



DEPARTMENT OF JUSTICE
GENERAL COUNSEL DIVISION

May 5, 2006

Jim Bucholz
Property Tax Division
Oregon Department of Revenue
Salem, Oregon 97301

Re: Effects of Measure 37 relevant to county appraisers
DOJ file No: 150303-GT0739-04

Dear Mr. Bucholz:

This letter responds to a number of questions that your department has asked about the possible effects of ORS 197.352, enacted as Measure 37 in 2004 (“ORS 197.352” or “Measure 37”) on property tax administration and the work of county appraisers. Your revised and reordered questions and our brief answers appear immediately below, followed by a discussion of the issues.

QUESTION 1

Could a decision to qualify or disqualify property for a farm use or forestland special assessment give rise to a compensable claim under Measure 37?

SHORT ANSWER

No. Measure 37 applies only to “land use regulations” and a special assessment designating property as farm use or forestland is not a land use regulation within the meaning of the measure. Moreover, special assessment results from the owner’s *election* to use the property in a manner that meets the criteria for the assessment, rather than from the state’s *enactment* or *enforcement* of the special assessment statutes.¹

QUESTION 2

Could the enforcement of timber tax statutes and rules under ORS chapter 321 give rise to a compensable claim under Measure 37?

¹ The question addresses farm use and forestland special assessments, but the answer should be the same for special assessments regarding open space land, riparian habitat, or wildlife habitat.

SHORT ANSWER

No, timber tax statutes and rules under ORS chapter 321 are not “land use regulations” for purposes of Measure 37.

QUESTION 3

Does the waiver, under Measure 37, of zoning restrictions on property lying within an exclusive farm use or forest zone disqualify the property for special assessment?

SHORT ANSWER

A decision by the government not to apply zoning restrictions under Measure 37 would not, by itself, disqualify property within an exclusive farm use or forestland zone for special assessment. Depending on the category of special assessment that is applicable to the property, the property may be disqualified for special assessment if the owner notifies the assessor to remove the special assessment, if the assessor discovers that the owner is no longer using the property in the required manner, or if the government decides to modify or remove the zoning restrictions. The disqualification of property for special assessment is controlled by statute. In addition, under ORS 215.236, a dwelling may not be established on land zoned for exclusive farm use unless the property has been disqualified for special assessment and any additional tax imposed as a result of the disqualification has been paid.

QUESTION 4

If zoning restrictions are waived for a property within an exclusive farm use or forest zone and the property is subsequently disqualified for special assessment, is the deferred value then calculated based on the new, unrestricted use of the property?

SHORT ANSWER

No. When a property is disqualified from special assessment, deferred additional taxes are calculated based upon the difference between actual taxes paid during each of the prior tax years that comprise the relevant deferral period, and the taxes that would have been paid for each of those years under then-existing law and market conditions had the property not been subject to special assessment. The new, unrestricted use of the property would only be considered for tax years following the year in which a Measure 37 waiver was granted.

QUESTION 5

What is the relationship between fair market value under Measure 37 and real market value for property taxation purposes?

SHORT ANSWER

The meaning of and methods for determining fair market value and real market value are essentially the same. However, real market value for purposes of property taxation assessment is determined as of the assessment date for the tax year, January 1, is based on actual market data, assumes existing laws apply and typically assumes that the property could be sold with all existing rights and uses. By contrast, determination of the fair market values for purposes of a Measure 37 claim relates to the effect of the enactment or enforcement of a law as of the date the owner makes written demand for compensation under the act. These values are based on a hypothetical market where the property is not subject to certain laws enacted after the owner acquired the property and where comparison and surrounding properties may also not be subject to certain laws enacted after the owner acquired the property, and where new uses allowed as a result of a Measure 37 claim are personal to the present owner and are not transferable. Therefore, the two values are not likely to be identical.

QUESTION 6

If the fair market value that is established in the resolution of a Measure 37 claim differs from the real market value shown on the tax roll, should there be an automatic correction to the real market value? If so, could the correction apply to prior tax years?

SHORT ANSWER

No, the law does not require that the determination of fair market value in the resolution of a Measure 37 claim result in a correction to the real market value shown on the tax roll.

QUESTION 7

When a determination is made under Measure 37 not to apply land use regulations, resulting in property that was un-buildable now being buildable and an increase in the real market value of the land based on the new higher and better use, is there any mechanism to increase the maximum assessed value? Does the decision not to apply a land use regulation under Measure 37 constitute an exception under Measure 50?

SHORT ANSWER

No, a determination not to apply a land use regulation under Measure 37 does not itself constitute an exception under Measure 50. However, if the owner were to use the property for a use permitted at the time the owner acquired the property after a decision not to apply land use regulations, one of the exceptions under Measure 50 might apply.

QUESTION 8

Will the governmental entity that pays an owner "just compensation" under Measure 37 acquire a property right for the consideration equal to the amount of compensation? If the

governmental entity acquires a property right, are there tax consequences of that change of ownership under ORS 307.090?

SHORT ANSWER

No, a governmental entity that compensates a property owner under Measure 37 will not acquire a property right to the underlying property. Because there is no change of ownership, there are no tax consequences.

QUESTION 9

Who conducts the appraisal when a claim is filed against county or municipal government bodies, a registered property appraiser on the county assessor's staff or a fee appraiser? Likewise, who conducts the appraisal if a claim is filed by a principal or secondary industrial property owner² or a utility or transportation property owner³?

SHORT ANSWER

Neither Measure 37 nor other state law addresses whether an appraisal must be conducted, let alone who will conduct such appraisals to determine property values for compensation claims against county or municipal governments. Until the legislature or the judiciary resolves the issue, state agencies and local governments acting within the scope of their existing statutory authority must address this question. If a governmental entity wishes to have an appraisal performed in response to a Measure 37 claim, registered appraisers on the county or state staff and certified or licensed fee appraisers are permitted to conduct such appraisals.⁴

QUESTION 10

Are registered property appraisers of assessors' or Department of Revenue's (DOR) staff permitted to offer an opinion of value (or a range of values) to the county governing body or as part of a court proceeding for potential Measure 37 claims, or are they limited by law to appraise for property tax purposes only?

SHORT ANSWER

ORS chapter 674 and the administrative rules adopted thereunder, OAR chapter 161, generally require that a real estate appraiser be licensed or certified. However, an exception applies to the salaried staff of state and local governments. Therefore, registered appraisers of county assessor or DOR staffs may offer an opinion of property value for purposes of a Measure 37 claim against county or municipal governments.

² The terms, "principal industrial property" and "secondary industrial property," are defined in ORS 306.126.

³ Certain utility and transportation property is subject to central assessment by the department under ORS 308.505 to 308.665.

⁴ Local government appraisers should consult with their own legal counsel to verify that they are acting within the scope of their authority.

We have not examined county charters and ordinances to determine whether these laws authorize or prohibit appraisers of the county assessor's office from offering an opinion of value for purposes of a Measure 37 claim against a county government.

QUESTION 11

What do the laws and rules governing the Appraiser Certification and Licensure Board (ACLB) direct concerning completion of appraisals or appraisal reviews for purposes of Measure 37 claims?

SHORT ANSWER

Neither ORS chapter 674 nor OAR chapter 161 address the issue of appraisals or appraisal reviews for purposes of Measure 37 claims. We find no basis to conclude that statutes and regulations applicable to the work of appraisers in other contexts would not apply to appraisals or appraisal reviews conducted in connection with Measure 37.

DISCUSSION

Measure 37/ORS 197.352

At the general election on November 2, 2004, the voters approved Measure 37, a new statute that generally requires the government to compensate owners of real property for the reduction in value of real property caused by land use regulations. *See MacPherson v. Dept. of Admin. Svcs*, 340 Or 117, ___ P3d ___ (2006) (upholding measure). The measure is codified as ORS 197.352. Its relevant substantive provisions are as follows:

- (1) If a public entity enacts or enforces a new **land use regulation** or enforces a **land use regulation** enacted prior to the effective date of this amendment that restricts the use of private real property or any interest therein and has the effect of reducing the fair market value of the property, or any interest therein, then the owner of the property shall be paid just compensation.
- (2) Just compensation shall be equal to the reduction in the fair market value of the affected property interest **resulting from enactment or enforcement of the land use regulation** as of the date the owner makes written demand for compensation under this act.
- (3) Subsection (1) of this section shall not apply to land use regulations:
 - (A) **Restricting or prohibiting activities** commonly and historically recognized as public nuisances under common law. This subsection shall be construed narrowly in favor of a finding of compensation under this section;

(B) ***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;

(C) To the extent the land use regulation is required to comply with federal law;

(D) ***Restricting or prohibiting the use*** of a property for the purpose of selling pornography or performing nude dancing. Nothing in this subsection, however, is intended to affect or alter rights provided by the Oregon or United States Constitutions; or

(E) Enacted prior to the date of acquisition of the property by the owner or a family member of the owner who owned the subject property prior to acquisition or inheritance by the owner, whichever occurred first.

* * * * *

(8) Notwithstanding any other state statute or the availability of funds under subsection (10) of this section, in lieu of payment of just compensation under this section, the governing body responsible for enacting the land use regulation may modify, remove, or not to 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.

* * * * *

(10) Claims made under this section shall be paid from funds, if any, specifically allocated by the legislature, city, county, or metropolitan service district for payment of claims under this section. 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 section. 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.)

Your questions require that we interpret Measure 37. Our goal is to discern the intent of the voters. ORS 174.020; *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610, 859 P2d 1143 (1993); *Ecumenical Ministries v. Oregon State Lottery Comm.*, 318 Or 551, 559, 871 P2d 106 (1994) (*PGE* methodology applies “not only to statutes enacted by the legislature, but also to the interpretation of laws and constitutional amendments adopted by initiative or referendum”). To determine the intent of the voters in enacting Measure 37, we first examine the text, which is the best evidence of legislative intent, and context of the statute at issue, which includes other provisions of the same statute and related statutes. *PGE*, 317 Or at 610-11; *Ragsdale v. Dept. of Rev.*, 312 Or 529, 536-37, 823 P2d 971 (1992). In so doing, we consider statutory and judicially developed rules of

construction that bear directly on how to read the text, including that common words are to be given their plain, natural and ordinary meaning. *PGE* at 611. If the legislative intent is clear from the text and context of the statutes at issue, we look no further. If it is not clear, the second level of analysis is a consideration of legislative history, which in this case includes the Voters' Pamphlet. *Id.*; *Ecumenical Ministries*, 318 Or at 559 n 7. If the intent of the legislature remains unclear after consideration of text, context and history, we resort to general maxims of construction, including a consideration of how the legislature would have intended the statute to apply if it had considered the issue. *Id.* at 612.

I. Is a farm use or forestland special assessment a “land use regulation” that could give rise to a compensable claim under Measure 37?

A. Meaning of “land use regulation”

Your first question is whether farm use and forestland special assessments are “land use regulations” that could give rise to a compensable claim under ORS 197.352. Subsection (11)(B) of that statute provides that “for purposes of this section”:

(B) ‘Land use regulation’ shall *include*:

(i) Any statute *regulating the use of land* or any interest therein;

(ii) Administrative rules and goals of the Land Conservation and Development Commission;

(iii) Local government comprehensive plans, zoning ordinances, land division ordinances, and transportation ordinances;

(iv) Metropolitan service district regional framework plans, functional plans, planning goals and objectives; and

(v) Statutes and administrative rules *regulating farming and forest practices*.
(Emphasis added.)

In addition, Measure 37 specified that it was to be added to and made a part of ORS chapter 197, which already contained its own definition of “land use regulation.” ORS 197.015 provides that, “[a]s used in ORS chapters 195, 196, and 197, *unless the context requires otherwise*:

* * * *

(11) ‘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.”
(Emphasis added.)

The meaning given to “land use regulation” by ORS 197.352 includes laws not included in the meaning given by ORS 197.015, which forecloses the latter as the exclusive source for that meaning. On the other hand, the former’s use of the term “include” allows for the possibility that the voters intended for ORS 197.015(11) to augment ORS 197.352(11)(B). That question is academic for our purposes, however. The laws governing farm use and forestland special assessments are statutory; have nothing to do with ORS 92.044 or 92.046 or with comprehensive plans; and are administered by the Department of Revenue on a statewide basis, which means that they plainly do not come within the meaning of ORS 197.015(11) *or* ORS 197.352(11)(B)(ii), (iii), or (iv).

Therefore, the definitional question reduces to whether farm use and forestland special assessments come within the meaning of ORS 197.352(11)(B)(i) or (v), i.e., whether they are either statutes “regulating the use of land” or statutes or rules “regulating farming and forest practices.” The measure fails to define “regulating,” which is a word of “common usage,” so we look to its “plain, natural and ordinary meaning” (“plain meaning”). *PGE* at 611. The plain meaning of “regulate” is “to govern or direct according to rule * * * to bring under the control of law or constituted authority.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY, UNABRIDGED, 1913 (unabridged ed 2002) (“WEBSTER’S”).

We must also consider how “regulate” is used in other subsections of the same measure. *See PGE* at 611. Measure 37 is concerned only with “land use regulations” that “restrict[] the use” of private real property. ORS 197.352(1). The plain meaning of “restrict” is “to set bounds or limits to * * * RESTRAIN * * * HAMPER, DIMINISH.”⁵ WEBSTER’S at 1937. The plain meaning of “use” is “the legal enjoyment of property that consists in its employment, occupation, exercise, or practice.” *Id.* at 2523. Thus, a land use regulation that restricts the use of private real property is one that limits the owner’s employment, occupation, exercise, or practice of the land.⁶ To the same effect is subsection (3). It exempts five categories of land use regulations from subsection (1). Of the three categories that are based on how a regulation affects an owner’s use of his or her property, all describe that effect as “restricting or prohibiting” particular uses or activities. ORS 197.352(3)(A),(B) and (D). Together, subsections (1) and (3) indicate that

⁵ The meaning of “restrict” is considered further below, in our discussion of the second element of a Measure 37 claim.

⁶ The Oregon Supreme Court has said that under *PGE*, the analysis of the text of a provision includes relevant case law interpreting that text. *Stranahan v. Fred Meyer, Inc.*, 331 Or 38, 61, 11 P3d 228 (2000). In a different context, but construing language very close to that of a phrase in Measure 37, the court held that the meaning of the phrase “governmental restriction as to use” in ORS 308.205(2) includes “a governmental restriction as to the method or manner of using the property in question, or as to how the property is employed or occupied.” *Bayridge Assoc. Ltd. P’ship v. DOR*, 321 Or 21, 29, 892 P2d 1002 (1995). The court looked at the legislative history of ORS 308.205(2) as part of its analysis of the context of the provision and, based on the legislative history, concluded that for purposes of ORS 308.205(2), a “governmental restriction as to use” need not be involuntary and may result in an economic benefit to the taxpayer. *Id.* at 31. However, in the context of Measure 37, “restrict the use” *does* appear apply only to involuntary restrictions on use of the land that result in an economic detriment to the taxpayer, because the regulation must be “enforced” by the government and must “reduce the fair market value” of the taxpayer’s property.

laws “regulating the use of land” or “regulating farming and forest practices” are those that *restrict* or *prohibit* particular uses or particular farming or forest practices.⁷

B. Compensability under Measure 37

Pursuant to ORS 197.352(2), the amount of an aggrieved landowner’s compensation under Measure 37 is “the reduction in the fair market value of the affected property interest *resulting* from the *enactment or enforcement* of the land use regulation * * * .” (Emphasis added.) In other words, a land use regulation is compensable under Measure 37 only insofar as its “enactment or enforcement” “result[s]” in a reduction in fair market value. The plain meaning of “result” is “to proceed, spring, or arise as a consequence, effect, or conclusion.” WEBSTER’S at 1937. Thus, a property’s reduction in value must arise as a consequence of *action by a public entity*, i.e., the very act of enacting or enforcing the regulation must reduce the value of property within the regulation’s purview.⁸

C. Applicability of Measure 37 to farm use and forestland special assessments

The farm use and designated forestland special assessment⁹ programs exist to promote the state’s policy of conservation, private ownership and investment of capital in farm activities on agricultural land, and sustained yield timber operations on forestlands. See ORS 308A.050, 321.259, 321.262. Implicitly, in providing for special assessment status, the legislature recognized that farm use and timber operations do not necessarily provide the highest possible financial return to property owners. See *Young v Jackson County Assessor*, 17 OTR-MD 78, 83 (2002) (“The whole point of farm use assessment statutes is the recognition that farming generates comparatively small returns relative to the value of land that the market recognizes alternative uses for”).

If property qualifies for farm use or forestland special assessment, the assessed value of the property for tax purposes is not determined by the usual method. Instead, in the case of farm use property, the assessed value is determined by an income approach. See ORS 308A.092 and

⁷ If a court were to decide that some ambiguity in the meaning of “regulate” in subsection (11)(B) remains, the legislative history of Measure 37 strengthens the argument here that the word should be construed narrowly to apply only to statutes that directly govern, or restrict, the use of land. See *PGE* at 611 (stating, “If, but only if, the intent of the legislature is not clear from the text and context inquiry, the court will then move to the second level, which is to consider legislative history to inform the court’s inquiry into legislative intent”). The primary source of legislative history for Measure 37 is the Voter’s Pamphlet. The Ballot Title in the Pamphlet reads: “Governments must pay owners, or forgo enforcement, when certain land use *restrictions* reduce property value.” (Italics added for emphasis.) By using the word “restrictions” instead of “regulations,” the Ballot Title suggests that only those regulations that restrict the use of property will fall within the definition of “land use regulation” in paragraph (B) of subsection (11).

⁸ However, ORS 197.352(7) provides that owners do not have to file for a local land use permit as a prerequisite to filing a claim for compensation. Consequently, “enactment” or “enforcement” does not necessarily require any particular act by the government proximate in time to the filing of a Measure 37 claim.

⁹ For the purposes of this discussion, forestland special assessment refers to lands “designated” as forestland for special assessment purposes. The owners of these lands have agreed through an application process to continue to manage these lands for the predominant purpose of growing and harvesting timber. It does not include highest and best use forestlands that are taxed at the real market value for this type of land.

308A.095. In the case of forestland, the assessed value is determined by a valuation model developed each year by the DOR in conjunction with a forestland value advisory committee, with the input of citizens who attend a yearly public hearing on the topic. *See* ORS 321.201 to 321.222. The effect of both the farm use and the designated forestland special assessment programs is to lower the tax liability of the property owners. *See* ORS 308A.083, 308A.703, 321.362, 321.839(3)(m).

A property owner must apply to the county assessor, or otherwise qualify, to obtain special assessment for farm use property or forestland. *See* ORS 308A.059, 308A.062, 308A.077, 321.358, 321.839. To qualify for farm use special assessment, the owner must show, among other things, that he or she uses the property “for the primary purposes of obtaining a profit in money” by engaging in one or more of the various types of farm activities that are described in detail in ORS 308A.056. If the property lies in a nonexclusive farm use zone, the property owner must also show that the farm produces a certain required gross income amount each year, spelled out in ORS 308A.071.

To qualify for forestland special assessment, the owner must show that the land “is being held or used for the predominant purpose of growing and harvesting trees of a marketable species.” ORS 321.257(2), 321.805(4), 321.358, 321.839. The owner of special assessment forestland must maintain a minimum level of stocking or have a management plan for adequate stocking. ORS 321.367. In addition, the owner must not use the property for growing Christmas trees or intensively managed timber. ORS 321.267, 321.824. The county assessor will approve the application for forestland designation if the assessor finds that the land is properly classifiable as forestland. ORS 321.358, 321.839.

Depending on the category of special assessment that is applicable to the property, the property may be disqualified for special assessment if the owner notifies the assessor to remove the special assessment or if the assessor discovers that the owner is no longer using the property in the required manner.¹⁰ *See* ORS 308A.113, 308A.116, 308A.700, 321.359, 321.842; *see also* ORS 215.236. Again, depending on the category of special assessment, the owner of farm use or forestland may re-qualify the property for special assessment by once again using the land in the required manner. *See* ORS 308A.086, 308A.724, 321.359(3), 321.824(3); *but see* ORS 215.236(5). The owner of forestland may appeal to the Oregon Tax Court if a special assessment designation is denied or removed. *See* ORS 321.359(2), 321.842(2) and 308A.718(4). ORS 308A.116(2) provides that a farm use special assessment will continue after sale or transfer of ownership if the land continues to be used solely for farm use. ORS 321.367(5) provides for the notification of a new owner of property that is designated special assessment forestland if the State Forester determines that the forest is no longer being managed in accordance with an approved management plan. By implication, the special assessment

¹⁰ Property within an exclusive farm use zone is also disqualified for special assessment if it is removed from the exclusive farm use zone. *See* ORS 308A.113(1)(b). If a public entity with authority to do so removes property from an exclusive farm use zone rather than deciding to not apply such zoning to the present owner’s use of the property, the property likely would be disqualified for special assessment under ORS 308A.113(1)(b).

designation will remain in place if, after notification, the new owner develops and implements a management plan.

In short, nothing in the programs requires property owners to use their land so as to qualify for a special assessment. Neither is there anything in the programs that penalizes owners for electing not to qualify their land. Land that is not used by its owner in a manner that would qualify it for a special assessment is simply assessed the same as land that would be ineligible for a special assessment regardless of the owner's choices about use.

Given the foregoing, we return to your question whether a decision to qualify or disqualify property from a farm use or forestland special assessment could give rise to a compensable claim under Measure 37. We conclude that it could not, for two reasons fundamental to Measure 37. First, the special assessment programs are not "land use regulations" within the meaning of Measure 37 since they do not restrict how an owner may use his or her property. Nothing in those programs prohibits owners from using their property as they please. Second, while the market value of property that qualifies for a special assessment may at that moment be less than it would otherwise have been, any reduction in value results not from the *state's enactment or enforcement* (which could only mean allowing the special assessment to property owners who qualify and denying it to those who do not) of the special assessment statutes. The reduction results from the *owner's election* to use the property in a manner that meets the criteria imposed by those statutes.

II. Could the enforcement of timber tax statutes and rules under ORS chapter 321 give rise to a compensable claim under Measure 37?

To answer this question, we must determine whether timber taxes are "land use regulations" within the meaning of Measure 37.

ORS chapter 321 provides for certain privilege taxes on the harvest of merchantable timber from forestlands across the State, measured in cents per thousand board feet of timber harvested. The tax proceeds are used for forest research, fire suppression, and the support of public schools, community colleges, and counties. *See* ORS 321.015 to 321.035; 321.307, 321.312; 321.485 to 321.686; 321.726 to 321.754.

For the same reasons applicable to the special assessment statutes, the only categories of Measure 37 land use regulations that could potentially include timber privilege taxes are those specified in ORS 197.352(11)(B)(i) and (v), namely, statutes "regulating the use of land" and statutes or rules "regulating farming and forest practices." As we explained in Section I above, however, a statute or rule "regulates" for purposes of Measure 37 only if it *restricts* a landowner's use of private real property or *prohibits* particular uses or farming or forest practices. ORS chapter 321 timber taxes do neither. They do not require an owner to make any particular use of his or her property or engage in any particular farm or forest practice. Nor do they prohibit any use or practice. Those statutes merely provide for certain tax consequences if an owner *chooses* to use his or her property to produce merchantable timber as described in the statutes.

III. Does the waiver, under Measure 37, of zoning restrictions on property lying within an exclusive farm use or forestland zone disqualify the property for special assessment?

A decision by the government not to apply zoning restrictions under Measure 37 would not, by itself, disqualify property within an exclusive farm use or forestland zone for special assessment. Depending on the category of special assessment that is applicable to the property, the property may be disqualified for special assessment if the owner notifies the assessor to remove the special assessment, if the assessor discovers that the owner is no longer using the property in the required manner, or if the government decides to modify or remove the zoning restrictions. The disqualification of property for special assessment is controlled by statute.

Property within an exclusive farm use zone is disqualified for special assessment if a nonfarm dwelling is established on the property or if the assessor discovers that the property is no longer being used as farmland. *See* ORS 308A.113(1)(a) and (c). Property within an exclusive farm use zone is also automatically disqualified for special assessment if the property is removed from the exclusive farm use zone. *See* ORS 308A.113(1)(b). In addition, under ORS 215.236, a dwelling may not be established on land zoned for exclusive farm use unless the property has been disqualified for special assessment and any additional tax imposed as a result of the disqualification has been paid.

Property that has been designated forestland will continue to be specially assessed unless or until the assessor affirmatively removes the designation. The reasons that an assessor will remove a forestland designation include: notification by the taxpayer to remove the designation, discovery by the assessor that the land is no longer being managed for timber production, or the recording of a subdivision plat.¹¹ *See* ORS 321.359(1), 321.842(1). Thus, as with property within an exclusive farm use zone, a decision not to apply regulation necessary for the property to be considered exclusive farm use property would not, by itself, disqualify property within a forestland zone for special assessment. However, if the owner were to make a Measure 37 claim, obtain a decision by the government not to apply the zoning restrictions, and either notify the county assessor or manage the property in a way that is inconsistent with special assessment, then the property would no longer qualify for special assessment. *See* ORS.321.359(1), 321.842(1).

¹¹ The recording of a subdivision plat does not constitute a rezone, and forestland zoning is not one of the factors that a county or city must consider before approving an application to record a subdivision plat. *See* ORS chapter 92. Thus, the zoning of forestland *per se* does not lead to the removal of a special assessment designation, but only the fact that the owner has indicated a desire to build a subdivision, rather than manage the property as a forest. Under ORS 321.842(3), an owner who has recorded a subdivision plat may re-qualify the property for forestland designation.

IV. If zoning restrictions on property within an exclusive farm use or forestland zone are waived under Measure 37 and the property is subsequently disqualified for special assessment, are the deferred taxes then calculated based on the new, unrestricted use of the property?

ORS 308A.703(2) provides for an additional tax to be added to the tax extended against property that is disqualified for farm use or forestland special assessment. *See also* ORS 321.848, 308A.700(1). ORS 308A.703(2) provides for the measurement of the additional tax:

The additional tax shall be equal to the difference between the taxes assessed against the land and the taxes that would otherwise have been assessed against the land, for each of the number of years determined under subsection (3) of this section.

The phrase “the taxes that would otherwise have been assessed against the land” means the taxes that would have been assessed in each of the relevant years¹² against the land under the relevant statutory scheme effective if the land had not been specially assessed. As discussed in Section I, above, special assessment lowers the tax liability of the property owner. The phrase “the taxes assessed against the land” means the actual amount of property taxes paid in each of the relevant years the property was under special assessment.

Disqualification from special assessment constitutes one of the exceptions under Measure 50. *See* ORS 308.146(3)(e). The assessed value of property that is disqualified is determined according to the relevant provisions in ORS 308.156. *See also* Section VII, below (discussing the assessed value of property after a Measure 50 exception).

As discussed in Section III, after a Measure 37 waiver, if the owner—of property that otherwise qualifies for special assessment—uses the property in a way that is inconsistent with farm use or forestland special assessment, the property will be disqualified for special assessment. If the property is disqualified for special assessment due to a reason that makes the additional taxes then collectible, the difference between the taxes that otherwise would have been assessed against the land, based on assessed values determined under ORS 308.146 or, for tax

¹² ORS 308A.703(3) provides:

The number of years for which additional taxes shall be calculated shall equal the lesser of the number of consecutive years the land had qualified for the special assessment program for which disqualification has occurred or:

- (a) Ten years, in the case of exclusive farm use zone farmland, but only if the land, immediately following disqualification, remains outside an urban growth boundary;
- (b) Ten years, in the case of wildlife habitat special assessment land within an exclusive farm use zone, but only if the land, immediately following disqualification, remains outside an urban growth boundary; or
- (c) Five years in the case of:
 - (A) Nonexclusive farm use zone farmland;
 - (B) Western Oregon designated forestland;
 - (C) Eastern Oregon designated forestland;
 - (D) Small tract forestland;
 - (E) Exclusive farm use zone farmland that is not described in paragraph (a) of this subsection; or
 - (F) Wildlife habitat special assessment land that is not described in paragraph (b) of this subsection.”

years prior to 1997, under ORS 308.205 (1995), and the taxes that the land was subject to under special assessment, calculated for the appropriate number of years as determined under ORS 308A.703(3), will equal the amount of the additional tax assessed against the property under ORS 308A.703(2). For assessment purposes, consideration of the value of the property as unrestricted is only appropriate in the year of disqualification and thereafter.

V. What is the relationship between fair market value under Measure 37 and real market value for property taxation purposes?

This section is intended to provide guidance to tax assessors about potential differences between determinations of fair market value for purposes of Measure 37 and real market value for property taxation. Assessors can consider these differences if they are asked to determine a property's fair market value for purposes of Measure 37 or if they are aware of a Measure 37 appraisal when determining real market value for property taxation purposes.¹³ At least some of the issues discussed in this section, and in this entire letter, may be litigated. Consequently, this discussion is subject to change based on court rulings.

"Real market value" is defined in statutes pertaining to property taxation, but "fair market value" is not defined in Measure 37 or elsewhere in ORS chapter 197. Because the terms are different, a court may construe them to have different meanings. However, we believe the methodologies for making both determinations are essentially the same. Whether a court construes the terms to have the same or different meanings, however, there necessarily will be differences between determinations of real market value and fair market value unless they are made at the same time and based on all of the same assumptions.

The term real market value appears throughout the property taxation statutes, ORS Chapters 305 to 312.¹⁴ The term refers to the value to be determined for purposes of taxation. See ORS 308.232 (providing that all property not exempt from ad valorem taxation or subject to a special assessment is to be valued at 100 percent of its real market value). ORS 308.205(1) provides a definition of real market value:

"Real market value * * * means the amount in cash that could reasonably be expected to be paid by an informed buyer to an informed seller, each acting without compulsion in an arm's length transaction occurring as of the assessment date for the tax year."

But Measure 37 refers to a "reduction" in "fair market value * * * resulting from enactment or enforcement of a land use regulation * * *." The legislature has defined "fair market value" in a variety of contexts not relevant here. *E.g.*, ORS 87.142(6) (pertaining to liens); ORS 474.011(5) (alcoholic beverages). And, the Supreme Court has defined the term in an eminent domain case.

¹³ Whether assessors may perform Measure 37 appraisals is addressed in response to questions 9-11.

¹⁴ The term "real market value" first appeared in the property taxation statutes in 1991. Before that time, the Oregon Constitution and statutes used the term "true cash value" to refer to the value of property for purposes of taxation.

Fair market value is defined as the amount of money the property would bring if it were offered for sale by one who desired, but was not obliged, to sell and was purchased by one who was willing, but not obliged, to buy. *Highway Comm. v. Superbilt Mfg. Co.*, 204 Or 393, 412, 281 P2d 707 (1955) (citing *Page v. Linn County*, 135 Or 430, 437, 296 P 65 (1931)). Just compensation requires that valuation of property be based on its highest and best use. * * * The highest and best use of property may be other than the use to which the property is currently put if it is reasonably probable that the property has actual potential for higher and better use. *State Highway Com. v. Arnold*, 218 Or 43, 57, 341 P2d 1089, *modified and reh den* 218 Or 81, 343 P2d 1113 (1959)* * *.”

State by DOT v. Lundberg, 312 Or 568, 574, 825 P2d 641 (1992).

Through its reference to a “reduction” in fair market value, subsections (1) and (2) of Measure 37 implicitly refer to two separate calculations of value that must necessarily be compared in order to determine the amount of the reduction in fair market value. One approach to determining that reduction would be to determine the value of the property subject to all existing applicable laws (the “actual” value), and to compare that value with the fair market value of the property as if it, and perhaps all other properties, was not subject to one or more “land use regulations” enacted after the date the owner or a family member of the owner acquired the property (the “hypothetical” value).¹⁵

The values derived for the “actual” and “hypothetical” Measure 37 values, and the real market value used for ad valorem taxation may differ due to differences in the timing and valuation assumptions. Real market value is determined annually as of a date certain, whereas the “actual” and “hypothetical” fair market values under Measure 37 relate to “* * * the enactment or enforcement of the land use regulation as of the date the owner makes written demand for compensation * * *.” Real market value is based upon existing land use regulations as they apply to the subject property and its relevant market, whereas “hypothetical” fair market value under Measure 37 is based upon hypothetical regulatory circumstances for both the subject property and, potentially, other properties as well. Finally, real market value generally assumes that the full bundle of the subject property’s existing rights is subject to transfer at sale, whereas, because Measure 37 limits its relief to the present owner of the property, so much of the bundle of rights as relates to a waiver of land use regulations for the present owner may not continue to exist after transfer of the property or property interest to another person.

Even if the valuation assumptions were otherwise identical, the fair market value and the real market value of a particular piece of property might not be identical on a given day. Real market value is determined “as of the assessment date for the tax year.” See ORS 308.205(1). ORS 308.210(1) provides that the assessor shall assess the value of property “as of January 1, at 1:00 a.m. of the assessment year.” By contrast, ORS 197.352(2) provides for a determination of fair market value “as of the date the owner makes written demand for compensation.” Thus, even if all other valuation assumptions are equal, the real market value and the fair market value

¹⁵ There may be other approaches to measuring the effect of the enactment or enforcement of a land use regulation on the fair market value of the property that are permissible under Measure 37.

of property could necessarily only be identical if, for purposes of determining the fair market value, a written demand for compensation under Measure 37 was made on January 1, at 1:00 a.m.

Property valuation is premised, in significant part, upon comparing the existing legal and permissible uses of the subject property against existing and comparable legal and permissible uses of competing properties in the marketplace. The American Institute of Real Estate Appraisers, *THE APPRAISAL OF REAL ESTATE*, 311-13, 417-21 (12th ed 2001). To determine the Measure 37 fair market value as if unrestricted, a property appraiser must hypothecate different conditions. "Hypothetical conditions are contrary to what exists, but the conditions are asserted by the appraiser for purposes of analysis." *Id.*, 56. Because estimates of real market value developed for ad valorem tax purposes and estimates of fair market value for Measure 37 purposes may be premised on different legal and permissible uses, the value conclusions may be different.¹⁶

As discussed previously, definitions of market value typically contemplate a transaction in which the property is sold. This is certainly true of statutory real market value. ORS 308.205 ("an arm's length transaction"). Underlying this premise is an assumption that the rights considered in the valuation will transfer from the current owner to a prospective purchaser. We have previously determined that a waiver of a land use regulation under Measure 37 is personal to the qualifying owner and does not run with the land. *See*, letter from Stephanie Striffler, Special Counsel to the Attorney General, to Lane Shetterly, February 24, 2005. Thus, to the extent that the "hypothetical" value of the property (its value when particular "land use regulations" do not apply to the present owner's use of the property) is relevant to the determination under section 2 of Measure 37, it may lead to different conclusions regarding valuation than estimates of real market value developed for ad valorem tax purposes.¹⁷

One additional distinction involves the difference in timing between the fair market values developed as of the date of claim and the value, however calculated, as of the date the claim is granted. Although it may be argued that Measure 37 implicitly affects the value of all properties, it is reasonably certain that the full effect on a claimant's property (for purposes of determining real market value) is not realized until the date a Measure 37 claim is granted. However, because the estimates of fair market value must be developed as of the date of the claim and the final disposition of the claim will not occur until a later date, changes in relevant

¹⁶ If a government chooses not to apply land use regulations that restrict a use and reduce the fair market value of property rather than pay compensation, the determination of the change in fair market value necessary to support the government's action need only show that there has been a reduction in fair market value, and need not determine the magnitude of the reduction. Appraisals of fair market value done in this manner are unlikely to be as detailed or precise as appraisals done for property taxation purposes.

¹⁷ The issue of whether a decision not to apply a land use regulation runs with the land is being litigated. Unless and until a court finally determines otherwise, the department may rely on our determination that such a waiver does not run with the land. However, local government assessors should obtain advice from their legal counsels on this and all issues discussed in this letter.

market evidence¹⁸ during the intervening period may result in a different conclusion of value at the date of disposition.

In sum, the fair market values of a particular piece of property determined for purposes of Measure 37 are unlikely to be identical to the real market value of the property currently shown on the tax roll. The determination of reduction in fair market value resulting from enforcement or enactment of a land use regulation under section 2 of Measure 37 is distinct from the determination of the property's real market value. In addition, if the government chooses not to apply the regulation rather than pay compensation, the Measure 37 appraisal may not include enough detail to determine the precise amount of reduction in fair market value. Finally, as with all matters involving valuation, a Measure 37 claimant's appraisal represents only the opinions of the claimant's appraiser; if litigated, a court might settle on a different conclusion of value.

VI. If the fair market value that is established in the resolution of a Measure 37 claim differs from the real market value shown on the tax roll, should there be an automatic correction to the real market value?

Property is valued and assessed as it exists on January 1 of the assessment year. ORS 308.210, 308.250. In addition, ORS 308.146 to 308.166 provide various ways for an assessor to adjust the assessed value of property to take into account any changes that were made to the property during the previous year. These adjustments are determined and recorded as of January 1, when the assessor determines the value of the property for tax purposes. There is no statute providing for the assessor to adjust the assessed value of property earlier, at the time a change that ultimately affects the assessed value for tax purposes was made. In any event, the establishment of fair market value for purposes of resolving a Measure 37 claim is legally independent from the establishment of real market value for purposes of determining the amount of property taxes that are due each year. Thus, the determination of fair market value for purposes of Measure 37 does not lawfully require a correction to the real market value on the tax roll.¹⁹

Just compensation under Measure 37 is due only to the owner, and the owner may only be compensated for land use regulations enacted after the owner (or family member as defined in ORS 197.352(A)(11)) acquired the property, as provided in paragraph (E) of subsection (3).²⁰

¹⁸ Examples of potentially material items that could change during the period between claim and waiver include interest rates, market-based capitalization rates, market demand for the property, supply of competing properties (perhaps due to previously granted Measure 37 waivers), and changes in other regulations affecting the subject or comparison properties.

¹⁹ However, the determination of the fair market value for purposes of Measure 37 compensation during the assessment year may constitute relevant evidence of real market value that the assessor should consider in determining real market value for the following assessment year. But if a government analyzing fair market value for purposes of Measure 37 does not determine the precise fair market value because it intends to waive applicable land use regulations in lieu of paying compensation, the determination for purposes of Measure 37 may not carry much weight as evidence in determining real market value for purposes of tax assessment.

²⁰ Paragraph (A) of subsection (11) provides:

“(A) ‘Family member’ shall include the wife, husband, son, daughter, mother, father, brother, brother-in-law, sister, sister-in-law, son-in-law, daughter-in-law, mother-in-law, father-in-law, aunt, uncle, niece, nephew, stepparent, stepchild, grandparent, or grandchild of the owner of the

An individual who acquires property that is subject to a land use regulation enacted prior to the person's or family member's date of acquisition of the property may not take advantage of Measure 37. Because compensation is linked to the identity of the owner, rather than to the property itself, the value of the just compensation owed under a Measure 37 claim is personal, and should not be added a priori to the real market value of the property. Moreover, as discussed in section V, above, if the government chooses to waive the land use regulation rather than pay compensation, the Measure 37 appraisal may not be detailed enough to support a change in the determination of real market value even if the Measure 37 appraisal is done at the same time and based on the same assumptions as the appraisal that is done for property taxation purposes.

VII. When a determination is made under Measure 37 not to apply land use regulations, resulting in property that was un-buildable now being buildable and an increase in the real market value of the land based on the new higher and better use, is there any mechanism to increase the maximum assessed value? Does the decision not to apply a land use regulation under Measure 37 constitute an exception under Measure 50?

In 1997, the voters approved Measure 50, which repealed the former Article XI, section 11, and substituted a new Article XI, section 11, of the Oregon Constitution. The amendment limited the growth of ad valorem taxation of property by establishing a "maximum assessed value," for each tax year, but specified six exceptions to the maximum assessed value. To implement the amendment, the legislature enacted ORS 308.146 to 308.166, which reiterate the constitutional text and provide a series of rules for determining the assessed value of property if one of the six exceptions to the maximum assessed value rule applies to a particular piece of property in a given year.²¹

A decision not to apply a land use regulation does not constitute one of the exceptions to maximum assessed value in Article XI, section 11, of the Oregon Constitution or in the statutes implementing it. Specifically it does not constitute "rezoning" within the meaning of Article XI, section 11(1)(c)(C) or ORS 308.146(3)(c). As we have advised the department on several occasions, "rezoning" is "a legislative act that amends the existing zone classification of an area

property, an estate of any of the foregoing family members, or a legal entity owned by any one or combination of these family members or the owner of the property."

Paragraph (E) of subsection (3) provides:

"(3) Subsection (1) of this act shall not apply to land use regulations:

* * * * *

(E) Enacted prior to the date of acquisition of the property by the owner or a family member of the owner who owned the subject property prior to acquisition or inheritance by the owner, whichever occurred first."

²¹ Under ORS 308.146(3), the six circumstances that constitute exceptions under which maximum assessed value may be adjusted are:

- (a) The property is new property or new improvements to property;
- (b) The property is partitioned or subdivided;
- (c) The property is rezoned and used consistently with the rezoning;
- (d) The property is first taken into account as omitted property;
- (e) The property becomes disqualified from exemption, partial exemption, or special assessment; or
- (f) A lot line adjustment is made with respect to the property * * *.

of land.” *See, e.g.*, letter dated September 20, 1999, from Assistant Attorney General Wendy Sanderson to Bruce Tindall (DOJ File No. 150-303-GT0107-99). Because a decision not to apply a land use regulation does not amend the existing zone classification, it does not serve as an exception to the limitation of maximum assessed value for purposes of ad valorem taxation of the property.

On the other hand, after the government decides not to apply a regulation restricting use of land under Measure 37, if the owner proceeds to use the property for a use permitted at the time the owner acquired the property, then one of the exceptions to the maximum assessed value rule *might* apply. In particular, the exceptions for new improvements to property, the partitioning or subdivision of property, and the disqualification of property for special assessment might be relevant in determining the assessed value of the property. *See* ORS 308.146(3)(a), (b), and (d). *See also* Section III, above (discussing the waiver of zoning restrictions on property that lies within an exclusive farm use or forestland zone). But, to reiterate, a decision not to apply the restriction itself does not constitute an exception to the limitation of maximum assessed value.

VIII. Will the governmental entity that pays an owner “just compensation” under Measure 37 acquire a property right for the consideration equal to the amount of compensation?

After reviewing the requirements of a takings claim, we conclude that although *enforcement* of a land use regulation that forms the basis of a Measure 37 claim, in some instances may also form the basis of a takings claim, mere payment of Measure 37 compensation to an owner for the effect of a land use regulation on the fair market value of the property would not itself provide the government with a property right in the property.

State government and, if granted such power by state statute or by charter, local government, may “take” private property for public use or benefit, either directly by the statutory procedure of condemnation, *see* ORS chapter 35 and ORS 223.005-223.015, or indirectly by regulation.²² An act against the government to recover the value of private property—that the government has taken without first filing condemnation proceedings—is referred to as an action for “inverse condemnation.” *Vokoun v. City of Lake Oswego*, 335 Or 19, 26, 56 P3d 396 (2002). Any destruction, restriction, or interruption of common and necessary use and enjoyment of property constitutes a “taking.” *See Morrison v. Clackamas County*, 141 Or 564, 568, 18 P2d 814 (1933). A “substantial interference” with the use and enjoyment of property is sufficient. *Hawkins v. City of La Grande*, 315 Or 57, 68-69, 843 P2d 400 (1992). A taking effectively

²² *GTE Northwest, Inc. v. Public Utility Comm’n of Oregon*, 321 Or 458, 466, 900 P2d 495 (1995). *See Dep’t. of Transp. v. Lundberg*, 312 Or 568, 671 n 1, 825 P2d 641 (1992) (describing eminent domain as “the power inherent in a sovereign state of taking [property] or of authorizing the taking of any property within its jurisdiction for a public use or benefit”). The state exercises its power of eminent domain either through the process of condemnation proceedings, as provided in ORS chapters 35 and 281, or “inverse condemnation” through the regulation or other government activity affecting the use of the property. *See Suess Builders v. City of Beaverton*, 294 Or 254, 258 n 3, 656 P2d 306 (1982) (explaining that claim for inverse condemnation is shorthand description of process through which landowner recovers just compensation for governmental taking of property even though government did not institute condemnation proceedings).

transfers title to the property to the public.²³ In taking property, whether by condemnation proceedings or by the effect of regulation, state government and local governments must comply with the Takings Clause of the Fifth Amendment to the Constitution of the United States or Article I, section 18 of the Oregon Constitution, which require just compensation.²⁴

It seems unlikely that enforcement of a land use regulation constitutes a taking under either the Fifth Amendment or Article I, section 18 of the Oregon Constitution. Few, if any, land use regulations involve a permanent physical invasion of the land by the government or deprive the owner of all economically viable uses of the land.²⁵ In contrast, under Measure 37 an owner may be entitled to compensation from enforcement of a land use regulation that restricts the owner's use of the property and lowers the property's fair market value by any amount.²⁶ Therefore, payment of compensation under a Measure 37 claim, even if payment is the result of litigation, does not establish proof of a government "taking" under the Oregon or federal constitutions.²⁷ We conclude that payment of compensation under a Measure 37 claim does not result in the government acquiring an interest in the property.

Because we conclude that the enforcement of a land use regulation under Measure 37 would not constitute a governmental taking, the governmental entity that justly compensates a property owner under Measure 37 will not acquire a property right to the property in question. Thus, there are no tax consequences under ORS 307.090.²⁸

IX. Who may conduct an appraisal of real property on behalf of a county or municipal government in response to a Measure 37 claim?

Measure 37 (ORS 197.352) does not, by its terms, require an appraisal as part of the claim process or as part of any governmental response. Nevertheless, because the fair market

²³ Public property is exempt from taxation under ORS 307.090.

²⁴ The Takings Clause of the Fifth Amendment to the Constitution of the United States provides: "[N]or shall private property be taken for public use, without just compensation." This prohibition applies to state and local governments by the Due Process clause of the Fourteenth Amendment. Article I, section 18 of the Oregon Constitution provides: "Private property shall not be taken for public use * * * without just compensation." ORS chapter 281 addresses the payment of just compensation to property owners resulting from the state's condemnation actions. ORS chapter 281 does not provide for compensation in cases of inverse condemnation, but damages for inverse condemnation are available through judicial action.

²⁵ Of course, if a land use regulation went so far as to deprive the owner of any economically viable use of the land or involved a physical invasion of the land, it would qualify as a taking. The owner of the affected property might then have two claims, one a Measure 37 claim and the other a takings claim.

²⁶ If, following *Lingle*, the Oregon courts were to adopt the *Penn Central* factors to analyze regulatory takings claims that do not rise to a *per se* level, it is possible that the test for a takings claim under either constitution would move closer to the test for a regulation under a Measure 37 claim. Currently, however, regulatory takings claims are routinely denied.

²⁷ We note also that there is no provision in Measure 37 that payment of compensation is in exchange for a government interest in the property.

²⁸ We acknowledge, however, that it is possible for enforcement of a land use regulation to amount to a taking. If it does, and if there is a judicial determination that a taking has occurred, the payment of compensation would result in an acquisition of property rights by the government. It is highly unlikely, however, that a Measure 37 claim will entail a taking. To the extent a taking is involved, the landowner always could have asserted a taking under the Oregon Constitution and does not need Measure 37 to support such a claim.

value of real property is at issue in a Measure 37 claim, an appraisal of the property that is the subject of the claim may be indicated. *See also* Section V.

Oregon law provides for two classes of real property appraisers: registered and licensed or certified. Registered appraisers are generally employed by a county or the state and are authorized to appraise property. ORS 308.010. Registration is required to conduct appraisals for ad valorem tax purposes. 308.231. We have not found any express limitation on the scope of work in the statutes or rules applicable to registered appraisers. For virtually all other real estate appraisal, ORS Chapter 674 regulates the certification and licensure of real estate appraisers. "Fee appraisers," professional appraisers who charge a fee for their services, are licensed and certified under ORS 674.310. As a general rule, a person may not perform a real estate appraisal without license or certification under ORS 674.310. ORS 674.100. However, one exception to this rule is appraisals performed by salaried employees of the state or its political subdivisions. ORS 674.100(2)(h).

There are certain situations where Oregon statutes require that an appraisal be conducted by an appraiser licensed or certified under ORS 674.310. Examples include the value of a scenic easement (ORS 271.729), the value of minerals or geothermal resources under certain circumstances (ORS 273.787), the value of real estate for purposes of computing the value of a guarantee fund (ORS 716.790), and the acquisition of port property (ORS 777.116). Because the legislature has not placed similar restrictions on appraisals of real property in response to a Measure 37 claim, we conclude that appraisers registered under ORS 308.010 may do so on behalf of their state or county employer.

If an appraisal is conducted by a third party on behalf of a Measure 37 claimant or by an appraiser that is not a salaried employee of the government on behalf of the government, that appraiser generally is required under existing law to be licensed or certified under ORS 674.310. ORS 674.310 provides numerous exceptions to this general rule, some of which may be applicable to Measure 37 claims. In addition, as in many ad valorem tax appeals, it is reasonable to conclude that a claimant may develop an appraisal analysis in support of the claim. Finally, the legislature or the judiciary may provide further clarification on this issue.

X. May registered appraisers from the DOR or county assessors' offices appraise properties for purposes of Measure 37 claims?

Yes, a registered property appraiser from either the DOR or the county assessors' offices is permitted to offer an opinion for purposes of a Measure 37 claim.²⁹ *See* Section IX above. To the extent that DOR or the counties wished to use another governmental entity's appraisers for Measure 37 claims, ORS Chapter 190 permits cooperation between intergovernmental units "for any lawful purpose, by agreement or otherwise." *See* ORS 190.110. It is important to note, however, that moneys currently are appropriated to the DOR for purposes other than the valuation of properties in response to Measure 37 claims. Thus, the DOR would need to charge the local government requesting an appraisal an amount sufficient to cover the actual expenses of

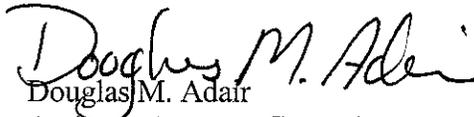
²⁹ It is conceivable, but unlikely, that local ordinances place restrictions on appraisers providing opinions of value related to a local government Measure 37 claim. We have not examined such ordinances.

providing such appraisal services. The DOR may charge such fees under ORS 190.240(1), as long as the single unit price of the appraisal is less than \$500.

XI. Does the Appraiser Certification and Licensure Board prescribe any rules particularly or uniquely applicable to appraisals or appraisal reviews performed for purposes of Measure 37 claims?

Neither ORS chapter 674 nor OAR chapter 161, related to the Appraiser Certification and Licensure Board, address the issue of appraisals or appraisal reviews for purposes of Measure 37 claims. We find no basis to conclude that statutes and regulations applicable to the work of appraisers in other contexts would not apply to appraisals or appraisal reviews conducted in connection with Measure 37.

Sincerely,

A handwritten signature in cursive script that reads "Douglas M. Adair". The signature is written in black ink and is positioned above the printed name.

Douglas M. Adair
Assistant Attorney General
Tax & Finance Section