CONCLUSION:

Partitioning and subdividing land is not a "use" of land which is subject to the provisions of Measure 37. Development rights gained through a waiver are personal to the claimant and are not transferable to a purchaser of a subdivided parcel. Because the development rights are not transferable, there has been no reduction in the fair market value of the property, which is required for a valid Measure 37 claim. A potential purchaser will only pay the fair market value of the property with land use restrictions in place because those restrictions will apply to the purchaser.

