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.

and

CENTER TO PROTECT FREE SPEECH, INC., an Oregon nonprofit corporation, and FRED VANNATTA,

Intervenor-Defendants and Cross-Claimants

Case No. 06C-22473

HORTON PLAINTIFFS MEMORANDUM OPPOSING SUMMARY JUDGMENT FOR DEFENDANTS AND INTERVENORS

AND

HORTON PLAINTIFFS REPLY MEMORANDUM SUPPORTING SUMMARY JUDGMENT FOR PLAINTIFFS

Judge Mary M. James
Hearing: June 18, 2007
9:30 a.m.
Recording Requested

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For Plaintiffs Horton and Lewis

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Plaintiffs Horton and Lewis [hereinafter "Horton" or "Horton Plaintiffs"] moved for an order granting summary judgment on the merits of their Third and Fourth Claims for Relief. In the memorandum below, they respond to the Memorandum in Support of Defendants' Motion for Summary Judgment and in Opposition to Plaintiffs' and Intervenors' Motions for Summary Judgment (March 9, 2007) [hereinafter "Defendants' Memorandum"]. They also adopt and incorporate fully by reference the memorandum filed today by the Hazell except their argument that Section (9)(f) of Measure 47 is valid.

I. RESPONSE TO INTERVENOR CFCS.

A. "EFFECTIVE DATE" AND "OPERATIVE DATE" ARE INTERCHANGEABLE.

Plaintiffs adopt the reasoning and citation of authority at Defendants' Memorandum (p. 26) and offer additional authority.

There is no meaningful distinction between an "effective date" and the "operational date" of a statute, neither in legal decisions nor commonly understood usage (which is relevant to this voter-initiated measure). The words are interchangeable in this context. Regardless of which word is used, the law in Oregon is that the effect/operation of a statute can be suspended until a specific date or validly expressed contingency.

The line of cases upon which CFCS relies commences in the early 20th century. ***Libby v. Olcott***, 66 Or 124, 134 P 13 (1913); ***City of Portland v. Coffey***, 67 Or 507, 135 P 358 (1913)*;* ***State v. Hecker***, 109 Or 520, 221 P 808 (1923). The phrases are

interchangeable in meaning now, and have been widely understood to be interchangeable for centuries.

WEBSTER'S REVISED UNABRIDGED DICTIONARY (1913), defines:

> Effective a. Having the power to produce an effect or effects; producing a decided or decisive effect; efficient; serviceable; operative; as, an effective force, remedy, speech; the effective men in a regiment.
>
> Effect, n.
>
> 1. Execution; performance; realization; operation; as, the law goes into effect in May.

"Operation" is defined:

> 3. That which is operated or accomplished; an effect brought about in accordance with a definite plan; as, military or naval operations.

BLACK'S LAW DICTIONARY (1951 ed) offers the following definition:

> Effect as a noun, illustrated by "the operation of a law, of an agreement, or an act. ***Maize v. State***, 4 Ind 342.
>
> The phrases "take effect," "be in force," "go into operation," *etc*., are used interchangeably, ***Maize v. State***, 4 Ind 342.[1]

The citation to Indiana law for an illustrative usage is of particular importance, as our Supreme Court, from the earliest days, has looked to constitutional decisions on analogous language by state Supreme Courts prior to or contemporaneous with the adoption of our Constitution. ***City of Portland v. Stock***, 2 Or 69, 73, 1863 WL 422,

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1. ***Maize*** was decided in 1853, thus the citation in BLACK's was likely in place for some time.

*2 (1863).[2] The ***Maize*** opinion, construing a section of the Indiana Constitution setting out the "operation of laws," (an early analog to Oregon's Article 1, S 21) states:

> Let us inquire whether the taking effect of the act of March, 1853, in whole or part, is made to depend upon any authority unknown to the constitution.
>
> The words "take effect," "be in force," "go into operation," &c., have been used interchangeably ever since the organization of the state. The "operation of the laws," as used in the 20th sec., art. 1, seems to be their taking effect and continuing in force.

Maize v. State, 4 Ind 342, 1853 WL 3340 *5 (1853). See ***Neisel v. Moran***, 80 Fla 98, 85 So 346 (1919), using "take effect" in the sense of suspending effect/operation and discussion at pp. 14-15, Horton Memorandum in Support.

B. *HECKER* AND *FOUTS* SUPPORT THE HORTON PLAINTIFFS.

Intervenors (pp. 7-10) extensively discuss ***State v. Hecker***, *supra*, and ***Fouts v. Hood River***, 46 Or 492 (1905), for the proposition that the Oregon courts carefully distinguish between the terms "effective" and "operational" and strike down any statute that uses the term "effective" to mean "operational."

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2. This clause was taken bodily from the Indiana State Constitution, and from a like provision in the Louisiana State Constitution. The States of Maryland, Michigan, California and Ohio, without enumerating others, have substantially the same provision in their several constitutions. The Constitution of Louisiana, of 1845, seems to have been the first containing such clause; and to determine our holding now, we may review briefly the course of procedure in those States, and recognizing as authority their constructions of that provision, determine what one shall prevail in Oregon.

City of Portland v. Stock*, supra.*

The key problem with Intervenors' argument is that neither of the statutes examined in ***Hecker*** and ***Fouts*** contained the magic word "operational." Instead, the law at issue in ***Hecker*** said "shall take effect," not "shall become operational." It was upheld. The law at issue in ***Fouts*** also said "shall take effect," not "shall become operational." It was upheld against a challenge under Article I, Section 21, the exact provision now asserted by Intervenors.

C. *COFFEY* SUPPORTS THE HORTON PLAINTIFFS.

Intervenors cite Oregon Constitution, Article I, § 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.

The Oregon Supreme Court has construed this language to allow legislation to be contingent upon anticipated events, if the legislative body "fully" exercises all the discretion necessary to "complete" the terms of the legislation. ***City of Portland v. Coffey***, 67 Or 507, 135 P 358 (1913), is an early example of this line of reasoning and in fact supports Plaintiffs' position that CFCS does not state a claim.

In ***Coffey***, the language at issue was phrased in the alternative. A term became effective only if some intervening non-legislative event (court decision) occurred. A voter registration process was set out, followed by the alternative:

> provided, that in case the Supreme Court should hold the above provisions for compulsory registration invalid then, and in that case only, the elector may register with the judges of the election upon election day [in another Intervenor cites the rationale [dicta] from Coffey

The formulation can be shown: "language B is adopted, if language A fails." CFCS quotes the following (devoid of context):

> [When] the validity of the enactment is to depend upon a decision of the Supreme Court. This is in effect combining independent departments of the state government which the Organic Act declares shall be kept separate. Const Or, Art 3, § 1.

67 Or 507. This syllogism has nothing to do with Section (9)(f). Section (9)(f) does not seek to substitute a Provision B, if Provision A is found unconstitutional. Instead, Section (9)(f) conditions the effectiveness of Measure 47 upon a judicial finding of constitutionality of Measure 47 itself.

However, the *actual holding* in ***Coffee*** relies on the "completeness" doctrine. A legislative act is internally "complete," even though it may need voter approval to become *effective/operational*. The statute in ***Coffey*** was not merely dependent upon voter action. The very terms were not definite and were expressed in the alternative. In sum, the statute was incomplete, because the decision about the choice of language was not finally determined by legislative action by either the representatives or the people.

> If a statute is complete in itself when it comes from a legislative assembly, it is a general law and effective throughout the entire state, though its operation in particular localities may be made to depend upon a majority vote of the qualified electors thereof [citations omitted].
>
> The principle thus announced is well recognized in this state, where it has been held that a general statute, complete in itself, requiring nothing else to give it validity, could be made applicable to a particular section by a vote of the qualified electors. ***Fouts v. Hood River****, supra*. The application of the act under consideration is not made to be appropriated to any particular district upon any vote of the people, who are regarded as the source from which legislative authority emanates; but the validity of the

> enactment is to depend upon a decision of the Supreme Court. This is in effect combining independent departments of the state government which the Organic Act declares shall be kept separate. Const Or art 3, § 1.
>
> Chapter 323 of the Laws of Oregon 1913 was not complete when it left the legislative assembly.

67 Or at 513.

While the modern understanding of constitutional jurisprudence would not likely include *dicta* suggesting that judicial interpretation might be an exercise of "legislative" authority, the *holding* stands for the rule that a legislative act, the language of which is expressed as either/or depending on action by a non-legislative actor, is "incomplete," thus failing Article IV, § 21. Obviously, the internal language intended by the legislature does not change when expressed as: "A becomes effective *when* the voters exercise authority at a particular election." This formulation is both "complete" and dependent upon later due exercise of voter authority. As pointed out in the Horton Memorandum on Summary Judgment, pp. 20-21, "contingent" in the later meaning--waiting for the voters to exercise legislative authority--has been upheld numerous times. The question of interpretation arose in ***Libby v. Olcott***, 66 Or 124, 132, 134 P 13 (1913). 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 I, § 21. 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 I, § 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. In the present case, Measure 47 is a complete expression of the voters will on the topics it covers. The present situation is controlled by the ***Marr v. Fisher*** reasoning and holding.

The Horton Plaintiffs differ with the Secretary of State however, in that they also contend that Article I jurisprudence requires that the formulation of contingency in Section (9)(f) of Measure 47, not because of some quibble over the "effective" date of the statute, but because the "when" is too vague. A constitutionally valid form of contingent operation requires a clearly anticipated "when," and Section (9)(f) fails as an "if" formulation ("if an election is ever held"). See discussion of "anticipated" at pp. xxx of the Horton Memorandum in Support.

D. SECTION 9 IS SEVERABLE.

Nor does ***Coffey*** stand for a "special" rule of non-severability, if a section of a statute fails for violation of Article I, § 21. The Court instead applied the general rules of statutory construction. It looked to the internal logic of the act and inferred that the

Legislature would not have intended to repeal the then-existing statutes, if had known the new alteratively-expressed provisions would fail. That situation is not remotely similar to the present case. Unlike ***Coffey***, in this case the statute, Measure 47, does not repeal existing law. Therefore, the question of whether some pre-existing law should remain in force is nonexistent.

The only issue of statutory construction is what did voters intend should some section of the enactment be void. The answer to that question need not be "inferred," it is clearly stated. There is a severability clause. It is clearly the intent of the drafters and the understanding of voters that any unconstitutional section or subsection shall be severed, with all remaining provisions left in place as enacted.

Plaintiffs previously cited ORS 174.040, which provides:

> 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."

In ***Gilbertson et al. v. Culinary Alliance et al.***, 204 Or 326, 282 P2d 632 (1955), the Oregon Supreme Court noted that the rules set forth in this statute are substantially the same rules applied by the courts in the absence of a statute citing, ***Fullerton v. Lamm***, 177 Or 655, 696, 163 P2d 941, 165 P2d 63 (1946):

> The general rule is "that a statute may be constitutional in one part and unconstitutional in another part and that if the invalid part is severable from the rest, the portion which is constitutional may stand while that which is unconstitutional is stricken out and rejected." 11 AM JUR, *Constitutional Law*, 834, § 152. ***State v. 1920 Studebaker Touring Car***, 120 Or 254, 271, 251 P 701, 50 ALR 81; ***Standard Lumber Co. v. Pierce***, 112 Or 314, 228 P 812; ***State v. Terwilliger***, 141 Or 372, 384, 385, 11 P2d 552, 16 P2d 651. "The inquiry in all such cases is primarily one of legislative intention," ***Standard Lumber Co. v. Pierce***, *supra*; 11 AM JUR, *id*., 842, § 155.

The Intervenors argument that all of Measure 47 must fall, if one section is void, is simply wrong on the facts and inconsistent with rules of statutory construction. Intervenors conveniently disregard ***Gilliam County v. Department of Environmental Qualify***, 316 Or 99, 849 P2d 500 (1993), reversed on other grounds, 511 US 953, 114 SCt 1345, 128 LEd2d 13 (1994) (Commerce Clause), although one of their counsel (Mr. DiLorenzo) argued the cause for petitioner on review Columbia Resource Co., a waste processor challenging the validity of a statute controlling environmental harm from waste disposal operations.

In ***Gilliam County***, petitioners argued that a new statute violated the same constitional provision, Article I, section 21, that Intervenors advance here. The statute in ***Gilliam County*** provided that the EQC would establish surcharges on waste disposal, "subject to approval by the Joint Committee on Ways and Means during the legislative sessions or the Emergency Board during the interim between sessions." The defendant, DEQ, conceded that this approval process was unconstitutional but argued that it was severable from the remainder of the statute. Both the Court of Appeals and the Oregon Supreme Court agreed. The provisions regarding approval by subdivisions of the Legislature were stricken, but the rest of the statute remained

effective. The unconstitutional provision was severed, even though the statute at issue did not even contain a severability clause and even though the language stricken was merely a portion of a single section. This result is consistent with the general rule that if a statute is constitutional in one part and unconstitutional in another part, the portion which is constitutional will stand. ***Gilbertson et al. v. Culinary Alliance et al.***, *supra.*

Here, the language stricken would be the entirety of Section (9)(f).

> As did the Court of Appeals, we conclude that ORS 459.298 is unconstitutional in two respects. First, as respondent concedes, ORS 459.298 is constitutionally impermissible insofar as it requires approval of EQC's rules by the Emergency Board. Second, the statute is constitutionally impermissible insofar as it requires approval of EQC's rules by the Joint Committee on Ways and Means. As written, ORS 459.298 requires either the Emergency Board (in the interim between legislative sessions) or the Joint Committee on Ways and Means (during sessions of the Legislative Assembly) to approve the rules before they can become legally effective. That requirement gives the Emergency Board or the Joint Committee on Ways and Means the right to veto the rules. But, a veto is a legislative act, and a legislative act by less than a majority vote of each chamber is unconstitutional. . . .
>
> Nevertheless, the statute as a whole need not be invalidated if the portions that have been found constitutionally impermissible are severable from the remainder. The severability of unconstitutional portions of a statute is governed by ORS 174.040, which provides:
>
> > "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."
>
> Nothing in the text of ORS 459.298 provides that, if any part of that statute were held to be unconstitutional, the remaining parts should not remain in force. *See* ORS 174.040(1), *supra.*
>
> Neither are the portions of ORS 459.298 relating to the establishment of the surcharge by EQC and to the bases of that surcharge "so essentially and inseparably connected with and dependent upon" the approval portions of the statute that it is apparent, either from the text or from the legislative history of the statute, that the former parts would not have been enacted without the latter. *See* ORS 174.040(2), *supra.* ORS 459.298 is part of a comprehensive statutory scheme of regulating solid waste, which includes many sections authorizing public bodies to impose fees to recover their costs. The overriding purpose of ORS 459.298, as revealed by its text and context, is to permit the establishment and collection of fees.

Gilliam County, 316 Or at 107-09.

Similarly, Section (9)(f), if constitutionally invalid, would be severed from the remainder of Measure 47, particularly in light of its own very strict severability clause, Section (11). The remainder of the statute, Measure 47, would survive, without Section (9)(f) at all. Then the courts would need to examine the substantive provisions of Measure 47 to determine their constitutional validity. That is what this case is doing.

Finally, Intervenors (p. 14) cite ***General Electric Co. v. Wahle***, 207 Or 302, 333 (1956), ***LaForge v. Ellis***, 175 Or 545, 554 (1945), and ***Van Winkle v. Fred Meyer***, 151 Or 455, 470 (1935), for the proposition that statutes which transgress Article I, Section 21, are void in their entirety. First, ***Wahle***, ***Laforge***, and ***Van Winkle*** are all separation of power cases, where the Legislature tried to assign legislative functions

to non-legislative bodies. Also, they are clearly obsolete, as what they proscribe is routine current legislative practice: assigning functions to the Governor and administrative agencies.

Second, ***Van Winkle*** found unconstitutional the delegation of legislative power to a private body. The entire scheme was unconstitutional, because it depended upon the actions of the private body.[3] There are no private bodies involved in Section (9)(f). There is a difference between delegation to private bodies and delegation to governmental entities:

> The legislature may not delegate to private, nongovernmental entities the authority to determine the applicability of a statute. For example, it is improper to delegate the authority to determine the applicability of a legislative pricing mechanism to a private marketing entity. [FN57] The private delegation cases are pitched generally on the theme of accountability, but proceed specifically from the premise that governmental authority must be exercised by a governmental entity. [FN58]
>
> The private delegation cases should be contrasted with cases of intergovernmental delegation and intragovernmental delegation, where general delegation principles apply. In the case of intergovernmental delegation, the court has upheld legislative delegations to local government bodies in the face of separation of powers challenges, stating that the focus in such cases remains "on the presence or absence of adequate legislative standards and whether the legislative policy has been followed." [FN59]
>
> [FN57]. ***Van Winkle v. Fred Meyer, Inc.***, 151 Or. 455, 49 P.2d 1140 (1935). See also ***Hillman v. Northern Wasco County PUD***, 213 Or. 264, 323 P.2d 664 (1958) (unconstitutional delegation of rulemaking authority to standard-setting private

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3. Also, the Court found that the purpose of the statute was beyond the authority of the Legislature. That is why the offending provision about delegation of authority was not merely severed. Nor was there a practical way to sever the delegation provision, as the entire program was supposed to be devised by the private marketing association.

agency), overruled on other grounds by ***Maulding v. Clackamas County***, 278 Or. 359, 365, 563 P.2d 731, 734 (1977).

[FN58]. ***Hillman***, 213 Or. 264, 323 P.2d 664; ***Van Winkle***, 151 Or. at 463, 470, 49 P.2d at 1143, 1146 (pursuant to Article III, Section 1 and also Article I, Section 21, which provides: "[N]or shall any law be passed, the taking effect of which shall be made to depend upon any authority, except as provided in this constitution ....").

[FN59]. ***State v. Long***, 315 Or. 95, 101-02, 843 P.2d 420, 424 (1992) (reviewing prior cases). See also ***Foeller***, 198 Or. at 266-68, 256 P.2d at 781.

Pulvers, *Separation of Powers under the Oregon Constitution: A User's Guide*, 75 OREGON LAW REVIEW 443, 452-53 (1996).

Intervenors have not identified any legislative function that Section (9)(f) assigns to a non-legislative body. Judicial review is obviously a judicial function, and Section (9)(f) does not delegate legislative authority to any entity, except perhaps the later enactment of an amendment to the Oregon Constitution by the ordinary legislative processes for doing so (initiative or referral to voters).

II. RESPONSE TO DEFENDANTS.

A. DEFENDANTS' DISCUSSION MISSES THE POINT OF THE HORTON PLAINTIFFS' ARGUMENT.

Horton Plaintiffs point out, agreeing with Defendants, that Oregon statutes may in fact be contingently effective/operative, so long as they are "complete" when adopted and the contingency anticipates a constitutionally authorized event or exercise of authority--ratification or adoption by the voters at an election. The Horton Plaintiffs are not concerned with the distinction without a difference posed by "effective" and

"operative" in this case. They do not dispute that statutes may be enacted, but dormant, and be constitutional, provided that procedural steps are observed. Horton Plaintiffs do, nonetheless, contend that the contingency in Section (9)(f) is not specifically expressed to meet the rule set in case law.

The part of Section (9)(f) that refers to having the Oregon Constitution "amended to allow, such limitations" expresses only the desire for a future amendment adopted at a future election. It does not refer to an actual "anticipated" election. We invite this Court to review cases set out at pp. 11-16 of the Combined Memorandum in Support filed by the Horton Plaintiffs on February 16, 2007, which, we submit, stand for the proposition that under Oregon law, a valid contingency must be specifically anticipated, such as the results of a particular future election.

III. CONCLUSION.

For the reasons and authority cited above, and in our earlier Combined Memorandum, the court should grant the Motion for Summary Judgment against the Intervenors-Defendants and either (1) grant the Horton Plaintiffs' request to declare 9(f) void, or (2) in the alternative, grant the Hazell Plaintiffs' Motion for Summary

Judgment.

Dated: March 30, 2007

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I served a true copy of the foregoing:

HORTON PLAINTIFFS MEMORANDUM OPPOSING SUMMARY JUDGMENT FOR DEFENDANTS AND INTERVENORS AND HORTON PLAINTIFFS REPLY MEMORANDUM SUPPORTING SUMMARY JUDGMENT FOR PLAINTIFFS

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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Dated: March 30, 2007

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