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IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR JACKSON COUNTY

JACKSON COUNTY, a political subdivision of the State of Oregon, Petitioner, vs. ALL ELECTORS, FREEHOLDERS, TAXPAYERS and OTHER INTERESTED PERSONS, and STATE OF OREGON, Respondents.

No. 05-2993-E-3(2) ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

This matter is before the Court on the parties' cross-motions for summary judgment. The record before the Court consists of the parties' pleadings, motion papers and exhibits, and the parties' statements at oral argument.

PROCEDURAL BACKGROUND

The voters of Oregon passed Ballot Measure 37 in November 2004 and the Oregon legislature subsequently codified the Measure as ORS 197.352.1 Thereafter, Jackson County established procedures for processing Measure 37 claims and implemented several ordinances and orders, including Order No. 300-05, codifying the procedures.

Jackson County initiated this lawsuit in August 2005. The County states in its Petition that it is necessary for the Court to declare the rights and duties of the parties under Order No.

1The full text of Measure 37 is attached to this order as Exhibit 1.

47

300-05 ("the Order"). The County asks the Court to rule on the validity of two sections of Order No. 300-05, Section 1 on transferability of Measure 37 claims and Section 2 on State involvement with Measure 37 claims.

Section 1 reads as follows:

All relief granted by the Jackson County Board of Commissioners under Measure 37 shall be transferable to subsequent owners of the property. To protect the interests of claimants and subsequent owners of the property, Orders of the Board of Commissioners granting relief under Measure 37, and all permits issued pursuant to such Orders, shall continue to advise of the position on this issue taken by the Department of Justice. County employees shall issue such permits to subsequent owners of property that was granted relief under Measure 37.

Section 2 reads as follows:

County employees shall issue such permits as were authorized to owners of property that was the subject of an Order of the Board of Commissioners granting relief under Measure 37, notwithstanding the failure of such owners or any previous or subsequent owners, to file a claim with the State of Oregon or to obtain relief from the State of Oregon under Measure 37. To protect the interests of owners and previous and subsequent owners of the property, the Orders of the Board of Commissioners, and all permits issued pursuant to such Orders, shall advise of the position taken on this issue by the Department of Land Conservation and Development.

Jackson County's lawsuit is in the form of a declaratory judgment for judicial examination pursuant to ORS 33.710. In order to enter the requested judgment on the validity of the Order, the Court must examine and determine two issues: (1) the extent, if any, to which Measure 37 claims may be transferred to new owners, and (2) whether Jackson County may issue permits to

successful Measure 37 claimants who have not sought or obtained relief from the State for such State regulations as may also apply.<sup>2</sup>

#### THE PARTIES' POSITIONS ON TRANSFERABILITY

Jackson County's position on transferability is set forth succinctly in the Order and is restated in the Stipulated Facts. It is Jackson County's position that "[a]ll relief granted by the Jackson County Board of Commissioners under Measure 37 shall be transferable to subsequent owners of the property." (Order 300-05, § 1; Stipulated Fact No. 6).

The State takes a contrary position, set out in a letter from the Office of the Oregon Attorney General to the Director of the Oregon Department of Land Conservation and Development dated February 24, 2005, of record in this case as Exhibit 2 to the Affidavit of Katherine G. Georges submitted by the State ("AG Letter"): "relief [provided under Measure 37] is personal to the current owner of the real property. If the current owner of the property conveys the property before the new use allowed by the public entity is established, then the entitlement to relief will be lost." (AG Letter p. 1; Stipulated Fact No. 7).

#### THE STANDARDS FOR INTERPRETING MEASURE 37

In interpreting a statute codifying an enacted ballot measure, the Court's task "is to discern the intent of the voters. The best evidence of the voters' intent is the text of the provision itself." *Roseburg School District v. City of Roseburg*, 316 Or. 374, 378, 378 n.4 (1993) ("The text of a

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<sup>2</sup> On October 11, 2006, the parties submitted a 14-item list of stipulated facts, most of which deal with the status of various parties to this action, the source of the Court's jurisdiction, and a summary of the parties' positions in this matter. The Court has considered these stipulated facts in reaching the conclusions set out in this opinion. Neither party has submitted any additional facts that are in dispute, nor does the Court find any disputed facts precluding the entry of the requested declaratory judgment.

<sup>3</sup> Order on Cross-Motions for Summary Judgment

document must always be the starting point in any interpretative endeavor”); *Stranahan v. Fred Meyer, Inc.*, 331 Or. 38, 58 (2000) (“As always, we begin with the text ...”). If there are “related ballot measures submitted to the voters at the same election,” *Ecumenical Ministries of Oregon v. Oregon State Lottery Commission*, 318 Or. 551, 559 (1994), the Court considers them as the “context” in which the challenged provision is placed. In this case, there were no ballot measures related to Measure 37 on the November 2004 ballot.

In determining the meaning of the text, the Court looks to definitions of terms within the text and to the “plain, natural, and ordinary meaning” of undefined terms. *Ecumenical Ministries*, 318 Or. at 560. The Court may neither ignore text nor add language that is not part of the text. ORS 174.010.

Although “caution is required in ending the analysis before considering the history of an initiat[ive],” *Ecumenical Ministries*, 318 Or. at 559, n.7, “if the intent [of the voters] is clear based on the text and context ... , the court does not look further.” *Roseburg*, 316 Or. at 378; *Coultas v. City of Sutherlin*, 318 Or. 584, 590 (1994) (court examines history “if there is a plausible alternative reading presented to the court”).

#### ARE MEASURE 37 CLAIMS TRANSFERABLE?

Section 1 of Measure 37 provides if the County enacts or enforces certain land use regulations which restrict the use of private property and reduce the value of the property, the owner shall be paid just compensation.

Section 6 of Measure 37 provides if the regulation continues to apply for more than 180 days after the present owner has submitted a written demand for compensation, the present owner can sue the County for compensation, attorney fees and other expenses of litigation.

Section 8 of Measure 37 provides instead of the payment mentioned in Section 1 the County may modify, remove or not apply the land use regulation(s) to allow the owner to use the property for a use permitted at the time the owner acquired the property.

Section 10 of Measure 37 provides if the County has not paid compensation due within two years of its accrual, the owner is allowed to use the property as was permitted at the time the owner acquired the property.

“Owner” is defined by Section (11) (C) as “the present owner of the property, or any interest therein.”

The terms “transfer,” “transferability,” “transferable,” and “subsequent owner” are not found in Measure 37.

Measure 37 did not repeal or amend any existing land use law. All land use laws which were in effect prior to the passage of Measure 37 remain in place today. What Measure 37 does is provide a method by which the “present owner” of a parcel could receive compensation or relief from enforcement if the land use regulation diminished the value of his/her property.

When read in context, Measure 37 makes it clear what is meant by “present owner.” The “present owner” must satisfy a requirement of being the owner on two dates. First, she/he must be the owner at the time the restrictive regulation is passed. Section 1 does not apply to land use regulations “[e]nacted prior to the date of acquisition of the property by the [present] owner.” Section (3) (E).

The second date on which the present owner must qualify to receive the benefit of Measure 37 is “the date the [present] owner makes written demand for compensation. . . .” Section (2). In both cases, the definition of the owner is the same. There is no provision in

Measure 37 for previous or subsequent owners.

Under Measure 37 the County has a choice of how to treat the owner who meets the qualifications of ownership on both dates. Section 8 provides in lieu of the payment of compensation as required by Section 1, the County "may modify, remove, or not apply the land use regulation[s] to allow the [present] owner to use the property for a use permitted at the time the [present] owner acquired the property." The language of Measure 37 is clear: the word "owner" means the person who was the then-present owner at the time the restrictive regulation was enacted as well as the owner on the date when he/she made written demand for compensation.

The term "owner" is used consistently throughout Measure 37. Measure 37 does provide for one situation where a person other than the owner at the time of the passage of the regulation may receive Measure 37's benefit. Section (3) (E) allows a claimant to benefit as an "owner" at the time the restrictive regulation was passed if the property was owned at that time by a family member. Family member is defined in Section (11) (A). No other exceptions can be found in Measure 37.

In documents filed with this Court Jackson County recognized it is the "present owner," as defined by Measure 37, who is entitled to *apply* for relief when there is a "loss of value resulting from land use regulations that have been placed on the property since the claimant first acquired an interest in the property." Petitioner's Response to Respondent's Motion, p. 1. (emphasis added). The County asserts, however, any and all "subsequent owners" also obtain the "do not apply" order benefits granted to the successful claimant, even if the successful claimant

has taken no steps to act on that relief by the time she sells her interest in the property to the subsequent owner.

At oral argument the attorney for the county asserted that under the County's Order, the Measure 37 relief granted to the "present owner" claimant would "run with the land" and would be "transferable to subsequent owners of the property." There is no support for this position of the County in the language of Measure 37.

In this case, the Court is not required to examine the history of Measure 37 because the County has not presented a "plausible" alternative interpretation of the text of Measure 37 supporting its position on transferability. The interpretation urged by the County would require the Court both to ignore included text (including the definition of "owner") and to add words that are not part of the text (including the County's proposed definition of "property").

Even if the Court were required to consider the history of Measure 37, that history does not support the County's position. The history of a ballot initiative consists of the "sources of information that were available to the voters at the time the measure was adopted and that disclose the public's understanding of the measure. Such information includes the ballot title and arguments for and against the measure included in the voters' pamphlet, and contemporaneous news reports and editorial comment on the measure." *Ecumenical Ministries*, 318 Or. at 559 n.8. There is no discussion or even mention in the voters' pamphlet for the 2004 election of the concept of transferability of Measure 37 claims or rights of subsequent owners, nor do the news reports alluded to in the State's court filings include any such mention or discussion. Under any legal analysis it is clear the voters did not intend Measure 37 claims to be transferable.

County legislation must be consistent with the state statute. *Marquam Farms Corp. v. Multnomah County*, 147 Or. App. 368, 380, 936 P.2d 990 (1997). Measure 37 claims are not transferable. Because Section 1 of Jackson County Order No. 300-05 states Measure 37 claims are transferable, that section is invalid.

### STATE INVOLVEMENT IN MEASURE 37 CLAIMS

Section 2 of Order No. 300-05 directs county employees to issue permits without regard to compliance with or waiver from applicable state statutes.

The State's position on this issue also is contrary to the position of Jackson County reflected in Order No. 300-05. The general statement of the State's position is found in a letter from the Department of Land Conservation and Development to the Jackson County Board of Commissioners dated August 10, 2006, of record in this case as Exhibit 4 to the Georges Affidavit ("LCDC Letter"): "Although the county may 'waive' laws they enact under Measure 37, they have no authority to 'waive' laws another government entity enacts, including state laws... The failure of the owners of the property to obtain an order from the state waiving applicable state laws means that [the owners' proposed use] is unlawful, as the County is not authorized to approve the [proposed use] when doing so would violate state laws that are still in effect." (LCDC Letter p. 1; Stipulated Fact No. 11). A specific instance of State involvement also is described in Stipulated Fact No. 11: for "measure 37 claims based upon property acquisition dates that fall between the adoption of statewide land use planning goals and the acknowledgment by LCDC, the use of real property is subject to both state land use regulations and local land use regulations, and a waiver under Measure 37 from both levels of government is necessary before an owner can use the property."

On its face, Section 2 of the Order purports to direct county employees to grant permits without consideration of, or regard for, state law. The Oregon Supreme Court and the Court of Appeals both have made it clear counties must consider applicable state laws when deciding whether to issue land use-related permits, even after the county's comprehensive plans have been acknowledged and accepted by the State. *Smith v. Clackamas County*, 313 Or. 519, 524, 524n5 (1992) ("sittings of nonfarm dwellings in EFU zones ... remain subject to certain statutes," e.g. ORS 215.263(3) & (4), even after the county's "comprehensive and implementing ordinances have been acknowledged"); *Foland v. Jackson County*, 311 Or. 167, 180 n10 (1991) ("[t]he local government's decision must, of course, also comply with any relevant statutes"); *Forster v. Polk County*, 115 Or. App. 475, 478 (1992) (both applicable state statutes and county ordinances and rules "must be interpreted and applied by the county in making its decision" whether to permit construction of a dwelling in an EFU zone"); *Kenagy v. Benton County*, 115 Or. App. 131, 136, 136 n3 (1992) ("relevant state statutes remain applicable to local land use decisions after acknowledgment," i.e., post-acknowledgment "the statutes are also applicable and the [county's] decisions must satisfy any statutory requirements that are not embodied in the local law"); *Marquam Farms Corp. v. Multnomah County*, 147 Or. App. 368, 380 (1997) ("relevant state statutes retain their independent applicability to local land use decisions after the local legislation has been acknowledged," in that case, increasing the size of a dog facility on EFU-zoned land).<sup>3</sup>

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<sup>3</sup> To the extent Section 2 of the County's Order deals with the period of time from the date the Land Conservation and Development Commission adopted statewide land use goals and administrative rules (January 25, 1975) and the date Jackson County's comprehensive plan and zoning ordinance was adopted in 1983, the Order directs employees to disregard state law. During that interim period of time State approval was required before the issuance of permits by the County.

It is not enough for the County to include a notation in permits granted to successful Measure 37 claimants to the effect that the State may disagree about whether a state-law waiver also is required. The County does not have the authority to sanction a wholesale disregard for compliance with state statutes that also may govern a particular claimant's application for building permits. Order No. 300-05 sweeps far too broadly.

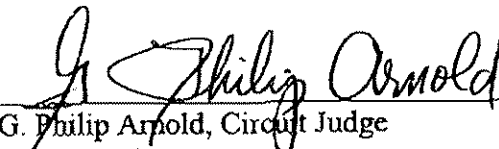
The County also argues a property owner "may" wish to apply for a state waiver or "may choose not to make such application." This argument misses the point. The Order *directs* county employees to issue permits without regard to possible state requirements and it is that mandatory disregard for whether state waivers also are required that renders the Order invalid. If there are cases in which no state waivers are required, the permit can be issued. But it is not for the County to declare in advance that permits "shall" be issued without even an inquiry about whether state requirements also continue to apply.

#### CONCLUSION

For the reasons stated in this Opinion, Sections 1 and 2 of Jackson County Order No. 300-05 are invalid. The Court will enter judgment reflecting the Court's determination and declaring Sections 1 and 2 to be unenforceable and void. The attorney for the State of Oregon shall prepare the judgment, consistent with this opinion.

SO ORDERED.

DATED: January 19, 2007.

  
G. Philip Arnold, Circuit Judge

cc: David J. Hunnicutt  
Katherine Greene Georges

**EXHIBIT 1****Measure 37**

The following provisions are added to and made a part of ORS chapter 197:

(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 act 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 act;

(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.

(4) Just compensation under subsection (1) of this act shall be due the owner of the property if the land use regulation continues to be enforced against the property 180 days after the owner of the property makes written demand for compensation under this section to the public entity enacting or enforcing the land use regulation.

(5) For claims arising from land use regulations enacted prior to the effective date of this act, written demand for compensation under subsection (4) shall be made within two years of the effective date of this act, or the date the public entity applies the land use regulation as an approval criteria to an application submitted by the owner of the property, whichever is later. For claims arising from land use regulations enacted after the effective date of this act, written demand for compensation under subsection (4) shall be made within two years of the enactment of

the land use regulation, or the date the owner of the property submits a land use application in which the land use regulation is an approval criteria, whichever is later.

(6) If a land use regulation continues to apply to the subject property more than 180 days after the present owner of the property has made written demand for compensation under this act, the present owner of the property, or any interest therein, shall have a cause of action for compensation under this act in the circuit court in which the real property is located, and the present owner of the real property shall be entitled to reasonable attorney fees, expenses, costs, and other disbursements reasonably incurred to collect the compensation.

(7) A metropolitan service district, city, or county, or state agency may adopt or apply procedures for the processing of claims under this act, but in no event shall these procedures act as a prerequisite to the filing of a compensation claim under subsection (6) of this act, nor shall the failure of an owner of property to file an application for a land use permit with the local government serve as grounds for dismissal, abatement, or delay of a compensation claim under subsection (6) of this act.

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

(9) A decision by a governing body under this act shall not be considered a land use decision as defined in ORS 197.015(10).

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

(11) Definitions - for purposes of this section:

(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 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.

(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.
- (C) "Owner" is the present owner of the property, or any interest therein.
- (D) "Public entity" shall include the state, a metropolitan service district, a city, or a county.
- (12) The remedy created by this act is in addition to any other remedy under the Oregon or United States Constitutions, and is not intended to modify or replace any other remedy.
- (13) If any portion or portions of this act are declared invalid by a court of competent jurisdiction, the remaining portions of this act shall remain in full force and effect.