



MEASURE 37 AND ESTATE PLANNING AND ADMINISTRATION

In a post-Measure 37 world, some basic estate planning techniques involving real property may no longer be advisable. Common legal advice on asset protection and tax reduction may conflict with some provisions of the measure. This article is an overview of how Measure 37 impacts Oregon estate planning and administration.

Under Measure 37, if the government chooses to compensate the land owner, it will pay based on the decrease in land value caused by land use regulations enacted on or after the date that the *present owner, or the present owner's family member*, acquired the property. If, however, the government chooses the waiver alternative, then it will waive only a land use regulation enacted on or after the date that the *present owner* acquired the property. Ownership by family members does not have any bearing on the waiver option. Local governments probably do not have sufficient funds to adequately compensate every valid Measure 37 claimant. Thus, land owned by a family member likely will not be relevant most of the time.

A recent decision on a Measure 37 claim illustrates this concept. On May 6, 2005, *The Oregonian* reported that a Deschutes County couple's Measure 37 claim was denied because "they didn't acquire the property from relatives until 1999 – after farming protection rules were in place. Measure 37 prescribes compensation based on the date of the family ownership, but waivers of rules are based on current ownership." While that case involved a pre-Measure 37 transfer, acquisi-

tions from family members after the measure was adopted will almost certainly encounter a similar result in waiver cases.

A direct transfer of property to family members is not the only way to destroy a valid Measure 37 claim. If John Doe sells his land to an unrelated developer, any Measure 37 claims John may have had are gone. This result appears to be well settled. If, instead, John transfers his land to a revocable living trust, to ultimately benefit his family, would John reasonably believe he was risking any Measure 37 claims? Some practitioners believe this is exactly what John has done.

If your client wants to transfer real property, you may want to advise the client to consult a real estate or land use lawyer to determine the possibility of a valid Measure 37 claim. If the real property does have a valid Measure 37 claim, determine who is the present owner of the property and the date the individual or entity acquired the real property or an interest in it.

ESTATE PLANNING ISSUES

Once you have determined the validity of a Measure 37 claim, the property's owner(s), and the date of acquisition, consult the following checklist to help analyze any estate planning transfers of real property that the client is considering:

1. **Does the present owner want to transfer the property to a revocable living trust (RLT)?** Estate planning lawyers appear to be split on whether transferring the property to an RLT allows the government to consider only regulations existing when the

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RLT acquired the property. According to some proponents of Measure 37, as long as the owner is either a trustee or beneficiary, a transfer to an RLT will not destroy the waiver claims. Some lawyers have espoused a “chain of title” approach, believing that because a deed transfers the property from the grantor to the RLT, the RLT is the present owner. The answer is unknown. Of all the lawyer’s basic estate planning techniques, however, the RLT is probably the least likely to diminish a valid Measure 37 waiver claim. Again, we simply do not know.

2. **Does the present owner want to transfer the property to an irrevocable trust?** If the current owner is also a beneficiary or trustee of the irrevocable trust, it is difficult to see any meaningful reason to treat an irrevocable trust differently from a revocable trust. Yet some Measure 37 advocates claim there is a difference and believe that irrevocable trusts are not afforded the same treatment as revocable trusts.
3. **Does the present owner want to transfer the property to an entity, such as an LLC or a family partnership?** Lawyers who have examined this question conclude that such a transfer will result in the LLC or partnership being the present owner of the property for waiver claims. It is not clear, however, what happens if the original owner is also one of the partners or LLC members. In that case, will the transfer of the property still defeat any waiver claims? Information from Measure 37 proponents suggests that only the LLC or partnership will be deemed the present owner of the property, regardless of who the members or partners are. Great caution is urged in transfers to LLCs or partnerships.

ESTATE ADMINISTRATION ISSUES

Normally, a personal representative is the person who “steps into the shoes of the decedent” and, for the most part, carries on the decedent’s pre-death activities. After Measure 37, however, that assumption may not always hold true.

1. **If the present owner dies before filing a Measure 37 claim, does the decedent’s potential Measure 37 claim run with his or her land?** In a February 24, 2005, letter from the Office of the Attorney General to the Oregon Department of

Land Conservation and Development (the AG’s letter), the Special Counsel to the Attorney General wrote the following: “[W]hen a public entity finds that there is a valid claim for compensation under Measure 37, but elects to provide relief by [waiving] the law, that relief is personal to the current owner of the real property.” Thus, in the attorney general’s opinion, the government may be able to claim that the estate is now the present owner of the property and that the Measure 37 claim, being personal, died with the owner. In other words, a Measure 37 claim does not “run with the land,” according to the attorney general. [To view the AG’s letter on the Oregon Department of Land Conservation and Development’s (DLCD) Web site, go to www.oregon.gov/LCD/docs/measure37/m37dojadvice.pdf. To view other Measure 37 materials on DLCD’s site, go to www.oregon.gov/LCD/measure37.shtml.]

2. **If the present owner dies after filing a Measure 37 claim, can the decedent’s personal representative pursue the claim?** Again referring to the AG’s letter: “If the current owner conveys the property before the new use allowed by the public entity is *established*, then the entitlement to relief will be lost (emphasis added).” The AG’s letter refers to the present owner *conveying* property before the new use is established. What happens if the present owner *dies* before the use is established? The AG’s letter does not address this situation, nor does it define when a new use is “established.” Although it is difficult to imagine why a personal representative could not pursue a Measure 37 claim filed by the decedent, the attorney general may take the position that the Measure 37 claim terminated when the decedent died.

ADEQUATE DISCLOSURE

It could take years to fully sort out Measure 37. In the meantime, what should you do if your clients want or need to transfer land with a potential Measure 37 claim?

If your clients are more interested in estate planning than in preserving a Measure 37 claim, have them sign a statement acknowledging that fact. No single statement will cover every situation. However, the following is an example of a broad-based disclaimer/disclosure statement for clients to ex-

ecute if they decide to proceed with a transfer:

As part of our estate planning advice to you, we have recommended that you {specify nature of real property transactions}. You and this firm discussed these transfers at length in the context of estate planning, tax laws, and Measure 37. We also discussed the potential of a valid Measure 37 claim that could be made on this property. After analyzing all the risks and benefits, you have decided not to pursue a Measure 37 claim involving this property at this time and, instead, to proceed with your estate planning transfers.

If we make these transfers, the government could deny waiver of any land use regulations imposed while you owned the property. Thus, only those regulations that arise after the property is transferred may be waived. Nevertheless, you have decided to proceed with the transfers because you believe that your estate planning goals override potential Measure 37 benefits, if any.

If your clients want to proceed with a Measure 37 claim, you might want to consider having them make the following acknowledgment:

As part of our estate planning advice to you, we have recommended that you {specify nature of real property transactions}. You and this firm discussed these transfers at length in the context of estate planning, tax laws, and Measure 37. We also discussed the potential of a valid Measure 37 claim that could be made on this property. After analyzing all the risks and benefits, you have decided to postpone your estate planning transfers and pursue a Measure 37 claim involving this property.

It is possible that if you pursue a Measure 37 claim and do not complete it before you die, your personal representative may not be able to complete the process. Nevertheless, you have decided to proceed with a Measure 37 claim at this time and postpone your estate planning transfers because you believe that the benefits of the Measure 37 claim outweigh your estate planning goals at this time.

While the future of Measure 37 is not certain, lawyers considering a transfer of real property need to analyze the Measure 37 implications of that transfer. Lawyers should exercise great caution in advising clients on transferring Oregon real property for estate planning and administration purposes.

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