

## PLENARY SESSION

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### **The World Turned Upside Down: Payment for Regulation Under Oregon's Measure 37**

9:45–10:45 a.m.

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Sturm Hall, Davis Auditorium

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Moderator: **Sarah Rockwell, Esq.**  
Kaplan Kirsch and Rockwell  
Denver, Colorado

Panelists: **Edward J. Sullivan, Esq.**  
Owner  
Garvey Schubert Barer  
Portland, Oregon

**David J. Hunnicut, Esq.**  
Executive Director  
Oregonians in Action  
Tigard, Oregon

**David Knowles**  
Vice President, Planning and Development Services  
David Evans & Associates  
Portland, Oregon

## THE WORLD TURNED UPSIDE DOWN

### PAYMENT FOR REGULATION UNDER OREGON'S MEASURE 37

Edward J. Sullivan, Owner  
Garvey Schubert Barer  
Portland, Oregon  
esullivan@gsblaw.com



## Measure 37 Application:

When a public entity "enacts or enforces" a land use regulation that "restricts the use of" private property "and has the effect of reducing the fair market value of the property," then the owner of the property shall be paid the difference between the value of the land with and without the regulation.

- When is a land use regulation "enforced?"
- Does a restriction in "use" include land use subdivisions or partitions?



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## Measure 37 Exceptions

- Common law public nuisances
- Activities that protect for the public health and safety such as building code regulations, solid or hazardous waste regulations and pollution control regulations
- Land use regulations that are required to comply with federal law
- Porn or nude dancing



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## Government Payment Issues

Payments are measured from the time that the current owner, or the owner's family member **or entity** acquired the property. (From the California Proposition 13 playbook)

The measure provides no source of funds for those payments and government entities typically do not have funds to pay claims.

The attorney fee "bet" over ambiguous provisions and exceptions.

Valuation uncertainty and deferred taxes.



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## The Transferability Problem

If a government does not pay:

It may elect to "modify, remove, or not to apply" the land use regulation or regulations thereby allowing "the owner to use the property for a use permitted at the time the owner acquired the property."

"Owner" has been interpreted by the Oregon Attorney General to mean the "current owner." The waiver runs with the person and not with the land meaning that transfer to a subsequent owner makes the action taken pursuant to the waiver non-conforming or an illegal use.



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## Filing a claim

Local governments are authorized to adopt procedures for the processing of claims but "in no event shall these procedures act as a prerequisite to the filing of a claim" or shall the failure of the owner to file an application for a permit be grounds for dismissal or delay of a claim.

- A majority of local governments have adopted claim procedures that require, for example, proof of ownership, an appraisal, payment of a processing fee, and identification of the regulations that have affected the land value. The validity of these responses is open to question.
- Ripeness may be another issue – A claimant must show the regulation would have been applied.



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## A local government has certain options:

- It has 180 days from the date of “written demand” to grant a waiver or pay just compensation.
- But failure to pay or waive within 180 days gives the claimant a cause of action in circuit court where the claimant is entitled to attorney fees.
- Local governments are not entitled to recover any fees, even if they prevail.
- If a claim is not followed by a court action, the regulation is lifted after two years anyway.

If an adjacent property owner obtains a waiver pursuant to a valid claim, a neighboring property owner can:

- Do nothing, under some ordinances.
- But many local ordinances require notice and an opportunity for a hearing before a waiver will be granted providing a forum where neighbors can voice their concerns.
- Some local ordinances provide a private right of action in circuit court should a Measure 37 waive reduce the value of adjacent properties.

## Commentary

# Oregon's Measure 37: Crisis and Opportunity for Planning

Edward J. Sullivan

It was a clever political stroke. For the second time, opponents of the Oregon planning system convinced the voters of the state to pass an initiative (Measure 37) that appears to cripple a planning system that had withstood three previous frontal assaults. The objective was accomplished not by another frontal assault, but by putting to the voters a proposition promising government payments when certain land use regulations reduce land values. By using the term “just compensation” in Measure 37, the drafters identified themselves with payment for property actually appropriated by state or local governments for roads, sewer plants, or other public works. By keeping “on message” with a theme based on “fairness” and concentrating on anecdotal inequities, especially tales of grandmothers unable to realize their fiscal expectations, the campaign rolled to a 61-to-39 percent victory in the November 2004 election.

How could this have happened? asked Oregon planners and planning supporters. Will this be the end of the Oregon planning system? Did voters wish to see the end of exclusive farm zones and urban growth boundaries, of natural resource protection and the regulation of growth? While the answer to all these questions is “probably not,” the passage of Measure 37 begins a new chapter in Oregon’s planning history. More importantly, the lessons learned by Oregon in the adoption, and aftermath, of Measure 37 may well be played out in other states during this first decade of the twenty-first century.

Measure 37 emphasizes government payments where certain land use regulations reduce property values. Payments are measured from the time the current owner, or the owner’s family member or entity, acquired the property at issue.<sup>1</sup> Because Measure 37 provides no source of funds for those payments and government entities typically do not have funds to pay

claims, the real import of the Measure is in the alternative to payment—namely, waiver of the land use regulations. Waiver means putting into effect those regulations that were in place when the current owner acquired the property.<sup>2</sup>

Issues raised by Measure 37 are not limited to the choice of government payments or waiver. As drafted, Measure 37 has significant practical difficulties, not the least of which is the lack of a statute of limitations. The threat of a rollback of regulations on a property-by-property basis may lead to an incoherent patchwork of land use regulations and a reluctance by state, regional, or local governments to undertake most new land use regulations.

While the foregoing is a dire forecast, there is still life left in the Oregon planning system. State, regional, and local officials are confronting the situation, attempting to deal with the effects of Measure 37. While legislation provides

Edward Sullivan is a partner with Garvey Schubert Barer in Portland, Oregon, where he practices planning, administrative, and municipal law, and serves as city attorney for several Oregon cities. He has written numerous articles on land use law and authored a number of amicus briefs for APA, and is a member of APA's Amicus Curiae Committee.

1. The drafters of Measure 37 took a page from the playbook of the California initiative limiting property taxes, Proposition 13 (1978), by which property assessment was virtually “frozen” but could be reassessed when it changed hands. This approach makes single-family housing more vulnerable to increased taxes,

while at the same time corporate property retained an artificially low tax rate, because it almost never “changed hands,” largely due to stock sales, mergers, or other transactions—which did not result in a new entity taking title.

2. The effects of Measure 37 are related to the class of property owner. A farmer may have had

land in her family for 100 years and would, under the Measure, be entitled to payment for any “loss” of value measured by the value of the land with and without land use regulations that came into effect in that period. However, that farmer would only be entitled to a waiver of the regulations that came into effect since *she* acquired the land. A

timber corporation, however, existing for the last 100 years, is, as a practical matter, not subject to the same kind of owner limitation for waiver and may take advantage of either the government payment option or the waiver option.

An initiative . . . was the only political tool available to change the state's land use program.

probably the best alternative means of dealing with Measure 37, a divided legislature may prevent that alternative from being realized. With similar initiatives likely to be introduced in other states, it is important to address the past, present, and future of Oregon's "pay or waive" effort.

### TROUBLE IN PARADISE: EVENTS LEADING TO MEASURE 37

Since 1973, Oregon has had a two-tier approach to land use.<sup>3</sup> Instead of detailed statutory direction, the legislature created the Land Conservation and Development Commission (LCDC), which had authority to create and enforce statewide land use standards, called "goals." These goals are implemented by city and county land use plans and ordinances, which LCDC reviews for compliance with the state goals. Land use plans and actions of other nonfederal public entities, including state agencies and special districts, are also required to conform to the goals—in most cases, by complying with city and county plans that were "acknowledged" (i.e., found by LCDC to conform to the goals). In 1981, the legislature established the Land Use Board of Appeals (LUBA) in place of the court system to review most land use actions not subject to LCDC jurisdiction, with a direct review available to the state's appellate courts.

Program supporters missed warning signals that the system could be undermined with the right combination of stories and words. Since the early 1990s, the political system was in stalemate, with Democrats—usually supporters of the program—occupying the Governor's Office, and Republicans—less committed to the existing system and including those who wished to diminish or abolish the program—controlling one or both houses of the legislature. With a stalemate at the legislative and executive branches, aboli-

tion or significant change of the program was not possible. Thus an initiative, being beyond the control of those branches, was the only political tool available to change the state's land use program.

Because of the stalemate, changes to the system required accommodation. Those bills that did pass into law were either minor in nature or compromise efforts. One of the last significant legislative compromises was House Bill 3991 (1993), which authorized counties to allow the owner of a farm- or forest-zoned "lot of record" that he or his family acquired before January 1985 to site a single-family dwelling on the lot.<sup>4</sup> The bill also established a minimum lot size for forest and farm lands at 80 or 160 acres<sup>5</sup> and prohibited nonresource use of certain prime farm and forest lands.<sup>6</sup> Another significant compromise was found in OR. REV. STAT. § 197.296, which required Metro, the Portland metropolitan service district, to review its urban growth boundary every five years (which homebuilders desired), but also set priorities for additions to that boundary to emphasize lands of lesser resource value.<sup>7</sup>

The lack of legislation did not mean that the system was at a standstill. LCDC still had broad discretion to adopt, amend, or repeal the goals and, more frequently, the administrative rules interpreting the goals. These changes did not require legislative approval. In fact, the legislature required local governments to comply with new statutes, goals, or rules at the time the new provisions were adopted or amended. Additionally, the legislature provided that if local governments had not amended their plans or regulations, these new standards were directly applicable.<sup>8</sup> LCDC commissioners were appointed by a governor who was usually committed to conservation and upholding the existing system. Any

change had to come from within the system or through the ballot box.

The first efforts to change the system were unsuccessful, with the system surviving three initiative challenges to repeal or eviscerate it. However, in 2000, Measure 7, a constitutional amendment similar to Measure 37 (though not expressly providing for waivers), was placed on the ballot and passed with 53 percent of the vote.<sup>9</sup> Measure 7 was invalidated by the state supreme court because it violated state constitutional provisions relating to amendment of the constitution.<sup>10</sup> Because Measure 37 is a statute rather than a constitutional amendment, it is less likely to be subject to a facial constitutional attack.<sup>11</sup>

### THE PASSAGE OF MEASURE 37

Supporters of the Oregon planning system had less excuse for allowing the passage of Measure 37 than the passage of Measure 7. The Measure 37 ballot was less crowded, opponents of the Measure outspent proponents by approximately two to one, and there was more publicity about the Measure and its effects. Newspapers around the state urged voters to reject Measure 37. Most state and local government officials provided dire warnings of its effects. Why then did Measure 37 pass?

While there is no single answer, there are a number of relevant observations:

1. Support for the state's land use system is strongest in urban areas, so the objective of opponents of that system has always been to get some of these supporters to vote for a initiative that did not appear to affect land use planning directly. On the other hand, opponents of the system could usually count on the votes of a majority in most rural areas and had a solid minority base of about 40 percent within urban areas.

3. In 1990, the voters of Oregon authorized a regional home rule charter for the Portland metropolitan area. In 1992, the voters of the Portland region passed a charter so that the Metropolitan Service District was recognized as a home rule entity, to which the state legislature gave certain authority, including land use planning and regulatory powers in matters of

regional concern. Local governments are also free to form regional planning agencies, as have local governments in the Salem-Keizer and Eugene-Springfield metropolitan areas. In those cases, there may be a "three tier" system of land use review.

4. OR. REV. STAT. § 215.705(1)(a)(A) and (B).

5. OR. REV. STAT. § 215.780(1).

6. OR. REV. STAT. § 215.705 AND 710.

7. OR. REV. STAT. § 197.298(1).

8. OR. REV. STAT. § 197.646.

9. See Carl Abbott et al., *A Quiet Counteroffensive in Land Use Regulation, The Origins and Impact of Oregon's Measure 7*, 14 Hous.

POL'Y DEBATE 383 (2003). This is an enlightening article on the politics of Measure 7 and its aftermath.

10. League of Oregon Cities v. Kitzhaber, 56 P.3d 892 (2002). The Oregon Supreme Court found that Measure 7 included several constitutional changes, in violation of the "separate vote" requirements of

Article XVII, Section 1 of the state constitution.

11. However, on January 14, 2005, a declaratory judgment complaint was filed to invalidate Measure 37 facially on various state constitutional grounds. MacPherson v. Dept of Admin. Servs., No. 05C10444 (Or. Cir. Ct. Marion County 2005). The suit is pending.

The theme of the campaign by opponents of the Oregon planning system was not anti-planning, but “fairness.”

2. Opponents of the Oregon land use system were reasonably well financed and able to get a ballot title through the process by putting up multiple possible Measures and waiting the statutory time to see if the ballot title were challenged (see proposed ballot title to the right). In this case, there was no challenge. For many observers, the ballot title was the end of the ball game, because many voters do not read the voters pamphlet and have only the ballot title to go on when they vote. Once the ballot title was certified, opponents of the system were able to use a combination of their own base and paid signature gatherers to get Measure 37 on the 2004 general election ballot.
3. The theme of the campaign by opponents of the Oregon planning system was not anti-planning, but “fairness,” usually embodied by anecdote. Taking a page from the national property rights movement playbook,<sup>12</sup> their ads effectively used a tape of a 94-year-old widow, Dorothy English, stating she wanted to divide her forest land to give portions to her children.<sup>13</sup> Combined with the desires of rural landowners to sell portions of their property for financial reasons and the occasional story of an urban landowner not being able to put up a deck on a house in a resource district, this story gave voters something to think about when entering the voting booth. All the successes of planning seemed to pale in this light. Fewer than half of Oregon’s current inhabitants lived in the state, or had been children, when Senate Bill 100, initiating the Oregon planning program, was passed in 1973. In over 30 years, that program had not been scrutinized. Many thought it was out of touch with the wishes of Oregon residents.

4. Private polls taken at the beginning of the “No on 37” campaign showed that 23 percent of those who had only read the ballot title opposed Measure 37. Although it had more money than Measure 37 proponents, the “No on 37” campaign eventually managed to raise opposition to only 39 percent—not enough to overcome the ballot title and the Measure’s text, which used language resonating from the takings clauses of the state and federal constitutions. Irrespective of their effectiveness, the ads opposing Measure 37 were simply not heard, nor remembered, over the din of the presidential campaigns in a “battle-ground state.”
5. Oregon is as much a libertarian state as it is a progressive state. Decriminalization of marijuana, no-fault divorce, and death with dignity are all causes that resonate with Oregonians.<sup>14</sup> Additionally, as a western state, Oregon has a strong property rights culture. Proponents of Measure 37 also exploited these themes well.

#### MEASURE 37’s PROVISIONS

Regardless of the reasons for the passage of Measure 37, planners in Oregon must now learn to deal with its provisions (see full text of Measure 37 on page 9), which are summarized as follows:

1. Measure 37 creates a general statutory (rather than constitutional) right to government payment when a government “enacts or enforces” a “land use regulation”<sup>15</sup> that restricts the use of property and reduces its value.
2. Should payment be chosen, the measure of payment is equal to the reduction in fair market value of the property with the regulation, as opposed to that value without the regulation.<sup>16</sup>
3. Section 3 of Measure 37 contains several exceptions to the payment or

#### BALLOT TITLE FOR PROPOSED MEASURE 37

##### MEASURE 37

**GOVERNMENTS MUST PAY OWNERS, OR FORGO ENFORCEMENT, WHEN CERTAIN LAND USE RESTRICTIONS REDUCE PROPERTY VALUE**

RESULT OF “YES” VOTE: “Yes” vote requires that governments pay owners, or forgo enforcement by repealing, changing, not applying restrictions, when certain land use restrictions reduce owners’ property value.

RESULT OF “NO” VOTE: “No” vote rejects requiring that governments pay owners or forgo enforcement by repealing, changing, not applying restrictions, when certain land use restrictions reduce property value.

SUMMARY: Currently, Oregon Constitution requires government(s) to pay owner “just compensation” when condemning private property or taking it by other action, including laws precluding all substantial beneficial or economically viable use. Measure enacts statute requiring that when state, city, county, metropolitan service district enacts or enforces land use regulation that restricts use of private real property or interest thereon, government must pay owner reduction in fair market value of affected property interest, or forgo enforcement. Governments may repeal, change, or not apply restrictions in lieu of payment; if compensation not timely paid, owner not subject to restrictions. Applies to restrictions enacted after “family member” (defined) acquired property. Creates civil right of action including attorney fees. Provides no new revenue source for payments. Certain exceptions. Other provisions.

12. *Dolan v. Tigard*, 512 U.S. 374 (1994) and *Suitem v. Tahoe Reg’l Plan. Auth.*, 520 U. S. 725 (1997), were “widow cases” in which sympathy for the status of the plaintiffs played a part in the litigation strategy.

13. The ads did not note that Ms. English had previously split off

two portions of her property for sale.

14. Although Oregon passed a constitutional amendment banning gay marriages in the 2004 election, it had the least amount of support of the 11 states that did so, and the state does allow certain rights to same sex couples.

15. While the term “land use regulation” includes state and local planning and zoning regulations, it also specifically includes transportation ordinances and forestry regulations. The inclusion of the latter should not be surprising, since timber corporations put up a good deal of the campaign funds to promote Measure 37.

16. There are multiple problems with appraisal, which must consider the value of land as affected by an open-ended number of potential waivers for surrounding lands.

The waiver of regulations only goes as far back as the acquisition of the property by the *present* owner.

waiver choices and appears largely to be designed to avoid the “parade of horrors” that might be raised by opponents of the Measure. In particular, Measure 37 does not apply to regulations:

- (A) “*Restricting or prohibiting activities commonly and historically recognized as public nuisances under common law. This subsection shall be construed narrowly in favor of a finding of compensation under this act*”  
This exception will be difficult to apply. Public nuisances involve violations of law or policy and are subject to equitable defenses. Combine this complexity with the narrow construction required by Measure 37 and there is no practical content to the exception.
- (B) “*Restricting or prohibiting activities for the protection of public health and safety, such as fire and building codes, health and sanitation regulations, solid or hazardous waste regulations, and pollution control regulations*”  
Note that only the “public health and safety” part of the familiar triad of “public health, safety, and welfare” is present. The change is significant, not only for the requirement that a land use regulation be limited to health and safety (and be consistent with the examples used in the text of the exception), but also because there is no guidance as to the meaning of these terms.
- (C) “*To the extent the land use regulation is required to comply with federal law*”  
While there are some clear examples of this exception, such as the Columbia River Gorge Commission’s authority in the bistate scenic area,<sup>17</sup> these are in the minority, for the federal government often does not require state and local governments to enact specific provisions, but allows those

governments to choose the means of complying with a federal program. Whether these choices—such as regulation of air and water quality sources and coastal zone mandates—constitute “requirements” remains to be seen.

- (D) “*Restricting or prohibiting the use of a property for the purpose of selling pornography or performing nude dancing. Nothing in this subsection, however, is intended to affect or alter rights provided by the Oregon or United States Constitutions*”  
This exception is incoherent. If there is a constitutional problem (as is likely under the Oregon Constitution) in paying others not to use their property and not paying those who choose to use their property for otherwise lawful free expression, then there is no exception. The exception is also underinclusive, as the first claim for a regulation restricting lingerie modeling will show.
- (E) “*Enacted prior to the date of acquisition of the property by the owner or a family member of the owner who owned the subject property prior to acquisition or inheritance by the owner; whichever occurred first*”  
This is the only surefire exception and revolves around when the person (or family member) or entity acquired the property. Genealogy tables, corporate papers dealing with renaming or reorganization, as well as applicable zoning regulations, must be at hand when evaluating possible actions under Measure 37.

- 4. A claim must be filed before any government obligation to respond occurs. While the Measure allows governments to establish claim procedures, Section 7 specifically states that such procedures

shall not constitute prerequisites for making a claim to a court. One immediate controversy is whether local governments may ask about the details of the claim, such as the current owner’s relationship to a family member or the amount of the claim, or require a processing fee. Moreover, if a previous owner reacquires the property, then she may be able to act as if the property had been in the family all along.

- 5. Because governments are more likely to choose waivers, it is important to note that the waiver of regulations only goes as far back as the acquisition of the property by the *present* owner.<sup>18</sup>
- 6. Measure 37 does not require notice or a hearing on decisions involving payment or waiver. Many local governments, however, have adopted ordinances requiring them for both political and legal reasons. The notice and hearing process avoids the inevitable shock when a neighboring landowner discovers a waiver for the first time when the bulldozers show up. Moreover, a hearing may result in a more reasoned decision that considers all the facts—both initially and if challenged.

#### THE AFTERMATH OF MEASURE 37

Measure 37 took effect on December 2, 2004. Since then, at least 58 claims have been filed against the State of Oregon, 7 against the Portland area regional government, 20 against cities, and 120 against counties.<sup>19</sup> The pattern of these claims is to allow residential development on farmland and forestland in rural areas and to remove environmental overlay regulations in urban areas. Because claims cannot be filed in court until 180 days after a demand for payment, the primary immediate effect of Measure 37 thus far has been governmental entities deciding whether or not to adopt ordinances and fee schedules for processing claims.

17. See Columbia River Gorge National Scenic Act, Pub. L. No. 99-663 (codified in scattered sections of 16 U.S.C.) and Or. Rev. Stat. §§ 197.105-.165.

18. As the rollback timeline is relatively short for natural persons (as opposed to impersonal entities), the tendency to waive,

rather than pay based on regulations applicable when the first family member acquired the property, is even greater for those entities.

19. There is no law requiring that a central registry of claims be kept, so the number of city and county claims may be inaccurate

and unrepresentative. At least one proponent of Measure 37 has suggested that potential claims be withheld for the moment, perhaps until the end of the 2005 biennial legislative session, so that no undue alarm is sounded immediately.

How Oregon deals with Measure 37 will also be emulated or eschewed elsewhere.

There are a number of issues inherent in the implementation of Measure 37. Some of these include:

1. Other than the exception relating to the date of acquisition by the claimant or family member, the exceptions and the claims process are full of ambiguities. Public entities must either guess right or suffer the awarding of attorney fees and costs to the claimant. They have no right to attorney fees and costs, however, if a claimant brings a failed claim.
2. Valuation of the land is an unknown, particularly if other surrounding properties may qualify for the same or different waiver. Appraisers may not know the genealogy of surrounding owners, and land use regulations (some over 70 years old) may not be available. This point is not only important in the evaluation of claims, but also in the financing of property.
3. Whether a waiver may be transferred is also important. If, as Measure 37 suggests, a waiver is personal to the present owner, then that owner may not transfer the waiver to allow another to develop the property. If the owner develops the property herself, the best she can transfer to others is a nonconforming use, which has its own set of problems under Oregon law. One way to deal with this is for a pre-existing owner to continue having a minimal property interest in the land, something more easily accomplished by a corporation or similar entity.
4. If one of several owners makes a claim, a government may decide to pay a minimal amount to one owner and use that payment to deny a waiver to others.
5. It is not yet certain whether regulations in effect when the present owner acquired the property “come back to life” unless current regulations are changed or repealed.

6. Oregon has invested \$5.4 billion in forgiven or deferred taxes to owners of farmland and forestland. Will this investment be taken into account when determining the amount of payment? Similarly, will development fees for infrastructure contributions be taken into account?
7. May local governments exact a covenant or other enforceable agreement by which the property owner agrees to keep in place either the current regulations (in the case of payment) or those regulations in place when she acquired the property (in the case of waiver)? Can such permission be granted or revoked in return for the payment of a fee?

Because these questions are unlikely to be resolved without litigation, it is likely they will be raised either by declaratory judgment proceedings before a claim is decided, or by collateral proceedings to challenge a payment or waiver. In that way, the government entity need not be concerned over payment of attorney fees.

#### OREGON DEALS WITH MEASURE 37

Because the passage of Measure 37 gave new life to the property rights movement, it is likely that the Measure, or its ideas, will be used elsewhere. Thus, how Oregon deals with Measure 37 will also be emulated or eschewed elsewhere.

In the immediate future, Measure 37 provides ammunition that applicants will use to negotiate conditions of approval or the waiver of regulations that may pose obstacles to development proposals. The very vagueness of Measure 37 that causes public entities to be cautious, however, will also cause those involved in real estate and development to abjure responsibility for transactions involving Measure 37.<sup>20</sup> While it is likely that planners will recount their share of “win-win” encounters with Measure 37 in self-congratulatory

articles, the fact remains that Measure 37 is an unmitigated disaster for planning in Oregon and leaves many practical questions unanswered.

To begin with, because many of the regulations targeted by the authors of Measure 37 are state-mandated,<sup>21</sup> claims must be filed with both the state and the local government, and a waiver of regulations in the case of the state does not necessarily equate to a waiver of the analogous local regulation, and vice-versa. A related issue concerns which level of government has authority to waive a given restriction. Measure 37 says that only a “governing body” may waive a regulation. In the case of a statute, only the legislature has that authority. But in the case of a state agency carrying out a broadly stated policy for preservation of the environment or preservation of open space, is the “governing body” the agency or the legislature?

Notwithstanding these difficulties and the uncertainties of the wording of Measure 37, state, regional, and local governments in Oregon are addressing the Measure in at least 10 ways:

1. **Adopting Claims Processing Requirements and Providing for Fees.** Most governmental agencies cannot evaluate claims without information on current ownership, family interests in the property, relevant regulations, property description, and the like. Moreover, evaluation of a claim takes time and money that is not in the agency’s budget. While Measure 37 states that procedural requirements will not prevent the filing of claims in court, public entities contend that the claimant has the burden of justifying the claim and paying the costs of processing it.
2. **Strategic Litigation.** With so many questions unanswered as to the scope of Measure 37, public entities and planning organizations are considering

20. The Oregon Association of Realtors advised its members not to give advice themselves but to tell clients that they should receive competent advice from other professionals.

21. For example, minimum lot size or use regulations in farm and forest zones, or natural

resource protections in areas around such resources, have both a state and a local analogue.

Local governments will declare subdivision regulations, which do not determine land use, to be outside the scope of the Measure.

- some “test cases” to determine its contours. These cases will largely be brought outside the scope of the claims process to avoid the Measure’s attorney fee provisions.
3. **Determining Coverage.** Because Measure 37 speaks to the “use” of land, a number of local governments will declare subdivision regulations, which do not determine land use, to be outside the scope of the Measure. It is also likely that other regulations now found within zoning or land development regulations—such as design review, tree cutting, and sign regulations—will be placed elsewhere in the local code.
  4. **Ripeness.** Because Measure 37 speaks to regulations “enacted or enforced,” one can expect to see more care taken in the characterization of regulations in the future.<sup>22</sup> For existing regulations, public entities may require a landowner to show that the regulation was enforced through the filing of, and final action on, a development application subject to the regulation. In those cases, however, denial of the application may not necessarily be based on the targeted regulation, and the process itself may winnow away some claims.
  5. **Community Obligation for Development Rights.** Local democracy may work best when neighbors decide to get together in a formal sense to “buy” the development rights of adjacent or nearby properties. Under home rule authority, local governments may form assessment districts to buy rights at an appraised value so that neighbors fund a public conservation easement over the land. It is possible for the local government to issue bonds to pay for this purchase and to charge benefited properties a proportionate share, plus interest and carrying costs, to accomplish that end.

6. **Coordination of Claims.** Measure 37 does not require any central repository of claims. The State of Oregon has provided for such a repository by a temporary administrative rule,<sup>23</sup> which is expected to be made permanent later in 2005. Regional and local governments may be required to provide a repository of claims by statute or administrative regulation. The coordination of information on claims is important to assure that one level of government knows what the other level is doing, especially to avoid double payments and to know which regulations are proposed to be waived for which property.
7. **Determining the Content of the Applicable Regulation.** Planning law in Oregon goes back to the early 1920s and has both a state and a regional/local element. Before 1969, cities adopted most land use regulations through their home rule powers, so those regulations must be researched. Starting in 1955, subdivision and street access regulations were required. In 1969, the legislature required cities and counties to adopt both plans and zoning regulations and to use certain statutory considerations in doing so. The scope and content of these considerations, which were not replaced until the statewide planning goals were enacted in 1974-75, were untested. Because the statewide planning goals applied for many years before being definitively interpreted by the courts, initial applications of the goals may differ from their application under the later definitive interpretations. These considerations are expected to keep lawyers busy for many years to come.
8. **The Role of Previous Subsidies.** Because the taxpayers have paid farmers, ranchers, and timber companies \$5.4 billion in deferred or forgiven

- taxes to keep their lands in resource use, a fair case may be made for recouping some or all of those funds if the recipient landowner seeks a further government payment. If the regulation prompting a Measure 37 claim were the basis for a previous government payment, it would be only fair that these funds be repaid as part of the claim for more public monies.
9. **Givings.** In their comprehensive work, *Windfalls for Wipeouts*,<sup>24</sup> the late Donald Hagman and Dean Misczynski suggested that perceived inequities in the application of land use regulations be mutually offset by a system of government payments for those “wiped out” by such regulations, funded in large part by the windfalls accruing to those who benefited by the regulations. While this end is better done on a statewide basis, there is no legal difficulty for its establishment and use at the regional or local level, where home rule applies.
  10. **Private Rights of Action.** In addition to challenges to improper grants of payments or waivers,<sup>25</sup> the legislature, and perhaps regional and home rule local governments, may enact regulations on matters of local concern to create a private right of action for damages to property brought on by the grant of a waiver. There is conflicting authority in this area, with an existing statute stating that planning is a matter of statewide concern,<sup>26</sup> but existing case law indicating that local governments may create private rights of action.<sup>27</sup>

Measure 37 is new and all of its implications have not been worked out. The most likely course of action is to accept the existing political stalemate in the legislature, where each party controls one house, and allow those implications to play out. If change is to come in the short term, it will be at the behest of those who have largely not yet weighed in—the real

22. For example, newer regulations are more likely to reflect connections with federal requirements or health and safety matters. 23. OR. ADMIN. R. 125-045-0010 to -0110 (December 1, 2004).

24. WINDFALLS FOR WIPEOUTS: LAND VALUE CAPTURE AND COMPENSATION

(Donald G. Hagman & Dean J. Misczynski, eds., 1978).

25. In Oregon, these grants by local governments may be tested by Writ of Review, a statutory form of common-law certiorari, which reviews local or regional actions, *inter alia*, for legal correctness, proper procedure, and

substantial evidence in the whole record. For the state, such grants may be tested as an order in other than a contested case. In either case, the challenge would be brought in the circuit (trial) court with appellate review.

26. OR. REV. STAT. § 197.013.

27. *Sims v. Besaw's Café*, 997 P.2d 301 (2000) (relating to employment discrimination on the basis of sexual orientation, which was not the subject of any statewide legislation).

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estate financing, appraisal, and property industries, who are at least as vulnerable to the uncertainties created by Measure 37 as state, regional, and local governments.<sup>28</sup> In the meantime, a credible review of the 30-year-old state planning program may provide an opportunity for change by consensus.

#### CONCLUSION

Policy makers and planners must be clear-eyed about the reasons, as well as the implications, of the passage of Measure 37 in Oregon, for if it can happen in Oregon—where most citizens support planning—it can happen anywhere. The lessons learned

from the Measure are not only political—e. g., the loss of connection between citizens and the land use program over a 30-year period, the need for political vigilance, and the constant need to justify planning and regulation—but also strategic and legal. If anything, Oregon may prove to be a “good bad example” of a mistaken choice once made, but ultimately rejected as too extreme. By returning to a feudal system based on property ownership limited only by nuisance law and covenants, as well as a narrow scope of legislative action instead of community interest, the contradictions of the new system will be realized in time.

It will be interesting to see if Oregon is saved by the very conservatism that engendered planning and land use regulation in the first place—i.e., protection of property values. In the meantime, Oregon’s experience should go to show that neither problems nor solutions are simple and that the need for immediate gratification by the “me generation” creates its own set of problems to be solved.

The first wave of claims must be resolved without court action in May and June of 2005. Any number of masters’ theses and doctoral dissertations will study this complex area. For planners and policy makers, there are interesting times ahead.

#### TEXT OF MEASURE 37

The following provisions are added to and made a part of ORS chapter 197:

- (1) If a public entity enacts or enforces a new land use regulation or enforces a land use regulation enacted prior to the effective date of this amendment that restricts the use of private real property or any interest therein and has the effect of reducing the fair market value of the property, or any interest therein, then the owner of the property shall be paid just compensation.
- (2) Just compensation shall be equal to the reduction in the fair market value of the affected property interest resulting from enactment or enforcement of the land use regulation as of the date the owner makes written demand for compensation under this act.
- (3) Subsection (1) of this act shall not apply to land use regulations:
  - (A) Restricting or prohibiting activities commonly and historically recognized as public nuisances

under common law. This subsection shall be construed narrowly in favor of a finding of compensation under this act;

- (B) Restricting or prohibiting activities for the protection of public health and safety, such as fire and building codes, health and sanitation regulations, solid or hazardous waste regulations, and pollution control regulations;
- (C) To the extent the land use regulation is required to comply with federal law;
- (D) Restricting or prohibiting the use of a property for the purpose of selling pornography or performing nude dancing. Nothing in this subsection, however, is intended to affect or alter rights provided by the Oregon or United States Constitutions; or
- (E) Enacted prior to the date of acquisition of the property by the owner or a family member of the owner who owned the sub-

ject property prior to acquisition or inheritance by the owner, whichever occurred first.

- (1) Just compensation under subsection (1) of this act shall be due the owner of the property if the land use regulation continues to be enforced against the property 180 days after the owner of the property makes written demand for compensation under this section to the public entity enacting or enforcing the land use regulation.
- (1) For claims arising from land use regulations enacted prior to the effective date of this act, written demand for compensation under subsection (4) shall be made within two years of the effective date of this act, or the date the public entity applies the land use regulation as an approval criteria to an application submitted by the owner of the property, whichever is later. For claims arising from land use regulations enacted after the effective date of this act, written demand for compensation under subsection (4) shall be made within two years of the

28. It may well be that the proponents of Measure 37 are as aware of its flaws as opponents are and are willing to use the Measure as “trading stock” for more realistic ends, such as lifting most regulations outside of urban growth boundaries in exchange for the *status quo ante* for lands within

those boundaries. If that’s so, it is a dangerous game, and if the implications of Measure 37 peak before this tradeoff is accomplished, the Measure, as well as the credibility of its proponents, may suffer irreversible loss.

The present owner of the real property shall be entitled to reasonable attorney fees, expenses, costs, and other disbursements reasonably incurred to collect the compensation.

enactment of the land use regulation, or the date the owner of the property submits a land use application in which the land use regulation is an approval criteria, whichever is later.

- (6) If a land use regulation continues to apply to the subject property more than 180 days after the present owner of the property has made written demand for compensation under this act, the present owner of the property, or any interest therein, shall have a cause of action for compensation under this act in the circuit court in which the real property is located, and the present owner of the real property shall be entitled to reasonable attorney fees, expenses, costs, and other disbursements reasonably incurred to collect the compensation.
- (7) A metropolitan service district, city, or county, or state agency may adopt or apply procedures for the processing of claims under this act, but in no event shall these procedures act as a prerequisite to the filing of a compensation claim under subsection (6) of this act, nor shall the failure of an owner of property to file an application for a land use permit with the local government serve as grounds for dismissal, abatement, or delay of a compensation claim under subsection (6) of this act.
- (8) Notwithstanding any other state statute or the availability of funds under subsection (10) of this act, in lieu of payment of just compensation under this act, the governing body responsible for enacting the land use regulation may modify, remove, or not to apply the land use regulation or land use regulations to allow the

owner to use the property for a use permitted at the time the owner acquired the property.

- (9) A decision by a governing body under this act shall not be considered a land use decision as defined in ORS 197.015(10).
- (10) Claims made under this section shall be paid from funds, if any, specifically allocated by the legislature, city, county, or metropolitan service district for payment of claims under this act. Notwithstanding the availability of funds under this subsection, a metropolitan service district, city, county, or state agency shall have discretion to use available funds to pay claims or to modify, remove, or not apply a land use regulation or land use regulations pursuant to subsection (6) of this act. If a claim has not been paid within two years from the date on which it accrues, the owner shall be allowed to use the property as permitted at the time the owner acquired the property.
- (11) Definitions: for purposes of this section:
  - (A) "Family member" shall include the wife, husband, son, daughter, mother, father, brother, brother-in-law, sister, sister-in-law, son-in-law, daughter-in-law, mother-in-law, father-in-law, aunt, uncle, niece, nephew, stepparent, stepchild, grandparent, or grandchild of the owner of the property, an estate of any of the foregoing family members, or a legal entity owned by anyone or combination of these

family members or the owner of the property.

- (B) "Land use regulation" shall include:
    - (i) Any statute regulating the use of land or any interest therein;
    - (ii) Administrative rules and goals of the Land Conservation and Development Commission;
    - (iii) Local government comprehensive plans, zoning ordinances, land division ordinances, and transportation ordinances;
    - (iv) Metropolitan service district regional framework plans, functional plans, planning goals and objectives; and
    - (v) Statutes and administrative rules regulating farming and forest practices.
  - (C) "Owner" is the present owner of the property, or any interest therein.
  - (D) "Public entity" shall include the state, a metropolitan service district, a city, or a county.
- (12) The remedy created by this act is in addition to any other remedy under the Oregon or United States Constitutions, and is not intended to modify or replace any other remedy.
  - (13) If any portion or portions of this act are declared invalid by a court of competent jurisdiction, the remaining portions of this act shall remain in full force and effect.