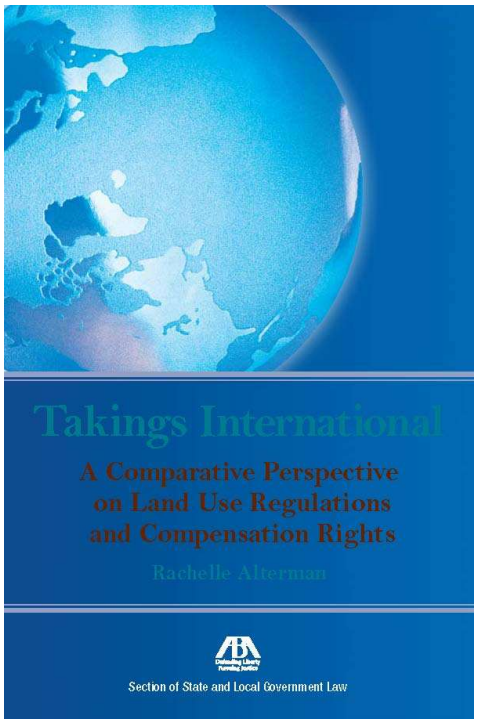

Takings International

A Comparative Perspective on Land Use Regulations and Compensation Rights

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Chapter 12
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CHAPTER 12

The Special Case of the State of Oregon:
The Heated Debates Regarding Measures 37 and 49

The special case of Oregon is included in this book because it exemplifies the intensity of debate about the "takings issue" as related to property rights in the USA. In 2004, Oregon adopted the most extreme experiment in granting extensive compensation rights for regulatory takings in the USA. Following unmanageable outcomes and a blow to this state's renowned planning policies, the legislation was revised in 2007.

Bianca Putters[1]

Editor's note: This chapter was commissioned especially for non-American readers to complement the USA chapter. It recounts the saga of the state that encapsulates the intensity of the debate surrounding property rights in the USA.

I. INTRODUCTION

Oregon occupies a unique position among all states in the United States. Although it does not rank as the largest in either acreage or population,[2] and it does not outrank all states in quality or quantity of natural resources,[3] its distinction arises from a longstanding unique approach to its land use and its progressive planning controls and regulations.[4] Many planners, politicians, landowners and the general public look to Oregon in admiration for its pacesetting broad attempts and successful policies to curtail sprawl and protect farm and forest lands. But in recent years, Oregon's voters have led the national debate regarding property rights when they approved a dramatic law – Measure 37 – which granted unprecedented compensation rights to Oregon landowners in cases where a regulation reduces property values. Only 3 years later, Oregon voters once again fueled the debate when they approved a major revision to that law – a revision which rolled back many aspects of the compensation rights granted by Measure 37.

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[2] Oregon's estimated population for 2005 is 3,641,056 and ranks 28 out of 50 states. http://www.infoplease.com/ipa/A0108262.html. Oregon's population rank among the 50 states is 28. Oregon's land area is 96,003 square miles, ranking ten out of the fifty states. http://222.netstate.com/states/alma/or_alma.htm.

[3] Oregon does lead in growing certain crops such as peppermint, blackberries, boysenberries, loganberries, black raspberries and hazelnuts. http://infoplease.com/ipa/A0108262.html.

[4] Benjamin P. O'Glasser, *Constitutional, Political, and Philosophical Struggle: Measure 37 and the Oregon Urban Growth Boundary Controversy*, University of Pennsylvania Journal of Constitutional Law (January 2007). In the 1970's, when other cities in the country were using federally designated funds to expand freeway systems, Portland residents fought against freeway expansion and urban neighborhood demolition and instead used the funds to develop a light rail system.

Measure 37 was passed by thirty-five out of thirty-six counties in Oregon in November 2004.[5] Voters in Oregon overwhelmingly endorsed a law that would significantly limit the capacity of local governments and the State of Oregon to continue to adopt and implement the types of land use controls that had vigorously been applied since the 1970's.[6] Measure 37 granted landowners the right to compensation for any decrease in their properties' value caused by land use regulations which restricted the properties' use.[7] The nation's planning communities looked to Oregon with a mixture of disbelief and curiosity – the disbelief was due to the seemingly abrupt turn Oregonians were taking, and the curiosity related to finding out how the compensation claims would be resolved.[8] In addition, some observers – those advocating stronger property rights - also looked to Oregon in hopes of learning how to duplicate the passage of similar legislation outside of Oregon.

The thousands of applications for Measure 37 claims turned out to be relatively short-lived when, in November of 2007, Measure 49 was passed by Oregon voters. Measure 49's purpose is to limit Measure 37 and effectively disable many of its key provisions.

This chapter will provide a brief history and background of Oregon's land use laws and certain constitutional issues. The central parts of the paper will focus on the now-overruled Measure 37 and the claims that ensued upon its passage. In addition, the newly-passed Measure 49 will be analyzed including a discussion regarding its effects on Oregon's land use.

History and Background

Oregon was a pioneer – in the US context - in strict land use controls to protect the State's land and environmental resources.[9] In the early 1970's, Oregon's governor at the time, Tom McCall, promoted a major revamp of Oregon's land use laws[10] in an effort to protect its forest lands and farmlands and to contain the damaging effects of urban sprawl.[11] This sentiment[12] culminated in

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[5] http://www.onethousandfriendsoforegon.org/issues/documents/M37/Stacey-Bellingham-06-22-05.pdf.

[6] Margaret Clune, *Government Hardly Could Go On: Measure 37, Implications for Land Use Planning and a More Rational Means of Compensation*, 38 Urban Lawyer 275, 286, American Bar Association (2006).

[7] Joni Armstrong Coffey, *High Hopes, Hollow Harvest: State Remedies for Partial Regulatory Takings*, 29 Urban Lawyer 619, American Bar Association (Summer 2007).

[8] James S. Russell, *Whose Property Rights? The Clash Between Private Interests and Public Welfare in Oregon Raises a Question that has Vexed the Nation Since its Founding*, Metropolis Observed (March 2008), *at* http://www.metropolismag.com/cda/print_friendly.php?artid=3230.

[9] Such controls were innovative in the context of the American tradition of comparatively low-intensity planning controls. *See*, Rachelle Alterman, *A View from the Outside: The Role of Cross-National Learning in Land-Use Law Reform in the United States*, Chapter 19 (pp. 309-320) in PLANNING REFORM IN THE NEW CENTURY, edited by Daniel R. Mandelker. Chicago: Planners Press (2005).

[10] James C. Nicholas, *State and Regional Land Use Planning: The Evolving Role of the State*, 73 St. John's Law Review 1069, 1076 (1999). Senate Bill 10 was adopted by the legislature in 1969 requiring cities and counties without comprehensive land use plans and zoning ordinances to adopt state-imposed plans and ordinances. However, since it did not apply to cities or counties with existing land use plans, it did not prove to be an effective way to create state-wide planning.

[11] Benjamin P. O'Glasser, *Constitutional, Political, and Philosophical Struggle: Measure 37 and the Oregon Urban Growth Boundary Controversy*, 9 University of Pennsylvania Journal of Constitutional Law 595, 597 (January 2007).

[12] Margaret Clune, *Government Hardly Could Go On: Measure 37, Implications for Land Use Planning and a More Rational Means of Compensation*, 38 Urban Law 275, 284, American Bar Association (2006). In Governor McCall's speech of January 8, 1973 he stated that "[s]agebrush subdivisions, coastal 'condo mania,' and the

the Oregon legislature's passage of Senate Bill 100 in 1973 which set forth requirements for a comprehensive plan that would accomplish these same goals. Senate Bill 100 gave birth to Oregon's Department of Land Conservation and Development (DLCD) and Land Conservation and Development Commission (LCDC). These bodies were granted the power to create a statewide land use policy which was ultimately stated in the format of nineteen "goals."[13]

One of the prominent provisions of these goals is the requirement to set urban growth boundaries (UGBs) around the metropolitan or urban areas of every city, county and region in Oregon. Rural land is to be placed outside of the UGBs. Two of the nineteen goals that are particularly relevant to this discussion are Goals 3 and 4. Goal 3 states that land classified as "agricultural" must be "preserved and maintained" for farm use. Similarly, Goal 4 applies to forest lands stating that forest lands must be conserved.[14] Many Measure 37 claims arose from landowners of these categories of land.

The Land Use Board of Appeals (LUBA) was created in 1979 to adjudicate appeals of local land use decisions in an attempt to arrive at a level of consistency to comply with basic due process or fairness standards. LUBA was also responsible for reviewing amendments to comprehensive plans and regulations after LCDC acknowledgement.[15]

Constitutional Issues

Controversy has been part of Oregon's statewide land use planning since the passage of S.B. 100.[16] This law includes provisions which are radically different from typical zoning restrictions throughout the United States. To begin with, S.B. 100 is not a local ordinance – it applies to the entire State of Oregon unlike zoning ordinances which are typically enacted by municipalities. Further, the components of S.B. 100 were dramatic and effective in curtailing sprawl and protecting farmland and forest land. As noted above, the law includes a mandatory provision requiring each urban area to delineate an UGB outside of which little development can take place. Many landowners were prevented from constructing dwellings and other structures on their properties. The restrictions put in place were comprehensive enough to accomplish the goals set forth. Independent-minded Oregonians, although often in support of protecting of Oregon's natural resources, resented the intrusion into the perceived inherent right to build and do as they wanted on their land.

As a result, citizen initiatives to eradicate the system have been placed on the ballots since 1976 – most were unsuccessful. Property rights' interest groups gathered strength and numbers and

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ravenous rampage of suburbia in the Willamette Valley all threaten to mock Oregon's status as the environmental model for the nation." He insisted that "unlimited and unregulated growth leads inexorably to a lowered quality of life."

[13] There are five broad categories of goals: 1) planning process 2) conservation 3) development 4) coastal resources, and 5) citizen involvement. 85 Denver University Law Review 279 (2007); Sullivan, Edward J., *Year Zero: The Aftermath of Measure 37*, 38 Urban Lawyer 237, 240, The American Bar Association, Spring 2006.

[14] Byron Shibata, *Land-Use Law in the United States and Japan: A Fundamental Overview and Comparative Analysis*, 10 Washington University Journal of Law and Policy 161, 215-16 (2002).

[15] Id. at 241.

[16] Margaret Clune, *Government Hardly Could Go On: Measure 37, Implications for Land Use Planning and a More Rational Means of Compensation*, 38 Urban Lawyer 275, 284, American Bar Association (2006). "[F]armland in Oregon is scarce" and "highly productive and often located near urban areas" and as a result, issues surrounding its use and protection have always been at the core of controversy.

scored success in 2000 with Measure 7 which was an attempt to amend the takings clause of the Oregon Constitution. Measure 7 required that local governments compensate landowners for loss of property value due to land use regulations. Eventually, Measure 7 was ruled unconstitutional by the Oregon Supreme Court on grounds that it actually amended two provisions of the constitution and therefore violated the "separate vote" provision of the constitution.[17]

Similar to the US Constitution, the Oregon Constitution's takings' clause requires that "just" compensation be provided for the taking of private property for public use.[18] However, in deciding cases alleging a taking under the Oregon Constitution, the Oregon courts have used a somewhat different approach than the traditional Penn Central analysis and its progeny dictated by the US Supreme Court.[19] The Oregon Supreme Court prefers to use the "some substantial beneficial use" or "some economically viable use" tests as illustrated in Dodd v. Hood River County and Boise Cascade Corp v. Board of Forestry[20], respectively. In Dodd, the Oregon Supreme Court set forth the requirements for a finding of deprivation of all economically beneficial use. In this case, plaintiffs purchased a parcel of land in a forest zone for $33,000 with the intention of building a retirement home there eventually. Subsequent to the purchase, the area was rezoned to comply with state's planning goals and as such, the construction of dwellings on petitioner's property was no longer allowed. An expert's testimony during trial revealed that 24 of the 40 acres could be used for timber production at a net profit of $10,000. The court found, therefore, that this was not a deprivation of all economically beneficial use. The court affirmed the lower court's determination that this constituted "some substantial beneficial use" and therefore, no constitutional "taking" was found by the court.[21]

Further, Oregon's courts, in interpreting Oregon's takings doctrine under its Constitution, and similar to Federal constitutional takings doctrine, require that the element of "ripeness" be met prior to filing a claim in court. Ripeness in this context requires that a landowner file for approval of some desired land use, in other words, it requires the exhaustion of administrative remedies. Interestingly, Measure 37 does not include the requirement that a landowner exhaust all administrative remedies (such as applying for a development permit) prior to filing a claim for compensation, and as such, does not include a "ripeness" component.[22] As such, the measure validates claims against regulations that vaguely purport to lower property values. Therefore, the

[17] In addition to the takings provision, the court decided the measure violated the free speech clause of the Oregon Constitution. League of Oregon Cities v. State of Oregon, 56 P.3d 892 (Or. 2002).

[18] "Private property or services taken for public use; just compensation; Private property shall not be taken for public use, nor the particular services of any man be demanded, without just compensation; nor except in the case of the state, without such compensation first assessed and tendered; provided, that the use of all roads, ways and waterways necessary to promote the transportation of the raw products of mine or form or forest or water for beneficial use or drainage is necessary to the development and welfare of the state and is declared a public use." Or. Const. art.I, § 18.

[19] Fifth Avenue Corporation v. Washington County, 581 P.2d 50, 60 (Or. 1978); Dodd v. Hood River County, 855 P.2d 608, 614-615 (Or. 1993).

[20] Boise Cascade Corp. v. Boards of Forestry, 935 P.2d 411 (Or. 1997).

[21] Dodd v. Hood River County, 855 P.2d 608, 617 (Or. 1993).

[22] OR. REV. STAT. § 197.352(7) (2004).

measure contributes to uncertainty in the judicial arena as well as within the various bodies of the local government and contributes to the abuse of judicial resources.[23]

The constitutional doctrine of "separation of powers" is also implicated in Measure 37 because the courts, and LUBA in Oregon, are responsible for determining the compensation that would be just or fair under takings doctrine. In section (9), Measure 37 states that "a decision by a governing body under this act shall not be considered a land use decision…"[24] As such, under Measure 37, local governments determine the amount of compensation due to a claimant, and at a minimum, affect consistency and judicial efficiency principles which are part of the separation of powers doctrine.[25] Therefore, it is clear that Measure 37 affects well-established doctrines of constitutional justiciability.

II. MEASURE 37

Despite the invalidation of Measure 7 in 2000, opposition to land use restrictions continued to foment in Oregon. Property rights' activists gathered support through intensive advertising efforts and bolstered their arguments with sympathetic cases of affected individuals. One such case involved a ninety-two-year-old widow, Dorothy English, who could not subdivide her nineteen-acre parcel (located outside of, but close to an urban growth boundary) to build homes for her children or grandchildren as she alleged she and her husband intended when they purchased the land.[26]

In November 2004, Measure 37 was passed by a 61% margin - becoming effective on December 2, 2004. Basically, Measure 37 (codified as ORS 197.352) provided that property owners whose land value dropped due to government land use regulations were entitled to compensation amounting to the difference between what their property was worth under the regulation(s) and what their property would be worth without the regulation(s) as of the date the claim is filed. No minimum or maximum changes in value are indicated. The regulation(s) at issue must have been imposed on the property after the landowner or a family member purchased it, whoever purchased first, in order to compensate owners who bought the property (or inherited it) under one set of restrictions and who upon the imposition of more stringent restrictions may have been financially adversely affected. The compensation was to be provided by the government entity (city, county or state) that imposed the land use regulation(s) in question. If the land use regulation(s) continued to be applied 180 days from the date of the claim, the landowner could sue in court for compensation and was entitled to receive attorney's fees in addition to the compensation. Furthermore, should the government entity not pay the compensation within two years of the date of the claim, the landowner was entitled to a modification, removal or waiver of the land use restrictions on the property so that the landowner was permitted a use that was

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[23] Rebekah R.Cook, *Incomprehensible, Uncompensable, Unconstitutional: The Fatal Flaws of Measure 37*, 20 Journal of Environmental Law & Litigation 245, 251-256, University of Oregon (2005).
[24] OR. REV. STAT. § 197.352(9) (2004).
[25] Rebekah R. Cook, *Incomprehensible, Uncompensable, Unconstitutional: The Fatal Flaws of Measure 37*, 20 Journal of Environmental Law & Litigation 245, 256-260, University of Oregon (2005).

[26] Rebecca L. Puskas, *Measure 37's Federal Law Exception: A Critical Protection for Oregon's Federally Approved Land Use Laws*, 48 Boston College Law Review 1301, 1305-06 (November 2007).

allowed when the property was purchased. One could argue the measure views any diminution in property value alleged to be due to land use or planning regulations as a taking requiring just compensation be paid.[27]

Furthermore, in reviewing the claims, the government was required to review the regulations in effect for each and every time period alleged in each claim. Landowners filing claims alleged that the regulation(s) in effect at the time of purchase had changed subsequent to the purchase date and adversely affected them. Therefore, the city, region or the state had to review the land use regulations in effect on each claimant's purchase date as well the change in laws reflected in each claim, and as such, the task was insurmountable.[28]

However, it is equally important to note what Measure 37 did not include within its provisions. The measure did not include a method for calculating the amount of compensation due to a claimant or a method for funding the claims that would be filed. In other words, the measure did not state from where the money was to be obtained or raised to pay claims. It did not make clear whether the waiver of the application of the land use restrictions was to be permanent, and therefore transferable to a subsequent owner, or whether it was to hold only during the lifetime of the original owners and their families. As such, it left the State of Oregon in a complete state of land-use chaos unlike it had probably ever experienced. The passage of this measure paralyzed planners and legislators who were hesitant to promote restrictions which might escalate the number of claims.[29]

A provision in Measure 37 required claimants to file their claims within two years of the effective date of Measure 37 if the land use regulation at issue was enacted prior to this effective date and within two years of the land use regulation at issue if it was enacted after the effective date of Measure 37. This two-year statute of limitations could be extended indefinitely if a claimant submitted a land use application where the restrictive land use regulation was an "approval criterion."[30] Therefore, landowners without intentions to submit an application for development realized they should hasten and submit their claims within the two-year limit. This may account, in part, for the profusion of claims that were filed.

The local government could waive the land use regulation in question in lieu of paying compensation. In the vast majority of cases, this was the preferred course. Out of all the claims that were filed, only one claimant was awarded compensation; however, that claimant refused the amount offered.[31]

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[27] Benjamin O'Glasser, *Constitutional, Political, and Philosophical Struggle: Measure 37 and the Oregon Urban Growth Boundary Controversy*, 9 University of Pennsylvania Constitutional Law 595, 602 (January 2007).
[28] Joni Armstrong Coffey, *High Hopes, Hollow Harvest: State Remedies for Partial Regulatory Takings*, 29 Urban Lawyer, 619, 630, American Bar Association (2007).
[29] Rebecca L.Puskas, *Measure 37's Federal Law Exception: A Critical Protection for Oregon's Federally Approved Land Use Laws*, 48 Boston College Law Review 1301, 1302 (November 2007); Edward J. Sullivan, *Year Zero: The Aftermath of Measure 37*, 38 Urban Lawyer 237, 265-66, The American Bar Association (Spring 2006).
[30] OR. REV. STAT. § 197.352 (2004).
[31] Carol M. Rose, *What Federalism Tells Us About Takings Jurisprudence*, 54 UCLA Law Review 1681, 1698, Regents of the University of California (2007); Sheila A. Martin, Meg Merrick, Erik Rundell, and Katie Shriver,, *What is Driving Measure 37 Claims in Oregon?* Institute of Portland Metropolitan Studies, Nohad A. Toulan School of Urban Studies and Planning, Portland State University (December 4, 2006).

A mini-drama occurred in October 2005, when the Oregon Circuit Court overturned Measure 37 as being in violation of several provisions of the state and federal constitutions including equal protection under the Oregon Constitution and due process under the U.S. Constitution. However, in February 2006, the Oregon Supreme Court overruled the circuit court and decided that Measure 37 was legal. Therefore, Measure 37 claims could again go forward.[32]

Main Grounds for Claims

The nineteen LCDC statewide planning goals are codified in a set of Oregon Administrative Rules. Most claims are based on Administrative Rules relating to agricultural land and forest land defined by Goals 3 and 4. These Administrative Rules set forth a list of permitted uses. On agricultural land relating to single family dwellings, only five specific types of dwellings are allowed, and only under very specific conditions: a dwelling customarily provided in conjunction with farm use, a "lot of record" dwelling, a non-farm dwelling, a farm manager's dwelling, and a hardship dwelling. Similarly, on forest land, three types of dwellings are recognized as potential developments: "lot of record" dwellings, large tract dwellings and "template dwellings."

In addition to claims based on the above Goals and Administrative Rule restrictions, there are several other Oregon state statutes that provided the basis for Measure 37 claims, namely statutes in chapter 215 (County Planning; Zoning; Housing Codes) of the Oregon Revised Statutes (ORS). Three of these statutes, ORS 215.213, 215.283 and 215.284 apply to property that is classified as "exclusive farm use." These statutes restrict the construction of single family dwellings on farmland unless the landowner proves the dwelling is "customarily provided in conjunction with farm use." By later definition, this means that a landowner must prove that he has earned $80,000 per year for the last two consecutive years (or three out of the last five years) in gross revenue from his farming activities in order to construct a dwelling on the property in question. ORS 215.284 includes, among other requirements, a "general unsuitability" standard which prohibits a dwelling on exclusive farmland unless it is "situated on a lot or parcel or portion of a lot or parcel that is generally unsuitable for the production of farm crops or livestock or merchantable tree species."

ORS 215.780, which applies to both exclusive farm use land and exclusive forestland, sets a certain threshold condition of minimum parcel size for permitting any residential development: The minimal plot size must be eighty acres in exclusive farm use land not designated "rangeland" and 160 acres in "rangeland." Eighty acre parcels are also required for dwellings in exclusive forest land. These controls were put in place to protect the special natural resources (which are readily apparent to any visitor) within the State of Oregon.

Measure 37 Claims

Since the last date in which to file a Measure 37 claim was December 4, 2006,[33] it is possible to get an overview of the number and types of claims that were filed in the measure's relatively

[32] MacPherson v. Department of Administrative Services, 130 P.3d 308 (Or. 2006).

[33] Sheila A. Martin, Meg Merrick, Erik Rundell, and Katie Shriver, *What is Driving Measure 37 Claims in Oregon?* Institute of Portland Metropolitan Studies, Nohad A. Toulan School of Urban Studies and Planning, Portland State University. Institute of Portland Metropolitan Studies, *Mapping Measure 37*, December 4, 2006,

short life span.[34] The Institute of Portland Metropolitan Studies (IMS) developed a database of all the claims filed since the passage of the measure. Oregon planners were interested in having an idea of the scope of potential claims in order to anticipate the costs and the potential change in land use.[35]

Due to the absence of a uniform procedure for submitting claims under Measure 37, governments encountered problems in classifying and categorizing the relevant information. Consequently, the statistics about the claims is not completely uniform or accurate across the state. However, a solid general impression can be gleaned from an examination of the available data.

Location and Scope of Claims

Within six months of Measure 37's passage, more than 1,000 claims were filed totaling more than one billion dollars.[36] Localities were unable to pay the claims, and in fact, incurred expenses in preparation for the onslaught of claims and for the subsequent administration of claims. Cities and counties felt unable to continue their planning practices due to fear of adding claims to the mountains that were building up. Ultimately, over 7,500 claims were filed demanding well over $15 billion in compensation and affecting over 750,000 acres of land (approximately 303,525 hectares)[37]

In order to more easily visualize the information regarding the Measure 37 claims, a brief description of the State of Oregon may be helpful. Oregon, the tenth largest state in the U.S., is located in the Pacific Northwest. It is bordered on the west by the Pacific Ocean, on the north by the State of Washington, on the east by the State of Idaho and on the south by the States of California and Nevada. The State is divided into 36 counties and five regions: the Northwest/Willamette Valley Region, the Coastal Region, the Southern Region, the Central Region, and the Eastern Region.

A majority of the more than 7,500 Measure 37 claims filed against city, county and state offices arose from the counties in the Northwest Region of the State including the Willamette Valley and Hood River counties. Forty percent of the land acreage included in the claims is in this

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Portland State University (December 4, 2006 was the last day to file a Measure claim "based on an existing land use regulation without first filing a land use application.").

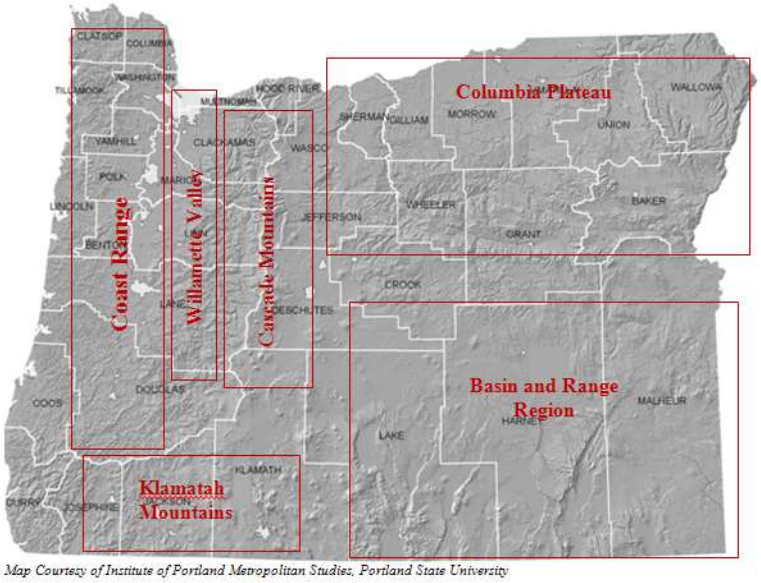
[34] The effective date of Measure 37 was December 4, 2004, and the only period during which claims could not be filed was between the decision of the circuit court invalidating the measure on October 24, 2005 and February 21, 2006 when the Oregon Supreme Court overruled the circuit court.

[35] Sheila A. Martin, Meg Merrick, Erik Rundell, and Katie Shriver, *What is Driving Measure 37 Claims in Oregon?* Institute of Portland Metropolitan Studies, Nohad A. Toulan School of Urban Studies and Planning, Portland State University. Institute of Portland Metropolitan Studies, *Mapping Measure 37*, December 4, 2006, Portland State University

[36] Bob Stacey, Executive Director of the 1000 Friends of Oregon, in remarks at Bellingham City Club on June 22, 2005.

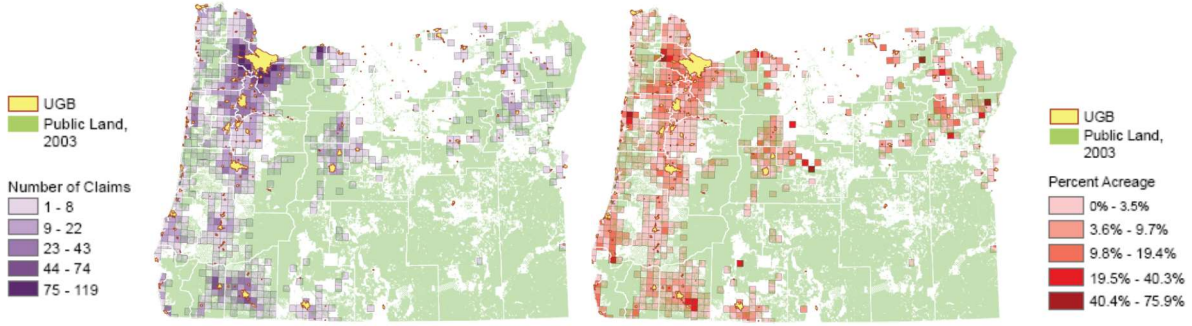
[37] James S. Russell, *Whose Property Rights? The Clash Between Private Interests and Public Welfare in Oregon Raises a Question that has Vexed the Nation Since its Founding, Metropolis Observed* (March 2008), *at* http://www.metropolismag.com/cda/print_friendly.php?artid=3230. Oregon has 61,600,000 acres of land area and of this approximately 34,000,000 acres are owned by the federal, state and local governments. Out of the remaining acreage, 93% of this privately-owned land outside of urban areas in Oregon is farm use land or forest land. Furthermore, only slightly over 10% of private land is rural land or urban land.

area. The claims are concentrated in areas close to UGBs, in particular the Portland metropolitan UGB. Ninety percent of claims in the Willamette Valley are within 5 miles of an UGB. In addition, claims are concentrated in areas close to public lands with eighty-nine percent of claims located within five miles of public land.[38] The correlation between high numbers of claims and proximity to public land as well as proximity to UGBs merits explanation. Property in close proximity to public open space can be perceived as having a higher expected market value. Property bordering UGBs can make use of existing public infrastructure and is conveniently located to pre-existing development.



Map Courtesy of Institute of Portland Metropolitan Studies, Portland State University

Measure 37 Claims by Township as of December 4, 2006



Maps Courtesy of Institute of Portland Metropolitan Studies, Portland State University

Almost all of the claims were submitted by owners of property in farm use lands or forestlands. Thirty-six and a half percent of the claims in Willamette Valley are in exclusive farm use (EFU) land, and those claims approaching the Coast Range and Cascades Mountains areas are in forest

[38] Institute of Portland Metropolitan Studies, Mapping Measure 37, Portland State University (December 4, 2006).

use land. A significant percentage of land with premium classification soils (Class 1 and Class 2) is affected by claims and the potential for development they bring. Hood River County includes 395 acres of Class 1 soils, and 188 acres or 48% is included in Measure 37 claims. This county includes 13,075 acres of Class 2 soil, and 2,890 or 22% is included in claims.[39]

Regions with high population growth since the inception of land use controls in 1973 also drew large numbers of claims. This pertains to major urban areas such as Portland.

Interestingly, although only one percent of the claims include land parcels larger than 1,000 acres (405 hectares), these claims make up nearly one-third of the total claim acreage.[40] In the Willamette Valley, the smaller claims arise out of the areas closer to the Metro UGB. The larger claims about public lands in the Coast Range and Cascade Mountains' areas, and owners are often large corporations. For example, the Stimson Lumber Company filed a claim which included 35,586 acres in Washington County in the Coast Range area adjacent to public land.[41]

Similarly, the Eastern Region placed fifth in number of claims (337) but came in third in acreage at 123,913 acres (50,146 hectares). The average size of the claim, 412 acres (167 hectares), was the highest of the five regions. Large corporations filed a significant number of these claims. Of the counties, Washington County's claims included the highest number of acres at 64,246 (25,999 hectares) (902 claims) and had the highest percentage of claim area to private land area (16%).[42]

Of the five regions in the State, the Northwest Region, including the Willamette Valley area, had the highest overall number of claims filed at 4,867 claims involving 295,344 acres (119,521 hectares). This was followed by the Southern Region with 1,327 claims affecting 152,128 acres (61,564 hectares). The Coastal Region came in third with 749 claims affecting 122,508 acres (49,577 hectares) of land. The Northwest Region includes eleven counties, and the most populous of the five, Clackamas County, had the highest number of claims, 1,082.[43]

Interestingly, ninety-two Measure 37 claims totaling approximately $260 million were filed against the City of Portland, and approximately 25% of them were claims against laws regulating billboards, and approximately 33% were claims for commercial or industrial development. The city of Portland approved only seven claims and rejected fifteen including all claims against environmental protection laws. One third of the claimants put their claims on hold to allow the city to assist them with their development plans based on current zoning codes. A satisfactory solution was found for most of the landowners, and their claims were subsequently withdrawn. Cities without Portland's resources had their hands tied and were forced to waive their land use regulations regardless of the merits of the claims. [44]

The IMS found that the characteristics of the claimants were more telling of the propensity to file claims than were the characteristics of the land. Relevant characteristics revolved around the claimants' future plans and whether the claimants were full-time farmers. Full-time farmers

[39] Id.
[40] Id.
[41] http://www.pdx.edu/ims/m37database.html.
[42] Id.
[43] Id.
[44] Telephone interview with Chris Dearth, Measure 37 Program Manager, City of Portland (May 7, 2008).

were less likely to file claims. In exclusive farm use areas (EFU), older farmers were less likely to file claims. Many claimants in remote areas of the State were large corporations and corporate ranches.[45]

The majority of claimants wanted to construct residences, and in second place were requests to construct mixed residential developments. Forty percent of the claims were requesting subdivisions of between one and three lots; 30% were requesting development of four to nine lots; and 20% were requesting over 500-lot subdivisions.[46]

Procedures

As noted, Measure 37 applied throughout the State of Oregon to all levels of government including city, county, regional, as well as the state level itself, yet the measure did not include provisions for creation of claim forms, development of procedures or administration of claims.[47] Therefore, each government entity was on its own to develop the administrative capabilities for dealing with the impending claims. Generally, the procedures included the filling out and filing of a claim form with the appropriate government entity (in cases where multiple entities may have been involved, multiple forms should have be filed), and including relevant documents (such as appraisals and deeds or land sale contracts) and a filing fee. The claim forms requested information regarding the property, the land use regulation(s) in question, the amount demanded in compensation, and the proposed use of the property. The government had 180 days within which to make its decision, and the applicant was notified of relevant dates for review of the claim. Some localities offered pre-claim conferences with the applicant to discuss the claim and the information needed to proceed with the claim before filing the paperwork.

Government entities processing claims had three alternative outcomes. A claim could have been denied if it would have been found invalid. If it would have been found valid, then the government had two alternatives: to authorize payment of compensation or to remove the land use restrictions in question.[48]

Ripple Effect on Other State Legislative Initiatives

Measure 37 had a dramatic effect nationwide. By 2006, proponents of property rights in eleven states succeeded in getting measures similar to Measure 37 on their ballots.[49] However, only

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[45] Sheila A. Martin, Meg Merrick, Erik Rundell and Katie Shriver, *What is Driving Measure 37 Claims in Oregon?* Institute of Portland Metropolitan Studies, Nohad A. Toulan School of Urban Studies and Planning, Portland State University (December 4, 2006).

[46] Institute of Portland Metropolitan Studies, *Mapping Measure 37*, Portland State University (December 4, 2006).

[47] OR. REV. STAT. § 197.352 (2004).

[48] http://www.co.lincoln.or.us/planning/M37/index.html; http://www.co.crook.or.us; http://www.co.douglas.or.us/legal-policies.asp; http://www.oregonmetro.gov/index.cfm/go/by.web/id=19145; http://www.lanecounty.org/planning/measure37/links.htm; http://www.das.state.or.us/DAS/SSD/Risk/M37Claims.shtml; http://www.co.deschutes.or.us/go/objectid/916553B5-BDBD-57C1-96E9F4324D8217E9/.

[49] Joni Armstrong Coffey, *High Hopes, Hollow Harvest: State Remedies for Partial Regulatory Takings*, 29 Urban Lawyer, 619, American Bar Association (2007).

Arizona's Proposition 207 was successful at the polls.[50] This is in contrast to the deluge of legislation following the U.S. Supreme Court's decision regarding a related issue - eminent domain. Following Kelo v. City of New London, 42 states have adopted one form or another of anti-Kelo legislation.[51] In Kelo, the Supreme Court ruled that the term "public use" in the Constitution allowed the city to appropriate private property for redevelopment purposes and transfer it to another private entity in order to economically benefit the city. Public sentiment against eminent domain, in particular, and against government regulations, in general, was strong. A number of states followed the Supreme Court's suggestion to put more stringent controls on the use of eminent domain.

Unfortunately, property rights activists have capitalized on the anti-Kelo sentiment and have used it to strengthen pro-Measure 37 sentiments. Aside from the arguments regarding the merits of the use of eminent domain, property rights' activists have ridden the coattails of anti-Kelo sentiment to include other general anti-regulation proposals along with anti-Kelo initiatives – eminent domain and zoning have been lumped together.[52] Undoubtedly, voters have had a difficult time deciphering the meaning and effects of the various initiatives. However, the effects of Measure 37 in Oregon have served to educate the rest of the country, and perhaps herein rests this measure's value. Measure 37 has proven impossible to implement and has shown to have carried far-reaching negative consequences toward beneficial public land use planning policies.

III. MEASURE 49

Despite the overwhelming voter support for Measure 37 in 2004, on November 6, 2007, Measure 49 was approved by the citizens of Oregon by a 62% margin. The passage of Measure 49 was clearly a backlash to Measure 37 and the torrent of claims for compensation that followed its passage. Measure 49, numbered as House Bill 3540 and codified as ORS 195.305, includes in Section 3 the following policy or purpose: "The purpose of… this 2007 Act and the amendments to Ballot Measure 37 (2004) is to modify Ballot Measure 37 (2004) to ensure that Oregon law provides just compensation for unfair burdens while retaining Oregon's protections for farm and forest uses and the state's water resources."[53] Unlike Measure 37, Measure 49's purpose seeks to balance the burden placed on landowners and at the same time protect Oregon's natural resources.

A quick overview of Measure 49's provisions immediately informs the reader that serious effort went into its creation. It is long and detailed - in direct contrast to the brief text of Measure 37. In fact, Measure 37 is subsumed, amended and made part of Measure 49 in Section 4. In addition, Measure 37 is made part of the remaining sections of Measure 49 (Sections 5 through 22) as set forth in Section 1a: "ORS 197.352 is added to and made a part of sections 5 to 22 of this 2007 Act."

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[50] Id. at 623. In 1995, the Texas and Florida legislatures enacted laws which provide for compensation for loss of property values resulting from regulations.
Christopher Smart, *Legislative and Judicial Reactions to Kelo: Eminent Domain's continuing Role in Redevelopment*, 22 Probate and Property 60, 61, American Bar Association (March/April 2008).

[52] Erik Kancler interviewing Bob Stacey, *The Aftermath of Measure 37: Resisting the National Eminent Domain Backlash* (May 30, 2006) *at* http://www.planetizen.com/node/19918.

[53] H.B. 3540.

Measure 49 includes provisions for 3 categories of claims: 1) previously approved Measure 37 claims, 2) Measure 37 claims which were pending as of the date the legislature put Measure 49 on the ballot (June 28, 2007), and 3) new claims for land use regulations passed after January 1, 2007. As opposed to remedies available under Measure 37, under Measure 49 monetary compensation is only available for the third category of claims, new claims, but, these claims can only be based on land use regulations that "restrict" the construction of single family residences or restrict farming or forestry practices. This is in contrast to Measure 37 which also allowed claims based on the restriction of industrial, commercial, billboard and multi-family development.

Compensation for the first two categories of claims is in the form of permission to construct single family residences equal to the value lost as a result of the land use regulation.

A more thorough examination of the text of Measure 49 reveals a carefully laid out section (Section 2) of twenty-two definitions in which very specific descriptions of "high-value farmland" and "high-value forestland" are included. The remedy provided for new claims or Measure 49 claims is either compensation, as discussed above, or a waiver of the offending land use regulation.

Measure 49 includes a further distinction: claims included in the first part of Measure 49 regarding property outside of an UGB and outside any city limits, include two options for relief. The first is referred to as an "express" option for the development of up to three residences. The second option is referred to as a "conditional" option that may allow the development of up to ten residences. Claims for property located within a UGB (even partially) or within city limits are eligible for development rights for up to ten residences but only in property that is already zoned residential. The number of residences is determined by loss in value suffered by the claimant due to the land use regulation. In contrast, Measure 37 did not include such distinctions, and instead stated that just compensation "equal to the reduction in fair market value…as of the date the owner makes written demand…" was due.[54] Under Measure 37, claimants could obtain relief in the form of permission to construct mega development projects.

Measure 49 includes a restriction of twenty dwelling approvals per claimant regardless of how many properties a claimant owns and regardless of how many claims the claimant files. For new claims under Measure 49, the claimant must file the claim within five years of when the alleged injurious land-use regulation was enacted. In addition, several new restrictions apply to new lots and dwellings in exclusive farm use, forest or mixed farm and forest zones. These restrictions should significantly curtail the number of claims filed, and in fact, as of March 25, 2008, claims filed after June 28, 2007 with the Department of Land Conservation and Development total eighty-two.[55]

Measure 49 attempts to address issues that proved problematic due to ambiguities or lack of guidelines and restrictions in Measure 37. As opposed to the confusion regarding the transferability of waivers brought on by the lack of direction in Measure 37, Measure 49

[54] OR. REV. STAT. § 197.352(2) (2004).
[55] Department of Land Conservation and Development, Measure 49 Development Services Division, Measure 49, New Claims Received (March 25, 2008).

provides that an approval is transferable to a subsequent owner, but that owner must then complete the development within ten years.

The restrictions that Measure 49 imposed on Measure 37 still allow for a potential remedy for a claimant such as the ninety-two-year-old Dorothy English discussed above - permission to build homes on her property for her children. At the same time, Measure 49 provides all levels of government in Oregon with a measure of financial security that was not possible since Measure 37 was enacted.

Opponents of Measure 49 (supporters of Measure 37) disapproved of many of the provisions in Measure 49. They emphasize that for claims outside UGBs it applies to claims based on land-use regulations that "prohibit" establishing a lot, parcel or dwelling as opposed to land use regulations that "restrict" establishing a lot, parcel or dwelling, and that this language was intended to drastically reduce the measure's relief.[56] While it is true that Measure 37 was activated when a land use regulation "restricted" the use of property, it remains to be seen whether the term "prohibits" in HB 3540 §6(6)(b) actually affects the claims relating to property outside UGBs. [57]

Opponents of the measure also emphasize that claims will now be stifled due to prohibitive costs involved in filing a claim. This is because Measure 49, unlike Measure 37, requires claimants, before they may submit a claim, to procure appraisals to determine the financial impact they suffer based on the difference between the value of the property one year before the land use regulation went into effect and the value one year after the land use regulation went into effect.[58] In addition, an appraisal is required for each land-use regulation the claimant alleges is at issue. Claimants filing new claims under Measure 49, unlike Measure 37, may also be required to pay a fee to cover the costs of reviewing the claim. For example, in the city of Bend, the fees for filing a Measure 49 claim are $3,000 plus $500 per dwelling or lot/parcel plus $200 postage/notice fee plus 4% surcharge.[59] These provisions help ensure that the costs entailed with processing the claims will be covered. Detractors of the new measure found many reasons to oppose it. Nevertheless, it was approved by voters by a significant margin.

Since the passage of Measure 49, both the Oregon Court of Appeals and the Oregon Supreme Court are applying its provisions in their decisions regarding Measure 37 claims that were previously decided and are now up on appeal.[60] In Hood River Valley Residents' Committee, Inc. v. State of Oregon, the Court of Appeals remanded the case back to the DLCD for a hearing that would be consistent with Measure 49. In Frank v. DLCD, the Court of Appeals dismissed the case due to the new process and standards of Measure 49. Likewise, the Oregon Supreme Court in Corey v. DLCD, dismissed petitioner's request for review and stated that Measure 49 pertained to all Measure 37 claims, "successful or not, and regardless of where they are in the

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[56] David Reinhard, *Measure 49*, The Oregonian, October 7, 2007, *at* http://www.oregonlive.com/printer/printer.ssf?/base/editorial/1191894942188570.xml.
[57] HB 3540, §6(6)(b) (2007).
[58] The appraisal must show that residential use was the highest and best use for the property at the time the land use restriction was enacted. Department of Land Conservation and Development, Measure 49 Guide, M49.Guide.3.7.2008, page 8.
[59] http://www.ci.bend.or.us/depts/community_development/measure_37.html.
[60] Hood River Valley Residents' Committee, Inc. v. State of Oregon, 174 P.3d 1091 (Or. Ct. App. 2007); Frank v. Department of Land Conservation and Development, 176 P.3d 411 (Or. Ct. App. 2008); Corey v. Department of Land Conservation and Development, 2008 WL 1970246, (Or. 2008).

Measure 37 process."[61] It remains to be seen how the courts will be affected by Measure 49 and how they will interpret it, but due to the additional limitations imposed by Measure 49 on claimants, undoubtedly fewer claims will be filed and fewer will reach the Oregon courts.

IV. EVALUATION AND CONCLUSION

Although it is clear that some landowners in Oregon may fall into the Dorothy English category of elderly claimants alleging injury due to restrictive land use regulations that will not allow construction of a single home for family members on multi-acre parcels of land, it is also clear that the vast majority of claimants do not fall into this category. A number of the claims filed under Measure 37 were filed by large timber corporations and other large companies. Many of these claimants sought to develop large subdivisions which included commercial and industrial development in environmentally-sensitive areas.

Therefore, Measure 37 was not the salvation that Oregonian landowners thought it would be when they voted in favor of it. On the contrary, Oregon's successful land use planning was in a state of uncertainty and planners felt undermined.[62] Oregon stood to lose its valuable farmland, and forestlands would have been drastically affected, altered and subject to haphazard injury and destruction. Residential leapfrog development would have adversely affected farmers. It could have lost the power to control the sprawl that plagues most American cities.[63] Although a halt was put to Measure 37, it will take some years for the effects of the claims that were filed under Measure 37 to be felt in Oregon. Claims against county regulations where large developments were sought and construction was started[64] may one day prove to be injurious to the lifestyle of Oregonians and to its natural resources.

Alternative solutions for the unfairly burdened landowners in Oregon were necessary, and Measure 49 may be helpful in balancing the benefits to individual landowners provided by the public and the burdens carried by these individuals. Measure 49 is not the "open door" to compensation or development rights that Measure 37 was. Its provisions reduce claimants' rights to compensation significantly. Legislators will no doubt consult the provisions of Measure 49 and take them into account prior to passing new land use regulations. In this way, landowners' rights will be considered in passing future legislation, and solutions will be available for those who have been unnecessarily burdened.

Government entities do not have funds available to them to pay for widespread claims such as those enabled by Measure 37. Therefore, Measure 49 provides a level of security to these government bodies, and allows them to perform their duties with respect to land use planning. Measure 37 opened the floodgates of claims and litigation, and the situation became quickly unmanageable. The public attempted to rectify the situation by passing Measure 49. When Oregonians voted for Measure 37, it is doubtful they voted to enrich a few corporations and individuals at the cost of damaging the marvelous natural resources within Oregon. The dual purpose included in Measure 49, fairness to property owners and the retention of Oregon's

[61] Corey v. Department of Land Conservation and Development, 2008 WL 1970246, (Or. 2008).
[62] Telephone interview with Chris Dearth, Measure 37 Program Manager, City of Portland (May 7, 2008).
[63] See, Edward J. Sullivan, *Year Zero: The Aftermath of Measure 37*, 38 Urban Lawyer 237, The American Bar Association (Spring 2006).
[64] Telephone interview with Chris Dearth, Measure 37 Program Manager, City of Portland (May 7, 2008).

protections for its natural resources, is more in tune with what Oregonians want for their state and more in line with the land use regulations which have protected Oregon since the 1970's.