

Summary of Measure 37

Overview

Oregonians approved Measure 37 in November 2004 by 61% to 39%. Measure 37 allows a property owner to receive “compensation” for any land-use regulation passed since the owner or his family acquired the property or, alternatively, waive any land-use regulation enacted since the owner has had the property. In virtually every case so far, government officials in Oregon have decided to use waivers as the primary way to address Measure 37 claims.

Oregon’s Land Planning System

Oregon has one of the most comprehensive land-use planning and regulatory programs in the country. In 1973, Senate Bill 100 was passed by the Oregon Legislature and signed into law, creating a statewide planning program which has since been expanded. The program is governed by the following statutes: ORS 92 (Subdivisions and Partitions), ORS 195 (Local Land Use Coordination), ORS 197 (Land Use Planning Coordination), ORS 215 (County Planning and Zoning), and ORS 227 (City Planning and Zoning). (Text for these statutes can be found at http://www.oregon.gov/LCD/state_statutes.shtml.) The program is coordinated by the state Land Conservation and Development Commission and the Department of Land Conservation and Development, but implemented by local governments. Local governments develop growth and zoning plans which then must be approved by the state. The most controversial element of these plans is often the “urban growth boundary,” which limits how property can be developed outside those boundaries. Many proponents of Measure 37 have objected to restrictions on building homes, including for owner-occupancy and subdividing.

As of 2003 (according to a 2003 speech by Governor Kulongoski) all of Oregon's 240 cities and 36 counties have comprehensive land-use plans, every city area has an urban growth boundary that separates urban uses from rural farm and forest uses, and all sensitive coastal lands and estuaries on Oregon's coast are part of a comprehensive management plan. Using land-use planning, Oregon has concentrated population growth in cities: for instance, between 1979 and 1999, the Portland metro area had a 40-percent increase in population and only a 20-percent increase in urbanized land, while between 1990 and 1996, Kansas City had a 5-percent increase in population and a 70-percent increase in urbanized land. The land use has also helped protect farmland at the same time many states, including Pennsylvania and Florida, lost significant amounts of farmland.

In addition to land-use planning regulations, Oregon also has a fairly strict forestry law which may give rise to Measure 37 claims. The 1971 Forest Practices Act requires replanting of logged tracts, limits the size of clear-cuts, and places restrictions on activities near streams.

How Measure 37 works

To enforce the act, owners are to write to the local or state government concerning the regulation they object to; the act calls for them to receive money or for the restrictions to be vacated within 180 days. Owners can only receive relief if they or a family member owned the property when the land restriction they object to was passed. If the government does not grant relief within 180 days, the statute creates a civil right of action and entitles the landowner to attorney’s fees.

The measure exempts from its compensation obligations rules and legislation that control common law public nuisances, selling pornography and nude dancing, or legislation that restrict activities to protect public health, protect safety, or to comply with federal law.

Because Oregon's land-use planning program delegates development and implementation to local governments, they will be responsible for addressing most of these claims and paying for them. The state has estimated costs to local governments to be between \$46 million and \$300 million, and has no obligation to cover those costs. While local governments can avoid liability by relaxing restrictions instead of paying landowners, they still expend funds for administrative and research purposes associated with issuing waivers.

Thousands of Measure 37 claims have been filed since December 2004. A sizable chunk of them are requests to build an additional home on an area zoned for farming. Some of the larger claims are detailed below.

Examples of Large Measure 37 Claims

Claim against Protections around Native American Sacred Places

Wallowa County – A Measure 37 claim has been filed by a developer who objects to density restrictions on his subdivision. The density restrictions had been imposed because of the Nez Perce's objection to the subdivision, which they found to be too close to the grave and monument of Old Chief Joseph of the Nez Perce tribe, culturally significant land and the site of many possible archeological sites. They had been permitted to build 22 homes on 60 acres; they now want to build 60-72 homes on the same land. (Richard Cogle, "Property Rights Tested at Wallowa Lake," The Oregonian. January 9, 2005.)

Claim to Build Casino in a Town of 400

Marion County – Two brothers have filed for permission to build a casino, hotel, and golf course on their farm outside of a town of 400. (Associated Press, "Marion County Brothers File Measure 37 Claim, Proposing Casino." January 26, 2005) Fire Chief Reed Godfrey of the St. Paul fire district that would be required to service the McKay casino development, has said that the project "...would completely overwhelm our fire department and ambulance transport capabilities." (Ron Soble, "Farmland Owners Claim Right to Build Casino," The Oregonian. January 26, 2005). While the Oregon Constitution prohibits nontribal casinos, the brothers claim their family has owned the land since before Oregon became a state.

Claim to Build Project Rejected by Community as Too Noisy

Lane County – A Measure 37 claim to create 300-acre motorcycle, ATV, and paintball park that has already been rejected by local county council was filed in late January 2005. Neighbors have been fighting the proposal for years and the county council had turned it down because of noise pollution and fire hazard concerns. (Bob Keefer, "Private Park Proposal Faces Opposition," Eugene Register-Guardian. Feb. 2, 2005)



Claims for Subdivisions in the Columbia River Gorge

Columbia River Gorge (above) is a federally designated scenic area. Land management decisions are federally designated to the interstate Columbia River Gorge Commission; that Commission has delegated some of its authority to local governments. Despite language in Measure 37 excluding regulations designed to comply with federal law, several Measure 37 claims now argue that the Gorge regulations are state and local regulations and can be waived. Because the Columbia Gorge building restrictions are fairly recent (1986), many landowners would qualify for waivers and thus would be allowed to turn their property into subdivisions. (Mathew Presusch, "Measure 37 questions Loom Over Gorge," The Oregonian, March 12, 2005.) One claim to build hundreds of homes asks for \$15.6 million. (David Bates, "Pair Seek Eye-popping \$15.6 million," McMinnville News-Register, Jan. 27, 2005.) In April, the Columbia River Gorge asked a state court whether Measure 37 applies to their regulations. ("State Joins Measure 37 Suit on Gorge Authority," The Oregonian, May 18, 2005.)

Claim for a Right to an Unstoppable Landfill

Washington County – A 43-acre landfill filed a Measure 37 claim. The company asked that the state waive its 209-foot height limitation, as well as allow the landfill to extend northwards, or pay the company \$11.4 million. The landfill is already unpopular with neighbors. (Laura Oppenheimer, "Landfill Files Measure 37 Claim," The Oregonian, March 29, 2005.)

Claim to Build a Mall in the Woods

A Measure 37 claim in rural Polk County has been approved for over 1 million square feet of commercial space, approximately the size of Oregon's largest malls. (April 15)



Subdivision Development Claims

- 842 homes on ¼ acre lots or receive \$57 million in the Hood River valley (above)
- 340 acres of housing and commercial development in Yamhill County (April 5, 2005)
- 167 acres of housing on 10-acre lots in Yamhill County (April 16, 2005)
- 173 acres of farmland in the heart of Red Hills wine country Yamhill County (below); alternately are seeking \$15.6 million. (Jan. 27, 2005)



Ambiguities

How much control the state and local governments can assert over development after a Measure 37 claim is approved is unknown. They can impose rules based on safety and health, but not impose additional land planning requirements. The difference between these two categories can be unclear. For instance, Oregon counties and cities often require that subdivisions widen the roads leading towards them, create sidewalks and add exterior lighting. It is unclear whether or not counties will be able to enforce these requirements to subdivisions approved under Measure 37. Counties also usually require conditional use permits for changes in zoning. Whether one would be required for a Measure 37 claim or whether the measure itself changes the zoning of a piece of property is unclear. A conditional use permit can cost \$1,800. (Crystal Bolner, "Despite Measure 37 Rulings, Some Marion County residents remain in Land-Use Limbo," Statesman Journal. March 31, 2005.)

In Measure 37, counties are given the choice between paying for the supposed loss of property value because of restrictions on the property since a family has held it or granting waivers of the law since the claimant acquired the property. Most counties in Oregon have stated that they will grant waivers because paying is simply impossible; in Yamhill County two of 74 claims were for more than the county's entire yearly property tax revenue. Those whose family has owned the property for a long time but have only recently inherited it themselves are left in the middle. In Linn County, a family in such a position is pressing the county to waive laws enacted before they inherited the property. On May 25, 2005, the County Council turned down the family's waiver request but the family is expected to sue in court. (Les Gehrett, "Linn Turns Down Measure 37 Inheritance Claim," Albany Democrat-Herald. May 26, 2005.)

Significant state and local government jurisdictional issues are raised by Measure 37. Because the land-use system is governed by state law, it is unclear whether or not local governments can authorize waivers of it. Most local governments advise claimants to file both state and local Measure 37 claims. What happens to a claim that is approved by the local government and rejected by the state? This issue will probably come to a head in Jackson County. The county council there has taken the position that claimants should not have to file a state claim as well and is approving claims without running them by the state. Whether or not the state will allow this is unclear. (Damian Mann, "County Commissioners Speak Up for Measure 37," Jackson County Mail Tribune. Feb. 3, 2005. See also Les Gehrett, "Linn OKs first claim under new land law," Albany Democrat-Herald. Feb. 17, 2005.)

The scope of the exception in Measure 37 for "the protection of public health and safety" is likely to also be controversial. Some issues that have already been raised are whether setbacks from forested lands can be waived or if they are a health and safety measure designed to limit forest fires, and whether limitations on building because of limited groundwater can be justified as a health restriction. (Ezra Casteel, "Measure 37 Claims Could Cause Water Shortage," The Lincoln City News Guard. May 10, 2005). See also Don Hamilton, "Cases Pit Measure 37 Against Nature: Commissioners May Consider Environmental Exceptions," Portland Tribune. May 20, 2005).

Whether Measure 37 requires continual ownership is also debated. Claims have been rejected because there was not continual ownership, but in Linn County a widow whose husband had owned the property for many years legally by himself was allowed to receive a waiver from regulations enacted when her husband owned the property. (Les Gehrett, "Board OKs widow's Measure 37 claim," Albany Democrat-Herald. May 18, 2005.) The status of family trusts is unclear.

Other potential ambiguities have not yet surfaced. The measure is expected to impact logging practices, but some of these could be defended under federal statutes like the Endangered Species Act. It will most likely take litigation to find out. De minimis issues will also be raised in the future. Many local governments have decided to waive rules for all valid Measure 37 claims and not even consider payment. If Measure 37 claims are filed where only a few hundred dollars or several thousand dollars are lost in value and the county waives important land use regulations, problems could be created. If compensation is to be paid, however, no one knows quite how it should be calculated. Different economists have advanced various proposals.

Commentary compiled by Meg Moore, Research Assistant for the Georgetown Environmental Law & Policy Institute, Spring 2006.