

The Hon. Mary M. James

**IN THE CIRCUIT COURT FOR THE STATE OF OREGON
COUNTY OF MARION**

**BRYN HAZELL, FRANCIS NELSON, TOM
CIVILETTI, DAVID DELK, GARY DUELL,
JOAN HORTON, and KEN LEWIS,**

Plaintiffs,

v.

**BILL BRADBURY, Secretary of State of
the State of Oregon,**

and

**HARDY MYERS, Attorney General of the
State of Oregon,**

Defendants.

Case No. 06C-22473

**MOTION FOR SUMMARY
JUDGMENT BY PLAINTIFFS
HORTON AND LEWIS ON
THEIR CLAIMS**

AND

**MOTION FOR SUMMARY
JUDGMENT ON
INTERVENORS' CROSS-
CLAIM**

**AND COMBINED
MEMORANDUM IN SUPPORT**

**Hearing: June 18, 2007
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I. MOTION FOR SUMMARY JUDGMENT ON PLAINTIFFS' CLAIMS (THIRD AND FOURTH CLAIMS).

Plaintiffs Joan Horton and Ken Lewis [hereinafter "Horton" or "Horton Plaintiffs" or "we"] join the Hazell Plaintiffs in their Motion for Summary Judgment filed this date. In the alternative, we move for an order granting summary judgment on our Claims for Relief set forth in the Complaint, based upon the entire record of this case and the discussion and authority cited below.

Although we agree with the Hazell Plaintiffs on most issues in this case, we submit, in the alternative, that Section (9)(f) of Measure 47 of 2006 is invalid and severable. Thus, it is not an impediment to the implementation (and judicial consideration) of the other provisions of Measure 47.

II. PLAINTIFFS MOVE FOR SUMMARY JUDGMENT ON INTERVENOR'S CROSS-CLAIM.

Intervenors Center to Protect Free Speech, Inc. and Vannatta [hereinafter, collectively "CPFE"] assert a counter-claim that Measure 47 is unconstitutional, *in toto*, because Section 9(f) violates Oregon Constitution, Article 1, § 21, of the Oregon Constitution. Plaintiffs move for summary judgment against this counter-claim. While the Horton Plaintiffs question whether the contingency clause of Section 9(f) is sufficiently specific to be given effect, all Plaintiffs join in this argument that Measure 47 is a complete expression of legislative intent and does not fail Article 1, § 21.

III. MEMORANDUM IN SUPPORT OF MOTIONS FOR SUMMARY JUDGMENT.

The Horton Plaintiffs were not among the Chief Petitioners on Measure 47. Each supported the adoption of Measure 47 with significant commitments of time and money. Both are registered voters in Oregon.¹

The Horton Plaintiffs adopt and incorporate by reference the following portions of the Memorandum in Support of the Motion for Summary Judgment by Plaintiffs Hazell, Nelson, Civiletti, Delk, and Duell [hereinafter the "Hazell Plaintiffs' Memorandum in Support of Summary Judgment"], also filed this day: Sections I and II, including the Motion and the subsections of II (A-E).

IV. THE HORTON PLAINTIFFS ARE ENTITLED TO SUMMARY JUDGMENT ON THE FIRST CLAIM FOR RELIEF (Declaratory Judgment).

The Horton Plaintiffs adopt and incorporate by reference the following major section of the Hazell Plaintiffs' Memorandum in Support of Summary Judgment, also filed this day. Section III, "THE HAZELL PLAINTIFFS ARE ENTITLED TO SUMMARY JUDGMENT ON THEIR FIRST CLAIM FOR RELIEF (Declaratory Judgment)."

The difference in our alternative position and that of the Hazell Plaintiffs is that we Horton Plaintiffs contend that Section (9)(f) itself is invalid under the Oregon Constitution and for that reason should be invalidated and severed from the remainder

1. Voter registration and campaign contributions are public records, easily verified. The signature sheets circulated by Horton are also public documents. The Horton Plaintiffs request the Court take judicial notice of their status. ORS 40.060.

of Measure 47. Thus, Defendants' refusal to implement any of Measure 47 cannot be justified on the basis of Section (9)(f).

A. SECTION (9)(f) IS INVALID.

Section (9)(f) specifies that, regardless of any constitutional infirmity, the provisions of Measure 47 shall be codified and shall take effect "at the time that the Oregon Constitution is found to allow, or is amended to allow, such limitations."²

Section (9)(f) of Measure 47 is not valid under the Oregon Constitution. It violates the procedural requirements and spirit of Article IV, section 4(d), of the Oregon Constitution, because it purports to hinge the effectiveness of some parts of Measure 47 upon a vague and presently unforeseeable contingency. Article IV, section 4(d), states:

Notwithstanding section 1, Article XVII of this Constitution, an initiative or referendum measure becomes effective 30 days after the day on which it is enacted or approved by a majority of the votes cast thereon. A referendum ordered by petition on a part of an Act does not delay the remainder of the Act from becoming effective.

Consequently, Section (9)(f) is invalid and must be severed from the rest of Measure 47, pursuant to the strict severability provisions in Section (11) of Measure 47 and pursuant to the statutes and rules of construction otherwise applicable to severability.

2. In full, Section (9)(f) states:

If, on the effective date of this Act, the Oregon Constitution does not allow limitations on political campaign contributions or expenditures, this Act shall nevertheless be codified and shall become effective at the time that the Oregon Constitution is found to allow, or is amended to allow, such limitations.

1. A STATUTE'S EFFECTIVENESS CANNOT BE CONTINGENT UPON A NONSPECIFIC FUTURE EVENT.

The general rule is that statutory provisions that are unconstitutional when adopted are *void ab initio* and not revived by subsequent amendment to the constitution.

Amendment or repeal of the constitutional provision which had rendered a statute invalid is generally held not to place the statute in force without subsequent reenactment * * *.

SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 2:7 (6th Ed 2006). "[A] statute declared unconstitutional is deemed void from its inception and is not revived merely because the constitutional infirmity is subsequently eliminated." AMERICAN JURISPRUDENCE, Constitutional Law § 205 (2d ed 2006).

In the case of Measure 47, then, section (9)(f) seeks to circumvent or change the general rule of constitutional law that an invalid statute is *void ab initio* and not revivable. The general rule has been adopted in Oregon. **Smith v. Cameron**, 123 Or 501, 262 P2d 946 (1928), held that a later amendment to the Oregon Constitution did not resurrect or revive a statute previously held to be unconstitutional. There, the plaintiff farmer attempted to exercise the power of eminent domain to enlarge a ditch.

A trial was had and judgment rendered in favor of the defendants, dismissing the action. Plaintiff appealed (106 Or 1, 210 P 716, 27 ALR 510), and the lower court was affirmed for the reason that sections 5719 and 5720 of the statute, purporting to authorize such proceedings in eminent domain, violated article 1, § 18, of the state Constitution, in that they undertook to authorize the taking of private property for a private use. It was suggested in the opinion of the court that the remedy was by constitutional amendment. As a result thereof the people, through the initiative, amended section 18 of article 1 of the Constitution to [authorize such use].

After the adoption of the above constitutional amendment plaintiff again commenced an action to condemn land necessary to enlarge the ditch. A demurrer to the complaint was overruled, and, upon refusal of the defendants further to plead, judgment was rendered in favor of the plaintiff.

123 Or at 503-04. The Court concluded that the later amendment of the Oregon Constitution did not resurrect or revive retroactively the portions of the eminent domain statute previously declared unconstitutional.

We may eliminate from our consideration sections 5719 and 5720, *supra*, which have been heretofore declared to be unconstitutional. The adoption of the constitutional amendment did not revive or bring into life those sections of the statute. They were and are null and void. As stated in 12 CJ 727:

An act of the Legislature not authorized by the Constitution at the time of its passage is absolutely void, and is not validated by a subsequent adoption of an amendment to the Constitution authorizing the passage of such an act.

123 Or at 505.

Smith v. Cameron has not been expressly overruled. If still good law, it would render Section 9(f) of Measure 47 invalid, because its instructions to the courts to consider "this Act" dormant (and contingently effective) until allowed by the Oregon Constitution would directly conflict with the notion that "an act of the Legislature not authorized by the Constitution at the time of its passage is absolutely void."

However, ***Cameron*** is distinguishable. The statute at issue in ***Cameron*** did not have a dormancy/resurrection clause. Oregon cases have endorsed the related majority rules that (1) a statute contingent upon later constitutional amendment does not conflict with the then-current Constitution (so it is not within the rule applied in

Cameron); and (2) a later Constitutional amendment, *if sufficiently specific*, may revive an unconstitutional statute.

In **State v. Hecker**, 109 Or 520, 221 P 808 (1923), decided five years prior to **Cameron**, the Oregon Supreme Court concluded that a statute with either a dormancy or resurrection clause somewhat similar to the one in Measure 47 was not in conflict with the existing Oregon Constitution and was valid. Assuming that **Hecker** is good law where a contingency clause exists (and not overruled by the later **Cameron** decision), the effective date of the enforceability of a statute may be suspended and made contingent upon a later constitutional amendment. *Accord*, **Libby v. Olcott**, 66 Or 124, 134 P 13 (1913) (the challenged contingent legislation anticipated the results of the November 1913 special election called by the legislature); **State v. Rathie**, 101 Or 339, 199 P 169, 200 P 790 (1921) (statute providing for death penalty for murder in the first degree dependent upon Constitutional re-authorization of death penalty).³

It is the general rule in this country that a legislature has power to enact a statute not authorized by the existing constitution of that State when the statute is passed in anticipation of an amendment to its constitution authorizing it or which provides that it shall take effect upon the adoption of an amendment to its constitution specifically authorizing and validating such statute.

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3. **Druggan v. Anderson**, 269 US 36, 39, 46 SCt 14, 70 LEd 151 (1925), considered the Eighteenth Amendment, which was ratified and became effective January 16, 1916, but provided that prohibition would not become operative until one year later. The National Prohibition Act, passed after the ratification of the amendment but before January 1917, provided that it was not to go into effect until after the Amendment did. The Court upheld the Act and observed that "indeed it would be going far to say that while the fate of the amendment was uncertain Congress could not have passed a law in aid of it, conditioned upon the ratification taking place."

Henson v. Georgia Indus. Realty Co., 220 Ga 857, 862, 142 SE2d 219, 224 (1965).

This requirement for specificity is the general rule, as well, in the closely related situation of a statute which is void when enacted as being unconstitutional. Such statutes may later be validated by a constitutional amendment which expressly or impliedly ratifies and confirms them. In **Northern Wasco County People's Utility Dist. v. Wasco County**, 210 Or 1, 12-13, 305 P2d 766 (1957), the county sought to tax the property of the Wasco County PUD under a 1939 statute which was contrary to the Constitution in effect at the time but would have been valid under a 1952 constitutional amendment arguably allowing the taxation of a PUD.⁴

The County asks the court to hold that the [language in fn 4] validates a statutory provision which was void when enacted in 1939. Such a holding would not be proper. The applicable rule is set out in 16 CJS, Constitutional Law, § 45, as follows:

A constitutional provision may ratify and validate a previously enacted statute, but it will not so operate unless an intention to do so is clearly manifested. * * * A constitutional provision, which from the language used shows expressly or by necessary implication that it was intended to operate retrospectively by validating antecedent unconstitutional legislation, renders valid all such legislation to which the constitutional provision relates, without reenactment by the legislature.

4. Article IV, § 20 (added in 1952) states:

This section shall not be construed to prevent the inclusion in an amendatory Act, under a proper title, of matters otherwise germane to the same general subject, although the title or titles of the original Act or Acts may not have been sufficiently broad to have permitted such matter to have been so included in such original Act or Acts, or any of them.

The Oregon Supreme Court concluded that the language of the amendment to Article IV, § 20, did not evidence an intent to revive the 1939 statute.

In sum, both the relief from dormancy and the revival of an unconstitutional statute depend upon the wording of the later constitutional amendment, not upon the language of the original statute, such as Section 9(f). In this case Section 9(f) is either mere surplusage (a wish that future voters do something) or invalid. It is the intent of the later voters (on a future constitutional amendment) to revive or enforce a dormant or defunct statute which counts, regardless of Section (9)(f) of Measure 47.

The policy reasons for requiring a demonstration of express or implied reference to dormant or revived statutes are compelling. In *Banaz v. Smith*, 133 Cal 102, 65 P 309 (1901), the California Supreme Court expressed the policy reasons against generic contingency and "generic" revival of statutes without specificity.

[I]t would be to enact a law to which no reference was made, and which the people in adopting the amendment could not have had in mind. Such is not the ordinary function of a constitutional provision, and such effect will not be given to it unless it is expressly so provided.⁵

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5. See *Annotation*, ALR 1072-1079 (1947), in which the rule is stated and many cases cited and discussed.

Under certain very limited circumstances, constitutional amendments have been held to validate prior unconstitutional statutes. Where the constitutional amendment expressly or impliedly ratifies or confirms the unconstitutional statute, it has been held to validate the statute, provided that such validation does not impair the obligations of a contract or divest vested rights. Almost all of the cases in this area have involved express ratification. See, *Lee v. Superior Court*, 191 Cal 46, 214 P 972 (1923); *Fontenot v. Young*, 128 La 20, 54 So 408 (1911); Annot., 171 ALR [1070].

(continued...)

In Oregon, enacting a statute *sub silentio*, through constitutional amendment, would be contrary to what have been described as the spirit of "procedural

5.(...continued)

Fellows v. Shultz, 81 NM 496, 502, 469 P2d 141, 147 (1970).

While the [constitutional] amendment was prospective in form as requiring the enactment of a compensation law, it shows on its face that it was an approval of chapter 83 [previously enacted workers' compensation scheme], and we, therefore, construe the two together.

Red Rover Copper Co. v. Industrial Commission, 58 Ariz 203, 211, 118 P2d 1102, 1106 (1941), 137 ALR 740.

Stating rule in the negative was ***Matthews v. Quinton***, 362 P2d 932, 939 (Alaska 1961):

We recognize the legal principle that a constitutional provision, which from the language used shows expressly or by necessary implication that it was intended to operate retrospectively to validate antecedent unconstitutional legislation, renders valid all such legislation to which the constitutional provision relates, without re-enactment by the legislature, unless such attempted validation would impair the obligations of a contract or divest vested rights. The cases we have examined, bearing on the subject, require that the validating constitutional provision must make some reference, however slight or inferential, to the statute intended to be validated. Tested by the principles just stated, section 1 of article XV of the Alaska Constitution, in our opinion, does not show by the language used, either directly or by necessary implication, that it was intended to operate retrospectively so as to validate Chapter 39. It follows, therefore, that Chapter 39 remains as void today as it was on the day of its enactment.

Ursuline Academy v. Board of Tax Appeals, 141 Ohio St 563, 49 NE2d 674, 677 (1943) (statutory tax exemption), concluded:

Unless otherwise provided, a constitutional amendment does not validate or enlarge any previously enacted legislation for which there was no constitutional authority at the time of enactment.

protections" of Article IV, § 1(2). These procedures are designed to assure that voters have basic information about how their votes will change existing law. A vote in favor of a constitutional amendment cannot itself evidence a vote in favor of an unmentioned dormant statutory provision. This would require the legal fiction that voters in an indeterminate near or distant future are aware of every dormant or void statute which remains codified.⁶

2. SECTION 9(f) DOES NOT ANTICIPATE A SPECIFIC FUTURE EVENT SUCH AS AN ELECTION.

As discussed above, we agree with the Hazell Plaintiffs that Oregon follows the general rule that a statute may be contingent upon a specific proposed, pending or anticipated constitutional amendment. We argue, however, that a statute cannot express a vague intent to become enforceable "if" the Constitution is amended at some unknowable time in the future. Thus Section 9(f) is itself invalid under the Oregon Constitution. As such, it must be severed from Measure 47, pursuant to Section (11).

In ordinary usage, one anticipates a particular event. "Anticipate," is rooted in the Latin "to take before" and implies taking some preparatory action to something that is expected to occur. MERRIAM-WEBSTER offers the following definitions of "anticipate:"

to give advance thought, discussion, or treatment to

6. There is apparently no limitation upon a later amendment to the Oregon Constitution which may revive whatever portions of Measure 47 are held to be presently in conflict with the Oregon Constitution. Instead, we argue that 9(f) is itself not the mechanism for generic revival.

to foresee and deal with in advance : FORESTALL

to act before (another) often so as to check or counter

to look forward to as certain: EXPECT

A review of the Oregon cases shows them to be is consistent with the majority rule that lawful contingent legislation must expressly or implicitly anticipate a particular event, usually an election. In *Hecker, supra*, the Oregon Supreme Court considered the re-establishment of the death penalty. Oregon had abolished capital punishment by an initiated amendment to the Oregon Constitution in 1914. In the spring of 1920, the Legislature submitted to the voters a constitutional amendment re-establishing the death penalty and also enacted a law providing for the death penalty and the method of placing it into effect. This act became a law on April 17, 1920, but its operative effect was expressly suspended by its terms until the adoption of the constitutional amendment referred to the voters. The amendment was approved by the voters in May 1920 and became part of the Oregon Constitution on June 18, 1920.

The Court upheld the constitutionality of the act, because (1) it was enacted for the sole purpose of prescribing a procedure which should be and could be available only upon the amendment of the Constitution, and (2) its purpose was to make the statutory law operative contemporaneously with, but not before, the amendment of the Constitution.

Additionally, in the Oregon cases, the contingent statutes and proposed Constitutional amendments have been close temporally, increasing the bases upon which the amendment can be said to "expressly or implicitly" relate to the earlier,

contingent statute. Each contingent statute anticipates a particular election (but not the *outcome* of such an election).

In this case, Section (9)(f) identifies a consequence (lawfulness and enforceability) which will trigger enforcement of the provisions of Measure 47 but does not identify a particular event or time period. A future amendment or court ruling might be the triggering event, but we cannot tell without a court ruling on the legal effect of this potential amendment. Defining an event by examining the effect of the event retrospectively is tautological. The triggering agent is not "anticipated" but merely conceptually available or identified after the fact, irrespective of voter knowledge at the time. Such ambiguous hovering statutory effect is not sufficiently specific and anticipated to be constitutionally valid. Thus Section 9(f) is itself unenforceable and severable.

In fact, much like the *Hecker* court, courts in other jurisdictions which have upheld particular contingent statutes have done so in circumstances where the contingent application was based on specific and anticipated constitutional amendments or events. *Henson v. Georgia Indus. Realty Co.*, *supra*. This is a long-established rule. In *Pratt v. Allen*, 13 Conn 119 (1839), the Connecticut Supreme Court held that, after the legislature had duly proposed an amendment to the Constitution (providing that the county sheriff should be an elected, not appointed, office), it properly enacted a statute prescribing the time and manner of holding the election to go into effect if the amendment were adopted. The Court reasoned that the argument the legislature was without power pass a contingent statute proceeded

upon the assumption that the Connecticut Legislature had only those powers granted by the Connecticut Constitution (just as the U.S. Congress has only those powers granted by the U.S. Constitution). To the contrary, the court concluded that the state constitution was a limitation of powers already existing.

It is true that until the people had power to elect a sheriff, any act passed by the legislature, directing how they should regulate their votes in such election, would have been frivolous and invalid, not because the legislature had not the power to pass acts regulating elections, but because, as it respects this office, there could be no election by the people. But because the Constitution thus indirectly restrained the operation of such an act, would it follow that when this constitutional difficulty was removed, such an act, made for the very purpose of meeting this new provision of the Constitution, would also be invalid? The act is not intended to, nor does it, oppose any existing article in the Constitution; but it is intended to meet and accord with its proposed substitute.

In the widely cited cases, *Re Opinions of Justices*, 227 Ala 291, 149 So 776 (1933) (income tax enabling act and amendment) and *Re Opinions of Justices*, 227 Ala 296, 149 So 781 (1933) (warrant enabling act and amendment regarding the state debt), the Alabama Supreme Court held that an enabling act may properly be passed in anticipation of the adoption of a constitutional amendment and to become operative when the amendment is adopted. The court noted that the enabling act before it, by its terms, became operative upon the adoption of the amendment. Thus, the act was to be controlled by the restrictions of the Constitution as thus amended, not as theretofore existing. *Accord, Opinion of the Justices*, 287 Ala 326, 251 So2d 744 (1971).

In *Neisel v. Moran*, 80 Fla 98, 85 So 346 (1919), the Florida Supreme Court upheld the constitutionality of a statute to implement a constitutional amendment prohibiting the manufacture and sale of intoxicating liquor.

[This] is a case where a constitutional amendment had been duly adopted by the electors of the state to take effect inevitably at a future fixed date, and between the adoption of the amendment to the Constitution by the electors and the date it became effective to entirely supersede the former Article 19 of the Constitution, the legislature without violating any provision of the Constitution enacted a suitable law to enforce the provisions of the amendment to the Constitution, the laws to take effect concurrently with the amendment to the Constitution.

The court noted that the statute by its express terms could not have been effective at any moment of time when original Article 19 was in force, so there could be no conflict between them. The court concluded that the validity of the statute was to be determined by the constitutional provisions in force at the time the statute took effect or became operative, and not at the time of its passage.

The following cases are in accord, as the courts upheld statutes which were contingent upon specific and anticipated changes. *Alabam's Freight Co. v. Hunt*, 29 Ariz 419, 422-23, 242 P 658 (1926) (workers' compensation statute expressly contingent upon adoption of proposed constitutional amendment and relying upon reasoning applied in *Hecker*); *State v. Kirkley*, 29 Md 85 (1868) (principle of express or implied ratification applied to municipal ordinance); *State ex rel. Woodahl v. Straub*, 164 Mont 141, 520 P2d 766, *cert denied*, 419 US 845, 95 SCt 79, 42 LEd2d 73 (1974) (contingent statute passed in express anticipation of approved constitutional amendment which had not yet taken effect); *Application of Okla. Indus. Fin. Auth.*, 360 P2d 720 (Okla 1961) (specific enabling legislation contingent upon constitutional

amendment referred for vote of electors at same legislative session); *Fry v. Rosen*, 207 Ind 409, 189 NE 375 (1934) (state laws adopted in anticipation of liberalization of federal prohibition on sale of alcoholic beverages).

The situation recognized in the foregoing authority, including *Hecker*, is not the case herein presented by Section (9)(f) and Measure 47. Here, there is no constitutional amendment "anticipated" in a realistic sense, only a hope that someday a constitutional amendment may be offered to voters and may be enacted. If the statute "anticipated" any amendment, it was the companion Measure 46 defeated in the November 2006 election. Having dormant statutes in a sort of limbo, potentially enforceable upon the future adoption of some constitutional amendment (which references them or not), would result in unpredictable and unintended consequences, as the electorate could pass a constitutional amendment and "enact a law to which no reference was made, and which the people in adopting the amendment could not have had in mind." *Banaz v. Smith, supra*.

3. SECTION 9(f) DOES NOT SUFFICIENTLY IDENTIFY A TRIGGERING EVENT.

Section 9(f) provides, in the alternative to Constitutional amendment, that it shall take effect "at the time that the Oregon Constitution is found to allow * * * such limitations." This is not necessarily a "contingent" future event, as such a finding might merely express the state of the law that exists. In this view the law is not dormant or null, but awaiting legal determination about Constitutionality (a frequent occurrence in the implementation of statutes). This would render Section (9)(f) mere surplusage.

The weakness of this interpretation is the ambiguity of the instruction. If the language is intended to mean something other than the usual court review of challenged law, it is not specific. What authority makes the "finding" -- an executive officer enforcing election laws, a lower court, the Oregon Supreme Court?

B. SECTION (9)(F) MUST BE SEVERED FROM THE REST OF MEASURE 47.

As Section (9)(f) is an invalid provision, it must be severed from the rest of Measure 47. If Section (9)(f) is invalid, then Section (11), the severability clause, severs Section (9)(f) from the remainder of Measure 47. That leaves Defendants with no basis for refusing to implement and enforce the other provisions of Measure 47.

Advance Resorts of America, Inc. v. City of Wheeler 141 OrApp 166, 917 P2d 61, *review denied* 324 Or 322, 927 P2d 598 (Or 1996), for example, ruled that an emergency clause was severable and that its severance would not affect the validity of the remainder of the statute.

As noted in the Hazell Plaintiffs' Memorandum in Support of Summary Judgment, even if there were no operative severability clause in Measure 47, preservation of all

severable valid provisions of Measure 47 would be required by ORS 174.040⁷ and common law.⁸

C. CONCLUSION.

Allowing statutes to exist in limbo, potentially enforceable when some constitutional amendment authorizes some other presently prohibited conduct, would result in unpredictable and unintended consequences. The electorate could pass a constitutional amendment and "enact a law to which no reference was made, and which the people in adopting the amendment could not have had in mind." *Banaz v.*

7. ORS 174.040. Severability of parts

It shall be considered that it is the legislative intent, in the enactment of any statute, that if any part of the statute is held unconstitutional, the remaining parts shall remain in force unless:

(1) The statute provides otherwise;

(2) The remaining parts are so essentially and inseparably connected with and dependent upon the unconstitutional part that it is apparent that the remaining parts would not have been enacted without the unconstitutional part; or

(3) The remaining parts, standing alone, are incomplete and incapable of being executed in accordance with the legislative intent.

8. However, the statute [ORS 174.040] was enacted as a codification of the common-law presumption that courts apply to any enactments that fail to contain a severability clause. *State v. Jackson*, 224 Or 337, 343, 356 P2d 495 (1960); see also *D.S. Parklane Development, Inc. v. Metro*, 165 OrApp 1, 16, 994 P2d 1205 (2000) (same severability principles that apply to statutes also apply to municipal ordinances).

Advocates for Effective Regulation v. City of Eugene, 176 Or App 370, 376, 32 P3d 228, 231 (2001).

Smith, supra. Thus Section (9)(f) is either unconstitutional or is mere surplusage. In either event, it cannot suspend the immediate enforcement of the portions of Measure 47 which have not been held to be unconstitutional, to the fullest extent authorized by the Oregon Constitution.

IV. PLAINTIFFS ARE ENTITLED TO SUMMARY JUDGMENT IN THEIR FAVOR ON INTERVENORS' CROSS-CLAIM.

A. OREGON LAW SPECIFICALLY ALLOWS STATUTES TO BE CONTINGENT UPON VOTER APPROVAL.

Intervenors cite Oregon Constitution, Article 1, § 21, which provides:

No ex post facto law, or law impairing the obligations of contracts, shall ever be passed., nor shall any law be passed, the taking effect of which shall be made to depend upon any authority, except as provided in this Constitution.

As discussed earlier in this memorandum, the Oregon Supreme Court has construed this language to allow legislation to be contingent upon anticipated events, and requiring that the legislative body "fully" exercise all the discretion necessary to "complete" the terms of the legislation.

The question of interpretation arose in **Libby v. Olcott**, 66 Or 124, 132, 134 P 13 (1913). The 1913 Legislature had passed a number of laws and authorized a special election for November 1913, should a referendum be taken. Plaintiff Libby objected, as do intervenors here, that the lawmakers had violated Article 1, § 21, by making effectiveness depend upon future election results. The Oregon Supreme Court held, "Neither this law, nor its taking effect, is made to depend in this instance upon anything except constitutional authority," and hence it did not violate Article 1, §

21. Voter approval is provided for by the Oregon Constitution, and thus an election cannot run afoul of a prohibition against relying upon authority *dehors* the Constitution. Applying that reasoning, allowing Measure 47 to become effective after the voters remove a constitutional impediment depends upon valid constitutional powers reserved to the voters in Article IV of the Oregon Constitution. Intervenors thus cannot prevail.

Libby remains robust law. The meaning of the prohibition upon delegating legislative power arose again in *Marr v. Fisher*, 182 Or 383, 187 P2d 966 (1947). The Legislature passed certain statutes relating to income tax exemptions (Ch 539) contingent upon voter approval or rejection of a referred Sales Tax Act. Plaintiffs objected that making the income tax provision contingent upon the outcome of an election violated Article 1, § 21. The Oregon Supreme Court explained:

While the legislature cannot delegate its power to make a law, it is well settled that it may make a law to become operative on the happening of a certain contingency or future event. 11 AMJUR 926, § 216; 50 AMJUR 516, § 497. The rule is thus clearly stated in 16 CJS, *Constitutional Law*, § 141: "It is a general rule that where an act is clothed with all the forms of law and is complete in and of itself, it is fairly within the scope of the legislative power to prescribe that it shall become operative only on the happening of some specified contingency, contingencies, or succession of contingencies. Such a statute lies dormant until called into active force by the existence of the conditions on which it is intended to operate."

Marr v. Fisher, *supra*, 182 Or at 388-89, 187 P2d at 968-99. The Court explained that an act is "complete" when the legislature has "exercised its discretion and judgment as to the expediency or in expediency of the [statute]" and having done so "it had the power to determine the conditions on which such Act should go into operation." *Id.* In the present case, Measure 47 is a complete expression of the voters will on the topics it covers. *Marr* continued:

As said in ***State ex rel. v. Bixler***, 136 Ohio St 263, 25 NE2d 341, 344: "There is a distinction between a legislative declaration that an enactment shall not become a law until approved by some authority other than the General Assembly itself, and a statutory provision which has become law but depends for its execution upon a contingency or an eventuality. The former is prohibited; the latter is not." In this state, laws may be enacted by two methods, viz.: (1) By the legislature; (2) By the people through the exercise of the Initiative. If the Acts in the instant case were incomplete when they came from the legislature, we would agree with appellants that they could not be made complete as a result of the referendum vote on the Sales Tax Act. The record, however, does not present that question.

We conclude that the legislature may constitutionally enact a law and make its operation depend upon the contingency of the Sales Tax being, or not being, in effect on and after January 1, 1948.

Marr v. Fisher, *supra*, 182 Or at 392, 187 P2d 970.

The present situation is controlled by the ***Marr v. Fisher*** reasoning and holding.

B. SECTION (9)(F) MUST BE SEVERED FROM THE REST OF MEASURE 47.

Even if Section (9)(f) is invalid for the reasons asserted in the Intervenor's Cross-Claim, the defect in a single section cannot invalidate the remainder of the text of Measure 47. As discussed above, if Section (9)(f) is invalid, then Section (11) of Measure 47, the severability clause, must be construed to sever Section (9)(f) from the remainder of Measure 47. Intervenor's thus cannot prevail on the cross-claim to invalidate *all* of Measure 47.

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V. CONCLUSION.

Based on the materials on file in the record of this case, and the discussion and authority herein, this Court should grant summary judgment in favor of the Horton Plaintiffs on all claims for relief and should issue an order granting them summary judgment on their claims for relief and denying Intervenors' Cross-Claim.

Dated: February 16, 2007

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I served a true copy of the foregoing **MOTION FOR SUMMARY JUDGMENT BY PLAINTIFFS HORTON AND LEWIS ON THEIR CLAIMS AND MOTION FOR SUMMARY JUDGMENT ON INTERVENORS' CROSS-CLAIM AND COMBINED MEMORANDUM IN SUPPORT** by (1) e-mail and (2) first class mail to all parties listed below, deposited in the U.S. Postal Service at Portland, Oregon, with first class postage prepaid.

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