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To : All Interested Persons

From : Sarah Hanson, County Counsel

Re : Legal Opinion-Analysis of Ballot Measures 5-190 and 5-191

Date : September 15, 2008

Columbia County has received numerous inquiries concerning the potential impact of Ballot Measures 5-190 and 5-191, related to the employment of unauthorized aliens, on County government. Therefore, the Columbia County Counsel's Office has been authorized to release its legal opinion regarding Ballot Measures 5-190 and 5-191. Neither the County nor this Office takes a position in favor or against the Measures. The legal opinion is meant only to analyze the potential legal implications of the passage of either Ballot Measure. The legal opinion is not intended to give legal advice to anyone other than the County Commissioners, on whose behalf the opinion was drafted. This Office cannot give legal advice to members of the public.

The legal opinion and attachments may be viewed on the Columbia County website www.co.columbia.or.us. Hard copies may be reviewed and copies purchased in the Board of County Commissioner's Office located in the Columbia County Courthouse, 230 Strand Street, St. Helens, Oregon 97051. For directions or questions please call the Board Secretary at 503-397-4322.

COLUMBIA COUNTY
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September 10, 2008

To : Board of Commissioners

From : Office of County Counsel

Re : Measures 5-190 and 5-191

LEGAL OPINION

You have asked me to perform a legal analysis of the two ballot measures filed by Wayne Mayo to determine the impact passage of the measures might have upon the County. It is not my intent to promote or oppose adoption of either of these measures, but simply to address their potential impacts on the County if they are passed.

I. Status. It is my understanding that both of these measures received enough signatures to qualify for the ballot and that they are on the November 4, 2008, election ballot.

II. Summary of Measures. Measure 5-190 would, if passed, prohibit the knowing or intentional employment of unauthorized aliens and establish penalties in addition to federal prohibitions. The ballot title (as determined by Circuit Court Judge Ted Grove) and the measure itself are attached hereto, labeled Exhibits 1 and 2, and incorporated herein by this reference. Measure 5-191 would, if passed, require building contractors to place plywood signs at the entrances to every subdivision, commercial/industrial development, and minor partition entitled "Legal Workers only" and explaining the penalties for hiring illegal workers. The ballot title and the measure itself are attached hereto, labeled Exhibits 3 and 4, and incorporated herein by this reference.

ANALYSIS OF MEASURE 5-190

III. Background of Measure 5-190. Measure 5-190 is based primarily on Arizona's Legal Arizona Workers Act (House Bill 2779)(hereinafter referred to as the "Arizona Act"), a copy of which is attached hereto, labeled Exhibit 5, and incorporated herein by this reference. *[See, or link to, http://www.azleg.gov/legtext/48leg/1r/bills/hb2779c.pdf for Exhibit 5].* The Arizona Act was enacted on July 2, 2007, and became effective on January 1, 2008. The Arizona Act amended certain existing provisions in the Arizona statutes and added new provisions which were codified as Sections 23-211 through 23-214 of the Arizona Revised Statutes. In general, the Arizona Act establishes a state-wide scheme for sanctioning employers that allegedly employ aliens who are unauthorized to work. In addition, the Arizona Act imposes a mandatory obligation on every Arizona employer to participate in the federal Basic Pilot Program for checking employment eligibility (now known as "E-Verify").

IV. Litigation challenging the Arizona Act. The Arizona Act was immediately challenged in federal district court by a coalition of immigrant rights and business groups, both national and local. The original action was brought against the Governor, Attorney General and Director of the Department of Revenue of the State of Arizona. U.S. District Court Judge Neil Wake dismissed the lawsuit on December 7, 2007, ruling that the defendants were not the proper parties to be sued. The plaintiffs filed an appeal and simultaneously filed a new lawsuit naming the County Attorneys of the State of Arizona as defendants.

On February 7, 2008, Judge Wake ruled in the second lawsuit that the County Attorneys were proper defendants, and that the Arizona Act was not preempted by federal law, in particular the Immigration Reform and Control Act of 1986 (IRCA). Judge Wake held that, even though the IRCA generally preempts state laws imposing civil or criminal sanctions upon employers who hire unauthorized aliens, 8 USC Section 1324a(h)(2)(a copy of which is attached hereto, labeled Exhibit 6, and incorporated herein by this reference) carved out a specific exception to preemption for "licensing or similar laws" *[See, or link to, http://www4.law.cornell.edu/uscode/html/uscode08/usc_sec_08_00001324---a000-.html for Exhibit 6]*. The judge further held that the Arizona Act was a licensing law which was not preempted by the IRCA.

On page 11 of Judge Wake's decision (a copy of which is attached hereto, labeled Exhibit 7, and incorporated herein by this reference), he noted that, "The [Arizona] Act's definition of license does not depart from common sense or traditional understandings of what is a license", and therefore fell "within the plain meaning of the IRCA's savings clause." *[See, or link to, http://www.azd.uscourts.gov/azd/courtopinions.nsf/1184BA444292555C072573E9000117A3/$file/07-2496-175.pdf?openelement for Exhibit 7].*

On page 13 of Judge Wake's decision, he noted that while the Senate and conference committee did not comment on the preemption provision in the IRCA, the House Judiciary Committee Report (the "House Report") dated July 16, 1986, did comment on the licensing exception to preemption as follows:

> "The penalties contained in this legislation are intended to specifically preempt any state or local laws providing civil fines and/or criminal sanctions on the hiring, recruitment or referral of undocumented aliens.
>
> "They are not intended to preempt or prevent lawful state or local processes concerning the suspension, revocation or refusal to reissue a license to any person who has been found to have violated the sanctions provisions in this legislation. Further, the Committee does not intend to preempt licensing or 'fitness to do business laws,' such as state farm labor contractor laws or forestry laws, which specifically require such licensee or contractor to refrain from hiring, recruiting or referring undocumented aliens."

Judge Wake's reference to the House Report was not intended to suggest that its statements were a binding interpretation of 8 USC Section 1324a(h)(2). Rather, he quoted it to rebut the Plaintiffs' argument that prior federal enforcement action was necessary before the State of Arizona could suspend or revoke an employer's business license. However, he took note (on page 14) that the Arizona Act did not impose civil fines or criminal sanctions.

The plaintiffs have filed an appeal with the Ninth Circuit Court of Appeals, seeking to consolidate it with the appeal from the original lawsuit. Oral arguments were held before the appellate court on June 12, 2008, but no decision has yet been issued.

For purposes of this analysis, I am assuming Judge Wake's decision will be upheld on appeal. If not, of course, the legal analysis will change depending on what the Ninth Circuit decision says about the Arizona Act.

V. Differences between the Arizona Act and Measure 5-190. Measure 5-190 differs from the Arizona Act in several important respects. Because of these differences, one cannot assume Judge Wake would uphold Measure 5-190, simply because it was modeled after the Arizona Act. Here are the major differences between the Arizona Act and Measure 5-190. In my opinion, only some of the differences would affect the legal analysis laid out by Judge Wake.

Because Measure 5-190 only applies to Columbia County, references contained in the Arizona Act to the state (of Arizona) and the attorney general have been removed from the Measure 5-190.

Measure 5-190 changes the definition of "employer" as stated in the Arizona Act by by adding a reference to "any individual or type of organization that holds a building permit in this county * * *".

The definition of "license" is changed as well. The Arizona Act includes under the definition of "license": articles of incorporation, certificates of partnership and transaction privilege tax licenses. The Arizona Act specifically excludes professional licenses. Measure 5-190, by contrast, does not include articles of incorporation, certificates of partnership or transaction privilege tax license, does not exclude professional licenses, and expressly includes building permits and business licenses.

The Arizona Act provides that persons who knowingly file a false and frivolous complaint are guilty of a Class 3 misdemeanor. Measure 5-190 does not include any prohibition of, or penalties for, false and frivolous complaints.

The Arizona Act requires the original action to be brought in Superior Court. Measure 5-190 provides that the original proceeding would be an administrative hearing to be held by the Board of County Commissioners with the right of appeal to justice and circuit courts.

The Arizona Act does not authorize any fines to be levied against violators. Measure 5-190, however, provides that upon a finding that an employer who is a contractor or subcontractor has intentionally or knowingly hired an unauthorized alien, the contractor or subcontractor shall be fined $10,000.

The Arizona Act requires immediate reinstatement of licenses after an employer files a sworn affidavit with the county attorney. Measure 5-190 does not include this provision.

The Arizona Act does not address building permits. Measure 5-190, on the other hand, has a provision calling for suspension of violators' building permits and the issuance of stop work orders on pending building projects.

Upon the finding of a second violation during the period of probation, Measure 5-190, in addition to permanently revoking licenses held by an employer, includes a provision permanently denying the employer the right to obtain building permits in the future.

Section 4 of the Arizona Act creates an employer sanctions legislative study committee. Measure 5-190 does not include that provision.

Section 6 of the Arizona Act provides that it shall be known as the "Legal Arizona Workers Act". Section 6 of Measure 5-190 provides that it shall be known as the "Columbia County Fair Trade and Employment Act".

Sections 7 and 8 of the Arizona Act appropriate $100,000 to the state attorney general for the purpose of enforcing the Act, and $2,430,000 to county attorneys for enforcement. Section 9 provides for the repeal of Section 4 (regarding the employer sanctions legislative study committee) on January 1, 2009.

Section 7 of Measure 5-190 prohibits imposing any new taxes as a result of the measure, requires the funding to come from the general fund, but prohibits reducing funding for law enforcement, the road department, or parks and recreation funding. Section 8 says the measure may not be amended, modified, or repealed without being referred to the voters. Section 9 requires county officials to enforce and uphold the measure and labels it official misconduct not to do so. In addition, it provides that citizens may petition the justice court for appointment as a special county counsel to be paid 1.5 times the hourly rate of the most junior county counsel, and with the authority to perform enforcement functions if any county official fails to enforce the measure.

VI. Apparent drafting errors, or inadvertent errors, in Measure 5-190. It is apparent that the drafter of Measure 5-190 was using Arizona 2007 House Bill 2779 as his model. HB 2779 is divided into nine sections. Measure 5-190 contains language from Sections 2, 3, 5 and 6 of HB 2779. Section 1 of HB 2779 has to do with identity theft and is not included in Measure 5-190. What is labeled as Section 1 of Measure 5-190 follows the language of Section 2 of HB 2779. However, the drafter of Measure 5-190 failed to change the section numbers of the other sections of Measure 5-190 from those in HB 2779. As a result, there is no Section 2 or Section 4 in Measure 5-190; Section 1 is followed directly by Section 3, and then by Section 5, which is somewhat confusing at first. Sections 7, 8 and 9 of Measure 5-190 are completely different from the same-numbered sections in HB 2779.

Section 2 of HB 2779 added Sections 23-211, 23-212, 23-213 and 23-214 to the Arizona Revised Statutes (ARS). Section 1 of Measure 5-190 includes much of the language of Section 2 of HB 2779, but does not include the any section numbers or section letters. The result is that at first read, Section 1 of Measure 5-190 seems to use numbers and letters for subsections, paragraphs and subparagraphs randomly, without a clear organization scheme. It also makes it difficult to clearly reference the various provisions of the measure.

The Arizona Act defines the word "intentionally" as having the same meaning as prescribed in Section 13-105 of the Arizona Revised Statutes. The Oregon Revised Statutes does not have a Section 13-105. The word "intentionally" is defined in ORS 161.085 (for criminal liability) and ORS 468.996 (for pollution violations), but rather than substitute either of these provisions, the drafter of Measure 5-190 simply refers to the "meaning prescribed in section ORS _____."

Because the Arizona Act applied to the entire state of Arizona, while Measure 5-190 would only apply to Columbia County, the drafter of Measure 5-190 changed references to the "state" to "county" in various places throughout the measure. However, there are cases where references to the "state" remain, which could cause confusion. For example, the definition of "employer" in the Arizona Act is as follows [the underlining of the word "state" is not in the original; I added the underlining for emphasis]:

> "'Employer' means any individual or type of organization that transacts business in this state, that has a license issued by an agency in this state and that employs one or more individuals who perform employment services in this state. Employer includes this state, any political subdivision of this state and self-employed persons."

Measure 5-190, changes "state" to "county" twice, but leaves "state" in the rest of the definition. (Measure 5-190 also divides the definition into two subsections and adds a reference to building permits.) The changes from the Arizona Act are marked in **bold**.

> "'Employer' means**:**
> "**a.** any individual or type of organization that transacts business in this **county**, that has a license issued by an agency in this **county, or**
> **"b. any individual or type or organization that holds a building permit in this county,** and that employs one or more individuals who perform employment services in this state. Employer includes this state, any political subdivision of this state and self-employed persons."

I will leave aside for now the issue of there now being two different types of employers, which I don't believe is a drafting or inadvertent error. The inadvertent error I see in this definition is that, by failing to change the third mention of the word "state" to "county", it appears to extend the definition of employer to employers who employ individuals anywhere in the state of Oregon, even if they are not employed in Columbia County. The error suggests that the County is obligated under the measure to sanction employers who hire an unauthorized alien anywhere in the State of Oregon.

The Arizona Act refers in some cases to the Attorney General, in some cases to the "County Attorney", and in some cases to the Attorney General and to County Attorneys. Measure 5-190, in most of the measure, deletes reference to the Attorney General, or changes the reference from Attorney General to County Attorney. But in Section 1 of the measure, at the end of subsection F.2(d), the reference is to the "county attorney general". In Section 9, the measure allows citizens to be appointed as "special county counsel" to be paid 1.5 times the rate of the most "junior county counsel".

The problem is that "County Attorney" is not defined in Oregon law. According to ARS 11-532, in Arizona the County Attorney is the public prosecutor of the county, but also advises county officers, advises the county's board of supervisors and attends their meetings, is attorney for school districts and community college districts in the county, and performs other duties. It appears that in Arizona, the County Attorney performs both the roles of the District Attorney in Oregon and of the county counsel. Because the term "County Attorney" is not defined in Oregon law or in Measure 5-190, it is unclear who is supposed to perform the duties for the County Attorney outlined in the measure. The references to "special county counsel" and "junior county counsel" in Section 9 could suggest the intent is that the term "County Attorney" is meant to refer to the county counsel,

but that conclusion is speculative at best.

In Section 2 of HB 2779, subsections D and E of ARS 23-212 provide that an action shall be brought against violators of the Arizona Act in the Superior Court. In the comparable sections of Measure 5-190, subsections 1.D and E provide that the action shall be brought against the employer in an administrative hearing before the board of county commissioners with the opportunity to appeal to the justice court and circuit court. Accordingly, subsection 1.E provides that "the board or the court" shall expedite the action. Paragraph 1.F.1 provides that "the board or the court" shall: (a) order termination of unauthorized aliens; (b) order contractors or subcontractors to be fined $10,000; [C) *sic* order employers, contractors and subcontractors to be placed on probation for three years; and (c) order the employer to file a signed sworn affidavit within three days, and order licenses and building permits to be suspended if the employer doesn't file the affidavit within three days that unauthorized aliens have been terminated, etc.

Unfortunately, the drafter of Measure 5-190 fails to insert the reference to the "board" in the rest of subparagraph 1.F.1(c), in subparagraph1.F.1(d), in paragraph 1.F.2 and in paragraph 1.F.3. As a result, only the "court" has the authority to issue the orders called for in paragraphs 1.F.2 and 1.F.3. (Paragraph 1.F.1 addresses first violations of the measure which are knowing violations. Paragraph 1.F.2 addresses first violations of the measure which are intentional violations. Paragraph 1.F.3 addresses second violations and calls for permanent revocations of licenses and building permits, and prohibits issuance of any new licenses and building permits to a violating employer.) The discrepancy is that the original hearing is supposed to be held before the board of county commissioners, but for intentional violations and second violations, only a court can issue the orders called for in the measure.

Subsections H and I of ARS 23-212 in the Arizona Act provide that the federal government's determination pursuant to 8 United States Code section 1373(c) creates a "rebuttable" presumption of the employee's lawful status and that the employer did not knowingly or intentionally employ an unauthorized alien. "Rebuttable presumption" is a term which is commonly understood in legal circles. Measure 5-190, however, uses the term "refutable" presumption, which does not have a commonly understood definition.

The Arizona Act requires employers to verify the employment eligibility of employees after December 31, 2007. The Arizona Department of Revenue is required to give notice to employers of the requirements of the Arizona Act by October 1, 2007. The notice shall include notice of the requirement to verify employment eligibility after December 31, 2007. The drafter of Measure 5-190 changed the year and date when employers are required to verify employment eligibility to December 31, 2008. However, the measure requires the county to give notice of the measure's requirements to employers by October 1, 2008, before the date of the election in which the measure will be considered by the voters. The notice is required to say the year and date of the verification requirement is December 31, 2007, not 2008, nine months before the notice is required to be sent out, and a year before the verification requirement takes effect.

VII. <u>The possible legal challenges that might be made to Measure 5-190</u>. It is obvious from the letters and articles in the local newspapers that Measures 5-190 and 5-191 are controversial. The immigration issue nationally has been the subject of much disagreement. In the case Judge Wake decided on February 7, 2007, and now on appeal, there were two consolidated lawsuits involving 14 separate plaintiffs, including national groups, such as the Chamber of Commerce of the United States of America, and local groups. If either of the measures pass, in my opinion, it is

almost certain that legal challenges will be made to the measure or measures by local groups and, possibly, national groups. Therefore, I believe the Board should consider how the county should respond to such challenges. Following are a number of issues within Measure 5-190 which could be subject to challenge. Measure 5-191 will be addressed later.

A. Challenges based on apparent drafting or inadvertent errors. Due to the numerous apparent drafting errors, or inadvertent errors, it is possible challenges could be made, seeking injunctions against the enforcement of Measure 5-190, or seeking an interpretation of its provisions. For example, a challenge could be made to either the District Attorney or county counsel enforcing the measure, since neither is a "County Attorney" as provided in the measure. Another example would be a petition for an injunction against the Board of Commissioners issuing orders in the case of intentional violations or second violations, since the measure only gives authority to the "court" in such cases. Such lawsuits could be expensive and time-consuming to defend, but I don't think they would be enough to invalidate the measure. More likely, a court would try to interpret the measure to determine the voters' intent, rather than to thwart the result of the election.

B. Challenges based on statutory home rule provisions. Article VI, Section 10 of the Oregon Constitution, originally adopted in 1958, directed the legislature to adopt legislation creating a method for legal voters of any county to adopt a county charter. According to Article VI, Section 10, "A county charter may provide for the exercise by the county of authority over matters of county concern." Counties with a home rule charter have considerable independence from the legislature over matters of "county concern", and are generally only limited by the provisions of their charters, the Oregon Constitution, federal law and the United States Constititution.

Until 1973, counties without a charter, such as Columbia County, often referred to as "general law counties", did not have authority to exercise authority, except as specifically authorized by legislation. However, in 1973, the Legislature passed 1973 Oregon Laws, Chapter 282, which greatly expanded the authority of counties that do not have charters to legislate over matters of county concern. The provisions originally adopted in 1973, although amended over the years, are codified as ORS 203.030 through 203.065. These statutes are sometimes referred to as the "statutory home rule" provisions because ORS 203.035(1) provides that:

> "* * * the governing body or the electors of a county may by ordinance exercise authority within the county over matters of county concern, to the fullest extent allowed by Constitutions and laws of the United States and of this state, as fully as if each particular power comprised in that general authority were specifically listed in ORS 203.030 to 203.075."

While much broader than the authority counties had before 1973, the statutory home rule provisions do not provide general law counties with as much authority as home rule counties have, because the grant is limited by the other provisions in 1973 Oregon Laws, Chapter 282. For example, ORS 203.040 provides that county ordinances adopted under the statutory home rule provisions shall not apply within incorporated cities, except by the consent of the governing body or the electors of the city. ORS 203.045 provides how such ordinances must be adopted. ORS 203.055 requires that such ordinances imposing or providing an exemption from taxation must receive the approval of the electors of the county before taking effect. ORS 203.060 provides that such ordinances are subject to judicial review and invalidation on account of unreasonableness, procedural error in adoption, or conflict with paramount state law or constitutional provision. ORS

203.065 provides that violation of such an ordinance is a Class A violation. ORS 153.018 provides that a person convicted of a violation is subject to a fine, but not imprisonment.

Measure 5-190 is vulnerable to challenge as beyond the County's authority under the statutory home rule provisions in a number of respects. First, there is a question whether the employment of unauthorized aliens is a matter of "county concern". Judge Wake's opinion is clear that he believes employment is a state concern, but he did not discuss whether it is a matter of local concern.

Second, despite language in Measure 5-190 which seems to apply to cities and within cities, it is beyond the authority of the governing body and electors of the county to apply their ordinances inside incorporated cities, unless consent is granted by the governing body or electors of the cities. This is significant because, although most if not all of the cities in Columbia County require and issue business licenses, the County itself does not. Since suspension or revocation of business licenses is part of the penalty for violation of the measure, its inapplicability within cities greatly weakens its significance. How is the County to revoke a business licenses when it does not issue or require business licenses?

Third, to the extent the measure appears to require employers to verify the employment eligibility of employees within the state, but outside Columbia County, it may not be a matter of county concern and, if not, would be beyond the authority granted by the legislature.

Fourth, although probably not enough for a court to invalidate the measure, the ordaining clause of the measure does not comply with the requirements of ORS 203.045(2)(b). (The measure reads, "Be it ordained by the County of Columbia State of Oregon: * * *." ORS 203.045(2)(b) requires ordinances adopted by the electors to begin, "The People of (name of county) ordain as follows:".)

Fifth, the $10,000 fines called for in the measure greatly exceed the amounts for Class A violations. Although ORS 203.065(1) allows county governing bodies to establish fine amounts greater than established by statute (ORS 153.018(2)(a)) for Class A violations, i.e., $720, there is case law which suggests fines in excess of $1,000 are criminal in nature, subject to all the protections of the criminal system, i.e., jury trials, court-appointed attorneys, etc. (*See* Brown v. Multnomah County Dist. Ct., 280 Or 95, 570 P2d 52 (1977), where the court noted that a fine of $1,000 for driving under the influence of intoxicants, "if not in itself a criminal rather than civil penalty, must be at the margin of legislative discretion. At the least it is strong evidence of the punitive significance that the legislature meant to give this fine." *Id*. at 105. *But see* State v. Roeder, ___ Or App ___, ___ P2d ___ (2006), "* * * the proper focus is not on the amount of the penalty involved, viewed as some abstract 'absolute,' but instead on the amount, viewed in relation to the remedial purposes of the statutory scheme." *Id.* at ___.)

Sixth, Section 9 of Measure 5-190 provides that the wilful refusal of county officials to follow the terms of the measure, and perform the duties assigned therein is official misconduct and shall be dealt with accordingly. ORS 162.405 defines Official Misconduct in the Second Degree as a knowing violation of any statute (not ordinance) relating to the office of the person. Official Misconduct in the Second Degree is a Class C misdemeanor. ORS 162.415 defines Official Misconduct in the First Degree as (1) a knowing failure to perform a duty, clearly inherent in the nature of the office, imposed on a public servant by law, or (2)a knowing performance of an act constituting an unauthorized exercise in official duties, if the failure to perform or the performance

of the unauthorized act is done with intent to obtain a benefit or to harm another. Official Misconduct in the First Degree is a Class A misdemeanor. Sentences for misdemeanors can include fines and/or imprisonment. ORS 161.615; 161.635. To the extent Measure 5-190 attempts to change the statutory definition of official misconduct, or to authorize imprisonment for violation of a county ordinance, it is beyond the authority of a general law county.

C. Challenges based on state preemption over the regulation of building permits. As noted above, one of the differences between the Arizona Act and Measure 5-190 is that the definition of "license" has been expanded to include building permits. It is questionable whether the County has authority to suspend or revoke building permits, except as permitted by Oregon law. Two sections of the Oregon Revised Statutes address county authority regarding the state building code. ORS 455.020(4) provides:

> "This chapter and any specialty code does not limit the authority of a municipality to enact regulations providing for local administration of the state building code; local appeal boards; fees and other charges; abatement of nuisances and dangerous buildings; enforcement through penalties, stop-work orders or other means; or minimum health, sanitation and safety standards for governing the use of structures for housing, except where the power of municipalities to enact any such regulations is expressly withheld or otherwise provided for by statute. * * *"

ORS 455.040(1) provides:

> "The state building code shall be applicable and uniform throughout this state and in all municipalities, and no municipality shall enact or enforce any ordinance, rule or regulation relating the same matters encompassed by the state building code but which provides different requirements unless authorized by the Director of the Department of Consumer and Business Services. * * *"

These two statutes, when considered together, seem to provide two possible exceptions to state preemption over local ordinances: one, under the circumstances addressed in ORS 455.020(4); and, two, when authorized by the Director.

It is clear that the second exception doesn't apply; the Director has not, and probably would not, in my opinion, authorize building permits to be revoked under the circumstances provided for in the ordinance.

The question is whether suspension or revocation of building permits falls within the exception in ORS 455.020(4). That exception seems to be limited to provisions which would help a municipality administer the state building code, not tie it to unrelated issues such as the employment of unauthorized aliens. While ambiguous at best, I think it is likely that the courts would rule that the attempt to prohibit employment of unauthorized aliens by suspending or revoking building permits falls outside the exception granted in ORS 455.020(4).

D. Challenges to suspension or revocation of other types of licenses. As noted above, Measure 5-190, if passed would not apply inside incorporated cities without their consent, and the County does not require or issue business licenses. If the County is preempted by state law from suspending or revoking building permits, what other types of licenses might be subject to the measure?

The definition provides that, other than building permits, "license" means "any agency permit, certificate, approval, registration, charter or similar form of authorization that is required by law and that is issued by any agency for the purposes of operating a business in this county."

While the Arizona Act excluded professional licenses from its definition of "license", Measure 5-190 does not. Nevertheless, it is doubtful that, despite the measure, that any professional licenses would be affected for two reasons: one, to my knowledge, professional licenses, such as for lawyers, doctors, pharmacists, architects, engineers, geologists, surveyors, etc., are issued and regulated by state agencies located outside of the County, and therefore beyond the County's authority to control; and, two, the definition of "agency" in the measure is limited to those of this county, city or town that issues a license in this county.

Another possibility is that the term "license" might include land use approvals, such as conditional use permits, to the extent they are required to operate a business. If the County were to try to suspend or revoke a conditional use permit pursuant to the measure, it would probably have to show that its actions comply with the very extensive comprehensive set of land use laws and administrative rules, the acknowledged local comprehensive plan and zoning ordinances, as well as the case law that has developed over the last thirty years or more in Oregon. It seems doubtful that, unless acknowledged by LCDC (which is itself unlikely), the County would be able to suspend or revoke a land use approval based on an unacknowledged ordinance governing employment of unauthorized aliens.

Other types of permits or authorizations that might fall within the scope of measure that conceivably could apply are access approach permits, overlength and overweight permits issued by the Road Department, but it is questionable if they are required "for purposes of operating a business in this county" as provided by the measure. The Columbia Health District may issue licenses or permits to employers outside of cities in this County under its environmental health program, such as for restaurants, swimming pools, community drinking water facilities, and mobile home parks. It would be beyond the scope of this memo to address each of those facilities, but it should be noted that they are governed by Oregon statutes and administrative rules that may or may not preempt local regulation.

E. Challenges based on the unauthorized practice of law. Section 9 provides that "in the event any county official fails to enforce this measure", "[a]ll citizens have the right to petition the justice court for appointment as a special county counsel" and "may perform enforcement functions" provided by the measure. Assuming the term "county counsel" means the same as it is commonly understood in Oregon, ORS 203.145(2) requires that such persons be "licensed to practice law in the State of Oregon". Certainly, if the enforcement functions being performed involve the practice of law, anyone appointed by the justice court as special county counsel who is not licensed to practice law would risk being charged with the unauthorized practice of law in violation of ORS 9.160 and subject to a fine of not more than $500 and/or imprisoned in the county jail for not more than six months, pursuant to ORS 9.990. To the extent such an appointment is petitioned for, it is conceivable that the justice court could be enjoined from making such an appointment, and/or the "special county counsel" could be enjoined from, or fined and/or imprisoned for, performing any enforcement functions that involve the practice of law.

F. Challenges to amendments to Measure 5-190. In my opinion, many of the drafting and inadvertent errors in Measure 5-190 could be fixed with minor amendments. (Even with such amendments, however, I still believe it is questionable whether the ordinance could be

saved in any meaningful form.) For example, errors such as the lack of authority for the board of commissioners to issue orders regarding intentional violations and second violations, or such as the problems with the dates, etc., could be easily fixed.

The problem is that Section 8 of the measure prohibits amendments without being referred to the voters. Legally, that prohibition is not binding. ORS 203.035 gives the county governing body the same authority as it gives electors to exercise authority over matters of county concern. Just as the board of commissioners could not prohibit the electors from exercising their initiative powers to amend county ordinances, the electors cannot prohibit the board of commissioners from exercising their statutory powers, except through the adoption of a county charter. There may be a political risk in attempting to amend the measure with referring it to the voters, but that is beyond the scope of this memorandum.

G. Challenges based on preemption under the IRCA. Judge Wake has held the Arizona Act is not preempted by the Immigration Reform and Control Act, and his ruling is the best law on the subject until we hear from the Ninth Circuit. However, Measure 5-190 differs from the Arizona Act to such an extent, it is questionable whether it would survive in any meaningful form if challenged under the IRCA for two reasons.

First, 8 USC Section 1324a(h)(2) of the IRCA provides:

> "The provisions of this section preempt any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ or recruit or refer for a fee for employment, unauthorized aliens."

While not necessarily dispositive on the question, the legislative history quoted above stated that it was the Congressional intent to, "preempt any state or local laws providing civil fines and/or criminal sanctions on the hiring, recruitment or referral of undocumented aliens." Thus, the legislative history suggests the $10,000 fine called for in the measure, if challenged, might be held to be preempted.

Second, although the Arizona Act was found to be within the exception for licensing law, as provided by the IRCA, Measure 5-190 has expanded the definition of "license" to include "building permits". While Judge Wake stated the definition in the Arizona Act did not depart from the "common sense or traditional understandings" of what a license is, it is questionable whether the "common sense or traditional understandings" of the term "license" would extend to building permits. Building permits are not issued for the purpose of operating a business; they are issued in order to allow the activity of building, whether by an owner or by a contractor. (*See, e.g.,* Section 106.1 of the 1994 Uniform Building Code, as amended by the Oregon Building Codes Division, which provides in relevant part:

> "Except as specified in Section 106.2, no building or structure regulated by this code shall be erected, constructed, enlarged, altered, repaired, moved, improved or converted unless a separate permit for each building or structure has first been obtained from the building official."

The Uniform Building Code says nothing about a building permit being required to operate a business.)

ANALYSIS OF MEASURE 5-191

VIII. Measure 5-191 is simply a question, not legislation. Article VI, Section 10 of the Oregon Constitution is entitled "County home rule under county charter". Columbia County is not a home rule county and does not have a county charter. Therefore, there is a question whether it is relevant to an initiative petition for a local measure in a non-home rule county. However, one sentence in the article does not by its terms appear to be restricted to home rule counties. It provides:

> "To be circulated, referendum or initiative petitions shall set forth in full the charter or legislative provisions proposed for adoption or referral."

Assuming that this sentence applies to non-home rule counties, the proposed initiative petition does not appear to comply with its requirement. The initiative consists only of a question, and does not by itself mandate any actions. If the question posed by the measure is answered with a positive vote by the electors, it would appear that the voters do want Columbia County to require contractors to post signs at the entrance of subdivisions, commercial/industrial developments, and minor partitions under construction stating what the measure calls for. But the measure doesn't itself contain any legislative provisions requiring such signs to be posted. In other words, the measure is just an advisory question, rather than a legislative provision.

This problem could easily be solved, if the measure is approved, by drafting and adopting an ordinance calling for such signs to be posted. But the measure itself is not in ordinance form and if approved, is not self-implementing and would not be binding.

IX. Measure 5-191 is not consistent with Measure 5-190. The signs called for by Measure 5-191 differ from the requirements of Measure 5-190 in several respects. For example, the signs described in Measure 5-191 would say that a punitive charge of $10,000 will be added to the cost of a construction permit if any undocumented workers are found to have worked on the site. Measure 5-190 provides that contractors will be fined $10,000 and licenses, including building permits, will be suspended or revoked, if the employer has hired an unauthorized alien. A fine would apply regardless of the building permit, whereas a punitive charge added to the cost of a construction permit could be avoided by surrendering the permit or allowing it to expire. Undocumented workers may or may not be unauthorized aliens. That is probably because Measure 5-190 was modeled after the Arizona Act and the Arizona Act does not provide fines for violations.

The signs described in Measure 5-191 would say that a stop work order would go into effect until the punitive charge is paid and undocumented workers are removed from the site. Measure 5-190 provides that for a first knowing violation, licenses and building permits will be suspended unless the employer files a sworn affidavit within three business days and remain suspended until the affidavit is filed. Upon a first intentional violation, licenses and building permits shall be suspended and stop work orders shall be issued for a minimum of ten days and longer, as determined by the court, and until a sworn affidavit is filed. Upon a second violation, all licenses shall be revoked and the employer shall be denied building permits in the future. Measure 5-190 does not require the fine to be paid before licenses and building permits will be reinstated.

The signs described in Measure 5-191 are only required at subdivisions, commercial/industrial developments and major partitions under construction. Measure 5-190

applies to all employers, although some provisions only apply to building contractors and subcontractors.

If both measures pass, and the Board decides to draft and adopt an ordinance to implement Measure 5-191, it would make sense to adopt an ordinance which is consistent with Measure 5-190.

X. Possible legal challenges to Measure 5-191. There have been cases in which a court has upheld the removal of measures from the ballot that were advisory questions. For example, in City of Eugene v. Roberts, 305 Or 641, 756 P2d 630 (1988), the Oregon Supreme Court upheld the Lane County Clerk and the Secretary of State's decision not to place an advisory question on the ballot. In that case the City of Eugene wanted to ask voters which of two nuclear-free zone ordinances they wanted to approve. Because the wording of the question did not allow the rejection of both nuclear-free zone ordinances, it was not a measure, according to the Supreme Court and, therefore, not entitled to be on the ballot. *See also* Amalgamated Transit v. Yerkovich, 24 Or App 221, 545 P.2d 1401, rev den (1976). In that case, an initiative petition was filed to adopt an ordinance "approving the construction of the Mount Hood Freeway/Transitway in southeast Portland with federal and state funds on a route to be selected by the appropriate procedure and agencies in accordance with applicable laws and regulations." 24 Or App at 223. Because the ordinance would merely express the City's approval of the construction of the freeway and would request the Secretary of Transportation to continue his approval of the freeway, and in no way bound the State or U.S. Department of Transportation to follow the ordinance, the Court held that the proposed ordinance was not "legislative action" for which an initiative measure was appropriate.

Although both cases discuss the questions involved as "advisory" in nature, the decisions were decided on other principles. In the City of Eugene case, the initiative wasn't a "measure" because rejection of either nuclear-free ordinance wasn't an option. In Yerkovich, the proposed ordinance wasn't legislation. In my opinion, Measure 5-191 similarly is not legislation and could be challenged on that basis. There is a process where a measure could be challenged prior to the election, but the time frame for such a challenge has passed. ORS 250.168 requires the County Clerk to determine whether a measure is legislative, i.e., whether it complies with Article VI, Section 10 of the Oregon Constitution. ORS 250.168(4) gives electors seven days to challenge a determination by the County Clerk that a measure complies with Article VI, Section 10. Since no pre-election challenge was filed within seven days, I don't believe it could be removed from the ballot at this point. Nevertheless, I think it could still be challenged if it passes, and the Board of Commissioners doesn't adopt an ordinance to implement it.

If Measure 5-191 passes and the County decides to draft and adopt an ordinance to implement it, it could be challenged if it is inconsistent with the measure, although I wouldn't think a good faith attempt to reconcile the ordinance with Measure 5-190 would be overturned by the courts.

RECOMMENDATION IF EITHER MEASURE PASSES

Given the likelihood of legal challenges being filed against either measure, the question arises whether the County has an obligation to defend the measures. Typically, the Attorney General defends statewide legislation and ballot measures, but I was unable to find a direct requirement in the Oregon Revised Statutes to do so. ORS 28.110 requires that when the Oregon Constitution, any statute, charter, ordinance or franchise is alleged to be unconstitutional, the

Attorney General shall be served a copy of the proceeding and be entitled to be heard. Similarly, ORS 28.110 requires that, in any proceeding which involves the validity of a municipal charter, ordinance or franchise, the municipality affected shall be made party, and shall be entitled to be heard. I am unaware of any other statute which might require the County to defend the validity of a measure or ordinance. There may be a political risk in deciding not to defend a measure or ordinance, but that is beyond the scope of this analysis. Even if no challenge is filed against either measure, if the County were to try to enforce the measures, the chances of litigation are very high and the result is uncertain.

There is a proceeding set forth in ORS 33.710 and 33.720 which allows the county to file a petition for a judicial examination of ordinances and proposed ordinances. Unfortunately the authorization applies to, among other things, "the authority of the governing body to enact any ordinance, resolution or regulation", and "any ordinance, resolution or regulation enacted by the governing body, including the constitutionality of the ordinance, resolution or regulation." (Emphasis added.) "Governing body" is defined as including the board or commissioners of a county "or other managing board of a municipal corporation". The statutes do not expressly authorize a judicial examination of ordinances proposed or adopted by the electors.

Nevertheless, I believe we could get around that problem if the Board of Commissioners, the governing body, were to draft its own ordinances to implement the measures. One ordinance would correct the drafting errors and other inadvertent errors in Measure 5-190. For example, the ordinance could add "the board" to the sections of the measure which apply to intentional violations and second violations. It could also fix the errors with the dates. One of the questions that could be asked of the court is whether the Board has the authority to correct these errors in spite of the language in the ordinance that no amendments can be made unless they are referred to the voters. At the same time the court could be asked to examine the other issues in the measure which are likely to trigger legislation.

The second ordinance would implement Measure 5-191, but in a way which is consistent with Measure 5-190, if it also passes. The court could be asked if the Board has authority to adopt an ordinance which is inconsistent with Measure 5-191, but nevertheless is consistent with Measure 5-190.

My recommendation is that the Office of County Counsel be directed to draft ordinances which implement the measure if passed, but which correct the inadvertent and/or drafting errors, and which correct the inconsistencies between the measures. In addition, I recommend that the Office of County Counsel be directed to prepare a petition for a judicial examination of the proposed ordinances, with the petition being ready for filing immediately after the November 4 election if the measures pass. If only one of the measures passes, then only one ordinance would be necessary and the petition amended accordingly. If neither measure passes, of course, the petition and ordinances would not be necessary. The petition should also specifically ask the court whether it is necessary to refer the ordinance implementing Measure 5-190 to the electors.

Given the likelihood that litigation will be filed regarding these measures, I believe that the County will be in a better position if it is the first to file an action. Otherwise, outside parties would frame the issues, the County would be on defense, and, it is possible, on the hook for attorney fees no matter which way a court rules on the measures. If the County files first, I believe it is likely that outside parties with an interest in the measures will join in the judicial examination action, and the County could remain neutral on them until a final judgment is issued. In addition, I believe would

be appropriate to attempt to implement the apparent intent of the electors, if the measures pass, but in a way which eliminates drafting and other inadvertent errors, and provides for consistency between the measures.

CONCLUSION

In my opinion, Measure 5-190 has numerous flaws and is unlikely to survive a legal challenge in its present form. Measure 5-191 is flawed as well, but if it passes an ordinance could be drafted and adopted to implement it. Such an ordinance should be consistent with Measure 5-190, if it passes. The ordinance should probably provide for automatic repeal if Measure 5-190 is overturned by a court. If Measure 5-191 passes, and Measure 5-190 is rejected, the ordinance should be consistent with Measure 5-191, not 5-190, obviously.

Given the likelihood of litigation surrounding both measures, I think the County would be in a better position to manage the litigation and control legal expenditures if it is the first party asking for a determination of the validity of the measures. In addition, the Board is in a position to correct errors in, and inconsistencies between, the measures. If the Board agrees with my recommendation, my advice would be to have the petition for judicial determination ready to be filed, with the proposed ordinances attached, immediately after the election results are known.

Please let me know if you have any questions regarding this opinion.

EXHIBIT

IN HE CIRCUIT COURT OF THE STATE OF OREGON 08 MAY 23 PM 3:57

FOR THE COUNTY OF COLUMBIA

MARCY WESTERLING, CHIP BUBL, CRAIG FRASIER,PRATITI FULLERTON, ELOISE BATES, MIKE EDERA, GIGI GORDON, MARJORIE KUNDIGER, JEFF FULLERTON, JEFF ROGERS and CHRISTINE SANTORO

Petitioners,

vs.

STEVE ATCHISON, District Attorney of Columbia County

Respondent.

Case No. 08-2234

JUDGMENT (BALLOT TITLE)

COLUMBIA COUNTY CLERK'S OFFICE

MAY 23 2008

DATE RECEIVED

THIS MATTER came before the Court on May 20, 2008. Petitioner had requested that the Court review and revise the ballot title for a proposed initiative prepared by the District Attorney. The proposed initiative at issue was entitled:

Employment of Unauthorized Aliens.

At the hearing petitioners were represented by Meg Heaton of Portland, respondent appeared on his own behalf. After considering the pleadings, memoranda and arguments of counsel, the Court modifies the ballot title prepared by respondent.

IS HEREBY ORDERED, ADJUDGED AND DECREED that the following ballot title is approved:

CAPTION

5-190 Requiring county to prohibit employment of unauthorized aliens.

QUESTION

Shall Columbia County prohibit knowing or intentional hiring of unauthorized aliens; and set penalties in addition to Federal prohibitions?

R. STEPHEN ATCHISON
District Attorney for Columbia County
328 County Courthouse, St. Helens, OR 97051
503-397-0300 • Fax 503-397-2760

STATEMENT

This measure would make it illegal for any employer in Columbia County to knowingly or intentionally hire unauthorized aliens.

The measure sets out a system of penalties. These include fines of up to $10,000, suspension of licenses and suspension of building permits. Probation for violators is also authorized. Penalties could vary in severity based on several factors, such as: whether the violation was knowing or intentional; evidence of good-faith efforts by employer to comply with the law; whether or not the violation is a repeat violation; and/or filing of an affidavit of compliance by an employer after being found in violation.

The measure sets out procedures for enforcement. The "county attorney" would investigate complaints as directed by the measure. Any action brought against an employer would require notifying the federal government and local law enforcement. The county commission would be required to hold hearings on violations.

Employers are required after December 31, 2008, to verify employment eligibility through Department of Homeland Security.

This program would be funded from the county's general fund.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the modified ballot title is hereby forwarded to the Columbia County Clerk.

DATED this 23rd day of May, 2008.

Ted E. Grove, Circuit Court Judge

CERTIFIED TO BE A TRUE AND COR. COPY OF THE ORIGINAL DOCUMEN TRIAL COURT ADMINISTRATOR COLUMBIA COUNTY, OREGON BY [signature] DATED 5/23/08

R. STEPHEN ATCHISON
District Attorney for Columbia County
328 County Courthouse, St. Helens, OR 97051
503-397-0300 • Fax 503-397-2760

5-190

EXHIBIT 2

#0808

Be it ordained by the County of Columbia State of Oregon:

MAR 3 4½ PM '08

COLUMBIA CO. CLE
BY

Section 1.

EMPLOYMENT OF UNAUTHORIZED ALIENS

In this act, unless the context otherwise requires:

1. "Agency" means any agency, department, board or commission of this county, city or town that issues a license for purposes of operating a business in this county or a building permit.

2. "Basic pilot program" means the basic employment verification pilot program as jointly administered by the United States department of homeland security and the social security administration or its successor program.

3. "Employee" means any person who performs employment services for an employer pursuant to an employment relationship between the employee and employer.

4. "Employer" means:
a. any individual or type of organization that transacts business in this county, that has a license issued by an agency in this county, or
b. any individual or type of organization that holds a building permit in this county, and that employs one or more individuals who perform employment services in this state. Employer includes this state, any political subdivision of this state and self-employed persons.

5. "Intentionally" has the same meaning prescribed in section ORS _____.

6. "Knowingly employ an unauthorized alien" means the actions described in 8 united states code section 1324a. This term shall be interpreted consistently with 8 United States Code Section 1324a and any applicable federal rules and regulations.

7. "License":

(a) Means any agency permit, certificate, approval, registration, charter or similar form of authorization that is required by law and that is issued by any agency for the purposes of operating a business in this county.

(b) Includes:

(i) A building permit issued by Columbia County Oregon or any city within Columbia County Oregon.

(ii) Any business license.

8. "Unauthorized alien" means an alien who does not have the legal right or authorization under federal law to work in the United States as described in 8 United States Code section 1324a(h)(3)

Employment of unauthorized aliens; prohibition; violation; classification; license suspension and revocation

A. An employer shall not intentionally employ an unauthorized alien or knowingly employ an unauthorized alien.

B. On receipt of a complaint that an employer allegedly intentionally employs an unauthorized alien or knowingly employs an unauthorized alien, the county attorney shall investigate whether the employer has violated subsection A. When investigating a complaint, the county attorney shall verify the work authorization of the alleged unauthorized alien with the federal government pursuant to 8 United States Code section 1373(c). A state, county or local official shall not attempt to independently make a final determination on whether an alien is authorized to work in the United States. An alien's immigration status or work authorization status shall be verified with the federal government pursuant to 8 United States Code section 1373(c).

C. If, after an investigation, the county attorney

determines that the complaint is not frivolous:

1. The county attorney shall notify the United States immigration and customs enforcement of the unauthorized alien.

2. The county attorney shall notify the local law enforcement agency of the unauthorized alien.

D. An action for a violation of subsection A shall be brought against the employer by the county attorney in an administrative hearing before the board of county commissioners. The hearing shall be conducted in a manner provided for contested case hearings under chapter 183 of Oregon Statutes. Appeals shall be to justice court and shall be de novo and shall be treated as an action at law. Appeals from justice court shall be in accordance with state statutes governing appeals from justice court.

E. For any action before the board of commissioners and appeals to justice or circuit court under this section, the board or the court shall expedite the action, including assigning the hearing at the earliest practicable date.

F. On a finding of a violation of subsection A:

1. For a first violation during a three year period that is a knowing violation of subsection A, the board or the court:

(a) Shall order the employer to terminate the employment of all unauthorized aliens.

(b) Shall Order the employer who is a contractor or a subcontractor to be fined the sum of $10,000.

[C) The employer contractor, subcontractor shall be placed on probation for a period of three years. During the probationary period the employer shall file quarterly reports with the county attorney of each new employee who is hired by the employer .

(c) Shall order the employer to file a signed sworn affidavit with the county attorney within three

business days after the order is issued. The affidavit shall state that the employer has terminated the employment of all unauthorized aliens and that the employer will not intentionally or knowingly employ an unauthorized alien. The board or the court shall order the appropriate agencies to suspend all licenses and building permits subject to this subdivision that are held by the employer if the employer fails to file a signed sworn affidavit with the county attorney within three business days after the order is issued. All licenses and building permits that are suspended under this subdivision shall remain suspended until the employer, contractor, subcontractor files a signed sworn affidavit with the county attorney. The employer shall not be entitled to obtain new licenses or building permits until in compliance with the requirements of this subdivision and has terminated all illegal employees. If a license is not necessary to operate the employer's business at the specific location where the unauthorized alien performed work, but a license is necessary to operate the employer's business in general, the licenses that are subject to suspension under this subdivision are all licenses that are held by the employer at the employer's primary place of business. On receipt of the court's order and notwithstanding any other law, the appropriate agencies shall suspend the licenses according to the court's order. The court shall send a copy of the court's order to the county attorney.

(d) May order the appropriate agencies to suspend all licenses described in subdivision (c) of this paragraph that are held by the employer for not to exceed ten business days. The court shall base its decision to suspend under this subdivision on any evidence or information submitted to it during the action for a violation of this subsection and shall consider the following factors, if relevant:

(i) The number of unauthorized aliens employed by the employer.

(ii) Any prior misconduct by the employer.

(iii) The degree of harm resulting from the violation.

(iv) Whether the employer made good faith efforts to comply with any applicable requirements.

(v) The duration of the violation.

(vi) The role of the directors, officers or principals of the employer in the violation.

(vii) Any other factors the court deems appropriate.

2. For a first violation during a five year period that is an intentional violation of subsection A, the court shall:
(a) Impose a fine of $10,000 on building contractors only. This fine is not subject to suspension. This fine is mandatory.

(B) Order the employer to terminate the employment of all unauthorized aliens.

(C) Order the employer to be subject to a five year probationary period. During the probationary period the employer shall file quarterly reports with the county attorney of each new employee who is hired by the employer at the specific location where the unauthorized alien performed work.

(D) Order the appropriate agencies to suspend all licenses, and building permits and issue stop work orders on all pending building projects described in subdivision (d) of this paragraph that are held by the employer for a minimum of ten days. The court shall base its decision on the length of the suspension under this subdivision on any evidence or information submitted to it during the action for a violation of this subsection and shall consider the following factors, if relevant:

(i) The number of unauthorized aliens employed by the employer.

(ii) Any prior misconduct by the employer.

(iii) The degree of harm resulting from the violation.

(iv) Whether the employer made good faith efforts to comply with any applicable requirements.

(v) The duration of the violation.

(vi) The role of the directors, officers or principals of the employer in the violation.

(vii) Any other factors the court deems appropriate.

(d) Order the employer to file a signed sworn affidavit with the county attorney. The affidavit shall state that the employer has terminated the employment of all unauthorized aliens and that the employer will not intentionally or knowingly employ an unauthorized alien. All licenses and permits that are suspended under this subdivision shall remain suspended until the employer files a signed sworn affidavit with the county attorney. For the purposes of this subdivision, the licenses and building permits that are subject to suspension under this subdivision are all licenses and building permits that are held by the employer and that are necessary to operate the employer's business at any location the employer's conducts work. On receipt of the court's order and notwithstanding any other law, the appropriate agencies shall suspend the licenses according to the court's order. The court shall send a copy of the court's order to the county attorney and the county attorney general shall maintain the copy pursuant to subsection G.

3. For a second violation of subsection A during the period of probation, the court shall order the appropriate agencies to permanently revoke all licenses that are held by the employer and that are necessary to operate the employer's business and permanently deny the employer the right to obtain building permits in the future. On receipt of the order and notwithstanding any other law, the appropriate agencies shall immediately revoke the licenses and building permits and shall not issue licenses or building permits to the employer in the future.

G. The county attorney shall maintain copies of court orders that are received pursuant to subsection F and shall maintain a database of the employers who have a first violation of subsection A and make the court orders available on the county website.

H. On determining whether an employee is an unauthorized alien, the court shall consider only the federal government's determination pursuant to 8 United States Code section 1373(c). The federal government's determination creates a refutable presumption of the employee's lawful status. The court may take judicial notice of the federal government's determination and may request the federal government to provide automated or testimonial verification pursuant to 8 United States Code section 1373(c).

I. For the purposes of this section, proof of verifying the employment authorization of an employee through the basic pilot program creates a refutable presumption that an employer did not intentionally employ an unauthorized alien or knowingly employ an unauthorized alien.

J. For the purposes of this section, an employer who establishes that it has complied in good faith with the requirements of 8 United States Code section 1324b establishes an affirmative defense that the employer did not intentionally or knowingly employ an unauthorized alien.

Employer actions; federal or state law compliance

This article shall not be construed to require an employer to take any action that the employer believes in good faith would violate federal or state law.

Verification of employment eligibility; basic pilot program

After December 31, 2008, every employer, after hiring an employee, shall verify the employment eligibility of the employee through the basic pilot program.

On or before October 1, 2008, the county shall provide a notice to every employer that is required to withhold tax. The notice shall explain the requirements of this act, including the following:

1. A new county law prohibits employers from intentionally employing an unauthorized alien or knowingly employing an unauthorized alien.

2. For a first violation of this new county law during a three year period that is a knowing violation, the court will order the appropriate licensing agencies to suspend all licenses and building permits held by the employer unless the employer files a signed sworn affidavit with the county attorney within three business days. The filed affidavit must state that the employer has terminated the employment of all unauthorized aliens and that the employer will not intentionally or knowingly employ an unauthorized alien. A license and permits that are suspended will remain suspended until the employer files a signed sworn affidavit with the county attorney. A copy of the court order will be made available on the county's website.

3. For a first violation of this new state law during a five year period that is an intentional violation, the court will order the appropriate licensing agencies to suspend all licenses held by the employer for a minimum of ten days. The employer must file a signed sworn affidavit with the county attorney. The filed affidavit must state that the employer has terminated the employment of all unauthorized aliens and that the employer will not intentionally or knowingly employ an unauthorized alien. A license that is suspended will remain suspended until the employer files a signed sworn affidavit with the county attorney. A copy of the court order will be made available on the attorney general's website.

4. For a second violation of this new state law, the court will order the appropriate licensing agencies

to permanently revoke all licenses and permits that are held by the employer.

5. Proof of verifying the employment authorization of an employee through the basic pilot program, as defined above, as added by this act, will create a refutable presumption that an employer did not violate the new county law.

6. After December 31, 2007, every employer, after hiring an employee, is required to verify the employment eligibility of the employee through the basic pilot program, as defined in this act.

7. Instructions for the employer on how to enroll in the basic pilot program.

Sec. 5. Severability

If any provision of this act or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this act that can be given effect without the invalid provision or application, and to this end the provisions of this act are severable.

Sec. 6. Short title

This act shall be known as and may be cited as the **"Columbia County Fair Trade and Employment Act."**

Sec. 7. No New Taxes

A. The county shall not impose any new tax as a result of this act. Funding for this act shall be taken from the general fund. The county may not cut law enforcement, road department, or parks and recreation funding to pay for any costs associated with the implementation of this act. The income generated from fines imposed under this act shall first be applied to costs of implementing this act, and all surplus shall be applied to law enforcement through the Columbia County Sheriff's Office.

This measure may not be amended, modified, or repealed without being referred to the voters.

Section 9. Enforcement

All county officials are required to enforce and uphold this measure. Willful refusal to follow the terms of this measure and perform the duties assigned herein, shall constitute official misconduct and shall be dealt with accordingly.

All citizens have the right to petition the justice court for appointment as a special county counsel, to be paid out of general funds at a rate no less than 1.5 times the hourly rate of the most junior county counsel and may perform enforcement functions in the event any county official fails to enforce this measure as required.

EXHIBIT 3

230 STRAND STREET
ROOM 328
COUNTY COURTHOUSE
ST HELENS OR 97051
(503) 397-0300
FAX (503) 397-2760

OFFICE OF THE DISTRICT ATTORNEY

COLUMBIA COUNTY, OREGON

R. STEPHEN ATCHISON

DISTRICT ATTORNEY

DALE L. ANDERSON, CHIEF DDA
JENNI JORDAN, DDA
JOHN N. BERG, DDA
KIMBERLYN SILVERMAN, DDA
LEA L. KEAR, DDA
PENNY EHRENKRANZ, OFC MGR
JANICE FALTERSACK, VICTIM ASSIST

SEP 27 2 25 PM '07

COLUMBIA CO. CLERK
BY DEP

Pet. ID 5-2007

CAPTION

5-191 Measure Requiring Signs at Construction Sites Referencing Undocumented Workers

QUESTION

Shall contractors within Columbia County be required to post construction sites with signs titled "Legal Workers Only"?

STATEMENT

This measure would require Columbia County contractors to post at the entrances to every subdivision, commercial/industrial development, and minor partition a sign saying "Legal Workers Only." The sign must contain the following information:

That a "punitive charge" of $10,000 would be added to the cost of a construction permit if any undocumented workers were found to have worked on the site.
That a "stop work order" would go into effect until:

1. The punitive charge was paid; and
2. All undocumented workers were removed from the site.

The telephone numbers of the Building Department, Sheriff's Office, and new 800 number of the Social Security verification pilot project would also be a part of the sign. Specifications of the sign would be 4 foot by 8 foot three-quarter inch plywood with words in minimum four inch high bold print.

5-191

EXHIBIT 4

Because of unfair trade practices implemented by unscrupulous contractors hiring undocumented workers rather than legal employees, measures must be taken to protect honest, hardworking local businesses. It is expected that affected employees, friends and business owners may ask for an investigation if because of pricing they suspect substandard wage advantage.

Shall Columbia County require of building contractors a **4'X 8' ¾"** plywood sign in at least **4"** readable bold print at the entrances to **every subdivision, commercial/industrial development, and minor partition** under construction titled **"Legal Workers only"** explaining the addition of a punitive charge to be levied by Columbia County through the code enforcement officer **of $10k** to the cost of every construction permit built in any part by even one confirmed illegal, undocumented worker in conjunction with a stop work order until paid and illegal hires are removed and listing the phone numbers of the building department, police department, and the new 800 number of the Social Security employee verification pilot project?

169 words. Wayne Mayo 415 South 2nd St. Helens, Oregon 97051

SEP 19 11 21 AM '07
COLUMBIA CO. CLERK
BY _____ DEP