

MARION COUNTY CIRCUIT COURT INVALIDATES MEASURE 37

MacPherson v. Dept. of Administrative Services, (Marion County Circ. Ct. Case No. 00C15769, October 14, 2005) involved cross motions for summary judgment in a declaratory judgment proceeding under ORS Chapter 28 and ORS 250.044 regarding the validity of voter-passed Measure 37 which requires either payment for, or waiver of, certain land use regulations reducing property values.

The Court allowed amendment of the complaint to show that some claims had been resolved by waiver of regulations in order to satisfy itself that some of the plaintiffs had standing. The Court also found the case to be justiceable and amenable to a declaratory judgment proceeding as the parties were adverse and the Court's decision would have a practical effect on the controversy. Plaintiffs generally alleged the measure was unconstitutional while defendants advocated its validity. Moreover, the court cited uncontested affidavits from individual plaintiffs over the practical effects on personal and property interests of finding the measure valid. This evidence led the Court to believe that plaintiffs had standing, and the controversy was justiceable and amenable to resolution in this declaratory judgment proceeding.

Plaintiffs' first claim dealt with the alleged interference by Measure 37 on the legislative or "police" power that resides in the legislature and people. The Court said the underlying land use regulations were not unconstitutional nor were they invalidated by the measure. The Court found these restrictions on the regulatory power to be invalid because they relied on payment for their enforcement. While payment for implementation of health and safety regulations was not in issue in this case, the Court said there was no principled reason why the "pay or waive" alternatives could not apply as well. By requiring payment for regulation, Measure 37 was found to "eviscerate" the regulatory power. The court added that, if the regulatory power were abused, there were constitutional remedies available. Appropriation of funds associated with costs for implementation of regulations is very different from payment of funds to individuals as a consequence of those same regulations. The court found the "pay or waive" provisions were essential to the measure and were not severable if the measure were found unconstitutional. Thus, the entire measure fell.

The Court then turned to plaintiffs' claims of invalidity based on Article I, Section 20 of the Oregon Constitution, which states:

"No law shall be passed granting to any citizen or class of citizens privileges or immunities, which, upon the same terms, shall not equally belong to all citizens."

The Court pointed to case law stating that this provision was violated if a "true class" received privileges or immunities not available to other classes. A "true class" is one that had characteristics other than those created by the challenged legislation, such as those involving past or present residency, legitimacy, or military service. If the class be "true" and a suspect category also be involved, such as sex, race, sexual orientation, alienage, or religious affiliation, the law is

subject to a “particularly exacting scrutiny;” otherwise, it is subject to rational basis scrutiny. In this case, the class under review (“pre-owners”) owned the land before certain land use regulations came into effect. This class is granted a benefit provided by the measure and not available to other land owners. Review of the privileges and immunities for the class in this case does not involve the more exacting scrutiny; nevertheless, Measure 37 was found to fail rational basis review both because its goal was to impede the legislative or “police” power, as well use illegitimate means chosen to do so, i.e., payment for regulation, which was not related to that interest. Moreover, the measure of payment was neither the diminution of value at the time of adoption of the restrictive measure adjusted to current value, nor the diminution at the time the owner sought to use the property notwithstanding the restrictive regulation and adjusted to current value. “Instead, it was what the property would be worth today, but for the land use regulation. The Court noted that property values in the state generally have increased greatly since the adoption of the first statewide land use regulations in 1973 that much land had been placed off limits to urban development, and that population has grown. The Court concluded:

“***Thus, permitting pre-owners to recover based on what their properties are worth today, instead of at the time the land use regulations were enacted and the injury to the owners was thus incurred, has no rational relation to the aim of Measure 37 of compensating property owners for the reduced fair market value of their property interest. The distinction between pre- and post-owners is not reasonably related to a legitimate state interest and, therefore, is unconstitutional.”

The Court also noted that those owners who acquire property more recently will have a greater basis in the property and thus will receive a lesser payment under the measure, if any payment is made at all. The Court found little rational basis for the distinction.

The Court specifically found the notion that owners more recently acquiring property would receive a discount on their purchase price to be tenuous at best, particularly since most land owners taking advantage of Measure 37 were rural property owners who would have little prospect for residential subdivisions or other non-resource uses on their property. Moreover, the Measure did not take into account buyers who purchased land because they were subject to a stable regulatory regime. For these reasons, the Court found Measure 37 invalid under Article I, Section 20 of the Oregon Constitution “because it does not serve a legitimate State interest and, in any event, the means chosen to secure the State’s interests are not rationally related to that interest.” The Court further found that the unconstitutional provisions of the Measure could not be severed from the remaining provisions.

The Court then turned to plaintiffs’ third claim, i.e., whether Measure 37 violated Article I, Section 22 of the Oregon Constitution which provides:

“The operation of laws shall never be suspended, except by the Authority of the Legislative Assembly.”

The State argued that no laws were suspended by Measure 37, which it likened to a variance process. Plaintiffs responded that variances are granted, or not, according to fixed standards, as opposed to the Measure 37 process which depends upon ownership and the date of

acquisition. The Court found that Measure 37 did not affect existing or new laws but did authorize suspension of those laws for certain property owners. The Court said that the Measure was not like a variance because a variance would issue, or not, in the light of fixed standards but Measure 37 allowed new exemptions from land use regulations unless the government pays the regulated parties. Variances do not have this payment aspect. Because Measure 37 was enacted by the voters, it effectively suspends laws enacted by the legislature. The Court found no violation of this constitutional provision inherent in the enactment of Measure 37 itself but stated that its *effect* was to undertake suspension of laws in a way that violates Article I, Section 20, described above. Thus, the Measure violates the suspension clause as well. The Court also found that this suspension violation could not be severed from the rest of the Measure.

The Court found that Measure 37 did not violate Article IV, Section 24 of the Oregon Constitution, which provides that the State may waive sovereign immunity for all potential liability. The Court found that the people may, consistent with this provision, choose to incur liability through the adoption of a statute.

The Court then turned to the exemption from the Measure's "pay or waive" provisions for nude dancing and the sale of pornography. It found that, because plaintiffs have not alleged that they wished to make use of their property for such purposes, no justiceable controversy is raised. Even if the Court were to reach that issue, the provision would likely be severable from the remainder of the Measure and would have no effect on plaintiffs. The Court also said that justiceability may exist for some, but not all, of issues presented in a declaratory judgment proceeding for resolution.

The Court also found no violation of Article I, Section 15 of the Oregon Constitution which prohibits payments to religious institutions because the Measure applies to all property owners, rather than to the function of religious institutions themselves.

The Court then turned to whether Measure 37 violated Article III, Section 1 of the Oregon Constitution, which provides for three separate departments of government, the executive, the legislative and the judicial, and states:

“[N]o person charged with official duties under one of these departments, shall exercise any of the functions of another, except as in this Constitution expressly provided.”

Plaintiffs claimed the Measure intruded on the powers of the executive to enforce the laws as it allowed the legislative branch to decide whether to enforce generally applicable land use regulations and also provided inadequate procedural safeguards for non-claimants against arbitrary decisions. The Court addressed the latter issue under its procedural due process analysis below. Plaintiffs also claimed the measure delegated to administrative bodies the power of exemption from the laws which the legislative body did not possess. The Court found delegation of the choice of payment or waiver by a legislative body was permissible under the Oregon constitution because this was established in the legislative process. The Court found no legislative encroachment on the power of the executive, at least technically, as the legislative branch enacts laws and determines the limits of executive discretion. However, the Court also found that the legislative branch (including the people) have no power to enact an

unconstitutional law, so the constitutional violations noted above are not affected by the fact that they were adopted by the people, who cannot authorize delegation of an unconstitutional process.

The Court then turned to plaintiffs' remaining claims based on due process. As to procedural due process, the Court noted a challenge to the grant of the payment or waiver provisions. The State had adopted regulations for claims administration and that administrative decisions on claims were subject to review as an "order in other than a contested case" under ORS 183.484. However, the Measure did not provide, in the view of the Court, adequate safeguards (as opposed standards) for all affected parties. According to waivers already granted and where construction had already begun, the Court found irreparable harm may occur. It also said that adjacent property owners must have a meaningful opportunity to be heard *before* that harm occurs. Under the State's scheme, affected neighbors will not get a hearing before a court until after deprivation of their rights occurs. If governmental action is ultimately found to be invalid, the damage has been done and it will be difficult, if not impossible, to remedy the same. The Court concluded:

"The serious and imminent risk of an erroneous deprivation of property interests that are impacted by a government entity's decision on a Measure 37 claim, and the fact that a pre-deprivation hearing, with notice and the opportunity of property owners near the Measure 37 claimants' land to be heard could prevent the improvident exemption or nonapplication of land use rules, obligates governments to provide property owners near a Measure 37 claimant's property with notice and the opportunity to be heard before the public entity decides the claim. The state has already provided for such notice and hearing when it is the entity to which the claim applies. See OAR 125-145-0080. That said, neither the Measure nor the regulation affords the property owner any modicum of relief. Assuming property ownership is established, and the off-ending regulation post-dates the date of acquisition, Measure 37 does not permit any discretion to deny a waiver request (excepting to pay the landowner to comply with the law, which governments are financially unable to do.) Thus, at the very least, the procedural due process right of [a certain claimant] has been violated because the procedural protections are inadequate if they exist at all."

As to substantive due process, plaintiffs claim Measure 37 was already found not to serve a legitimate State interest and the payment alternative does not have a reasonable relationship to any State interest. The Court found substantive due process is not a free-standing right, but must be connected with another constitutionally protected right. The Court found this right to be the potential loss of property interests or value. While those rights are not "fundamental," the Court determined that the government "could not have had a legitimate reason for enacting Measure 37, because the compensation provisions of Measure 37 impedes the exercise of the plenary power" (emphasis supplied), thus violating plaintiffs' substantive due process rights.

This is an extraordinary decision. Regardless of how one feels about the outcome, the Circuit Court has certainly discovered new limits on law making. Perhaps a system to review

potential initiatives to assure pre-circulation reconsideration to avoid facial flaws might be appropriate to avoid the current cycle of adoption, challenge, and invalidation.

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