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2004 OREGON BALLOT MEASURE 37 INITIAL QUESTIONS & ANSWERS

QUESTION 1: Measure 37 provides that in certain cases a public entity may “modify, remove or not apply” (“waive”) a law as an alternative to paying compensation. Does a public entity have the authority to waive laws on a “blanket” basis without reviewing whether each individual claim qualifies for relief under the measure?

Answer: *Public entities may not waive laws on a blanket basis. Measure 37 allows waivers only after a claimant has established entitlement to relief under the criteria of the measure. Additional detail and legal analysis concerning this issue is provided in the Letter of Advice from the Oregon Department of Justice to the Oregon Department of Land Conservation and Development (DLCD), dated February 24, 2005, which is available from DLCD.*

QUESTION 2: Measure 37 provides that in certain cases a public entity may waive a law as an alternative to paying compensation. If the owner of property receives a waiver, and then sells the property without acting on it, what happens?

Answer: *Generally, decisions under Measure 37 to waive laws (that would otherwise apply to a property) provide relief only to the present owner. If an owner sells the property without acting on the waiver, it is likely that the waiver cannot be transferred to the new property owner and the right to relief will be lost. Additional detail and legal analysis concerning this issue is provided in the Letter of Advice from the Oregon Department of Justice to the DLCD, dated February 24, 2005, which is available from DLCD.*

This Q&A is intended to provide information to State agencies to enable the state to better implement Measure 37; it is not intended to be legal advice to the reader (other than the Letter of Advice from the Attorney General referenced herein), but the conclusions reflected in the answers are based on advice of counsel received.

QUESTION 3: Measure 37 provides for compensation if a “public entity enacts or enforces” certain laws. Which public entity is responsible for compensation to the claimant if the Oregon legislature enacts a law, but a county, or Metro, or a city enforces it? If the local government enforces a law that it was directed to enforce by the legislature, is the state responsible for compensating the claimant or for reimbursing the local government if it pays compensation?

Answer: *Generally, the public entity that enforces the law is responsible for paying compensation regardless of whether the law is state or local. If the Oregon legislature has enacted a law (prior to December 2, 2004) and the law is enforced by a local government, the local government has no right of indemnity from the state for any liability that it incurs. The same is true with regard to a law enacted after December 2, 2004, except that under Article XI, section 15 of the Oregon Constitution, a post-December 2, 2004 enactment may require the state to appropriate funds to pay the usual and reasonable costs of responding to valid claims based on the newly-enacted law. See Question 4 for additional information regarding liability.*

QUESTION 4: Does enforcement of a state statute or rule by a local government trigger liability for the state?

Answer: *No. Even where state law requires a local government to enforce state law, the local government’s act of doing so does not trigger liability for the state. Under the terms of section (1) of the measure, relief is available when a “public entity enacts or enforces a new land use regulation or enforces a land use regulation enacted prior to the effective date of [Measure 37].”*

With regard to existing laws, only the public entity that enforces that existing law is liable under the measure. With regard to new laws, if a local government enforces a new law it may be liable for enforcement, but its action will not trigger liability for the state. If the state enacted the new law, it may be liable for its act of having enacted the law, but not as a result of the action of the local government to enforce it.

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QUESTION 5: When a state agency receives a Measure 37 claim, how does it decide whether the claim is valid and whether to provide monetary or non-monetary relief if it is valid?

Answer: *The Department of Administrative Services (DAS) has adopted rules that provide direction to state agencies concerning how to administer Measure 37 claims. See OAR 125-145-000. The state Administrative Procedures Act applies to agency decisions concerning claims.*

As a general matter, when processing a claim under Measure 37, an agency must confirm that :

- *the record shows that the individual making the claim is the owner of the private real property the claim is made for;*
- *the law that has been enforced has restricted the lawful use of the property in a manner that has reduced its fair market value;*
- *and that the law does not fall within one or more of the exceptions provided by the measure.*

The decision to provide monetary or non-monetary relief will depend on the availability of funds in the first instance. If the agency has available funds, its decision to “waive” or pay is a policy decision. Agencies have a responsibility to be consistent when making decisions on claims, which may require some rulemaking to help avoid ad hoc decisions and maintain a fair decision-making process. In addition, agencies must explain if they make a decision that departs from an officially stated agency position or a prior agency practice, such as by showing that an exception applies, demonstrating that a decision can be distinguished from prior policy or practice, or explaining that there is reason to reverse the prior policy or practice.

QUESTION 6: What state agencies may pay compensation for Measure 37 claims? What sources of funds may be used to pay claims? Does an agency need a specific appropriation of funds or expenditure limitation in order to be able to pay compensation?

Answer: *Measure 37 does not specify a source of funds to pay claims. Moneys in the State Treasury may be used to pay claims only if:*

- *an agency approves the claim,*
- *it has the authority to pay the claim; and*
- *there is a legislative appropriation from which the claim may be paid*

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State agencies do have authority to pay claims stemming from laws that they enforce or enact unless the funds are otherwise restricted .

QUESTION 7: Under Measure 37, a property owner may make a claim concerning an existing law if a public entity “enforces” that law. What does it mean for a public entity to “enforce” a law?

Answer: A government “enforces” an existing law against a property when it takes an affirmative step to put a law into force or to require that it be observed with regard to the property on which a Measure 37 claim is made. Such actions include, but are not limited to:

- ***compelling compliance with the law through a judicial or administrative action;***
- ***preventing or discouraging violations of the law;***
- ***exercising discretionary authority to restrict the use through a regulatory action; and***
- ***clarifying how a general law applies to the particular property for which a claim is made.***

QUESTION 8: If there are existing state procedures that a property owner is normally required to follow to find out if their desired use of property will be allowed, or to find out under what conditions it may be allowed (e.g., a variance process) does the landowner first have to go through those procedures before going to court with a claim under Measure 37? The measure provides that the failure to file an application for a land use permit with a local government is not a grounds for dismissal or delay of a claim. Is the failure to file an application for a use with a state agency a ground for dismissal or delay of a claim?

Answer: If there is an existing state procedure to determine whether or how a use of property may be allowed, a person seeking relief from that law will be required to complete that procedure before seeking judicial relief or judicial review. That will also be true at the local level, except where the use the owner is seeking would normally be reviewed as a “permit,” as that term is defined in state law. Where the claim is based on a state law requiring a permit or other procedure to determine whether and how the law applies, the owner will have to seek that permit or follow that procedure, otherwise judicial relief or review will be barred.

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QUESTION 9: Does a “land use regulation” include state agency rules other than those specifically enumerated in section (11)?

Answer: *It is most likely that the definition of the term “land use regulation” in subsection (11) of Measure 37 is exclusive. The categories of laws listed in subsection (11) of Measure 37 do not illustrate some broader group of laws subject to the measure. As a result, state agency rules other than those specifically listed in section (11) are not included within the definition of “land use regulation” for purposes of Measure 37. If a rule is not a “land use regulation,” there will be no basis for a claim under Measure 37 concerning the enforcement or enactment of the rule.*

QUESTION 10: Measure 37 requires government to compensate an owner of private real property when a law restricts the use of private real property. What types of laws restrict the use of private real property such that they could be the basis for a claim under the measure (if the claim is otherwise valid and no exception applies)?

Short Answer: *There are four general classes of laws that restrict the use of private real property within the meaning of Measure 37. These general classes are:*

a) laws that limit what types of uses may be carried out on private real property or that prohibit a specific use (many zoning laws would come within this category);

b) laws that provide that a government entity may allow the use, subject to certain standards, conditions or requirements;

c) laws that limit how a use of real property may be carried out, by restricting the area of the property that may be used or by restricting the times at which the property may be used;

d) laws that impose affirmative obligations on the use of property, such as a requirement to dedicate property for roads and sidewalks.

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However, there are certain laws under Measure 37 that if enforced do not require compensation For example see Question and Answer 11 concerning the measure's exemption for laws that are for the protection of the public health and safety.

QUESTION 11: The measure says that there is no right to compensation for laws “restricting or prohibiting activities for the protection of public health and safety, such as fire and building codes, health and sanitation regulations, solid or hazardous waste regulations, and pollution control regulations.” What does it mean for a law to “protect public health and safety” such that Measure 37 does not require compensation?

Short Answer: *Laws restricting or prohibiting activities for the protection of public health and safety are those reasonably related to the achievement of one or both of those goals. Laws reasonably related to one of those goals do not require compensation under Measure 37.*

The use of the word “and” does not mean that the law must apply to both “health and safety.” Instead, compensation under Measure 37 is not required as long as the law is reasonably related to one of those purposes.

This exemption likely does not include laws for the protection of economic, social or aesthetic interests (or that aspect of the traditional “police power” that may be described as “general welfare”). However, a law that is reasonably related to public health or to public safety will come within the exception even if it has some incidental economic, social or aesthetic benefit.

All pollution control laws are included within the exception, but in order to be a “pollution control law” within the meaning of the measure, the law must have a reasonable relationship to pollution control, e.g., the law will not qualify merely because of how it is labeled.

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