

TRANSFERRING MEASURE 37 WAIVERS

BY

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In the near future, the Oregon courts will address whether landowners can transfer Measure 37 waivers granted by the government in lieu of compensation. On the basic question of whether waivers are personal or run with the land, the courts will likely conclude that waivers are personal.

However, courts may apply the principle of vested rights in the area of Measure 37 waivers. Currently a landowner can have a vested right in a nonconforming use that may be passed to subsequent landowners. Similarly, a landowner may have a vested right in the use granted by a Measure 37 waiver if the landowner has taken substantial steps toward implementing that use.

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I. INTRODUCTION

Measure 37 provides that a government must compensate a landowner for the enactment or enforcement of certain land-use regulations adopted after the landowner or the landowner's family acquired the property. Measure 37 also provides that in lieu of compensation, the governmental entity that enacted the land-use regulation may choose to modify, remove, or not apply the regulation. Such actions are commonly referred to as waivers. One of the important issues, currently unresolved, is whether Measure 37

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waivers can be transferred from the original claimant to a subsequent purchaser of the property.

The resolution of the transferability issue will likely impact, among other things, the overall number of Measure 37 claims filed by landowners and the number of waivers granted by government entities. A waiver is more attractive to a landowner if the landowner is able to transfer the waiver to subsequent owners. If waivers are fully transferable, it is more likely that a landowner will file a Measure 37 claim seeking a use of the property that the landowner does not intend to undertake while he or she owns the land, but that may enhance resale value.

Similarly, nontransferable waivers pose a lesser threat to government entities' land-use schemes. If the courts determine that waivers are not transferable, a governing body is more likely to grant a waiver in lieu of compensation because it will know that the waiver will be relatively short-lived; the use will be permitted only as long as that particular person owns the property.

This article first discusses the analytical framework for interpreting statutes, then applies that approach to Measure 37 and concludes that Measure 37 waivers are personal rather than running with the land. Next, the article outlines the established principles of variances, nonconforming uses, and vested rights. The article describes how the courts could apply those established principles to Measure 37 waivers to assess whether a landowner has a vested right in the use permitted by the landowner's Measure 37 waiver.

II. DISCUSSION

The question of transferability arises due to the ambiguities contained in subsection (8) of Measure 37. That subsection provides:

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 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.¹

A court could interpret that provision in at least four different ways. The first possible interpretation, and the most restrictive, is that waivers are personal to the owner and are not transferable at all. If a landowner obtained a waiver, he or she could make use of the land in accordance with the waiver. However, when title to that property passed to a new owner, the use and any improvements that are inconsistent with the land-use regulations that had been waived would become unlawful.

A second possible interpretation—at the other extreme—is that waivers run with the land and are fully transferable. That scenario is the least restrictive: a waiver would run indefinitely with the land. When a landowner

¹ Ballot Measure 37 § (8) (Or. 2004).

obtained a waiver, he or she could record the waiver with the title to the property and then, regardless of whether the landowner ever made use of the waiver, when the landowner passed title to that property, the waiver would pass with the property.

A third interpretation of subsection (8) is that each governing body responsible for issuing waivers has authority to determine if its waivers are transferable. Measure 37 provides that governing bodies may adopt procedures for processing claims, and many have done so. A governing body could explicitly provide that the waivers it issues are not transferable to subsequent owners.² Alternatively, a governing body could provide that a landowner may record a Measure 37 waiver with the landowner's real property records and then transfer the right to use the land in accordance with the waiver to subsequent landowners. Currently, a lawsuit is pending in Crook County addressing that county's right to specifically allow the transfer of Measure 37 waivers.³

The fourth possibility is that waivers are personal, but are transferable to subsequent owners if the use has vested. That interpretation parallels Oregon's approach to vested rights in the area of nonconforming uses.

A. Analytical Framework

To interpret a statute adopted through the initiative process, Oregon courts utilize the same methodology that they use for other statutes.⁴ The court's objective is to determine the intent of the voters who passed the measure⁵ and in doing so the court may engage in up to three levels of review. At the first level, the court looks to the text and context of the provision.⁶ The text is the best evidence of the voters' intent in adopting the provision.⁷ In interpreting the text, a court employs specific maxims of construction including giving words of common usage their plain and natural meaning and not inserting what has been omitted nor omitting what has been inserted.⁸ Also, the court does not assess the meaning of terms in isolation, but rather, the court will consider the context in which the voters adopted the provision.⁹ Context includes existing relevant laws.¹⁰

If the intent of the voters is not clear from the text and context—in other words, if the measure has two or more plausible interpretations—then

² *Id.* § (7) (“A metropolitan service district, city, or county, or state agency may adopt or apply procedures for the processing of claims under this act, . . .”).

³ Complaint, Crook County v. All Electors, No. 05CV0015 (Crook County, Or. Cir. Ct.) (filed Oct. 25, 2005).

⁴ *Stranahan v. Fred Meyer, Inc.*, 11 P.3d 228, 239 (Or. 2000); *Portland Gen. Elec. Co. v. Bureau of Labor and Indus. (PGE)*, 859 P.2d 1143, 1147 n.4 (Or. 1993) (“[T]he same structure . . . applies, not only to statutes enacted by the legislature, but also to the interpretation of laws and constitutional amendments adopted by initiative or referendum . . .”).

⁵ *Roseburg Sch. Dist. v. City of Roseburg*, 851 P.2d 595, 597 (Or. 1993).

⁶ *PGE*, 859 P.2d at 1146.

⁷ *Roseburg Sch. Dist.*, 851 P.2d at 597.

⁸ *PGE*, 859 P.2d at 1146.

⁹ *Id.*

¹⁰ *Osborn v. Psychiatric Sec. Review Bd.*, 934 P.2d 391, 397 (Or. 1997).

a court would move to the second level of review: an examination of the history of the provision.¹¹ The history of a ballot measure includes information available to the voters at the time the measure was adopted.¹² Relevant information may be found in the ballot title, explanatory statement and arguments for and against the measure included in the Voters' Pamphlet, and also in contemporaneous news reports and editorials.¹³ The extent to which those sources will be considered depends on their objectivity, as well as their disclosure of public understanding.¹⁴

If the intent of the voters is still unclear, the court will turn to the third level of review, general maxims of statutory construction derived from statutes or case law.¹⁵ Such maxims include construing statutes to avoid unreasonable results¹⁶ and construing statutes to avoid unconstitutionality.¹⁷

B. Interpretation of Measure 37

Measure 37 does not explicitly address transferability. As noted above, subsection (8) of Measure 37 describes the availability of a waiver as follows:

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 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.¹⁸

The measure provides that the governing body can waive land-use regulation in three ways: it may modify, remove, or not apply the regulation. The first two options—modify or remove—both entail changing the regulation itself and thus transferability would not be an issue for regulations modified or

¹¹ *PGE*, 859 P.2d at 1146. Under *PGE*, courts only move to the second level of review if the meaning remains unclear after looking at the text and context. However, in 2003, the Oregon legislature amended ORS 174.020, providing, among other things, that to “assist a court in its construction of a statute, a party may offer legislative history of a statute.” While the statute refers only to “legislative history,” it may apply to initiative history as well because the same framework is used in analyzing statutes. *See supra* note 4. Although courts have not yet turned to history immediately in interpreting statutes, based on ORS 174.020 it may be possible for the court to look to initiative history without first finding that the statute is ambiguous given its text and context.

¹² *Ecumenical Ministries v. Oregon State Lottery Comm'n*, 871 P.2d 106, 111 n.8 (Or. 1994).

¹³ *Id.*

¹⁴ *Stranahan v. Fred Meyer, Inc.*, 11 P.3d 228, 243 (Or. 2000).

¹⁵ *PGE*, 859 P.2d at 1146–47; *see also Carrigan v. State Farm*, 949 P.2d 705, 709 (Or. 1997) (applying directives from Insurance Code).

¹⁶ *See State v. Vasquez-Rubio*, 917 P.2d 494, 497 (Or. 1996) (recognizing but declining to apply the absurd-result maxim because legislative intent was clear from the text and context).

¹⁷ *Westwood Homeowners Ass'n, Inc. v. Lane County*, 864 P.2d 350, 359 (1993), *adhered to as modified*, 866 P.2d 463 (1994) (“When, after consideration of the text, context, and legislative history, the meaning of a statute is unclear, this court will construe the statute so as to satisfy the constitution.”).

¹⁸ Ballot Measure 37 § (8) (Or. 2004).

removed. However, the third type of waiver—to “not apply” the land-use regulation—appears instead to be specific to a particular owner and a particular property. The land-use regulation is still in force; however, the owner is permitted to undertake a use inconsistent with the regulation.

The text of the measure indicates that such a waiver is granted to the owner personally because it allows “*the owner* to use the property for a use permitted at the time the owner acquired the property.”¹⁹ Measure 37 defines “owner” to mean the “present owner” of the property.²⁰ In other words, incorporating the definition of “owner” into the text of the waiver language in subsection (8), the measure would authorize a waiver to allow the present owner to use the property for a use permitted at the time the present owner acquired the property.

As noted above, while the text of Measure 37 is the best indicator of the voters’ intent, context, including related statutes, also plays a role at the first level of review. Of note, the conclusion that a waiver is personal is consistent with Oregon’s statutory land-use planning schemes. Land-use regulations operate prospectively to facilitate a shift toward specific types of use, and manners of using property, as part of a larger land-use plan.²¹ Oregon courts have recognized the harmful impact that nonconforming uses have on zoning plans.²² Allowing landowners to lock in a waiver to shield property from land-use regulation indefinitely is inconsistent with the overall statutory land-use scheme.

Also, the statute authorizing nonconforming uses specifically provides that a nonconforming use is transferable.²³ In light of the similar nature of nonconforming uses and Measure 37 waivers, and the explicit statutory provision that makes nonconforming uses transferable, it is significant that transferability language was not included in Measure 37.

Although it appears from the text and context of Measure 37 that waivers are personal, if the court decides that more than one interpretation is possible it will look to the second level of review—history. However, the court will find little guidance in the history of Measure 37 to assist in its interpretation. The explanatory statement and arguments for and against Measure 37 in the voters’ pamphlet do not contain any explicit references to transferring waivers, and transferability does not appear in the media coverage leading up to the vote on Measure 37.²⁴

¹⁹ *Id.* (emphasis added).

²⁰ *Id.* § (11)(C).

²¹ See discussion *infra* Part II.C (discussing variances and nonconforming uses and illustrating that uses in existence when a land-use regulation is adopted are generally allowed to continue until there is some abandonment or other break in that use).

²² See *Parks v. Bd. of County Comm’rs of Tillamook County*, 501 P.2d 85, 95 (Or. Ct. App. 1973) (“Nonconforming uses are not favored because, by definition, they detract from the effectiveness of a comprehensive zoning plan.”).

²³ See OR. REV. STAT. § 215.130(5) (2003) (“A change of ownership or occupancy shall be permitted.”).

²⁴ The only statement that remotely touches upon transferability is a statement in favor of Measure 37 by Dorothy English, the chief petitioner for Measure 37. Dorothy English, *Argument in Favor*, in 1 VOTERS’ PAMPHLET 105, 105–06 (Office of the Or. Sec’y of State ed., 2004), available at <http://www.sos.state.or.us/elections/nov22004/guide/pdf/vpvol1.pdf>. English describes how she and her husband wanted to divide their property so that they could give some to their

In the event that the court reaches the third level of review—substantive maxims of construction—the court would again find little guidance for its interpretation because few, if any, maxims appear to be relevant.²⁵

C. Variances, Nonconforming Uses, and Vested Rights

If the court determines that waivers are personal and do not run with the land, further analysis is required. The courts will likely look to other government authorizations to analyze situations in which a use may have become a vested right such that it may continue with subsequent owners. A brief background about variances, nonconforming uses, and vested rights is helpful to understand how Measure 37 waivers may be passed on to subsequent owners even if they do not run with the land.

1. Variance

A variance generally occurs when a government body authorizes a specific use of a particular piece of property that is otherwise prohibited by the local land-use ordinance.²⁶ In Oregon, variance law generally is embodied in local legislation, *i.e.*, local government's codes, ordinances, and possibly comprehensive plans.²⁷ Although the particular factors required to obtain a variance will vary by locality, typically a landowner must establish that there is a hardship that creates the need for the variance or that there is no reasonable economic use of the property without a variance.²⁸

2. Nonconforming Use

A nonconforming use of land generally is a use inconsistent with the current zoning ordinance, but which lawfully existed prior to the enactment of the ordinance.²⁹ Outside cities, the right to continue a nonconforming use is a right established by statute.³⁰ That statutory right to a nonconforming

children and grandchildren and sell the remainder. *Id.* at 105. The English's plan would require that a waiver be transferable. However, the statement is not direct enough to infer that the voters intended Measure 37 waivers to be fully transferable.

²⁵ Substantive maxims employed by the courts include statutory directives such as favoring natural rights, OR. REV. STAT. § 174.030 (2003), and when two statutes are irreconcilable, favoring the most recently enacted. *Harris v. Craig*, 697 P.2d 189, 191 n.1 (Or. 1985). Some codes, such as the insurance code, contain specific directives. *See Carrigan v. State Farm Mut. Auto. Ins. Co.*, 949 P.2d 705, 709 (Or. 1997).

²⁶ *Bienz v. City of Dayton*, 566 P.2d 904, 919–20 (Or. Ct. App. 1977).

²⁷ *Kelley v. Clackamas County*, 973 P.2d 916, 919 (Or. Ct. App. 1999).

²⁸ *See id.* at 917–19 (describing standards in Clackamas County ordinance for granting variance from set-back provision); *Fisher v. City of Gresham*, 685 P.2d 486, 487–88 (Or. Ct. App. 1984) (discussing Gresham variance provision).

²⁹ *Clackamas County v. Holmes*, 508 P.2d 190, 192 (Or. 1973) (“A nonconforming use is one which lawfully existed prior to the enactment of a zoning ordinance and which may be maintained after the effective date of the ordinance although it does not comply with the use restrictions applicable to the area.”).

³⁰ OR. REV. STAT. § 215.130(5) provides:

use of land is transferable under Oregon law.³¹ Within cities, however, nonconforming uses are governed by city codes, not state statutes.

In general, nonconforming uses are not favored by the courts because they detract from the effectiveness of comprehensive zoning plans.³² Therefore, “uses are liberally construed to prevent the continuation or expansion of nonconforming uses as much as possible.”³³ A right to a variance may be lost if it is abandoned.³⁴ Enlargement or extensions of nonconforming uses generally are not permitted and a nonconforming use generally may not be changed to a new and different use and continue to be protected.³⁵

3. Vested Right

A vested right is a use “under construction” that is inconsistent with a zoning ordinance but which is allowed to be completed, as a nonconforming use, because the property owner took substantial steps toward developing the use prior to the enactment of the zoning ordinance.³⁶ Whether a landowner has taken sufficient steps to have acquired a vested right is an issue of fact that is decided on a case-by-case basis.³⁷

The landowner must have taken substantial steps toward beginning construction or incurred substantial costs toward completing the job.³⁸ The Oregon Supreme Court has recognized the following factors as relevant to whether the right has vested: ratio of expenditure made to total expense of complete project, good faith of the landowner (whether landowner knew of pending land-use regulation), type of expenditure (whether the improvements could apply to other uses), kind of project, location, and ultimate cost.³⁹ In addition, “the acts of the landowner should rise beyond mere contemplated use or preparation, such as leveling of land, boring test holes, or preliminary negotiations with contractors or architects.”⁴⁰ Platted

The lawful use of any building, structure or land at the time of the enactment or amendment of any zoning ordinance or regulation may be continued. Alteration of any such use may be permitted subject to subsection (9) of this section. Alteration of any such use shall be permitted when necessary to comply with any lawful requirement for alteration in the use. . . . A change of ownership or occupancy shall be permitted.

See also Polk County v. Martin, 636 P.2d 952, 959–60 (Or. 1981) (describing nonconforming use).

³¹ OR. REV. STAT. § 215.130(5) (2003) (“change of ownership or occupancy shall be permitted.”)

³² Parks v. Bd. of County Comm’rs of Tillamook County, 501 P.2d 85, 95 (Or. Ct. App. 1973).

³³ *Id.*

³⁴ Fountain Village Dev. Co. v. Multnomah County, 31 P.3d 458, 462 (Or. Ct. App. 2001); Lane County v. Bessett, 612 P.2d 297, 301 (Or. Ct. App. 1980); Parks, 501 P.2d at 95.

³⁵ Parks, 501 P.2d at 95.

³⁶ Clackamas County v. Holmes, 508 P.2d 190, 192 (Or. 1973) (“The allowance of nonconforming uses applies not only to those actually in existence but also to uses which are in various stages of development when the zoning ordinance is enacted.”).

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* at 192–93.

⁴⁰ *Id.* at 193.

but undeveloped land is not a “use” in zoning law for purposes of establishing a vested right for a prior nonconforming use.⁴¹

D. How Measure 37 Claims Could Be Treated

Courts have treated other government authorizations for inconsistent uses, such as a permit for substandard lot sizes, in the same manner as nonconforming uses.⁴² The courts could approach Measure 37 waivers similarly. Courts could consider on a case-by-case basis whether a vested right exists after a Measure 37 waiver, using specific factors for determining at what point the use becomes a vested right. If the right has vested, the use would then pass with the land to the next owner.

As an example, consider a landowner with thirty contiguous acres that the landowner acquired in 1950 and has owned continuously since that time. The landowner wants to divide the property into six five-acre parcels for residential development. The property is currently zoned by the county for exclusive farm use. Under Oregon Revised Statutes (ORS) section 215.780, the minimum lot size for new parcels on exclusive farm use land is now eighty acres and thus the landowner is unable to divide the property into smaller lots. No statewide planning goals applied to the property in 1950 and the legislature enacted ORS section 215.780 in 1993.

The landowner files a demand for compensation from the county and the state under Measure 37. The county and state, in lieu of compensation, grant waivers by choosing to “not apply” ORS section 215.780 (and any similar county code provision) to the landowner’s property. The landowner then sells the property to a developer but the county refuses to recognize the waivers for the developer and the developer sues the county. If the court approaches the issue as a vested right, then whether the landowner may transfer the waiver along with the property will depend on the steps that the landowner has taken in preparation for the development prior to selling the land.

As discussed above, the Oregon Supreme Court has established factors for determining whether a landowner has a vested right in a nonconforming use. Many of the factors used in that analysis could be relevant to a Measure 37 waiver, such as the type of expenditure made toward establishing the use and whether the improvements could apply to another use. Other established factors, however, would not be relevant to a Measure 37 waiver, such as whether the landowner took steps toward the use in anticipation of a pending change to the zoning ordinance. Thus the courts would need to establish specific factors for vested rights for use of Measure 37 waivers rather than simply adopting the factors used for vested rights of a nonconforming use.

Furthermore, the court could adopt the same limiting principles it adopted for nonconforming uses. For example, if a Measure 37 waiver is abandoned, the right to the use obtained by the waiver would no longer be

⁴¹ Parks v. Bd. of County Comm’rs of Tillamook County, 501 P.2d 85, 95 (Or. Ct. App. 1973).

⁴² *Id.*

available to the landowner, and the use permitted by the waiver could not be enlarged or changed.

III. CONCLUSION

When litigants present an Oregon court with the opportunity to interpret whether Measure 37 waivers are personal or run with the land, the court will likely conclude, based on the text and context of the measure, that waivers are personal. However, the court will also likely determine that landowners who obtain a waiver, and take substantial steps toward implementing the use provided for by the waiver, will have a vested right. If the landowner secures a vested right, then the Measure 37 waiver will pass to subsequent owners. However, like nonconforming uses, the court will likely disfavor waivers because they detract from the effectiveness of comprehensive land-use plans, and thus will likely adopt limiting principles.