

MEMORANDUM

TO: Office of Commissioner Vega Pederson

FROM: Will Glasson, Assistant County Attorney

DATE: September 20, 2018

SUBJECT: **Impact of Measure 103 (2018) on County revenue and operations**

Question: we have been asked to assess the potential impacts to the County of Measure 103 (2018), and particularly the impacts to the County's revenue sources and operations.

Brief Answer: Measure 103 would have potentially broad, significant, and likely negative impacts on existing and proposed County revenues and operations.

Discussion:

Measure 103 is a proposed amendment to the Oregon Constitution that is on the November 6, 2018, ballot. The amendment would prohibit all new or amended "tax[es], fee[s], and other assessment[s]" on the "sale or distribution of groceries."

Measure 103 defines "sale or distribution of groceries" as "any transaction for the sale, purchase, distribution, or transfer of groceries sold, distributed, transferred to, or purchased, or received from, any" business licensed or regulated to handle "groceries." The measure defines groceries as "raw or processed food or beverage intended for human consumption ..."¹

Measure 103's prohibition would reach all "sales tax, gross receipts tax, commercial activity tax, value-added tax, excise tax, privilege tax, and any other similar tax on the sale of groceries" that is or was "adopted, approved or enacted on or after October 1, 2017."

Gauging the potential impact of Measure 103 on County revenues is difficult. Given that it would prohibit new and amended assessments on "transaction[s] for the sale, purchase, distribution, or transfer of groceries" (i.e., it reaches direct and indirect assessments on grocery items), we may reasonably conclude that it would affect collections from the County's motor vehicle fuel and rental taxes and business income tax.² In addition, Measure 103 would comparably impact state assessments and reduce payments to the County from those receipts. As a result, we may conclude that Measure 103 will affect assessments that account for just less than half of County "corporate revenues," which account for approximately 40% of total General Fund revenues. However, estimating the actual fiscal impact of Measure 103 is functionally impossible, at this point, due to the new and unprecedented administrative challenges that the amendment would create.

The potential administrative impacts of Measure 103 are clearer than its potential fiscal impacts. County administration of the affected fees and taxes would be significantly disrupted by the

¹ Excluding "alcoholic beverages, marijuana products, and tobacco products."

² Measure 103's official text confirms that it would prohibit the County from amending its business income tax.

amendment. Similarly, State administration of affected assessments would be comparably disrupted. Apparently reliable State and private projections assert that Measure 103 will reach at least 12,000 different types of businesses and require new administrative requirements that cannot at this time be effectively addressed with existing practices and technology.

For example, Measure 103 would prohibit assessments on “groceries” but not on assessments on non-“grocery” items. Often, “grocery” items are commingled with non-“grocery” items. Measure 103 provides no guidance on how a taxing authority might target assessments only on non-“grocery” items in a commingled environment. For that matter, Measure 103 provides no guidance to taxpayers on how to segregate “grocery” and non-“grocery” items for assessment purposes. The complexity of targeting assessments to apply only to taxable items has led many Oregon taxing authorities to use gross-receipts taxes, such as the County’s motor vehicle rental tax. Gross-receipts taxes largely avoid the administrative challenges raised by trying to segregate taxable items from non-taxable items. In states with sales tax prohibitions on grocery items, administration is often simplified by assessing the tax at the point of sale, rather than throughout the chain of commerce (with the latter being Measure 103’s approach). Assessments at the point of sale allow retailers to code items based on their tax status at the time of purchase and to aggregate taxable sales for reporting and payment to taxing authorities. However, none of these approaches are available to the County or to affected taxpayers under Measure 103. As a result, should Measure 103 pass, we should expect legal challenges to the County’s administrative processes for its affected assessments.

Operational impacts would also extend to the County’s ability to regulate the sale of particular “grocery” items for public health purposes. For example, Measure 103 would prohibit the County from using an assessment as part of a regulation on nicotine vaping products and “grocery” items, such as juices, that contain nicotine. Similarly, Measure 103 would prohibit the County from regulating sugary drinks with an assessment.

Accordingly, Measure 103 would impose significant challenges on the County’s ability to collect different assessments and to administer “grocery”-proximate operations.

Measure 103 could be susceptible to a number of legal challenges. For example, the amendment is applied retroactively. Measure 103 applies to assessments “adopted, approved, or enacted on or after October 1, 2017.” A plain language interpretation of “adopted” – meaning “the act or process of beginning to use something”³ – shows that Measure 103 will affect laws passed prior to its enactment⁴. There is a “presumption against retroactive legislation” that is “deeply rooted in our nation’s jurisprudence ...”⁵ A retroactive law will be invalidated if it “takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or consideration already past.”⁶ Measure 103 will impair vested rights or impose a new “disability” on transactions completed if it is enacted. Although its text contains a savings clause⁷, there is reason to believe that a challenge to the amendment could be at least successful in part.

³ Merriam-Webster Dictionary, <https://www.merriam-webster.com/dictionary/adoption>.

⁴ “Enact” is “to establish be legal or authoritative act.” Id. at <https://www.merriam-webster.com/dictionary/enact>.

⁵ *Olatunji v. Ashcroft*, 387 F.3d 383, 389 (2004) (citing *Landgraf v. USI Film Products*, 511 U.S. 244, 265 (1994)).

⁶ *INS v. St. Cyr.*, 522 US 289, 321 (2001).

⁷ “It is the intent of the people that all parts of this amendment are independent and that if any part ... is held unconstitutional, all remaining parts shall remain in force.”