



STATE OF OREGON
Legislative Counsel Committee

August 1, 2016

Representative John Davis
900 Court Street NE H483
Salem OR 97301

Re: Measure 97—Limitations on Legislative Appropriations

Dear Representative Davis:

You asked whether section 3 of Ballot Measure 97 (2016) (Initiative Petition 28) is binding to limit the ability of the Legislative Assembly to appropriate revenues that would be generated by the passage of Measure 97. The answer is no. Section 3 would not bind a future legislature in its spending decisions. If Measure 97 becomes law, the Legislative Assembly may appropriate revenues generated by the measure in any way it chooses.

Measure 97 is a statutory initiative measure amending ORS 317.090 relating to corporate taxation. Section 3 directs the Legislative Assembly to spend revenue generated from the tax increase proposed by Measure 97 for public early childhood and kindergarten through twelfth grade education, healthcare and services for senior citizens.

Short Answer

It is inherent in the notion of legislative power that the actions of one Legislative Assembly, or of the people acting through the initiative process, may not prevent a future Legislative Assembly from adopting subsequent laws. The power to legislate is reserved to both the Legislative Assembly and the people by the Oregon Constitution. Those legislative powers are coequal. Any limitations on legislative power must be contained in the Oregon Constitution. The Oregon Constitution does not prohibit the Legislative Assembly from modifying a statute adopted by initiative. Therefore, a mere statute such as section 3 may not limit the constitutional legislative power of the Legislative Assembly, and the Legislative Assembly is not bound by the spending requirements of section 3.

Discussion

Article IV, section 1 (1), of the Oregon Constitution, provides:

The legislative power of the state, except for the initiative and referendum powers reserved to the people, is vested in a Legislative Assembly, consisting of a Senate and a House of Representatives.

Article IV, section 1 (2)(a), of the Oregon Constitution, provides:

The people reserve to themselves the initiative power, which is to propose laws and amendments to the Constitution and enact or reject them at an election independently of the Legislative Assembly.

The legislative power is the power to enact laws. The constitutional legislative power is split between the Legislative Assembly and the people. Laws enacted by the Legislative Assembly or the people may be completely new or they may amend or repeal existing laws. Every session, the Legislative Assembly has the authority to amend or repeal laws enacted by every prior Legislative Assembly or by the people. In addition, the Legislative Assembly has the authority to enact a new law that contradicts provisions of an existing law and that applies “notwithstanding” the existing law.

So, if Measure 97 becomes law, and if a subsequent Legislative Assembly does not wish to follow the provisions of section 3, that Legislative Assembly may enact laws that amend or repeal section 3 or that apply “notwithstanding the provisions of section 3.” The Legislative Assembly may also simply ignore section 3 and appropriate an amount equal to the revenues that would be generated by the passage of Measure 97 in any way it chooses. The later-enacted laws appropriating the moneys would be more particular laws that are inconsistent with the general directions of section 3. Oregon courts apply a statutory rule of construction that a particularly worded statute controls over a conflicting, generally worded statute. ORS 174.020 (2); *Kambury v. DaimlerChrysler Corp.*, 334 Or. 367, 374 (2002); *In re Miller*, 358 Or. 741 (2016).

The Supreme Court has held that the legislative powers reserved to the people by Article IV, section 1, of the Oregon Constitution, are coequal and coordinate and that the Legislative Assembly may amend or repeal a law adopted by the people. In *State ex rel. Carson v. Kozer*, 126 Or. 641, 643-644 (1928), the Supreme Court said:

Prior to the amendment of June 2, 1902, of Article IV, Section 1, of the Constitution, the legislative authority of the state had been vested exclusively in the legislative assembly. By the amendment the power of the legislative assembly to enact laws or to declare what the law should be at a future time was not in any way impaired, but the power was no longer to be exclusive, for another clause was added which provided:

“[. . .] but the people reserve to themselves power to propose laws and amendments to the constitution and to enact or reject the same at the polls, independent of the legislative assembly, and also reserve power at their own option to approve or reject at the polls any act of the legislative assembly.”

By this reservation of the legislative power in the people themselves by means of the initiative the people may propose and enact any law and by means of the referendum may repeal any law passed by the legislative assembly, and at the same time the legislative assembly, when convened, may amend or repeal a law passed by the people. Under this dual system of legislation we have now two law-making bodies, the legislative assembly on the one hand and the people on the other, which in the exercise of the legislative powers are coequal and co-ordinate.

The language of Article IV, section 1, of the Oregon Constitution, has changed since this 1928 case was decided, but the concept remains the same. See also *Meyer v. Bradbury*, 341 Or. 288, 300 (2006); *Stranahan v. Fred Meyer, Inc.*, 331 Or. 38, 61-62 (2000).

In *Hazell v. Brown*, 352 Or. 455 (2012), the Supreme Court said:

We have recognized that the legislative power is a unitary authority that rests with two lawmaking bodies, the legislature and the people. *Meyer v. Bradbury*, 341 Ore. 299-300. The exercise of that power is always “coequal and co-ordinate,” regardless of which of the two entities wields it. *Id.* at 300. For that reason, we apply a similar method of analysis to statutes enacted by voter-initiated measures as we do to statutes enacted by the legislature, with the goal of discerning the intent of the voters who passed those initiatives into law. *State v. Guzek*, 322 Or 245, 265, 906 P2d 272 (1995).

Further, the Supreme Court has explained that the authority of the Legislative Assembly to enact laws is plenary, and is limited only by the Oregon and United States Constitutions. The Oregon Constitution is not a grant of legislative authority. Instead, the Oregon Constitution reserves the legislative power to the Legislative Assembly and the people and generally acts to limit legislative authority. In *Jory v. Martin*, 153 Or. 278, 284-285 (1936), the Supreme Court said:

We must also remember that our constitution, like all other state constitutions is not to be regarded as a grant of power but rather as a limitation upon the powers of the legislature and that the people, in adopting it, committed to the legislature the whole lawmaking power of the state, which they did not expressly or impliedly withhold. Plenary power in the legislature, for all purposes of civil government, is the rule, and a prohibition to exercise a particular power is an exception. It, therefore, is competent for the legislature to enact any law not forbidden by the constitution or delegated to the federal government or prohibited by the constitution of the United States.

In *Macpherson v. Dep’t of Admin. Servs.*, 340 Or. 117, 126-127 (2006), the court said:

In Oregon, the Legislative Assembly and the people, acting through the initiative or referendum processes, share in exercising legislative power. . . . Thus, limitations on legislative power must be grounded in specific provisions of either the state or federal constitutions. See, e.g., *State v. Hirsch/Friend*, 338 Ore. 622, 639, 114 P.3d 1104 (2005) (“any constitutional limitations on the state’s actions must be found within the language or history of the constitution itself” (internal quotation marks and citation omitted)).

In *School District No. 12 v. Wasco County*, 270 Or. 622, 627 (1974), the court said:

It is well established that the legislature has the plenary power to enact laws for all purposes of civil government; any prohibition

upon the legislature is the exception rather than the rule and must be expressly provided for in the state or the federal constitution.

These cases illustrate that any limitation on the ability of the Legislative Assembly to amend or repeal a law passed by initiative must be found in the Oregon Constitution. There is no specific provision in the Oregon Constitution that prevents the Legislative Assembly from amending or repealing a law passed by the people by initiative or from enacting a law that is contrary to a law passed by the people by initiative.¹ A recent example of the Legislative Assembly amending and repealing provisions of a statutory initiative law is the Legislative Assembly's amendments during the 2015 and 2016 regular sessions to the initiative law that legalized certain uses of marijuana and was adopted by the people in 2014 as Ballot Measure 91.²

In this instance, section 3 of Measure 97 purports to limit the ability of the Legislative Assembly to spend certain tax revenues for purposes other than those listed in the section. This would impermissibly attempt to limit by statute the plenary exercise of the legislative power vested in the Legislative Assembly by Article IV, section 1, of the Oregon Constitution. A statute such as section 3 may not limit the constitutional power of the Legislative Assembly to pass subsequent laws. Any such limitations must be in the Oregon Constitution. Therefore, any subsequent law enacted by the Legislative Assembly that spent the tax revenues in a way that is contrary to section 3 would be a valid enactment of the Legislative Assembly.

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Very truly yours,

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¹ Article IV, section 33, of the Oregon Constitution, requires a supermajority vote in each house of the Legislative Assembly to pass a bill that reduces a criminal sentence approved by the people using the initiative process.

² See House Bill 2041 (2015), imposing tax on retail sale of marijuana items and creating procedures for remittance of tax; House Bill 3400 (2015), providing for the regulation of cannabis in Oregon, including licensure and work permit qualifications and public health and safety standards; Senate Bill 460 (2015); Senate Bill 844 (2015), providing for the further regulation of cannabis in Oregon, Senate Bill 1511 (2016); Senate Bill 1524 (2016); Senate Bill 1598 (2016); Senate Bill 1601 (2016).