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November 30, 1999

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Salem, OR 97301

Re: Advice Concerning Implementation of Measure 56
DOJ File No. 660-009-GN0074-99

Dear Mr. Benner:

This advice is being provided in response to your letter dated January 25, 1999, in which you asked a number of questions regarding the meaning and implementation of Ballot Measure 56. The voters approved Measure 56 on November 3, 1998 following its referral to the voters by the Oregon Legislature (Or Laws 1997, House Bill 2515).

Measure 56 requires notice to be sent to property owners when the Oregon Legislature, the Land Conservation and Development Commission (LCDC), or cities or counties "rezone" property. "Rezonings" are actions that limit or prohibit uses of property that are currently allowed. Measure 56 creates a dual system of paying for the mailing of notices to property owners. If a proposed "rezoning" is initiated by a local government, then the local government must mail the notices and pay the associated costs. However, if the proposed "rezoning" is the result of changes to Oregon statutes, LCDC administrative rules, or of requirements stemming from periodic review, then the Department of Land Conservation and Development (DLCD) must reimburse local governments for the costs of required mailings.

For purposes of organization, we have grouped the questions in your letter and our answers to those questions under the following general headings: (A) what are "rezonings" under Measure 56 (DLCD questions 3, 4, 5, and 7); (B) to what extent do the notice requirements of Measure 56 apply retroactively (DLCD questions 1 & 2); (C) how does Measure 56 apply to multi-stage proceedings (DLCD questions 11 & 12); (D) what are the consequences of failure to provide notice (question 9); (E) how is notice given for statutes and rules with emergency clauses (DLCD question 10); (F) what are "usual and reasonable costs" of mailing notices that must be reimbursed (DLCD questions 8, 14 & 15); (G) how may assessment rolls be used for providing notice (question 13); and (H) how does Measure 56 apply to "rezonings" required by federal laws (DLCD question 6).

A. What Are "Rezonings" Under Measure 56?

> **DLCD Question 5:** The measure's crucial definition of "rezoning" refers to any ordinance change that would "limit" land uses previously allowed in the affected zone. Does the word "limit" extend to any additional requirement or heightening of standards for a given use—increasing a side-yard setback for houses from five feet to seven feet, for example? Would it apply to a raising of the general standards for conditional uses and variances? Or does it apply only to changes in regulations that would make it less likely for a specific "previously allowed use" to be developed?

Short Answer: Although the matter is not free from doubt, we believe Measure 56 is most likely to be interpreted as requiring notice *both* where an ordinance establishes new (or strengthens existing) standards of general applicability for establishing a use, *and* where an ordinance directly reduces the physical extent to which or a particular use may occupy or occur on a given property.

Analysis: Under Measure 56 property is "rezoned" by a city or county when it: (a) changes the "base zoning classification" of the property, or (b) adopts or amends an ordinance in a manner that *limits* or prohibits land uses previously allowed in the affected zone. Measure 56, subsections 1(9)(a)-(b) and 3(9)(a)-(b). None of the key terms in the definition of "rezone" is defined in the measure, so we first look to the plain and ordinary meaning of the words to determine the intent of the voters. *Ecumenical Ministries v. Oregon State Lottery Comm.*, 318 Or. 551, 559, 871 P2d 106 (1994).

To "limit" land uses clearly means something less than to "prohibit" then, and because both terms are used in the same subsection of Measure 56 each must be read to have an effect. ORS 174.010. In common parlance, to "limit" a use is to set a boundary on the use or to prescribe the quantity or extent of the use allowed. However, to "limit" a use may also mean to establish conditions to the establishment or expansion of the use. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (unabridged 1993 ed.). Thus, the plain and ordinary meaning of the term "limit" supports a reading of "rezoning" that includes both standards of general applicability for the establishment or expansion of a use, and conditions on the physical extent of uses.

In addition to examining the plain meaning of the term limit, in ascertaining the voters' intent, we also examine the context of the text in question. *Armatta v. Kitzhaber*, 327 Or 250, 256, n 4, 959 P2d 49 (1998). This context includes the provisions of Measure 56 specifying what must be included in the required notice of local "rezonings". The notice must state that the local government "* * * has determined that adoption of [the proposed] ordinance *will* affect the permissible uses of your property and *may* reduce the value of your property." Measure 56, subsections 1(5)-(6) and 3(5)-(6). An ordinance could "affect the permissible uses of property"

either by creating new standards for the establishment or expansion of uses that would make it less likely that such uses would occur, or by limiting the physical extent to which such uses are allowed. Thus, while the context strongly suggests that the Legislature and the voters were concerned with government actions that, on their face, *will* directly constrain uses of property, it does not distinguish between standards for establishing or expanding a use and limits on the extent of a use.

If the meaning of a particular term in an enactment by the voters is not clear after considering the text and context of the measure, the next step in determining the intent of the voters is to examine the history of the measure. *Ecumenical Ministries*, 318 Or. at 560. Although we question whether a court would find it necessary to review the history of Measure 56 concerning the meaning of the term "limit," we have done so to ensure that the plain and ordinary meaning of "limit" as we have described it above, is consistent with the history of the measure.

The history of a Ballot Measure includes "* * * sources of information that were available to the voters at the time the measure was adopted and that disclose the public's understanding of the measure. Such information includes the ballot title and arguments for and against the measure included in the voters' pamphlet, and contemporaneous news reports and editorial comment on the measure." *Ecumenical Ministries*, 318 Or. at 560, n 8. The ballot title and explanatory statement shed no light on the meaning of the term "limit." Arguments for the measure speak broadly of uses being restricted or eliminated. *See, e.g.*, Oregon Association of Realtors Argument in Favor, Voters' Pamphlet at 16; Oregonians in Action Argument in Favor, Voters' Pamphlet at 18.

Although it is an open question whether a court would consider it, we have also examined the *legislative* history of the referral of Measure 56 by the Oregon Legislature in the form of House Bill (HB) 2515. Earlier versions of HB 2515 stated that a "rezone" occurred when a local government adopted "changes to the substantive *criteria for approving* uses permitted in the zone in which the property is located." HB 2515-8, subsection 1(9)(b) (April 30, 1997) (emphasis added). In other words, before final amendments, HB 2515 would have required notice for *any* change to substantive criteria for approving uses, whether that change made it more difficult or easier to establish and carry out the use. At the same time, the earlier language was clearly limited to changes to approval criteria, and did not reach restrictions on the physical extent of uses such as height limits or setbacks. Testimony from Oregonians in Action (OIA), the primary author of HB 2515 and a leading advocate for the bill and then Measure 56, stated that the change in the definition of "rezone" to cover only an ordinance that "limits or prohibits land uses previously allowed in the affected zone" was intended to reduce the number of property owners that would have to be notified. According to OIA's written testimony, the change meant notice is required:

> "only to those landowners whose land uses will be restricted by the new or amended regulation. It is the adoption of more restrictive criteria or the removal

> of allowable uses, which most often leads to citizen frustration and loss of property value. These are the circumstances in which notification must occur."

Senate Water & Land Use Committee, HB 2515, Exhibit C, page 3 (May 22, 1997) (document pages are unnumbered). Notwithstanding OIA's belief that this change was expected to reduce the circumstances in which notice would be required, we believe that the amendments to HB 2515 strongly suggest that the Legislature intended to include ordinances that restrict the physical extent of land uses, as well as ordinances that enact new or more difficult approval standards for establishing or expanding uses. The amendment to HB 2515-8 reduced the range of ordinances that are "rezonings" by replacing *all* "changes to the substantive criteria for approving uses" with only those changes that "limit or prohibit land uses previously allowed." Although the new definition may pick up the class of ordinances that limit land uses previously allowed by setting physical limits on them, OIA's belief that the overall number of notifications would be reduced is not inconsistent with this meaning.

Based on the preceding analysis, and particularly the plain meaning of the term "limit" as it is used in Measure 56, a change in local government standards for uses that are presently allowed will be a "rezoning" if the change physically restricts or constrains those uses, *or* narrows the circumstances under which the use may occur at all. Examples include ordinances that adopt new or amended land use regulations that make it more difficult to establish conditional uses, and ordinances that limit the extent of conditional uses or variances that are already allowed within particular zones. Similarly, new or amended base zone standards that reduce the extent to which uses are allowed outright are also "rezonings" under Measure 56.

Several additional points concerning which local ordinances are "rezonings" for purposes of Measure 56 bear some discussion. First, subsections 1(5) and 3(5) indicate that Measure 56 applies only to governmental actions that *will*, necessarily (on the face of the ordinance), restrict the range or extent of permissible uses of property, relative to existing law. We believe that local ordinances that affect the use of property indirectly are not "rezonings" for Measure 56 purposes. Thus, for example, ordinances that increase or impose a development fee generally will not be a "rezoning," as it will not be clear on the face of the ordinance that it *will* bound, restrain or confine the uses of property or otherwise prescribe limits on the use.

Second, Measure 56 also indicates that not all actions of local governmental that "limit" or prohibit the use of property require notice under the measure. The sections of the measure that address locally-initiated rezonings (sections 1-3), amend statutes or add new statutes that are codified among the requirements for local governments *when they are adopting or amending a comprehensive plan or land use regulation*. Measure 56, subsections 1(2) to 1(6) and 3(1) to 3(6). We believe these references and others mean that the notice provisions only apply to local ordinances that adopt or amend a comprehensive plan or land use regulation. Conversely, we believe that local ordinances or resolutions that do not adopt or amend a local government's comprehensive plan or land use regulations are not "rezonings" under Measure 56, even if they may affect the use of property.

Third, in some circumstances, a local government may replace a broadly-worded approval standard that provides it with substantial discretion in allowing, approving or denying a particular use (or conditioning that use), with more a more specific standard or standards that allow less discretion. Such an ordinance could be construed as not "prohibiting" or "limiting" use(s) allowed in a particular zone when viewed in relation to the existing provisions of a comprehensive plan or land use regulation. However, we believe that unless it is clear from the face of the ordinance that the change has not made it more difficult to establish the use, or restricted the extent to which a previously allowed use may be carried out, such changes should be treated as a "rezoning," and notice should be provided. The same is true of LCDC regulations that replace broad legal requirements with specific "safe harbor" standards.

Finally, of course, when particular uses are deleted from an existing list of allowed (or conditionally allowed) uses, that change "prohibits" a use that is allowed and we believe that notice is required under Measure 56.

DLCD Question 3: Do increases in local development fees or infrastructure standards constitute "rezonings" per subsection 1(9) and 3(9)? That is, do they "limit" the use of property and hence require mailing of notices to landowners?

Short Answer: Increases in development fees and infrastructure standards generally are not "rezonings" as that term is used in Measure 56.

Analysis: Applying the principles outlined above to infrastructure standards and development fees, a local government ordinance should be treated as a rezoning under Measure 56 only if it *both*: (a) prohibits or limits (e.g. restricts the circumstances under which the use is allowed, or restricts the extent or amount of an otherwise allowed use) a use of property that was previously allowed in a zone; *and* (b) the ordinance amends or adopts a local comprehensive plan provision or land use regulation.

Increases in development fees *will* increase the *cost* of uses of property, and *may* reduce the *value* of property, but they do not (on their face) *prohibit* or *limit* what uses are allowed in a particular land use zone. In addition, development fees typically are not set forth in local comprehensive plans or land use regulations. As a result, we believe that increases in development fees generally are not "rezonings" requiring notice under Measure 56. There may be circumstances, however, where fees are adopted as part of a local government's land use regulations, and where it could be argued that the amount of the fee (on the face of the ordinance) is so great that it will limit or prohibit particular uses. Such circumstances may require more detailed and specific analysis to determine if notice is required under Measure 56.

The answer for increases in infrastructure standards is more complex. If the new infrastructure standard, on its face, reduces the amount of land available for development, and the ordinance amends a comprehensive plan or land use regulation, it is clearly a "rezoning." Examples include increases to public road or utility right-of-way size requirements, which directly reduce the amount of land available for private uses (where the right-of-way or utility

easement is exclusive). Similarly, an increase in the minimum residential lot size required for an on-site septic system would "limit" the residential use of property.

We believe, however, that increases in infrastructure requirements that raise the *cost* of a use, without otherwise restricting the permissible uses of property, generally are not "rezonings" for the reasons stated above with regard to development fees. Examples of such ordinances include requirements that roads or utilities meet particular construction standards.

The most difficult cases are local ordinances that impose requirements on a use that could, in theory, be satisfied if sufficient funds are spent. Examples include requirements that the streets serving a development be shown to operate at a particular level of service, that a public water system be available to serve the proposed development, or that roads not exceed a particular grade. In cases such as these, the ordinances are imposing direct limits on the circumstances under which a use may be allowed or expanded. As a result, if the ordinance is adopted as a comprehensive plan provision or land use regulation, we believe that local governments should provide notice to affected property owners under Measure 56.

> **DLCD Question 4:** Ordinances involving construction, plumbing, electrical services, fire safety, signs, and tree cutting are not usually regarded as "land use ordinances." Changes to such codes and ordinances, however, might be construed to "limit" use of land and hence fall within Measure 56's definition of "rezoning." Must notice of such changes be mailed to all landowners affected by them?

Short Answer: Ordinances involving construction, plumbing, electrical services, fire safety, signs, or tree cutting will not be "rezonings" if they do not adopt or amend comprehensive plan provisions or land use regulations.

Analysis: Local ordinances involving matters such as construction, plumbing, electrical services, and fire safety are not normally adopted pursuant to a comprehensive plan or as part of local land use regulations. As a result, we believe that changes to such ordinances will not normally be "rezonings" as that term is used in Measure 56. Ordinances concerning construction, plumbing and electrical services and fire safety are more appropriately categorized as building code standards. Typically, such regulations do not implement a comprehensive plan and are not land use regulations. State oversight of such codes and code enforcement is via the Department of Consumer and Business Services. *See generally* ORS Chapter 455. We do not believe changes in these ordinances require notice under Measure 56.

In the unusual case where local building codes *are* adopted as part of the local comprehensive plan or land use regulations, and the existence or extent of uses that are otherwise allowed in a zone is made to be dependent on compliance with the building code, we believe notice is required.

Sign and tree-cutting ordinances often are adopted as land use regulations, and amendments to such ordinances that restrict the extent or types of uses allowed on property are

"rezonings" if they adopt or amend comprehensive plan provisions or land use regulations. Similarly, local ordinances that regulate or prohibit forest practices within an urban growth boundary may also be land use regulations if they implement a local comprehensive plan. ORS 197.015(11).[1] As a result, we believe that notice should be provided for such ordinances.

> **DLCD Question 7:** Does the extension of a moratorium already in effect when Measure 56 was passed constitute a "rezoning" and hence require mailing of notices to landowners?

Answer: Under ORS 197.520 and 197.530, a moratorium based on a shortage of public facilities generally is limited to a period of six months (ORS 197.530(2)), and a moratorium based on other reasons is limited to 120 days (ORS 197.520(4)). These actions expire, unless extended by the local government. We believe that when a local government adopts an ordinance to extend a moratorium that would otherwise expire, it is prohibiting or limiting uses that would otherwise be allowed. *See* ORS 197.505(1) ("[A] moratorium * * * means engaging in a pattern or practice of delaying or stopping issuance of permits, authorizations or approvals necessary for * * * construction on * * * any land."). As a result, notice of extensions of moratoria already in effect is required under Measure 56.

B. Do the Notice Requirements of Measure 56 Apply Retroactively?

> **DLCD Question 1:** Do the notification requirements apply to city and county decisions made after the effective date of Measure 56 if the hearings took place before the effective date of the measure? What if the "first hearing" took place before the effective date but subsequent hearings are set after that date?

Short Answer: The notification requirements of Measure 56 do not apply to city or county ordinances that would result in a "rezoning" if the first hearing on the ordinance occurred before December 3, 1998, and if the ordinance is not being adopted to meet a requirement of periodic review.

Analysis: The question of whether a statute applies retroactively is a matter of legislative intent. Where, as here, the statute was enacted by direct action of the electorate, the question regarding retroactivity is answered by determining the intent of the voters. *Ecumenical Ministries*, 318 Or 551; *State v. Lanig*, 154 Or App 665, 670-73, 964 P2d 58 (1998). This is done by applying the familiar statutory construction analysis set forth in *PGE v. Bureau of Labor and Industries*, 317 Or 606 (1993). That methodology looks first to the statute's text and context, and then (if ambiguity remains) to the measure's history and applicable rules of statutory construction.

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[1] Such regulations must "be acknowledged as being in compliance with the land use planning goals" before they can supplant the state's Forest Practices Act and, as a result, they will normally be "land use regulations" as defined in ORS 197.015 and as used in this advice. Local governments are authorized to adopt such regulations only for land inside urban growth boundaries. ORS 527.722(5).

The text of Measure 56 contains no retroactivity clause that makes the statute applicable to proceedings that commenced before its enactment. In *Lanig*, the court considered whether Measure 40, the "crime victims' rights" initiative, applied to criminal cases that were pending on the date of enactment of the measure. The court noted that Measure 40 did not contain a retroactivity clause, and that such clauses are not difficult to draft, being commonly used both by legislatures and the people in enacting statutes and constitutional amendments. The court held that the absence of a retroactivity clause in a statute "strongly suggests" that the measure was not intended to apply to cases that were pending upon enactment of the statute. *Id*. at 670.

Arguably, the absence of an express retroactivity clause in Measure 56 is sufficient to end the inquiry. However, the next step under the *PGE* analysis is to consider the legislative history of the measure. *Id*. at 673. The history of a measure enacted by the voters includes the ballot title and other materials contained in the voters' pamphlet. *Ecumenical Ministries*, 318 Or at 560 n 8. As there are no statements in the ballot title or voters' pamphlet that bear on the issue of retroactivity, we proceed to the final step in the *PGE* analysis, which is to consider relevant rules of statutory construction.

The Oregon Supreme Court examined a similar question in *State ex rel Town Concrete v. Anderson*, 264 Or 565 (1973). In that case, the legislature amended the statutes governing the right of an unpaid materialman to recover from a general contractor or the contractor's surety. The amendment added a requirement that in order to have a right to recover from the general contractor, the materialman had to provide notice to the general contractor that materials had been furnished to a subcontractor of the general contractor. The notice had to be given within 90 days after delivery of the materials. Under the facts of the case, deliveries of materials to the subcontractor began before the effective date of the statute, and continued for over six months after the effective date. The questions before the court were whether the notice requirement applied to deliveries made before the effective date of the statute, and whether the fact that a contract for all the deliveries was in place prior to the effective date of the statute meant that notice was not required for any of the deliveries under the contract. The court relied on *Joseph v. Lowery*, 261 Or 545 (1972), for the proposition that:

> "Unless retroactive construction is mandatory by the terms of the act it should not be applied if such construction will impair existing rights, create new obligations or impose additional duties with respect to past transactions * * *.
>
> "* * * * *
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> "* * * [T]his court has refused to give retroactive application to the provisions of statutes which affect the legal rights and obligations arising out of past actions. This is without respect to whether the change might be 'procedural or remedial' or 'substantive' in a strictly technical sense." *Town Concrete*, 264 Or at 568 (quoting *Joseph*, 261 Or at 548-49, and *Kempf v. Carpenters & Joiners Local Union*, 299 Or 337, 341-342 (1961)).

Applying this law to the facts of the case, the court in *Town Concrete* held that:

> "The notice requirement added by the legislature imposed additional duties with respect to past transactions. The requirement affects the 'legal rights and obligations arising out of past transactions.' For these reasons the statute does not apply to those deliveries made before August 22nd." *Id.* at 569.

The court also held that the fact that the contract for deliveries was entered into prior to the effective date of the statute made no difference, because by its terms the statute imposes the notice requirement with regard to *deliveries*, not *contracts for deliveries*. Thus, the notice requirement applied only to deliveries made after the effective date of the statute. *Id.*

Measure 56 requires governmental entities to provide notice of certain types of actions. Retroactive application of the Measure 56 notice requirements would "impose additional duties with respect to past transactions" by establishing new notice requirements tied to particular governmental actions that have already occurred. For example, subsections 1(3) and 1(4) (counties) and 3(3) and 3(4) (cities) of Measure 56 require prior notice of the *first hearing on an ordinance* that proposes to adopt or amend a comprehensive plan [and that "rezones" property]. Thus, if the *first hearing* for such an ordinance occurred prior to the effective date of Measure 56, the statutory amendments do not apply and no new notice is required.

In contrast, subsections 1(6) and 3(6) of Measure 56 (addressing local actions required by periodic review) require prior notice of the *adoption or amendment of a comprehensive plan or land use regulation* [that will result in a "rezoning"], rather than of the *first hearing*. Thus, in the periodic review context, the Measure 56 notice requirements apply unless the ordinance in question had been adopted prior to December 3, 1998.

Sections 5 and 7 of Measure 56 enact new provisions that require notice at least 50 days prior to the *effective date* of certain rules and statutes, respectively. As a result, under *Town Concrete*, we believe that the new notice requirements apply to the adoption of new or amended administrative rules and statutes that are "rezonings" where the effective date of the rule or statute is more than fifty (50) days following December 3, 1998 (i.e., after January 22, 1999).

In conclusion, we believe that local governments are required to provide the notice specified by Measure 56 for proceedings that constitute "rezonings" in the following circumstances: (1) for an ordinance that is being adopted as a requirement of periodic review, notice is required for ordinances adopted after December 3, 1998; (2) for ordinances that are not required by periodic review, notice is required if the first hearing on the ordinance will occur after December 3, 1998; and (3) for new state administrative rules and statutes that constitute "rezonings," Measure 56 notice is required if the rule or statute has an effective date of January 23, 1998 or later.

> **DLCD Question 2:** Some "rezonings" take many months from first hearing to adoption. If a local government already had taken some steps toward a rezoning before Measure 56 took effect, must it start the process over and mail notices to affected landowners "at least 20 days but not more than 40 days before the date of the first hearing?"

Short Answer: The answer to this question is the same as to the preceding question, and will depend on exactly what "steps" were taken by the local government and whether the ordinance is one that is required by periodic review. As stated above, new notice is not required under Measure 56 if the first hearing on the local government ordinance was held before December 3, 1998 and the ordinance is not required by periodic review. If a proposed ordinance is required as part of periodic review, notice is required 30 days prior to *adoption* of the ordinance.

Analysis: Subsections 1(3) and 1(4) (for counties), and 3(3) and 3(4) (for cities), require notice a certain number of days prior to the *first hearing* on ordinances that would result in a "rezoning." If the first hearing has already occurred, imposing a notice requirement on that hearing would create a new legal duty with respect to a past transaction, a result that Oregon courts will not imply absent (at a minimum) ambiguous statutory text and history clearly demonstrating an intent that the statute apply retroactively. We have found no history indicating that the voters intended Measure 56 to apply retroactively. As a result, even where there may be many months between the first and final hearings on an ordinance that is a "rezoning," we do not believe that the local government is required to provide notice pursuant to subsections 1(3), 1(4) or 3(3) and 3(4) of Measure 56. If, however, the ordinance is being adopted "pursuant to" periodic review (under subsections 1(6) or 3(6) of Measure 56), then notice is required 30 days prior to *adoption* of the ordinance regardless of whether there were proceedings on the ordinance prior to December 3, 1998.

C. Application of Measure 56 to Multi-Stage Proceedings

> **DLCD Question 11:** Suppose a local government mails notices about the first hearing on a proposed rezoning to all affected landowners. However, the proposal is later modified as a result of the first or subsequent hearings. Must a second round of notices be mailed?

Answer and Analysis: Your question concerns the pre-hearing notice required for locally initiated ordinances by sections 1 and 3 of Measure 56. That notice must be mailed "at least 20 days and not more than 40 days before the date *of the first hearing* on an ordinance" that would "rezone" property. Measure 56, subsections 1(3) and 1(4) (counties) and 3(3) and 3(4) (cities). This notice of the first hearing must be mailed to "each owner whose property would have to be rezoned in order to comply with the [the new standards] if the ordinance becomes effective." *Id*. A local government has complied with Measure 56 if it follows these instructions. We find no express or implied requirement *in Measure 56* mandating a local

government to issue a second notice if the substance of the proposal changes over the course of the local proceedings. Indeed, the whole notion of public participation and public proceedings on local legislation is to allow for modification to the proposal in response to the concerns and ideas of those who participate. Measure 56 does not *itself* require notice of any subsequent local proceedings on the locally initiated legislation.

Although we find no requirement for new notice *under Measure 56* when a locally initiated "rezoning" changes, *under existing law* there are circumstances when a local government may be required to issue new notice of a revised proposal and provide an opportunity to comment. As a general rule, under existing law new notice is required when the action taken "is different from the proposal described in the notice to such a degree that the notice of the proposed action did not reasonably describe the local government's final actions." ORS 197.830(3). Under this statute, as it has been applied, a second round of notices must be mailed if the initial notice "did not reasonably describe the local government's final decision." *Kevedy, Inc., v. City of Portland*, 28 Or LUBA 227 (1994) (setting forth the rule for quasi-judicial cases). One means of minimizing the need for more than one round of notices is to describe a range of possible actions in the initial notice.[2]

In a subsequent question, you have asked whether a public "informational" meeting on a matter requires notice under Measure 56, where the meeting may lead to a "rezoning" required by state or local law. Specifically, you have asked whether DLCD is required to reimburse a city or county when the local government holds a public "informational" meeting on an issue or subject matter that is included in its periodic review work program. Under subsections 1(6) and 3(6) of Measure 56 (the subsections addressing periodic review), Measure 56 notice is not required for a public "informational" meeting even if the subject of the meeting is how to meet a requirement of periodic review. In order for a meeting or hearing to fall under Measure 56 in the periodic review context (as well as for locally initiated actions) it must be a meeting or hearing *on a proposed ordinance* that is proposed for adoption to meet a requirement of periodic review. In addition, the notice that is required for ordinances being adopted pursuant to a requirement of periodic review is a *pre-adoption* notice (at least 30 days prior to adoption), rather than a notice of a first hearing. *Compare*, Measure 56, subsections 1(3) and 1(6) with 3(3) and 3(6). As a result, DLCD may not reimburse a city or county for its costs in providing notice of a public informational meeting on a matter or issue that is included in the local government's periodic review work program unless the meeting or hearing concerns a specific ordinance that has been proposed to meet a requirement of periodic review. Even in these cases, DLCD may reimburse local governments only for their costs in providing the pre-adoption notice required by section 1(6) of Measure 56, and DLCD may not reimburse a local government for its costs in providing notice of a first hearing on such an ordinance.

[2] The consequences of failure to re-notify property owners, when re-notification is required, are addressed in the answer to your question 9, beginning at page 13 below.

DLCD Question 12: Many local legislative changes to land use ordinances involve two steps: amending the comprehensive plan, and amending the ordinances that implement that plan. In such cases, does Measure 56 require dual mailings, one providing notice about changes to the plan, and the other providing notice about changes to the ordinance?

Answer and Analysis: We believe that each local ordinance that "rezones" land requires a separate notice. This would include situations where a local government amends its comprehensive plan in one ordinance and then, in a subsequent ordinance, amends its land use regulations implementing the comprehensive plan. If the local government, in the same ordinance, amends both its comprehensive plan and its land use regulations that implement the plan, we believe that a single notice describing the changes to the plan and the regulations satisfies the requirements of Measure 56.

Even where separate ordinances are used to amend a comprehensive plan and implementing provisions of local land use regulations, Measure 56 does not require that notice of each ordinance be *mailed* separately. To the contrary, the Measure expressly allows local governments to mail the notices required under Sections 1 and 3 with annual tax statements. Measure 56, subsections 1(7) and 3(7).[3] We believe these provisions allow local governments to mail several notices together, so long as each notice is sent within the time periods required (20 to 40 days prior to the first hearing for locally initiated ordinances, and at least 30 days prior to adoption for ordinances required under periodic review).[4]

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[3] Although we again caution that it is an open question whether a court would consider the *legislative* history of a bill referred to the voters in determining the intent of the voters, the legislative history of HB 2515 indicates at least a legislative intent that notices may be combined in one mailing:

> "During the group meetings on this bill, a number of suggestions were made regarding ways to save costs in providing notice. The following cost savings measures are contained in the bill:
>
> 1. Inclusion of the notice in the property tax statement: Local governments are free to include *notices* in the annual property tax statement. They are not required to do so, however.
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> * * * * *
>
> 4. Single notice. Local governments are allowed to provide only one notice to a company or individual affected by a change in a regulation, regardless of how many parcels the company or individual owns that are affected by the same regulatory change."

Testimony of Oregonians in Action, Senate Committee on Water and Land Use, -12 Amendments to HB 2515 A-Eng (May 22, 1997) at page 4 (document pages are unnumbered). This history indicates that the Legislature understood local governments could mail more than one notice at a time in the same mailing.

[4] The adequacy of notices issued pursuant to Measure 56 will most likely be reviewed under the "reasonableness" standard of ORS 197.830(3), discussed above under Question 11. If a local government mails several notices together, it should consider whether a reasonable person could tell that several proceedings were involved, what each proposed action is, and which ones may affect his or her property.

D. Consequences of Failure to Provide Required Notice

> **DLCD Question 9:** Different sections of the measure require cities, counties, and Metro to mail various types of notices within specified time periods. What are the consequences of these entities failing to provide timely notice? What are the consequences of a failure to provide any notice?

Short Answer: The consequences of failure to provide required notice, or failure to do so in a timely fashion, vary depending on the type of action being taken and who is taking it.

Rezonings Initiated by a Local Government: In the first category, locally initiated "rezonings" adopted by a local government outside of the periodic review process (subsections 1(5) and 3(5) of Measure 56), as a general matter ORS 197.830 will apply. When notice is required and is not given or is given in a manner that is inadequate, ORS 197.830 essentially suspends the normal 21-day period for appealing land use decisions to the Land Use Board of Appeals (LUBA), and allows certain persons to file an appeal either: (a) 21 days after they receive actual notice of the final decision *if* they were entitled to notice of the final decision; or (b) within 21 days of when the person knew or should have known of the final decision where no notice of the final decision is required. *See Kevedy*, 28 Or LUBA 227 (interpreting ORS 197.830(3) as to a quasi-judicial proceeding.). Instead a three-year limitation period will govern appeals. ORS 197.830(5)(a). Furthermore, under 197.830(2), where no notice or untimely notice is given, a person need not have appeared before the local government in order to appeal the ordinance to the Land Use Board of Appeals (LUBA). Finally, where no notice or untimely notice is given, a petitioner to LUBA may also have a basis for remand of the ordinance in question if the petitioner can show that the failure to provide proper notice prejudiced his or her substantial rights. ORS 197.835(9)(a)(B).

A related issue results from circumstances where a local government has provided the pre-hearing notice required by subsections 1(5) and 3(5) of Measure 56, but then following the notice decides to change the proposed ordinance. If the final decision departs substantially from what the notice described, property owners may claim that the notice failed to provide the required information or otherwise put them on notice that their property might be affected. See, *infra*, at page 10-11. Such a result may be prejudicial to the substantial rights of a party and may require a remand. *See Tarjoto v. Lane County*, 29 Or LUBA 408, 413 (1995). In addition, the failure to provide new notice where the nature of the ordinance changes may excuse a petitioner from the requirement to appear during the local proceedings in order to establish standing to appeal a land use decision to LUBA. ORS 197.620(2); *Williams v. Clackamas County*, 27 Or LUBA 602, 605-6 (1994).[5]

[5] Except for the pre-adoption notice for local legislation adopted under periodic review, (subsections 1(6) and 3(6)), Measure 56 does not require local governments to issue notice to landowners or anyone else of the final decision.

Rezonings Pursuant to Periodic Review: Sections 1 and 3 of Measure 56 both contain a second notice requirement that applies to local decisions that "rezone" property and that *also* are "pursuant to a requirement of periodic review." Measure 56, subsections 1(6) and 3(6). Consequently, if a local ordinance is adopted in response to a periodic review requirement (*e.g.* pursuant to a periodic review work program, ORS 197.633), then subsections 1(6) and 3(6) require the city or county to give a second notice of the change 30 days before the scheduled adoption or amendment of the ordinance (the notice must specify the effective date of the new ordinance). Both this notice requirement and the one requiring notice of the first hearing apply, and one cannot be read as an implicit substitute for the other. This is particularly the case because Measure 56 already contains express exemptions from the notice requirements in sections 1 and 3 if the local legislation "result[s] from" a new statute or administrative rule, notice of which was issued under section 5 of Measure 56. Measure 56 subsections 1(10) and 3(10). The express exemptions from the notice requirements undermine any argument that local legislation pursuant to periodic review is implicitly exempt from the general pre-hearing notice requirements of sections 1 and 3.

The second, pre-adoption, notice required by subsections 1(6) and 3(6) of Measure 56 informs recipients of the effective date of new regulations that will "rezone" their land, and it must be mailed at least 30 days before the new regulations are to be adopted or amended. By the time a property owner receives the notice required by subsections 1(6) and 3(6) there may be no remaining opportunity to participate in local proceedings on the ordinance. Although the legislative record is not explicit, the purpose of the pre-adoption notice required by subsections 1(6) and 3(6) appears to be to allow property owners to submit land use applications before new ordinances that prohibit or limit uses are adopted pursuant to periodic review.[6]

The failure of a local government to issue a required notice (or to do so in a timely fashion) under subsections 1(6) or 3(6) of Measure 56 may result in a property owner's loss of the opportunity to submit an application for a permit under existing standards. The loss of the opportunity to file an application under more favorable review standards may prejudice a "substantial right" of the property owner. As a result, under ORS 197.835(9)(a)(B), a property owner in this situation may be able to obtain a remand of the ordinance, requiring pre-adoption notice of the ordinance and allowing the owner to file an application under the former provisions of the local comprehensive plan or land use regulation. This remedy is in addition to the consequences previously identified with regard to locally initiated rezonings.

Rezonings Resulting from Action by Metro: Section 7 of Measure 56 requires Metro to provide notice to local government entities at least 50 days prior to the effective date of a Metro land use planning ordinance. As with the pre-adoption notice required for ordinances that are

[6] Notice of DLCD and LCDC actions in a periodic review proceeding is not required under Ballot Measure 56. Final DLCD and LCDC decisions in periodic review come in to play under Ballot Measure 56 only as triggers requiring local legislation be adopted. It is the local legislation, not the DLCD or LCDC order, that is subject to the notice requirements in Ballot Measure 56 Sections 1 and 3.

pursuant to a requirement of periodic review, we believe that if Metro fails to provide pre-adoption notice of its land use ordinances that will result in a "rezoning," property owners who had a right to such notice and who did not receive it as a result of Metro's failure may have a basis for obtaining a remand of the Metro ordinance. Metro's compliance with the Measure 56 notice requirement is subject to LUBA review, and so is subject to the review standard in ORS 197.835(9)(a)(B). As discussed above, that statute provides that LUBA shall remand a land use decision for procedural error that prejudiced the substantial rights of a petitioner.

E. Enactments with Emergency Clauses

> **DLCD Question 10:** Subsection 5(1) requires DLCD to notify local governments about any new or amended [LCDC] rule or statute that limits land uses "at least 50 days prior to the effective date" of the new rule or statute. How is that to be done if the rule or statute contains an emergency clause and thus takes effect immediately?

Short Answer: For LCDC administrative rules that will result in a "rezoning," LCDC should provide that the rule does not go into effect until at least 50 days after notice is provided to local governments as required by Measure 56. For statutes that take effect immediately upon their enactment, it appears that it is impossible to provide notice 50 days prior to their enactment. In such cases, DLCD should provide notice as soon as is reasonably practicable following their enactment.

Analysis: Under ORS 183.335(5), as a general matter, an agency may temporarily adopt or amend a rule without prior notice or hearing or upon any abbreviated notice that is practicable. Similarly, under Article IV, section 28 of the Oregon Constitution, the Legislative Assembly may provide that a statute takes effect upon its approval by the Governor.

Section 5 of Measure 56 makes a distinction between adoption and enactment, and the effective date of a statute or rule. Where LCDC adopts a temporary rule that will limit or prohibit otherwise permissible land uses, it should specify an *effective date* at least 50 days after the date it mails notice to local governments under subsection 5(1) of Measure 56. There may be circumstances where the statute authorizing the temporary rule contains sufficiently specific direction that LCDC may specify an earlier effective date for such a rule. Such circumstances are likely to be the exception, however.

The application of section 5 of Measure 56 to statutes with emergency clauses presents a more difficult question. The difficulty results from the fact that legislation containing an emergency clause will generally be effective upon signature by the Governor. The Governor, in turn, is generally required to sign bills within five days of the date the bill is presented to him or her by the Legislature. Or Const. art. V, Section 15b. As a result, it will usually not be possible to provide notice of the enactment of a bill 50 days in advance of its effective date if the bill has an emergency clause.

The Legislature has very broad authority to determine when an emergency exists, and any limitation of one Legislature on a subsequent Legislature must be stated explicitly. Measure 56 does not prohibit the Legislature from enacting legislation with an emergency clause that otherwise falls under Measure 56. As a result, we believe that the Legislature may specify that particular legislation go into effect without waiting for the 50-day period specified by Section 5(1) of Measure 56 to pass. In such a circumstance, it will be impossible for DLCD to provide notice of the statute 50 days prior to its effective date. It is possible that Measure 56 could be construed not to apply to statutes enacted with an emergency clause. However, we believe that DLCD should, nevertheless, provide notice of such statutes as soon as is reasonably practicable following their enactment.

F. Usual and Reasonable Costs

> **DLCD Question 8:** Section 5(5) of Measure 56 requires DLCD to reimburse local governments for all "usual and reasonable costs of providing notice" about new state rules or laws to affected landowners. What is "usual and reasonable?"

Short Answer: LCDC should define these terms by rule, consistent with their ordinary usage in this context.

Analysis: The phrase "usual and reasonable costs" is not defined by Measure 56 or by any related statute. As explained in response to question number 15 below, we believe that LCDC has authority to adopt a rule defining what costs are "usual and reasonable" in implementing the notice requirements of Measure 56.[7] Measure 56 does set forth some parameters for how notice may be given under the statutes, and these have some bearing on what costs must be reimbursed. The phrase "usual and reasonable costs" is a classic delegative term that affords LCDC the authority to define it, so long as it does so in a manner that is consistent with the general policy of the statutes it is implementing. *See Jeld-Wen v. Env. Quality* Comm., 162 Or App 100, __ P2d __ (1999); *Meltebeke v. Bureau of Labor and Industries*, 322 Or 132, 903 P2d 351 (1995); *Springfield Education Assn. v. School Dist.*, 290 Or. 217, 226-35, 621 P2d 547 (1980).[8] Because notice is required prior to the effective date of statutes or rules, rather than prior to any hearing, that policy appears to be primarily one of ensuring an opportunity for

[7] However, LCDC's authority to define "usual and reasonable costs of providing notice" may not extend to Section 7 of Measure 56, which requires the Metropolitan Service District to reimburse local governments for all usual and reasonable costs of providing notice of proposed rezonings resulting from a Metro ordinance.

[8] Although we do not believe dictionary definitions are *controlling* in this context, any application of these terms by LCDC or DLCD should be consistent with them. The terms "usual" and "reasonable" are defined by WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (unabridged 1993 ed.) as follows: "usual" means "**1:** such as accords with usage, custom, or habit: of the character or amount in common use;" "reasonable" means "**1b:** being or remaining within the bounds of reason: not extreme: not excessive."

affected property owners to avoid pending limitations or prohibitions by filing applications prior to the effective date of legislation or LCDC rules.

Subsection 5(4) of Measure 56 requires local governments to mail a *copy* of the notice DLCD mails to the local government. That notice must be sent "* * * to every owner of real property that *will* be rezoned as a result of the adoption or enactment of the rule or statute." (Emphasis added). And the notice must be mailed at least 30 days prior to the effective date of the statute or rule. *Id.* In other words, under this provision of Measure 56 local governments are required to do three things: (1) determine whom the notice is sent to; (2) make the appropriate number of copies of the notice; and (3) mail the notice. DLCD is required to reimburse for "usual and reasonable" costs of doing these things; it is *not* required to reimburse local governments for other costs, such as the cost of preparing a notice different from the one DLCD sends to the local government.

We believe that one means of implementing this portion of Measure 56 is for LCDC to survey or otherwise investigate the costs that local governments now incur in providing individual notice to landowners, and to develop a rule defining the limits of what "usual and reasonable costs" are on this basis. Such costs will necessarily include both the direct costs of providing notice (including costs for copying, paper, envelopes, postage, and staff time spent identifying landowners and preparing and mailing notice), and some reasonable amount of indirect costs (overhead).

> **DLCD Question 14:** The measure requires DLCD to reimburse cities and counties for their "usual and reasonable costs" of mailed notice of adoption or amendment of a plan or regulation "pursuant to a requirement of periodic review…" Periodic review work programs contain tasks that respond to a state requirement. But they often include tasks that state law does not require; they are part of the work program because the local government chooses to undertake them. Does the measure require the department to reimburse costs incurred in amendment of plans or regulations to complete these tasks?
>
> **Short Answer:** Yes.

Analysis: The language of subsections 1(6) and 3(6) require notice to be provided to owners of parcels that will be "rezoned" by the governing body "pursuant to a requirement of periodic review of the comprehensive plan under ORS 197.628 to 197.636." Subsections 1(12) and 3(12) of Measure 56 require DLCD to reimburse local governments for their "usual and reasonable" costs incurred in providing such notice. The text of Measure 56 does provide some parameters concerning the type of notice that may be used for ordinances stemming from periodic review and how notice may be sent which, in turn, will have some bearing on costs that must be reimbursed. Subsections 1(11) and 3(11) of Measure 56 specify that counties and cities, respectively, need not provide more than one notice to a person owning more than one affected parcel for rezonings generally, including those resulting from a requirement of periodic review. Similarly, subsections 1(7)-(8) and 3(7)-(8) allow notice of rezonings to be included with tax

statements, and sent by bulk mail, so long as the notice is mailed between 20 and 40 days before the date of the first hearing on the proposed ordinance.

Your specific question is whether DLCD must reimburse local governments for costs associated with providing notice of "rezonings" that are included in a periodic review work program, but are not required by state law. However, we believe that under the statutes and rules governing periodic review, the department's decision to include *any* work task in a work program means that the work task is required by state law, even if the specific work task was initiated by the local government. Once DLCD issues an order approving a work program, all tasks included as part of that program, including any tasks that were included by choice of the local government, become "a requirement of periodic review" within the meaning of Measure 56. If a local government, on its own initiative, proposes a task that would result in a "rezoning" under Measure 56, DLCD would have to remove that task from the approved work program to avoid responsibility for repayment of notice costs.

> **DLCD Question 15:** Does LCDC have the authority to adopt rules to establish procedures for submission by local governments of cost claims to the department? To define terms in the measure, such as "usual and reasonable costs?"
>
> **Short Answer:** Yes.

Analysis: Under ORS 197.040, LCDC is expressly authorized to "adopt rules that it considers necessary to carry out ORS chapters 195, 196 and 197…" Chapter 197 contains post-acknowledgment procedures including periodic review requirements implicated by subsections 1(6) and 3(6) of Measure 56. Also, Section 5 of Measure 56, which contains most of the provisions directly applicable to DLCD, amends ORS Chapter 197 to require notice to local governments of new statutes or rules, and requires reimbursement by DLCD of local governments' "usual and reasonable costs" of providing corresponding notice to affected landowners. In sum, we believe that LCDC has statutory authority to adopt rules establishing procedures for reimbursement claims and defining delegative terms such as "usual and reasonable costs."

G. Use of Assessment Rolls for Notice

> **DLCD Question 13:** Subsections 1(1) and 3(1) of Measure 56 require that notices be mailed to affected landowners "as shown on the last available complete tax assessment roll." Such rolls are amended daily, so must the notices be mailed on the same day the names of landowners are taken from the roll?
>
> **Short Answer:** No.

Analysis: We believe the use of the phrase "last *available* complete tax assessment roll" in subsections 1(1) and 3(1) of Measure 56 affords local governments the ability to include a reasonable amount of time in preparing a mailing list and carrying out the mailing.

LUBA addressed a similar issue in *Walz v. Polk County*, 31 Or LUBA 363 (1996). That case involved the meaning of ORS 197.763(2), which requires that notice of local quasi-judicial land use decisions must be provided to certain property owners as identified "on the most recent property tax assessment roll." The county argued that it was not obligated to provide notice to petitioner under the statute because the county's assessment rolls were only updated once a year, and therefore the tax rolls had no record of petitioner's recent acquisition of property. LUBA concluded that the county could not rely on its failure to update its tax rolls for changes of property ownership and owners' addresses to defeat the notice requirement of ORS 197.763. More relevant for the present inquiry, LUBA held that:

> "The 'most recent county property tax assessment roll' is the property tax assessment roll that shows, as nearly as possible, the current ownership of each property in the county and that notes any property owner's change of address." *Walz*, 31 Or LUBA at 369.

Similarly, we believe the "last available" complete tax assessment roll under Measure 56 should be read to require use of the last available roll for the practical purposes of providing timely notice required by the statute. In other words, where the number of notices that must be sent is extensive, a local government may generate a list of the owners "of record" and then take a reasonable amount of time in turning that list into mailing labels and accomplishing the mailing—the notices need not be mailed on the same day the names are taken from the roll where the act of carrying out the mailing necessarily will require more than one day.

H. Changes Required by Federal Laws

> **Question 6:** Measure 56 deals only with locally initiated and state-required "rezonings." But changes in *federal* regulations may require state or local governments to amend land use laws in a manner that would meet Measure 56's definition of "rezoning" and hence require notice to landowners. For example, recent changes in FEMA regulations require local governments to amend their floodplain management regulations if they are to remain eligible for federal flood insurance. In such cases, must a local government mail notices to landowners? If so, who must bear the costs of such mailings?

Answer and Analysis: In general, we believe that changes to local comprehensive plans or land use regulations that limit or prohibit otherwise allowed uses of property require notice under Measure 56, regardless of whether those changes result from a decision of the local government (sections 1 and 3), changes in state law (section 5), or changes in federal law. Where changes in federal law require the state to enact legislation, or LCDC to adopt new

administrative rules, those state-law changes are not exempt from section 5 of Measure 56. In these cases, DLCD is required to send notice to local governments, and to pay the costs of both the notice to local governments and the resulting notice to property owners. Similarly, sections 1 and 3 of Measure 56 provide no exemption for local ordinances that are adopted to comply with federal law. In these cases, local governments are required to send notice and to pay the cost of the notice.

The one exception is changes that result from decisions of a "court of competent jurisdiction." Measure 56, subsections 1(10) and 3(10). These subsections expressly state that sections 1 and 3 do not apply to legislative acts of local government "* * * resulting from a [decision by] a court of competent jurisdiction." *Id.* We believe that this exemption includes decisions by state or federal courts requiring local governments to adopt changes to their comprehensive plans or land use regulations in order to comply with federal law.

This advice is provided only for the benefit of the Department of Land Conservation and Development, and may be relied upon only by DLCD. It is not intended as, and should not be considered, advice to anyone other than state officers acting in their official capacity. All other persons should consult their own legal counsel regarding the matters addressed in this letter.

Sincerely,

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