

REC'D MAY 08 2007

May 8, 2007

Via Hand Delivery

Mr. Bill Sage
Lane County Land Management Division
125 East 8th Ave.
Eugene, Oregon 97401

Re: Measure 37 Claim PA06-7309 (Harper1)

Dear Mr. Sage:

Please include this submission in the file for the above-referenced Measure 37 claim.

As Janet Harper's Measure 37 application relates, Mrs. Harper and her late husband in 1996 placed title to the properties that are the subject of her claim in the Harper Family Limited Partnership, of which Mrs. Harper is a general partner. In Mrs. Harper's initial application materials, we addressed why placing title to the properties in the partnership did not disturb Mrs. Harper's continuity of ownership for purposes of determining the date from which any County land use regulations must be waived pursuant to Measure 37 (the "waiver date"). We now submit this letter to supplement that argument in light of claims that the County has decided since we submitted Mrs. Harper's initial application materials.

Since we submitted Mrs. Harper's application, the County has decided a number of Measure 37 claims where an individual asserted an ownership interest in property the title to which he or she had placed in an entity such as a trust, partnership, corporation, or limited liability company. We have conducted an extensive review of the County's past decisions on such claims. In making those decisions, the County has repeatedly professed a concern for consistency in its decision making process. This letter explains why, in light of the County's decisions to date, the only consistent result is to find that Mrs. Harper, for purposes of determining the appropriate Measure 37 waiver date, has maintained a continuous ownership interest in the properties in the Harper Family Limited Partnership since she first acquired an interest in those properties.

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1. There Is No Principled Reason for Treating Mrs. Harper's Interest Any Differently from the Interest Retained by a Grantor/Trustee to a Revocable Family Trust.

The County has adopted a consistent approach to the issue of whether an individual's transfer of title to a revocable family trust breaks the individual's continuity of ownership for purposes of determining the proper waiver date under Measure 37. The County has answered this question in the negative where the grantor is also the trustee of the trust in question, finding with regard to a number of claims that, "The trust is the new owner, but [because] it is revocable and [the applicants] are the Trustees... the ownership interest of [the applicants] is continued." *See* PA06-7201 (Ritter); PA06-7212 (Brewer); PA 06-6722 (Baxter); PA06-6679 (Wymer).

This analysis appears to focus on: (1) the practical control that the individual retains over the land despite the transfer of title and the fact that the applicant also retains most if not all of the de facto prerogatives of ownership, such as the right to manage, possess, and dispose of the property (trustee status); and (2) the fact that the applicant in such circumstances holds what essentially amounts to a vested reversionary interest in title to the property that he or she can convert into a present possessory interest merely by exercising his discretion (revocability).

Regarding these points, County Commissioner Bill Dwyer remarked at a Board hearing on April 3, 2007 that a revocable trust compared to:

"The old analogy, you know, of my twenty dollar bill: I take it out of my one pocket and I put it into this other pocket—but it's still my twenty dollars and if I want to put it back in my other pocket, I can do it. So... it's kind of a no brainer."

See BCC Work Session, 4/3/2007, 9:00 a.m., at 2:06:01 – 2:06:19 (Discussing the Svingen claim, PA06-7109).

Much the same could be said of Mrs. Harper's continued interest in, and control of, the property that is the subject of her claim. As a general partner of the Harper Family Limited Partnership, Janet Harper has retained control over the property in the partnership equivalent to the control that a trustee retains over property placed in a trust. Indeed, as the governing partnership agreement provides, "The General Partners shall have full and exclusive authority and power to do any and all things necessary or incidental to the management of the business," including managing the properties placed in the partnership. *See* Limited Partnership Agreement, p. 5 (Exhibit B to the application of Janet Harper).

Mrs. Harper also retains essentially unfettered power to dissolve the partnership at any time – just like the trustees in the claims cited above could revoke the trusts in question at any time. Specifically, subsection 18.1(d) of the governing partnership agreement provides that “The withdrawal of a General Partner from the Partnership, whether in accordance with or in violation of this agreement,” will lead to the automatic dissolution of the entity. *See id.* at p. 16.

Finally, just like the situation of a grantor/trustee to a revocable trust, Mrs. Harper has maintained what amounts to a vested reversionary interest in title to the property. The governing partnership agreement provides that a general partner, in liquidating the assets of the partnership upon dissolution, “may determine not to sell all or any portion of the assets of the Partnership, including, without limitation, the interest of the Partnership in the Property, in which event such assets shall be distributed in kind.” *See id.* at p. 20. In other words, not only can Mrs. Harper essentially dissolve the partnership at will, she can re-take title to the properties in the partnership essentially at will. *Like the trustees in the claims above, she is limited only by her own discretion.*

Therefore, in sum, there is no principled reason to treat Mrs. Harper differently than the County has treated grantors/trustees to revocable family trusts.

2. There Are Principled Reasons for Treating Mrs. Harper’s Interests Differently from those of a Shareholder in a Corporate or Quasi-Corporate Entity.

We are aware of very few claims that have compelled the County to consider whether an individual applicant’s transfer of title to property to a family partnership breaks his continuity of ownership for Measure 37 purposes. In those few claims to date where the County has decided the issue, it has determined that, unlike a transfer to a revocable family trust, the transfer in those cases *did* break continuity of ownership. *See* PA05-6833 (Don Wilbur Ltd. Partnership), PA06-7325 (Donald L. Lamb). However, we believe that *these limited decisions do not establish a blanket rule that transfers of property to a family partnership necessarily break the individual transferor’s continuity of ownership.* Moreover, as explained below, the facts of the Wilbur and Lamb claims were sufficiently different from the facts presented here that a different outcome is justified – if not compelled – with regard to Mrs. Harper’s claim.

We recognize that the County appears to have created a de facto blanket rule that a transfer of title to a corporate or quasi-corporate entity breaks an individual’s continuity of ownership for purposes of determining the appropriate Measure 37 waiver date – even if the individual retains a significant interest in the corporate entity. *See* PA05-6234 (CBM Family LLC), PA06-6148 (Peterson Brothers LLC). However, while such treatment might be justified in the context of LLCs and corporations, a similar blanket rule is not appropriate in the case of family partnerships.

Precedent from the Oregon Supreme Court suggests that where the law of takings is concerned (and, by analogy, the law of Measure 37), there are principled reasons for treating corporate entities and partnerships differently. In *City of Salem v. H.S.B.*, 302 Or 648 (1987), the court held that there was no “unity of ownership” between two parcels of land for the purposes of determining the proper amount of just compensation even though a married couple owned a 50% interest in the partnership that held one parcel and a majority shareholder interest in the closely held corporation that held the other. *Id.* at 650-51. However, the court’s justification for that holding is illuminating. It stated:

[I]ncorporation is a status which should not be assumed and discarded at the whim of the incorporators.... [¶] Incorporation may hold many attractions—*limited tax and other forms of liability* not least among them—but it is, at bottom, the creation of a legal entity different from other entities. *A corporation is not ... a partnership or joint venture*; it is, rather, another and particular kind of creature....

Id. at 654. (Emphasis added.)

In other words, the court intimated that its decision might have been different had *two partnerships* been in issue, rather than one partnership and one corporation. Moreover, the court flatly stated that there are important reasons that corporations and partnerships should be treated differently where the law of takings is concerned – chief among them the fact that corporate status confers the critical benefit of limiting various forms of personal liability. The court reasonably concluded that it would be unfair to let individuals avail themselves of this advantage in one context and then discard the corporate status for other purposes: “To do so would merely provide a benefit to the shareholders by relieving them – for some limited purpose – of the consequences of the corporate form they have voluntarily assumed.” *Id.* at 655.

Such considerations do not come into play where general partners to a limited partnership are concerned. As a general partner to the Harper Family Limited Partnership, Janet Harper receives none of the same advantages that made the *HSB* court “extremely reluctant” (*id.*) to look behind the corporate form. A partnership does not receive the same tax benefits as a corporation, and *a general partner retains unlimited personal liability* for the acts of the partnership. See ORS 70.185, 67.105(1). Thus, in the context of takings claims and claims under Measure 37, there should be no more concern about a general partner “assuming and discarding” the entity form at a whim than there would be about a trustee disregarding the form of a revocable family trust.

In sum, precedent from the Oregon Supreme Court suggests that it would be inappropriate to adopt with regard to family partnerships a blanket rule – similar to the kind the County appears to have adopted with regard to LLCs and corporations – that a transfer of title to the entity necessarily breaks the individual transferor’s

continuity of ownership for purposes of determining his Measure 37 waiver date. Rather, at the very least, the County should determine the effect of a transfer of title to a family partnership on a case-by-case basis. As demonstrated below, employing that approach, there are excellent reasons to reach a different result with regard to Mrs. Harper's claim than the County reached in the Wilbur and Lamb claims. In cases such as this one, where the general partner applicant retains essentially unfettered discretion to manage the property and dissolve the partnership – and retains what amounts to a vested reversionary interest in title to the property – the only consistent result is to reach the same decision that the County has reached in cases involving revocable trusts. That result is consistent with the language of Measure 37, which defines an "owner" as anyone who has maintained "any interest" in the property in question. ORS 197.352(11)(C).

3. The County Can Reconcile Its Decisions on Partnerships and Revocable Trusts By Focusing on the Nature of the Future Interest Retained by the Individual Applicant and His or Her Power to Revoke the Entity's Title.

Approving Mrs. Harper's claim would not be inconsistent with the Wilbur and Lamb prior decisions, each of which is distinguishable in multiple respects.

The claim of the Don Wilbur Limited Partnership (PA05-6833) is highly distinct from Mrs. Harper's claim. First, *Don Wilbur was not a general partner of that partnership.* Rather, the general partner of the partnership was *a corporation* (Don Wilbur, Inc.), and that corporation controlled all of the rights to manage, possess, and dispose of the land held by the partnership. Although Mr. Wilbur controlled the corporation, he did not manage the land held by the partnership as an individual partner subject to personal liability but only as an officer of the partner corporation. In this capacity, *Mr. Wilbur benefited from the corporate form and the limited tax and personal liability it conferred just like the individuals in HSB.* As a general partner to the Harper family partnership, Mrs. Harper does not receive these benefits.

Of equal importance, Mr. Wilbur did not retain anything approaching a true vested reversionary interest in title to the properties, as Mrs. Harper has. Rather, the Don Wilbur Limited Partnership Agreement provides that the properties held by the partnership must be liquidated *in cash* upon dissolution of the partnership, unless the general and limited partners can reach a mutual agreement in writing to distribute the property in kind. *See Limited Partnership Agreement, p. 10* (attached to materials submitted with claim PA05-6833, Wilbur33). That is a significant limitation on Mr. Wilbur's ability to re-take title to the properties, as the partnership agreement reveals five partners to the partnership aside from Mr. Wilbur's corporation and Mr. Wilbur himself. Here, in contrast, Mrs. Harper has essentially unfettered discretion to re-take title to the properties in the partnership, just like the grantors/trustees in the revocable trust claims cited above.

Turning to the claim of Donald Lamb (PA06-7325), it is entirely inapposite to Mrs. Harper's claim because Mr. Lamb apparently did not even present the governing partnership agreement with his claim. There was therefore no way for the County to determine whether the applicant, as an individual, retained a vested reversionary interest in title to the property placed in the partnership, as Mrs. Harper has. Mr. Lamb's claim, in other words, was akin to an individual trying to show a "springing executory interest" in land (i.e., a right to a fee simple following another individual's life estate) *without presenting any evidence of any document (e.g., a deed or will) that created that interest*. Given that, the County essentially had no choice but to reject Mr. Lamb's assertion of a right to a waiver extending back to the date that he first acquired an interest in the subject properties.

In contrast, where proper documentation is presented, the County in its decisions on "springing executory interests" has found that the correct waiver date for individuals possessing such interests is not the date the individual actually takes present possession of a fee simple in the land, but, rather, the date that the individual first acquires a vested future interest in the property. For example, with regard to the Neely claim (PA06-5132), applicant Mayme Neely currently holds a life estate in the property in question. However, the County there found that co-applicants Daniel and Sandra Teal, who in 1990 acquired a vested interest in a fee simple following Mayme Neely's life estate, are entitled to a Measure 37 waiver *back to the 1990 date*. A similar result was reached by the County with regard to the Wagner claim. *See* PA06-7214 (it was uncertain whether the three individuals with springing executory interests had joined the application of the current holder of the life estate, but, if they did join, they would be considered current "owners" of the land for Measure 37 purposes).

Unlike Messrs. Wilbur and Lamb, Mrs. Harper has shown that she has a vested future interest in title at least equivalent to that retained by claimants Ritter, Brewer, Baxter, and Wymer, the trustees of revocable trusts. Indeed, if anything, Mrs. Harper's future interest is *stronger*, because the Harper family partnership is set to expire on a date certain without the need for any action from Mrs. Harper, whereas the trusts in question were apparently of indefinite duration. *See* Harper Limited Partnership Agreement, p. 2 (providing that term of partnership will expire on December 31, 2026). Mrs. Harper also holds an interest which, if anything, exceeds the "springing executory interest" of claimants Daniel and Sandra Teal. Unlike the Teals, Mrs. Harper has *current rights* to manage the properties in the Harper partnership (whereas the Teals have no current right to manage the property currently possessed by life estate holder Mayme Neely) – rights that she has possessed and not relinquished since she first acquired an interest in the properties. Also, again, her reversionary interest in title can become possessory either on a date certain (when the partnership naturally expires) or on *whatever date she wants it to* (if she chooses to leave the partnership and thereby dissolve it), whereas the Teals' interest cannot become possessory until the termination of Ms. Neely's life estate.

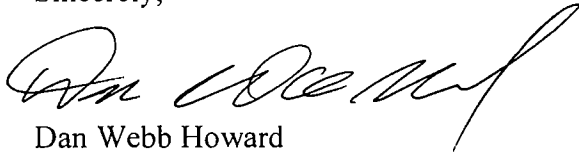
CONCLUSION

In light of the aforementioned decisions, the only consistent result is for the County to find that Mrs. Harper has continuously "owned" the properties in the Harper family partnership for Measure 37 purposes from the date she first acquired an interest in those properties to the present, and that her continuity of ownership was not disturbed when title to the properties was placed with the partnership entity.

The above decisions represent all of the relevant decisions of the County of which we are aware. If there are other relevant decisions that we have failed to take into account, we would appreciate the County informing us of those decisions so that we have the opportunity to discuss them at the hearing on Mrs. Harper's claim

Thank you very much for your consideration of this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Dan Webb Howard", with a stylized, flowing script.

Dan Webb Howard
howard@gleaveslaw.com

cc: Matt Laird
Kent Howe
Steve Vorhes