

## ENVIRONS

An Environmental Law Update

### Measure 37: Approaching Year Zero Plus Three

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In November 2004, the Oregon voters passed Ballot Measure 37 (now codified as ORS 197.352), which allows property owners to make claims for compensation if the value of the claimant's property has been reduced by land use regulations enacted or first enforced after the claimant (or certain family members) came into ownership. The initiative, which passed by a substantial margin, was the culmination of years of work by property rights advocates and others dissatisfied with the system of statewide land use planning that had evolved in Oregon since the passage of Senate Bill 100 in 1973. While observers of the electoral process will continue to debate the intentions and understanding of the voters who enacted Measure 37, the impact of land use restrictions on the density of development, particularly in suburban and rural areas, was clearly a central concern. Proponents of the measure were able to point to concrete examples where, as the result of regulations intervening since the acquisition of their property, individual owners were no longer able to subdivide their property to permit an additional dwelling for their children, or allow development to provide anticipated retirement income.

In 2002, the Oregon Supreme Court invalidated a prior voter initiative, Measure 7, as an impermissible amendment of more than one portion of the Oregon Constitution in a single ballot measure. While Measure 7 presented an amendment to the Oregon Constitution, Measure 37 created a purely statutory scheme under which the government was required to compensate the affected property owners unless it chose to "modify, remove, or not to apply" the regulation within 180 days of the owner's written demand for compensation. Legal challenges to the validity of Measure 37 appear to have been resolved by the Oregon Supreme Court's unanimous 2006 decision in *MacPherson, et al. v. Dept. of Administrative Services, et al.*, which upheld the constitutionality of the new law. Midway through the third year since its enactment, however, the uncertainty concerning how Measure 37 will be applied by the courts or amended by legislation seems as great as it has ever been.

#### Issues Pending in the Courts

Under the statutory scheme established by Measure 37, nearly all of the cases now pending in the courts result from a process that began with claims for compensation presented to the affected agencies of state and local government, typically a county board of commissioners or its delegate, and the Oregon Departments of Administrative Services ("DAS") and Land

Conservation and Development (“DLCD”), the two state agencies normally designated to receive claims. If the state or local agency failed to grant a waiver of the pertinent regulations within 180 days, if the claim was denied for other reasons, or if a claimant believed the waiver granted was insufficient, the claimant might then seek redress in the courts. Because the governments involved generally have chosen to waive regulations rather than pay compensation, most of the resulting court litigation is concerned, in one way or another, with issues of the claimant’s standing to demand compensation and the adequacy of any waiver granted. In attempting to resolve these disputes, the courts are also forced to confront a number of unanswered questions concerning jurisdiction and procedure. These legal uncertainties can translate into formidable real-world risk and expense for the claimants unfortunate enough to be drawn into the process. Ironically, such risk and expense often weighs heaviest on those individual claimants whose Measure 37 goals are the most modest.

- **Standing and Waiver**

By far the largest portion of the claims now pending in circuit court involve disputes over the standing of the claimant and/or the scope of the waiver allowed by the county or state. Often these cases turn on disputes concerning what constitutes “ownership” for purposes of Measure 37, or the continuity of ownership, as these issues affect the determination of the date on which the present owner acquired the property. The statute’s definition of ownership is quite broad, and includes “the present owner of the property, or any interest therein.” ORS 197.352(11)(C). While this definition implies that holders of interests other than deeded fee simple ownership are entitled to protection, the outer limit of ownership for purposes of Measure 37 remains to be determined. Many questions regarding the scope of the ownership definition remain unanswered, including the rights of tenants in common; holders of a life estate or long-term ground lease; the holder of the remainder interest that is subject to the life estate or long-term lease; the settlor of a revocable living trust; a spouse not on the title; individuals claiming interests in property held in a partnership; the member of single-member limited liability company; the sole shareholder of a closely held corporation that is the title owner of the property.

Particularly where family relationships are involved, it is not uncommon to encounter situations where the property in question has been in the family for more than 50 years, perhaps always under the control of the same individual, and yet has undergone one or more transfers of record title based on family, business or estate planning considerations. The governmental response to these scenarios has not been uniform, and many Measure 37 claimants have received waivers from a county board that may apply the definition broadly, only to find that the state agencies take a different view and will only waive regulations to the date of the last change in record title.

- **“Transferability” and “Vesting”**

Another unanswered question is the extent to which a Measure 37 waiver is specific to the present owner of the property, or may be transferred to a buyer or other future owner. In the view of the Oregon Attorney General and many local governments, Measure 37 development rights are personal to the holder and, even when they have been legally vindicated in the claims process, are not transferable with the property. According to this view, the economic value of a waiver of regulations remains ephemeral until the permitted development is

actually implemented to the extent that it can be considered “vested” as a characteristic of the property itself. It is unclear when such “vesting” is complete. Some claimants have been advised to place septic systems, or even temporary manufactured homes, in an effort to preserve development rights after a Measure 37 waiver.

Another aspect of this uncertainty is the risk that a claimant, after investing time and money in the legal process associated with a Measure 37 claim, might die before the process is complete or before vesting is achieved. Given the age of many claimants and the potential for a protracted appeals process, in many cases this is unfortunately a very significant risk.

- **Jurisdiction and Procedure**

As originally enacted, Measure 37 provides a claimant has a cause of action for compensation in circuit court if the affected regulations have not been waived and continue to apply to the property more than 180 days after the claim is filed, and further provides that a prevailing claimant is entitled to recover its attorney fees and litigation expenses. ORS 197.352(6). The statute also allows affected government agencies to adopt procedures for handling claims, provided such procedures do not “act as a prerequisite to the filing of a compensation claim” in circuit court. ORS 197.352(7). By providing governmental decisions on Measure 37 claims will not be considered land use decisions, the statute also makes it clear that such decisions may not be appealed to the Oregon Land Use Board of Appeals (“LUBA”). ORS 197.352(9). Beyond these provisions, however, Measure 37 does not spell out how the cause of action established by ORS 197.352(6) affects the jurisdiction and procedural limitations that are arguably established under other preexisting statutes.

Absent some statutory or common law basis for independent jurisdiction, decisions by county governments are generally subject to review in circuit court pursuant to a “writ of review” obtained by the aggrieved party under procedures established in ORS Chapter 34. An application for a writ of review must be made within 60 days of the county decision to be timely. Assuming a timely petition, the circuit court reviews the county action under a relatively deferential standard, accepting any factual findings made by the county unless it can be shown that they are not supported by the record. In contrast, a claim for compensation arguably requires the circuit court itself to make similar determinations, including the owner’s date of acquisition, without any particular deference to the county.

A similar process exists for the review of state agency decisions under the Administrative Procedures Act (“APA”). In the case of decisions made by the agency without a contested case proceeding, an aggrieved party may appeal to circuit court within 60 days of the decision. In contested case proceedings, which follow a somewhat different procedure and typically require an evidentiary hearing before the agency, an aggrieved party may appeal directly to the Oregon Court of Appeals within 60 days. The state agencies have treated their Measure 37 determinations as orders in “other than contested case” proceedings, and have routinely advised claimants that they have the right to an appeal in circuit court. Early in 2007, however, the Oregon Court of Appeals issued a preliminary decision in *Corey v. Department of Land Conservation and Development*, 210 Or. App. 542, 152 P.3d 933, *adhered to on reconsideration*, 212 Or App. 536, 159 P.3d 327 (2007), *petition for review*

*pending*, which has cast doubt on this view of the proceedings required at the agency level and the path of appeal.

In *Corey*, the claimant appealed directly to the Court of Appeals, and to the surprise of many, the court declined to dismiss for lack of jurisdiction. Instead, the Court of Appeals suggested that, at least if the agency proposes to grant a Measure 37 waiver, it must hold a contested case hearing from which the path of appeal would run directly to the Court of Appeals rather than to circuit court. As no such hearings have been held, *Corey* raises the possibility that all of the appeals now pending in circuit court will need to be transferred to the Court of Appeals and then remanded to the agencies for a hearing. As the *Corey* court's ruling remains preliminary and a petition for review by the Oregon Supreme Court is pending, it may be months before this threshold jurisdictional issue is resolved. In many cases, circuit court judges have simply stayed proceedings until then. In the meantime, even more far reaching changes to the Measure 37 landscape are looming on the legislative front.

### **New Legislation**

While the Oregon legislature has been criticized for its failure to craft a workable compromise in the years preceding Measures 7 and 37, there was renewed discussion of a legislative “fix” in the current legislative session. For the most part, this discussion focused on efforts to limit the scope of the remedy and involved a debate over Measure 37's impact on the preservation of farmland, particularly in the Willamette Valley. The proposals most frequently discussed allowed for a smaller number of additional dwellings on agricultural land but blocked larger-scale subdivision development. Because the focus of the legislative discussion was on this sort of larger compromise, it was often difficult to determine how the different proposals might affect the details of the statute that are pending in the Oregon courts.

Ultimately, near the close of the session, the Oregon legislature passed two bills:

- **HB 3546 – The “Moratorium”**

The first, House Bill 3546, which was signed by the governor and took effect on May 10, 2007, is a response to the pleas of state agencies for additional time to process the avalanche of claims that were filed in November 2006 as one of Measure 37's statute of limitations periods was drawing to a close. Under Measure 37, a claimant may bring suit in circuit court to recover compensation for diminution in property value if a challenged regulation continues to restrict the development of the property 180 days after the claim is filed with a local government or state agencies. While most counties were able to satisfy this deadline, DLCDC, which is also responsible for most claims filed across the state, was overwhelmed. HB 3546 adds a year to the 180 day timeline and postpones the time at which those claimants may file for compensation in circuit court. Because of concerns that some claimants might die in the interim, it also preserves their rights to their successors, providing some limited protection with respect to the vesting concerns discussed earlier. HB 3546 does not extend the 60-day timeline in which to file for a writ of review (in the case of a county or other local government decision), or an appeal under the APA (in the case of an agency decision).

- **HB 3540 – The “Referendum”**

The second piece of legislation, HB 3540, is a more sweeping proposal to amend Measure 37 that will be referred to the voters in November. The proposal contains a host of detailed provisions, and a thorough analysis is beyond the scope of this article. In general, however, the measure reflects an effort to repeal much of the existing law while retaining some more limited relief for current claimants who are seeking residential development of their property. Landowners would only be entitled to compensation for regulations restricting residential development. Restrictions on commercial or industrial development would not entitle landowners to compensation under the proposal.

Under HB 3540, existing claimants with property in rural areas generally would be entitled to up to three dwelling sites, provided that total includes any existing dwellings and does not exceed either their claim or the limits of any waiver previously granted by the state. Claimants in rural areas whose property does not consist of “high value” farm or forest land, as defined by the act, may seek to develop four to ten dwellings, but they would be subject to a significantly more detailed and rigorous claims process, including appraisals. Claimants in urban areas may seek to develop up to ten dwelling sites, again, under a much more rigorous claims process. Under the proposed law, the right to present new claims is triggered by the enactment of land use regulations rather than by their application and enforcement, and those who have not filed Measure 37 claims by the close of the legislative session would be limited to claims based on land use regulations enacted after January 1, 2007.

While the focus of the legislation is on the entitlement to additional dwelling sites as the vehicle for compensating current claimants, the rules defining the value of any monetary compensation available would require an exacting analysis of appraised values shortly before and after each challenged regulation, and not, as Measure 37 now provides, at the time the claim is made. Instead, the successful claimant would be entitled to interest on the resulting values at Treasury Bill rates.

HB 3540 also would resolve most procedural and jurisdictional questions in favor of greater restrictions on the enforcement of private property rights. Measure 37’s primary cause of action in circuit court for compensation would be eliminated, as would the claimant’s related entitlement to recovery of attorney fees. Instead, HB 3540 places primary jurisdiction in the state and local government agencies and provides for appeal to circuit court on a writ of review or, in the case of state agencies, under the APA (absent continuing constitutional objections, this provision would expressly resolve the jurisdictional issue presented in *Corey* in favor of the “other than contested case” treatment proposed by the state). Judicial review by the circuit court would be limited to the record made before the state and local governments, and would give significant deference to any factual determinations made by those bodies.

For current claimants who are successful in obtaining a waiver of regulations, HB 3540 would provide for the transferability of the rights obtained, eliminating for that class of claimants the uncertainty of the current “vesting” process.

HB 3540 also would resolve most of the questions of standing that are at the heart of many of the Measure 37 appeals now pending, almost always by eliminating standing. The new law would repeal the current broad definition of ownership under Measure 37, which includes the owner of “any interest” in the property, and instead determine standing based on the acquisition of recorded title. The only exceptions under the new definition would be for the surviving spouse of a title owner, for the purchaser under a land sale contract, and for the settlor of a revocable trust (the last two exceptions are consistent with the treatment of most agency and court decisions under the current law). If HB 3540 is enacted by the voters, the application of the new law to claims in progress, and the remedies available to those claimants adversely impacted, are likely to provide another chapter in the saga of Measure 37.

For the present, nearly three years into the story, the one thing that can be said with certainty is that nearly everything remains uncertain.

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