

SYMPOSIUM

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A Practical Guide to Measure 37

INTRODUCTION

On November 2, 2004, the voters of Oregon approved Ballot Measure 37.¹ Measure 37 requires that state and local governments compensate property owners when land-use regulations restrict the use and reduce the fair market value of their property.² As an alternative to compensation, Measure 37 allows state and local governments to waive³ the challenged regulation and grant owners license to use their property as they could have before the regulation was passed.⁴

Stakeholders involved in the Measure 37 debates include Oregonians in Action, the property rights group that sponsored the measure, 1000 Friends of Oregon, a conservation group opposed to the measure, the state of Oregon, and various local governments. Because the language of the measure can be vague, the various interest groups have developed different interpretations of the provisions of Measure 37. This article attempts to juxtapose the views of different interest groups on various aspects of the measure in order to present a more complete picture

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¹ Measure 37, available at http://www.sos.state.or.us/elections/nov22004/guide/meas/m37_text.html (last visited April 8, 2006).

² *Id.* § 1.

³ For ease of reference, the modification, removal or lack of application by the government of a land-use regulation to a particular piece of real property, as referenced in section (8) of the measure, will be referred to as a “waiver” of a land-use regulation throughout this piece.

⁴ Measure 37, *supra* note 1, § 8.

of the many and varied “answers” to the questions raised by Measure 37.

The passage of Ballot Measure 37 created many questions. Because the Legislature was conveniently in session directly following the passage of Measure 37, it was thought that legislators might try to clarify some of the provisions of the measure. Unlike its precursor, Measure 7, Measure 37 is not a constitutional amendment, but a statute, and as such it can be amended by the Oregon Legislature. Unfortunately, the 2005 session adjourned without reaching a consensus on how to interpret the ambiguous provisions in Measure 37. Because the 2005 Legislative Assembly failed to pass legislation clarifying the measure,⁵ most of the questions will remain unanswered until Measure 37 lawsuits make their way through the courts.⁶ This article does not constitute an attempt to provide definitive answers to questions raised by Measure 37. Instead, this piece is meant to be used as a lens, to enable the reader to focus on a few categories of questions and provide, if not answers, at least avenues of investigation.

QUESTIONS AND DISCUSSION

I

WHO CAN FILE A CLAIM?

A. Who Qualifies as a Property Owner Under Measure 37?

Although Measure 37 provides that property owners are entitled to just compensation when the use of their property is restricted and its fair market value is reduced,⁷ the term “property owner” is never expressly defined within the measure. The measure does provide that no compensation is due for land-use regu-

⁵ Senate Bill 1037, which clarified many of the aspects of Measure 37, failed to pass when the Senate refused to concur in amendments made to the bill in the House. S.B. 1037, 73rd Or. Legis Ass’y (2005), available at <http://www.leg.state.or.us/05reg/measpdf/sb1000.dir/sb1037.d.pdf>; Oregon State Legislature, History of 2005 Senate Bills, <http://www.leg.state.or.us/05reg/pubs/senmh.html>.

⁶ See Oregonians in Action, Ballot Measure 37: Frequently Asked Questions, Question 5, <http://measure37.com/measure%2037/faq.htm>, (noting that Measure 37 is being challenged in court) (last visited April 9, 2006). 1000 Friends of Oregon, Measure 37 Litigation, <http://www.friends.org/issues/M37litigation.html> (showing documents relating to *MacPherson v. Dep’t of Admin. Serv.*, 340 Or. 117, 130 P.3d 308 (2006), which held that Measure 37 violated neither state constitutional protections nor the procedural or substantive due process protections of the federal constitution) (last visited April 8, 2006).

⁷ Measure 37, *supra* note 1, § 1.

lations passed before either 1) the owner, or 2) a family member of the owner who owned the property prior to its acquisition or inheritance by the current owner, acquired the property.⁸ “Family member” is defined by the measure as including:

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 any one or combination of these family members or the owner of the property.⁹

Although the definition of property owner included in the measure is fairly exhaustive, it fails to address a few important issues, such as whether a corporation may be considered an owner under the measure.

The measure defines the term “owner” as “the present owner of the property, or any interest therein,”¹⁰ but does not address whether an owner must be an individual. The Oregon Supreme Court, in *Portland Gen. Elec. Co. v. Bureau of Labor & Indus.*, created a framework for courts to use when interpreting Oregon statutes.¹¹ At the first level of analysis, the court attempts to determine the intent of the legislature.¹² In order to evaluate the intent of the legislature, the court will look at the “plain, natural and ordinary meaning” of the words of the statute, as well as the “context of the statutory provision at issue.”¹³ Section 3 of Measure 37 refers to “a family member of the owner” which, because corporations do not have family members would seem to imply that an owner under Measure 37 is defined as an individual. In contrast, Oregon Revised Statutes, chapter 197, in which Ballot Measure 37 is incorporated, defines a ‘person’ as “any individual, partnership, corporation, association, governmental subdivision or agency or public or private organization of any kind.”¹⁴ Although the terms person and owner are certainly not synonymous, if a corporation can be a person, a corporation can almost certainly also be an owner. Other Oregon statutes define owner

⁸ *Id.* § 3(E).

⁹ *Id.* § 11(A).

¹⁰ *Id.* § 11(C).

¹¹ *Portland Gen. Elec. Co. v. Bureau of Labor & Indus.*, 317 Or. 606, 610-12, 859 P.2d 1143, 1145-47 (1993).

¹² *Id.*, 859 P.2d at 1145-47.

¹³ *Id.* at 611, 859 P.2d at 1146.

¹⁴ OR. REV. STAT. § 197.015(18) (2005).

without reference to an individual,¹⁵ and in casual parlance, an owner is simply one who possesses¹⁶—there is no requirement that an owner be an individual person. Thus, it seems likely that the courts will interpret the term owner to include corporations. The group 1000 Friends of Oregon, a nonprofit organization founded as a voice for the citizens of Oregon to encourage land-use planning “that protects Oregon’s quality of life from the effects of growth,”¹⁷ believes that corporations can be owners under Measure 37.¹⁸ If corporations are included in the definition of “owner” under Measure 37, questions such as whether a single shareholder could file a claim as an owner, separate and apart from a claim filed by the corporation and what the consequences of such claims would be, are likely to arise as Measure 37 claims are filed.

B. Is Familial Ownership of Property Equally Important for Purposes of Both Compensation and Waiver of Land-Use Regulations?

In order for a property owner to be eligible for compensation, Measure 37 requires that either the current owner or the current owner’s family member must have acquired the property before the challenged land-use regulation became effective.¹⁹ Once a valid Measure 37 claim is filed the local government must either compensate the owner for the decrease in property value due to the challenged land-use regulation²⁰ or waive the regulation as it affects the particular property.²¹

The waiver section of Measure 37 only allows the “governing body responsible for enacting the land-use regulation” to waive that regulation to “allow the *owner* to use the property for a use

¹⁵ See, e.g., OR. REV. STAT. § 223.001(11) (2005) (defining “owner” as “owner of the title to real property or the contract purchaser of real property of record as shown on the last available complete assessment roll in the office of the county assessor”).

¹⁶ See WEBSTER’S NEW DICTIONARY AND THESAURUS 382 (concise ed. 1990) (defining “own” as “to possess”).

¹⁷ See 1000 Friends of Oregon, About 1000 Friends of Oregon, <http://www.friends.org/about/index.html> (last visited Mar. 22, 2006).

¹⁸ See 1000 FRIENDS OF OREGON, MEASURE 37: SUMMARY AND QUESTIONS 2 n.2 (2005), <http://www.friends.org/issues/documents/M37/M37-Q-and-A.pdf>.

¹⁹ See Measure 37, *supra* note 1, § 3(E).

²⁰ *Id.* § 1.

²¹ *Id.* § 8.

permitted at the time the *owner* acquired the property.”²² In a compensation situation, the current owner is eligible for compensation in the amount of the reduction in the fair market value of his property caused by any land-use regulation passed since *any of the current owner’s family members* acquired the property. Thus, if the property has been in the current owner’s family for generations, the current owner is entitled to compensation for regulations passed any time after her first ancestor acquired the property if they decrease that property’s value. In contrast, the current owner is only entitled to waiver of land-use regulations enacted since he acquired the property.²³ Familial ownership can be very important in cases of compensation, but has no bearing in cases of waiver.

II

WHAT CONSTITUTES A CLAIM UNDER MEASURE 37?

A. *Definitions*

1. *Land-Use Regulation*

To prevail on a Measure 37 claim, a property owner must show that a land-use regulation both restricts the use and reduces the value of her property. Therefore a question that has become very important to local governments since the passage of Measure 37 is, “what constitutes a land use regulation?” Measure 37 defines a land-use regulation as:

1) [a]ny statute regulating the use of land or any interest therein; 2) [a]dministrative rules and goals of the Land Conservation and Development Commission; 3) [l]ocal government comprehensive plans, zoning ordinances, land division ordinances, and transportation ordinances; 4) [m]etropolitan service district regional framework plans, functional plans, planning goals and objectives and; 5) [s]tatutes and administrative rules regulating farming and forest practices.²⁴

Section 197.015(11) of the Oregon Revised Statutes (ORS), the statute which contains definitions for ORS chapter 197, into which Ballot Measure 37 will be incorporated, defines a ‘land use regulation’ as “any local government zoning ordinance, land division ordinance adopted under ORS section 92.044 or 92.046, or similar general ordinance establishing standards for a compre-

²² *Id.* (emphasis added).

²³ *Id.* § 8.

²⁴ *Id.* § 11(B).

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hensive plan.”²⁵ Arguably, the definition of the term “land use regulation” included in Measure 37 is more inclusive than the existing statutory definition because it specifically incorporates state statutes and administrative rules and goals, while the definition of “land use regulation” in ORS section 197.015 is oriented toward local land-use planning regulations.

Oregonians in Action, the group behind Measure 37, seems to think that the limits of the definition of “land use regulation” are coterminous with the currently existing “body of law in Oregon which defines what constitutes regulation of land use.”²⁶ The Governor’s office agrees generally with that conclusion, declaring that it is “most likely that the definition of the term ‘land use regulation’ in subsection (11) of Measure 37 is exclusive. The categories of laws listed in subsection (11) of Measure 37 do not illustrate some broader group of laws subject to the measure.”²⁷ The Governor’s office concludes that because the definition of land-use regulation in Measure 37 is exclusive, any regulation not listed in the measure is not a land-use regulation subject to claims for compensation under the measure.²⁸

There are generally four types of land-use regulations which restrict the use of property within the scope of Measure 37.²⁹ First, regulations that limit the type of use to which a property may be put; second, regulations that confer authority on a public entity to allow a use, subject to certain conditions; third, regulations that restrict the time, place or manner of a use; and fourth, regulations that impose affirmative obligations on the owner of a property.³⁰

Another question relating to the definition of a “land use regulation” is whether the waiver of a land-use regulation constitutes a land-use regulation in itself. For example: Neighbor A wants to erect a cell phone tower on his property but land-use regulations prohibit the siting of cell phone towers on that property. He files a Measure 37 claim and the local government waives the rule

²⁵ OR. REV. STAT. § 197.015(11) (2005).

²⁶ Oregonians in Action, *supra* note 6, at Question 8.

²⁷ OFFICE OF GOVERNOR KULONGOSKI, 2004 OREGON BALLOT MEASURE 37 INITIAL QUESTIONS AND ANSWERS 5 (2005), available at <http://www.orcities.org/Portals/17/CurrentIssues/M37/M37Q&A.pdf>.

²⁸ *Id.*

²⁹ *Id.* at Question 10.

³⁰ *Id.*

regulating the siting of cell phone towers rather than paying the claim. Neighbor A erects his cell phone tower.

The presence of a cell phone tower next door causes a decrease in the value of Neighbor B's property. Neighbor B is upset by this. Assuming Neighbor B can also show that the waiver restricts the use of her property in some way, may she file a Measure 37 claim contesting the waiver? Maybe.

Rather than pay a valid Measure 37 claim, a public entity may "modify, remove or not to apply [sic] the land use regulation . . . to allow the owner to use the property for a use permitted at the time the owner acquired the property."³¹ If a local government simply does not apply the cell phone tower regulation to Neighbor A, it likely does not constitute a new land-use regulation and Neighbor B will not have a valid Measure 37 claim for compensation (although she may have a common law nuisance claim, or a private right of action against Neighbor A).³² If, however, the public entity modifies or removes a land-use regulation, in effect changing the law on the books, it might constitute a new regulation, and if Neighbor B can show that the modification (and hence new land-use regulation) both restricts the use of her property and reduces its value she may have a valid Measure 37 claim.

Understanding what constitutes a land-use regulation is critical because without a land-use regulation, there can be no Measure 37 claim. Honing in on the precise definition of "land use regulation" will likely be a slow process, and one that takes place through the courts.

2. *Enforce*

Measure 37 provides that a property owner is entitled to compensation if a public entity *enforces* a land-use regulation that both restricts the use and reduces the value of her property.³³ The definition of the term "enforce" as applied to Measure 37 claims is somewhat ambiguous. The Governor's office believes that a public entity enforces a land-use regulation when it "takes an affirmative step to put a law into force or require that it be

³¹ Measure 37, *supra* note 1, § 8. For a further discussion of waivers, see *infra* Part V.

³² Several local governments have established private rights of action against Measure 37 claimants in their local ordinances. For more discussion on private rights of action, see *infra* Part III.G.

³³ Measure 37, *supra* note 1, § 1.

observed with regard to the property on which a Measure 37 claim is made.”³⁴ According to the Governor’s office, enforcement actions include, but are not limited to, “compelling compliance with the law through a judicial or administrative action; preventing or discouraging violations of the law; exercising discretionary authority to restrict the use through a regulatory action; and clarifying how a general law applies to the particular property for which a claim is made.”³⁵ The true definition of the word “enforce” is also likely to be decided by the courts.

B. *Exceptions*

Measure 37 provides that even if a land-use regulation exists that restricts the use and reduces the value of property, the property owner may not have a valid claim under the measure if certain exemptions apply. Land-use regulations: 1) relating to public nuisance; 2) protecting public health and safety; 3) required to comply with federal law; 4) restricting or prohibiting the use of property for selling pornography or performing nude dancing; or 5) enacted prior to the date of acquisition of the property by the owner or a family member of the owner; are not subject to Measure 37 claims for compensation.³⁶

1. *Public Nuisance*

Measure 37 provides that valid claims for compensation cannot arise out of land-use regulations “[r]estricting or prohibiting activities commonly and historically recognized as public nuisances under common law.”³⁷ In addition, Measure 37 provides that the definition of a public nuisance should be narrowly construed by the courts in favor of a finding that compensation is due under the measure.³⁸

Because Measure 37 does not explicitly delineate the activities commonly and historically recognized as public nuisances under common law, other sources must be consulted. Black’s Law Dictionary defines a public nuisance as “[a] condition dangerous to

³⁴ OFFICE OF GOVERNOR KULONGOSKI, *supra* note 27, at 4.

³⁵ *Id.*

³⁶ Measure 37, *supra* note 1, § 3. It should be noted that although claims for compensation are referred to throughout the exemptions section, the governing body responsible for enacting the challenged land-use regulation may, in its discretion, waive the regulation in lieu of granting a claim for compensation. *Id.* § 8.

³⁷ *Id.* § 3(A).

³⁸ *Id.*

health, offensive to community moral standards, or unlawfully obstructing the public in the free use of public property.³⁹ The Oregon Supreme Court defines a public nuisance as an “unreasonable interference with a right which is common to members of the public generally.”⁴⁰ While these definitions are helpful in thinking about which land-use regulations may be exempt from Measure 37 claims, the final definition of a historical public nuisance under Measure 37 will likely only be reached through litigation.

2. *Public Health and Safety*

Measure 37 provides that land-use regulations “[r]estricting 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” are not subject to claims for compensation.⁴¹ Oregonians in Action also includes traffic safety regulations in the class of those land-use regulations within the ambit of the public health and safety exception.⁴² Because many regulations serve multiple purposes, including health and safety protections, a question important to local governments is, “what makes a regulation a health and safety regulation?”

The Governor’s office defines regulations “protecting public health and safety” as those regulations “reasonably related to the achievement of one or both of these goals.”⁴³ It should also be noted that although the measure refers to “health and safety regulations,” a regulation need not apply to both health and safety in order for it to be exempt from the compensation requirements of Measure 37.⁴⁴ As long as the regulation is reasonably related to either health or safety it should be exempt.⁴⁵ The Governor’s office further provides that the health and safety exception likely does not apply to regulations that protect economic, social or aesthetic interests (otherwise known as the general welfare). Therefore, a regulation reasonably related to health or safety

³⁹ BLACK’S LAW DICTIONARY 1230 (6th ed. 1990).

⁴⁰ *Raymond v. S. Pac. Co.*, 259 Or. 629, 634, 488 P.2d 460, 462 (1971).

⁴¹ Measure 37, *supra* note 1, § 3(B).

⁴² *Oregonians in Action*, *supra* note 6, at Question 9.

⁴³ OFFICE OF GOVERNOR KULONGOSKI, *supra* note 27, at 6.

⁴⁴ *Id.*

⁴⁵ *Id.*

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should fall within the exemption, even if it also provides a side economic, aesthetic or social benefit.⁴⁶

It may be that a regulation will fall under the public health and safety exemption if a public entity can point to a governing statute to show that a land-use regulation is meant to benefit public health and safety even if it is not the obvious or primary purpose of the regulation.⁴⁷ On the other hand, simply labeling a law a health or safety regulation will not qualify it for the public health and safety exemption in the measure. The regulation must substantively bear some reasonable relationship to public health or safety for it to qualify for the exemption.⁴⁸

3. *Compliance with Federal Law*

Measure 37 provides that land-use regulations that are required in order for the state to remain in compliance with federal law are not subject to claims for compensation under the measure.⁴⁹ But which land-use regulations are required to comply with federal law? Oregonians in Action claims that “in most instances, the federal government leaves land-use planning and regulation to state and local governments, such that the times when federal law truly mandates the adoption of a state or local land use law are not common.”⁵⁰ In other words, Oregonians in Action implies that in order for a regulation to fall within this exemption, federal law must *mandate* compliance. The language in the measure is not quite so clear. A regulation would certainly be necessary in order for a public entity to comply with federal law if the federal law in question mandated regulation. There will almost certainly be situations, however, where a federal law mandates a certain result, but leaves the design of that result up to local governments. In such a situation, there may be several possible avenues for a public entity to follow in creating that mandated result. When the public entity chooses one land-use

⁴⁶ *Id.*

⁴⁷ See OR. REV. STAT. § 92.046(1) (2005) (providing that in order to promote public health, safety, and general welfare the “governing body of a county or city may . . . adopt regulations or ordinances requiring approval, by the county or city of proposed partitions”); OR. REV. STAT. § 197.005(1) (2005) (stating that “uncoordinated use of lands within this state threaten the . . . health, safety . . . and welfare of the people of this state”).

⁴⁸ OFFICE OF GOVERNOR KULONGOSKI, *supra* note 27, at 6. See also Oregonians in Action, *supra* note 6, at Question 8.

⁴⁹ Measure 37, *supra* note 1, § 3(C).

⁵⁰ Oregonians in Action, *supra* note 6, at Question 9.

regulation to effect the result mandated by the federal government, but another option for regulation existed, is the regulation required to comply with federal law? Oregonians in Action will likely say that the regulation was not required by federal law in the above situation because federal law did not mandate that the local government pass that specific regulation. Others might feel the opposite, reasoning that a certain result was mandated by the federal government, the local government enacted or enforced a regulation to comply with the federal mandate, and therefore the regulation was required in order to comply with federal law.

4. *Regulations Restricting or Prohibiting the Sale of Pornography or Performance of Nude Dancing*

Measure 37 provides that regulations “[r]estricting or prohibiting the use of a property for the purpose of selling pornography or performing nude dancing” are exempt from the compensation requirement,⁵¹ although the exemption seems unnecessary because regulations targeting these types of establishments are currently unconstitutional in Oregon.⁵² Oregonians in Action explains that this provision was added to Measure 37 in order to frustrate anti-property rights activists who had in the past, “defeated a takings initiative in Washington by . . . arguing that voters would be forced to compensate pornographers if the Washington law was adopted.”⁵³

5. *Regulations Enacted Prior to the Acquisition of the Property by the Owner or the Owner’s Family Member*

Measure 37 provides that land-use regulations enacted prior to the time either 1) the owner, or 2) a family member of the owner⁵⁴ acquired the property in question are not subject to the compensation provisions of the measure.⁵⁵ Measure 37 does not specify whether the familial ownership must be continuous. So it is unclear whether compensation would be appropriate in a situation where for example, grandpa Joe bought property in the 1930s when it was unregulated, the county passed a zoning ordi-

⁵¹ Measure 37, *supra* note 1, § 3(D).

⁵² See *Portland v. Tidyman*, 306 Or. 174, 191, 759 P.2d 242, 251 (1988).

⁵³ Oregonians in Action, *supra* note 6, at Question 10.

⁵⁴ For the definition of “family member” under Measure 37, see *supra* Part I.A.

⁵⁵ Measure 37, *supra* note 1, § 3(E).

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nance designating the property as farmland, the property was sold outside of the family in the 1940s and now, in 2005, granddaughter Mary has just repurchased the land and wants to subdivide it and build tract housing.

Oregonians in Action interprets the provision to mean simply that Measure 37 does not apply to land-use regulations enacted before the owner or the owner's family member acquired the property, whichever came first. Therefore Oregonians in Action would likely believe that Mary has a valid claim for compensation.⁵⁶ The regulation she is challenging was enacted after her grandfather (a family member) bought the property, so it doesn't matter, for purposes of the measure that the regulation was passed before Mary acquired the property.

On the other hand, the argument could certainly be made that the measure should only apply in situations where one family member intended to pass property and its attached rights and privileges to another family member but was stymied by a land-use regulation enacted before the property could be transferred.⁵⁷ If that interpretation of the measure is accepted, situations like the one above, where property was sold out of the family, should not fall under the auspices of the measure. 1000 Friends of Oregon has not taken a position on the issue of continuity of family ownership of property, but the group does observe that if no continuity of ownership is required, the impact of Measure 37 will be "greatly increased."⁵⁸

C. Valuation of Claims Under Measure 37

Measure 37 provides that when a land-use regulation both restricts the use and reduces the value of property, the property owner is entitled to just compensation.⁵⁹ The measure defines "just compensation" as the amount "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

⁵⁶ See Oregonians in Action, *supra* note 6, at Question 9.

⁵⁷ See, e.g., Dorothy English, *Argument in Favor*, in Measure 37 Arguments in Favor, 1 VOTERS' PAMPHLET 105, 105-06 (2004), available at <http://www.sos.state.or.us/elections/nov22004/guide/pdf/vpvol1.pdf>; State Legislators Support Measure 37, *Argument in Favor*, in Measure 37 Arguments in Favor, 1 VOTERS' PAMPHLET 107, 107 (2004), available at <http://www.sos.state.or.us/elections/nov22004/guide/pdf/vpvol1.pdf>.

⁵⁸ See 1000 Friends of Oregon, *supra* note 18, at 4.

⁵⁹ Measure 37, *supra* note 1, § 1.

date the owner makes written demand for compensation under this act.”⁶⁰

Generally there are two categories of claims for compensation available under Measure 37: prospective claims and retrospective claims. Prospective claims stem from regulations enacted *after* the passage of Measure 37.⁶¹ Retrospective claims stem from regulations enacted *before* Measure 37 took effect.⁶² Prospective claims are relatively easy to value. In valuing a prospective claim all that is needed is to look at the difference in the value of the property before and after the land-use regulation was passed. In other words, prospective compensation equals the price of the land without regulation minus the price of the land with regulation.⁶³ The valuation of retrospective claims involves a calculation of the income lost over the years as a consequence of the regulation and is thus more difficult.⁶⁴

1. Valuation Factors

Valuing a Measure 37 claim is not an easy task. First, the valuator must decide whether the affected property should be valued as though it alone is exempt from the challenged regulation, or as though the challenged regulation has been lifted for all similarly situated properties. This is a difficult question, and the measure itself provides no guidance. Calculating compensation as though the claimant is the only property owner for whom the regulation is waived will likely create a windfall for the claimant.

For example, Susie owns farmland that she would like to subdivide and develop. Current regulations prevent both Susie *and* all her neighbors from subdividing and developing their farmland. If Susie’s property is valued under the assumption that it is the only property in the area available for subdivision, its purchase price will likely be higher than if the valuation assumes that all the properties in the area can be subdivided. When the valuation of Susie’s property assumes that the regulation is only waived for Susie, her property is one of a kind and therefore a hot commodity, and the market price will likely reflect that. When the valua-

⁶⁰ *Id.* § 2.

⁶¹ See ANDREW J. PLANTINGA, MEASURING COMPENSATION UNDER MEASURE 37: AN ECONOMIST’S PERSPECTIVE 5 (2004), <http://arec.oregonstate.edu/faculty2/measure37.pdf>.

⁶² See *id.* at 5-6.

⁶³ *Id.* at 9.

⁶⁴ *Id.*

tion assumes that the regulation is waived for Susie and all her neighbors, her land is not special (unless there are other attributes attached to the land such as a view or water access) and the market price will likely be lower.⁶⁵ In fact, when the valuation assumes that the regulation is waived as to everyone similarly situated to Susie, agriculture may be the most profitable use for the land, and therefore compensation under the measure would be zero.⁶⁶

Second, if the original price of the property included a collection of assets (the land itself, buildings, equipment, etc.) the valuator must decide whether the price placed on the property as a whole (land and assets) should be used for the purpose of calculating compensation. Land-use regulations affect only the value of the land itself. So if the original purchase price is used for purposes of calculating compensation, it is important to determine the price of the land itself, separate from other assets.⁶⁷

2. Proposed Valuation Strategies

A working group composed of various Measure 37 stakeholders created three proposed methods for valuing Measure 37 claims.⁶⁸

Method A involves determining the original purchase price of the property, adjusting it to current dollars using an inflation index and comparing the adjusted original purchase price to the current real market value of the property.⁶⁹ The current real market value of the property is the value “reflected in the county’s property tax records.”⁷⁰ If the current real market value is less than the adjusted original purchase price, just compensation equals the difference.⁷¹ The problem with Method A is that

⁶⁵ See *id.* at 10-11.

⁶⁶ *Id.* at 11.

⁶⁷ *Id.* at 14.

⁶⁸ Proposal for Valuation of Claims Under Measure 37 (on file with the author). The working group consisted of John Brown (licensed appraiser), Chris Garrett (Office of the Senate President), Glenn Klein (Harrang Long Gary Rudnick, PC), Ed MacMullan (ECONorthwest), Andrew Plantinga (Oregon State University) and Rob Zako (1000 Friends of Oregon). *Id.* at 5.

⁶⁹ *Id.* at 1-2.

⁷⁰ *Id.* at 2.

⁷¹ *Id.* “In lieu of using the [original purchase price] either the claimant or the public entity may, at its option, obtain an appraisal of the property’s historical fair market value (historical FMV) immediately before the enactment of the complained-of land-use regulation.” *Id.* The historical FMV is then adjusted to current

it does not differentiate between causes of reduction in fair market value. This may result in public entities paying compensation for reductions in value not attributable to their actions, as the property may have experienced a reduction in value for reasons other than the negative impacts of land-use regulation.⁷²

Method B involves determining the difference between the real market value of the property immediately before and after the enactment of the land-use regulation.⁷³ For a retrospective claim, the values should then be adjusted into current dollars using an inflation index.⁷⁴ By looking at the value of the property directly before and after the regulation was enacted, Method B is most likely to get at the effect of the regulation alone, and exclude the effect of other events on the value of the property.⁷⁵ The problem with Method B is that historical market values may be difficult or even impossible to ascertain.⁷⁶

Finally, Method C involves calculating the hypothetical market value of the property without the challenged regulation, and comparing that hypothetical value to the current market value of the property.⁷⁷ Either the claimant or the public entity may choose to use valuation Method C.⁷⁸ The party that chooses to use valuation Method C must retain an Oregon-licensed professional appraiser and bears the burden of proving the hypothetical market value.⁷⁹ The other party may retain its own Oregon-licensed professional appraiser to provide another hypothetical market value estimate.⁸⁰ In determining the hypothetical market value the appraiser must: 1) take into account the supply of comparable properties, 2) subtract costs that would be incurred to “make the property legally and physically suitable and marketable for the intended use described in the Measure 37 claim,” 3) “consider the economic impact of the intended use on the prop-

dollars and just compensation equals the difference between the adjusted historical FMV and the current real market value. *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* at 2. If either of the parties dispute the real market value determinations, “the corresponding fair market value as determined by an Oregon-licensed professional real estate appraiser shall be used instead.” *Id.* at 3.

⁷⁵ *Id.* at 4.

⁷⁶ *Id.*

⁷⁷ *Id.* at 3.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* at 3.

erty as a whole,” 4) assume all complained of regulations are waived concurrently, 5) calculate only the hypothetical market value of the land itself, 6) take into account other causes of loss of value, 7) adjust the hypothetical market value for any “increased property tax liability that would result from the intended use,” and 8) weigh other factors.⁸¹ Method C is problematic because it relies on subjective calculations and “may not account for the effect on property value caused by events that occurred subsequent to and independent of the regulation.”⁸²

The working group recommends using valuation Method B for prospective claims and in the case of retrospective claims, choosing Method A as the default valuation method and using either Method B or C as a backup.⁸³

D. Statute of Limitations

Several sections of Measure 37 provide timelines for a particular action.⁸⁴ The measure does not, however, define with sufficient specificity when the clock begins to run on, 1) when compensation is due to a claimant, or 2) when a regulation is considered constructively waived under the measure.

1. Compensation

Measure 37 provides that compensation is due to a property owner if a challenged land-use regulation continues to be enforced against her property 180 days after she “makes a written demand for compensation . . . to the public entity enacting or enforcing the land use regulation.”⁸⁵ Unfortunately, Measure 37 does not define what it means to make a written demand for compensation. Does the clock start to run on the day the owner writes the demand? The day the demand is postmarked? The day the demand is received by the public entity? What if the property owner sends the demand to the wrong public entity? Does the clock start to run on the day any public entity receives the demand or the day the correct public entity receives the demand? What if the demand implicates multiple public entities? Oregon Administrative Rule (OAR) 125-145-0030 starts the

⁸¹ *Id.* at 3-4.

⁸² *Id.* at 4.

⁸³ *Id.*

⁸⁴ See Measure 37, *supra* note 1, §§ 4-6, and 10.

⁸⁵ *Id.* § 4.

clock under section 4 of Measure 37 on the day the Department of Administrative Services (DAS) receives a claim for compensation, but the OAR only applies to claims against state agencies.⁸⁶ Multnomah County defines ‘claim’ and ‘written demand for compensation’ identically, and specifies that the 180 day Measure 37 clock starts ticking only when the Planning Director for Multnomah County deems a claim to be complete and accepts it for filing.⁸⁷ In contrast, Oregonians in Action emphatically states that the 180 day clock begins to run when a property owner makes a written demand for compensation, regardless of whether that demand meets the affected public entity’s standards for a complete claim.⁸⁸

2. *Accrual*

The measure is also uncertain as to when a claim accrues. Section 10 of Measure 37 provides that 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.”⁸⁹ So, if a public entity has not paid a property owner within two years of the time her claim ‘accrues’ the land-use regulation is constructively waived and she can use her property as she could have when she acquired it. Unfortunately, the measure does not say when a claim ‘accrues.’ Does a claim accrue when it is filed? After a public entity elects to pay compensation (but never actually does)? When a public entity is ordered by a court to pay compensation? Oregonians in Action says that a claim accrues when a circuit court grants a judgment in favor of the property owner.⁹⁰ However, the exact

⁸⁶ OR. ADMIN. R. 125-145-0030(3) (2005). It should also be noted that the Measure references a written demand for compensation, while the OAR refers to a claim. OAR 125-145-0040 governs the required elements of a claim submitted to DAS. The required elements consist of more than a written demand for compensation. For more discussion on the elements of a claim, see section 2(F), Required Format for a Claim, *infra*.

⁸⁷ See MULTNOMAH COUNTY, OR., ORDINANCE 1055 §§ 7.500, 7.520 (2005), available at http://www2.co.multnomah.or.us/Departments/Community_Services/LUT/land_use/Measure37/ch7_revised.pdf.

⁸⁸ Oregonians in Action, *supra* note 6, at Question 19 (asking: “How long does the government have to make a decision on my Measure 37 claim?”).

⁸⁹ Measure 37, *supra* note 1, § 10.

⁹⁰ Oregonians in Action, *supra* note 6, at Question 20 (“[A]fter obtaining a judgment from the circuit court, the government has 2 years to satisfy the judgment. If the local government fails to satisfy the judgment, the offending regulations are automatically removed.”).

time of accrual is likely something that the courts will have to decide.

E. Is there a Required Format for Measure 37 Claims?

Measure 37 does not specify a particular format in which claims for compensation should be submitted. The State of Oregon and various cities and counties have all created their own criteria for the information that should be included in a Measure 37 claim,⁹¹ but the real question is whether property owners are required to comply with the claim requirements of public entities in order to be eligible for compensation.

Oregonians in Action generally advises property owners to comply with the claim requirements of public entities.⁹² At the very least, Oregonians in Action suggests that property owners submit: 1) a demand for compensation, citing Measure 37; 2) a description of the regulation(s) at issue and when they were enacted and/or enforced; 3) proof of the date of acquisition of the property; 4) a description of the regulations in effect when the owner or owner's family member acquired the property; 5) an accounting of the fair market value of the property without the contested regulation; and 6) the name, address and telephone number of the current owner of the property.⁹³

Some public entities have provided that they are free to make decisions on claims even if the claims are not considered to be complete under that public entity's regulations.⁹⁴

⁹¹ See, e.g., OR. ADMIN. R. 125-145-0040 (2005); MULTNOMAH COUNTY, OR., ORDINANCE 1055 § 7.520 (2005), available at http://www.co.multnomah.or.us/dbs/LUT/land_use/Measure37/ch7_revised.pdf; EUGENE, OR., CITY CODE § 2.075 (2006), available at <http://www.eugene-or.gov/> (click on the "Find the City Code?" link, then click on the "Weblink - City Code" link); PORTLAND, OR., CITY CODE § 5.75.040 (2004), available at <http://www.portlandonline.com/auditor/index.cfm?&c=28804>.

⁹² See Oregonians in Action, *supra* note 6, Question 17 (asking: "What information should I include in my Measure 37 claim?").

⁹³ *Id.*

⁹⁴ See, e.g., EUGENE, OR., CITY CODE § 2.075(3) (2006); PORTLAND, OR., CITY CODE § 5.75.040(C) (2004), available at <http://www.portlandonline.com/auditor/index.cfm?&c=28804> (last visited August 31, 2005).

III

WHAT CLAIMS PROCESS MAY THE GOVERNMENT MANDATE?

A. *Must a Public Entity Adhere to a Particular Claims Process?*

Measure 37 does not require that a public entity adopt a particular claims process to deal with Measure 37 claims.⁹⁵ The measure does provide that a “metropolitan service district, city, or county, or state agency may adopt or apply procedures for the processing of claims,” but those local governments may not require that property owners go through their claims processes before filing a claim for compensation in a circuit court.⁹⁶

As mentioned previously, Oregonians in Action generally encourages property owners to follow claims procedures adopted by local governments, but emphasizes that section 7 of the measure guarantees property owners the right to file a claim in circuit court, regardless of whether they have complied with the local government’s claims procedures.⁹⁷

The Governor’s office distinguishes between Measure 37 claims processes and existing state processes which determine “whether or how the use of a property may be allowed.”⁹⁸ According to the Governor’s office, property owners must comply with existing state processes designed to determine whether or how a property may be used “before seeking judicial relief or judicial review.”⁹⁹ So, the Governor’s office has taken the position that before filing a Measure 37 claim, a property owner must apply for and be denied permission to put his property to a particular use. He may not file a Measure 37 claim in circuit court because he believes a public entity will deny his request; he must be denied in reality, then he is free to file a Measure 37 claim with the circuit court.

Oregonians in Action agrees that property owners should comply with existing government processes to determine whether or

⁹⁵ See also Oregonians in Action, *supra* note 6, at Question 21 (stating that each local government (and the state government) is free to create its own process for handling Measure 37 claims).

⁹⁶ Measure 37, *supra* note 1, § 7.

⁹⁷ Oregonians in Action, *supra* note 6, at Question 12 (addressing whether claimants must follow state and local claim procedures if they exist).

⁹⁸ OFFICE OF GOVERNOR KULONGOSKI, *supra* note 27, at 4.

⁹⁹ *Id.*

how their property may be used if they believe there is a chance of success. If, however, the property owners believe it would be futile to apply for a right to use their property through existing channels, according to Oregonians in Action, they need not do so and may go straight to court.¹⁰⁰

B. Which Public Entity Must Compensate a Claimant or Waive a Regulation in Response to a Valid Claim under Measure 37?

Measure 37 provides that claims for compensation may be made against government entities that either enforced or enacted the land-use regulation complained of.¹⁰¹ In many cases this will mean that two different governmental entities are liable. Generally, the governmental entity that enforces the land-use regulation “is responsible for paying compensation regardless of whether the law is state or local.”¹⁰² In contrast, only the governmental entity responsible for enacting the land-use regulation complained of may waive it.¹⁰³ This may create confusion if a claim is only filed with the enforcing entity, because the enforcing entity may not wish to pay compensation, but under the measure is not authorized to waive the challenged regulation.

Measure 37 does not provide that claims must be filed with every governmental entity that might be involved in the claims process, but Oregonians in Action encourages claimants to file with both the local government entity that enforces a regulation and the State of Oregon.¹⁰⁴

¹⁰⁰ Oregonians in Action, *supra* note 6, at Question 13 (asking whether a claimant “may be able to use my property for the use that I want under regulations enacted after I acquired the property, should I make an application for that use before filing a claim under Measure 37?”). The “enforced” requirement must be satisfied, so if “there has been no denial or other action that ‘enforces’ the regulation, [the property owner] should include a statement that an application would be futile and ask for approval of the uses [the property owner expects] the government to deny.” *Id.*

¹⁰¹ Measure 37, *supra* note 1, § 1.

¹⁰² OFFICE OF GOVERNOR KULONGOSKI, *supra* note 27, at 2.

¹⁰³ Measure 37, *supra* note 1, § 8.

¹⁰⁴ See, e.g., Oregonians in Action, *supra* note 6, at Question 3 (asking: “Where do I file my Measure 37 Claim?”).

C. Once the Government Decides to Waive, Must It Waive an Entire Regulation or Regulatory Scheme, or May it Only Waive the Pertinent Parts?

This is a question that the courts will likely have to answer. It is not uncommon for several different topics to be included in a single regulation. For example, a regulatory scheme may zone an area rural residential, provide for certain setbacks and regulate the height of buildings on the property. If a property owner challenges the building height restriction and the local government decides to waive the regulation, can it waive just the building height restriction? Or must it waive the building height restriction and the setbacks and the zoning because they are all included in the same land-use regulation? Additionally, if the local government anticipates several challenges to the same regulation from similarly situated property owners, may it waive the regulation as to all similarly situated property owners or must it confine the waiver to the property owner who actually filed the Measure 37 claim?

The Attorney General's Office has declared that local governments may not issue blanket waivers, that is, they may only waive regulations on a case-by-case basis when property owners present valid claims.¹⁰⁵ Local governments may not waive state-mandated regulations for all property owners in a certain category regardless of the status of their claims (or lack thereof).¹⁰⁶ So, a local government may only grant a waiver to a specific person, but it is unclear whether waivers may be fine-tuned to apply only to specific pieces of a regulation.

D. Does the Waiver of a Particular Land-Use Regulation Effectively Waive All Intervening Regulation?

Whether the waiver of a particular land-use regulation also effectively waives all intervening regulation is unclear under Measure 37. The City of Eugene has provided that if the "city council removes or modifies the challenged land-use regulation, the council may as part of the decision re-impose with respect to the

¹⁰⁵ Letter from Stephanie Striffler, Special Counsel to the Attorney General, Oregon Department of Justice, to Lane Shetterly, Director, Oregon State Department of Land Conservation and Development 7-8 (Feb. 24, 2005), <http://www.oregon.gov/LCD/docs/measure37/m37dojadvice.pdf>.

¹⁰⁶ Of course, a local government may repeal or modify regulations enacted under its own authority at any time. *Id.* at 3 n. 1.

subject property, all the land use regulations in effect at the time the claimant acquired the property.”¹⁰⁷ Under the Eugene ordinance a claimant may be allowed to put her property to a use that she could have when she acquired it, but she may also lose the beneficial effects of subsequent regulations.

E. Must a Public Entity Establish Specific Findings or Meet Specific Criteria Before Making a Decision to Waive Instead of Compensate?

Measure 37 does not impose any requirements on a local government’s decision making process on the question of whether to compensate a property owner or waive a regulation. It may, however, be in the best interests of local governments to impose such requirements on themselves. In operating without some sort of established decision making criteria, a local government exposes itself to claims of arbitrary decision making and equal protection violations.¹⁰⁸ Several local governments already provide in their Measure 37 ordinances that a decision either to waive a land-use regulation or to compensate the owner must be based on whether the public interest is better served by waiver or compensation.¹⁰⁹ Ultimately, local governments must decide the structure of Measure 37 claims decisions for themselves. The more criteria a local government imposes on itself, the less discretion it will have to make judgments on a case by case basis, but it will also be less likely to find itself in the middle of an equal protection lawsuit.¹¹⁰ Governor Kulongoski has declared

¹⁰⁷ EUGENE, OR., CITY CODE § 2.090(4) (2006), available at <http://www.eugene-or.gov/> (click on the “Find the City Code?” link, then click on the “Weblink – City Code” link).

¹⁰⁸ See *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000) (“Our cases have recognized successful equal protection claims brought by a ‘class of one,’ where the plaintiff alleges she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment.”).

¹⁰⁹ See, e.g., EUGENE, OR., CITY CODE § 2.090(3) (2006) available at <http://www.eugene-or.gov/> (click on the “Find the City Code?” link, then click on the “Weblink – City Code” link); BEAVERTON, OR., CITY CODE § 2.07.030(E)(1)-(3) (2004), available at http://www.beavertonoregon.gov/departments/attorney/attorney_code.html.

¹¹⁰ Even if a local government is sued on equal protection grounds, it is likely that the local government will only have to show a rational basis for its decision. “Social and economic legislation . . . that does not employ suspect classifications or impinge on fundamental rights must be upheld against equal protection attack when the legislative means are rationally related to a legitimate government purpose. Moreover, such legislation carries with it a presumption of rationality that can only be overcome by a clear showing of arbitrariness and irrationality.” *Hodel v. Indiana*, 452 U.S. 314, 331-32 (1981) (internal citations omitted).

that state agencies have a “responsibility to be consistent when making decisions on claims,” and in order to remain consistent in their decisions on claims, agencies may have to implement “some rulemaking to help avoid ad hoc decisions and maintain a fair decision-making process.”¹¹¹ In addition, agencies must provide an explanation if they make a decision on a claim that “departs from an officially stated agency position or prior agency practice.”¹¹² Reasons for deviation may include the applicability of an exemption to the compensation requirement, a demonstration that a “decision can be distinguished from prior policy or practice,” or an explanation that there is “reason to reverse the prior policy or practice.”¹¹³

F. Is There a Limit on the Number of Claims an Owner May File?

Generally there is no limit to the number of claims a property owner may file. Measure 37 itself places no limit on the number of claims that a property owner may file. Some local governments have included provisions in their Measure 37 ordinances that limit the number of claims a property owner may file.¹¹⁴ These limitations will likely be challenged in court, and it remains to be seen whether these provisions will be upheld in light of the language of the measure.

G. May Governments Charge a Claim Processing Fee?

Measure 37 does not directly address whether state and local governments may charge a fee to process Measure 37 claims. Many public entities do associate fees with the Measure 37 claims process.¹¹⁵

Oregonians in Action vehemently opposes the imposition of fees as part of the Measure 37 claims process citing section 7 of

¹¹¹ OFFICE OF GOVERNOR KULONGOSKI, *supra* note 27, at 3.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ See, e.g., ASTORIA, OR., CITY CODE § 1.835 (2004), available at <http://www.orcities.org/Portals/17/CurrentIssues/M37/AstoriaM37ord.pdf>; BEAVERTON, OR., CITY CODE § 2.07.030(E)(5) (2004), available at <http://www.orcities.org/Portals/17/CurrentIssues/M37/BeavertonM37ord.pdf>.

¹¹⁵ See, e.g., MULTNOMAH COUNTY OR., ORDINANCE 1055 § 7.525 (2005), available at http://www.co.multnomah.or.us/dbcs/LUT/land_use/Measure37/ch7_revised.pdf; EUGENE, OR., CITY CODE § 2.080 (2006), available at <http://www.eugene-or.gov/> (click on the “Find the City Code?” link, then click on the “Weblink – City Code” link).

the measure which provides that local government claims processes may not act as a prerequisite for filing Measure 37 claims for compensation in circuit court.¹¹⁶ In fact, according to Oregonians in Action, section 7 of the measure was specifically included to “avoid cases where the local government adopts fees so high that they make it very costly for any property owner to receive relief under Measure 37.”¹¹⁷

H. Which Party Must Carry the Burden of Proof in a Measure 37 Proceeding?

Measure 37 does not specify which party carries the burden of proof in a claims proceeding under the measure. The measure does provide that in order for Measure 37 to apply, a property must be subject to a land-use regulation that both restricts its use and reduces its value. Therefore, 1000 Friends of Oregon opines that in order to make a valid claim under Measure 37 a property owner must bear the burden of providing “information proving ownership, identifying the applicable land use regulation(s) and the restriction(s) on the use of property, and substantiating some reduction in the fair market value of the property as a result of the particular land use regulations.”¹¹⁸

The City of Ashland’s Measure 37 ordinance provides that the property owner has the “burden of proof to demonstrate to the City, by a preponderance of the evidence, that just compensation is due under Measure 37.”¹¹⁹ The ordinance also provides that the city has the burden to show by a preponderance of the evidence, that a challenged regulation is exempt under Measure 37.¹²⁰

I. What Rights Do Neighboring Landowners Have Under a Measure 37 Claims Process?

Measure 37 does not provide the neighbors of landowners filing claims for compensation any particular status, nor does it provide a mechanism for neighbors to recover loss in value of

¹¹⁶ Oregonians in Action, *supra* note 6, at Question 18 (asking whether “the government charge me a fee for making a Measure 37 claim?”).

¹¹⁷ *Id.*

¹¹⁸ 1000 Friends of Oregon, *supra* note 18.

¹¹⁹ ASHLAND, OR., ALUO § 18.110.030(B) (2004), available at <http://www.ashland.or.us/Page.asp?NavID=2671>.

¹²⁰ ASHLAND, OR., ALUO § 18.100.035(F) (2004), available at <http://www.ashland.or.us/Page.asp?NavID=2671>.

their property because of the use a neighboring property is put to under a Measure 37 waiver. 1000 Friends of Oregon believes that there is no right to recovery for the neighbor under Measure 37.¹²¹ However, some local governments have created private rights of action for those wishing to challenge Measure 37 claims.¹²²

IV

WHAT APPEALS PROCESS IS AVAILABLE?

Measure 37 provides that:

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 . . . 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 located¹²³

Other than ensuring that a cause of action in the circuit court is available, the measure does not provide guidance as to who has standing in a judicial action, what the standard of review or evidentiary standards for a claim under the measure should be, or the ripeness and injury calculations under the measure. These will likely be governed by subsequent decisions by the courts.

V

WAIVERS

A. What is a “Waiver”?

The term ‘waiver’ does not appear in the text of Measure 37.¹²⁴ Instead, Measure 37 provides that “in lieu of payment of just

¹²¹ See 1000 Friends of Oregon, *supra* note 18, at Question 10.

¹²² See, e.g., ASHLAND, OR., ALUO § 18.110.045 (2004), available at <http://www.ashland.or.us/Page.asp?NavID=2671&JSEnabled=True>; EUGENE, OR., CITY CODE § 2.095 (2006), available at <http://www.eugene-or.gov/> (click on the “Find the City Code?” link, then click on the “Weblink – City Code” link); PORTLAND, OR., CITY CODE § 5.75.080 (2005), available at <http://www.portlandonline.com/auditor/index.cfm?&a=76341&c=2880>.

¹²³ Measure 37, *supra* note 1, § 6.

¹²⁴ Oregonians in Action objects to the use of the term ‘waiver’ because they feel it implies permission to take an action that would otherwise be illegal, and “Measure 37 is not about property owners ‘getting away with something,’ it is about restoring legal rights.” Oregonians in Action, *supra* note 6, at Question 6 (asking: “What is a Waiver?”).

compensation . . . the governing body responsible for enacting the land use regulation may modify, remove, or not to apply [sic] the land use regulation . . . to allow the owner to use the property for a use permitted at the time the owner acquired the property.”¹²⁵ The question then becomes whether the terms “modify,” “remove,” and ‘not apply’ mean different things in the context of the measure.

The Attorney General’s Office, while concluding that modification, removal, or lack of application (i.e. waiver) of a land-use regulation is not transferable to subsequent owners, also concluded that different consequences flow from a local government’s decision to modify, remove, or not apply a land-use regulation.¹²⁶ The terms ‘modify’ and ‘remove’ imply that a waiver could be either only applicable to the owner who filed the Measure 37 claim, or it could run with the land and apply to all subsequent owners.¹²⁷ Lack of application of a land-use regulation implies that the regulation remains in place but is simply not applied to a particular owner.¹²⁸

B. Are Waivers Transferable?

Unsurprisingly, the question of whether waivers are transferable is of great importance to many people. Much of the value of a waiver would be lost if the waiver only applied to the specific property owner who made a claim under Measure 37. A non-transferable waiver which allows a property owner to subdivide her property and build a housing development is not likely to be of any use to the property owner if she does not wish to develop the land herself. The moment she transfers the property to another entity, the waiver becomes invalid, and the new owner has no claim under Measure 37 because the regulation limiting development was in effect prior to his acquisition of the property. Measure 37 does not directly address the transferability of waivers. Oregonians in Action emphatically insists that Measure 37 waivers are transferable and run with the land.¹²⁹ The Oregon

¹²⁵ Measure 37, *supra* note 1, § 8.

¹²⁶ Stephanie Striffler, *supra* note 105, at 4-5.

¹²⁷ *Id.*

¹²⁸ *Id.* at 5.

¹²⁹ See Oregonians in Action, *supra* note 6, at Question 7 (asking whether it is “a government’s decision under Measure 37 to modify, remove or not apply a regulation (i.e. ‘a waiver’) transferrable to a subsequent purchaser of the subject property”).

Attorney General's Office, in a letter of advice dated February 24, 2005, takes generally the opposite position.¹³⁰ The Attorney General's office concluded that waivers are personal to the property owner making the claim.¹³¹ Generally, if a government has the discretion to adopt a regulation, it also has the discretion to waive it. If a local government had discretion over whether to adopt a land-use regulation challenged under Measure 37, it is free to waive it for the present owner, future owners, or in perpetuity, just as it was before the passage of Measure 37.¹³² Measure 37 provides local governments with a new option, the option to waive land-use regulations adopted as required by state law in lieu of compensation under the measure. This new waiver power only applies, according to the Attorney General's office, to the property owner making the claim.¹³³ Local governments are not authorized by the measure to waive land-use regulations mandated by state law for future owners of the property.¹³⁴ 1000 Friends of Oregon agrees with the Attorney General's conclusion that Measure 37 waivers are non-transferable.¹³⁵ Many Oregon cities have also enacted ordinances that explicitly provide that Measure 37 waivers apply only to the property owner who submits the Measure 37 claim.¹³⁶

¹³⁰ See Stephanie Striffler, *supra* note 105, at 7.

¹³¹ *Id.* at 3.

¹³² *Id.* at 7.

¹³³ *Id.* ("Where a local government has discretion concerning whether or not to adopt [a land-use regulation], local government may have authority to modify or repeal that ordinance with regard to both present and future property owners. However, where local government has adopted [a land-use regulation] to implement a requirement of state or federal law, Measure 37 authorizes the local government to waive the [land-use regulation] as to the present owner of the property.").

¹³⁴ *Id.* ("[T]he phrases 'to allow the owner to use the property for a use permitted at the time the owner acquired the property' and 'the owner shall be allowed to use the property as permitted at the time the owner acquired the property' together with the definition of 'owner' as 'the present owner of the property, or any interest therein' are the only text that directly addresses whether a decision to grant non-monetary relief by 'not applying' or modifying or removing a law applies to the present owner of the property. Those phrases specify the minimum that a public body *must* do to avoid paying compensation . . . those phrases also specify the maximum that a public body *may* do to avoid paying compensation.").

¹³⁵ See 1000 Friends of Oregon, *supra* note 18, at Question 6.

¹³⁶ See, e.g., ALBANY, OR., ALBANY MUNICIPAL CODE § 2.100.070 (2004), available at <http://www.orcities.org/Portals/17/CurrentIssues/M37/AlbanyM37ord.pdf>; ASHLAND, OR., ALUO § 18.100.040 (2004), available at <http://www.ashland.or.us/Page.asp?NavID=2671>; ASTORIA, OR., CITY CODE § 1.825(2) (2004) <http://www.orcities.org/Portals/17/CurrentIssues/M37/AstoriaM37ord.pdf>; BEAVERTON, OR., CITY CODE § 2.07.045(A)(2-3) (2004), available at <http://www.orcities.org/Portals/17/Cur>

1. *Who Can Waive a Land-Use Regulation?*

Measure 37 provides that “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 [sic] the land-use regulation . . . to allow the owner to use the property for a use permitted at the time the owner acquired the property.”¹³⁷ Generally this means that city councils and county commissions may waive city and county ordinances respectively, and state agencies may waive rules they have adopted.¹³⁸ Local governments may not waive state statutes or planning goals.¹³⁹ Land-use regulations enacted by multiple public entities will likely need to be waived by all the entities involved.¹⁴⁰ The waiver of state statutes is a more problematic issue. State agencies are free to waive administrative rules that they have adopted to implement a statute, but presumably only the legislature may waive the statute itself. This may present a separation of powers issue under the Oregon Constitution because in waiving a statute under Measure 37 the Legislature is acting in a quasi-judicial, quasi-executive capacity.¹⁴¹

CONCLUSION

Measure 37 created many questions, and different groups with different interests have interpreted the measure in a multitude of (sometimes conflicting) ways. This article represents an attempt

rentIssues/M37/BeavertonM37ord.pdf; BEND, OR., CITY ORDINANCE § 1950 (2004), available at <http://www.orcities.org/Portals/17/CurrentIssues/M37/m37draftproceduresordbend.pdf>; SISTERS, OR., ORDINANCE 352 § 6(5) (2004), available at <http://www.orcities.org/Portals/17/CurrentIssues/M37/SistersM37ord.pdf>. But see AUMSVILLE, OR., ORDINANCE 544 § 6(1)(b) (2004), available at <http://www.orcities.org/Portals/17/CurrentIssues/M37/AumsvilleM37ord.pdf>; EUGENE, OR., CITY CODE § 2.090(5) (2006), available at <http://www.eugene-or.gov/> (click on the “Find the City Code?” link, then click on the “Weblink – City Code” link); PORTLAND, OR., CITY CODE § 5.75.060 (2004) available at <http://www.portlandonline.com/auditor/index.cfm?&c=28804>.

¹³⁷ Measure 37, *supra* note 1, § 8 (emphasis added).

¹³⁸ See 1000 Friends of Oregon, *supra* note 18, at Question 7-8.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ See OR. CONST. art. III § 1 (2003) (“The powers of the government shall be divided into three separate [sic] departments, the Legislative, the Executive, including the administrative and the Judicial; and no person charged with official duties under one of these departments, shall exercise any of the functions of another, except as in the Constitution expressly provided.”). But see 37 OR. ATT’Y GEN OP. 554 (1975) (concluding that Art. III, section 1 of the Oregon Constitution does not apply to city or county governments).

to collect and display various interpretations of the provisions of Measure 37 in order to provide a more complete picture of its content and consequences. In reality, however, not much can be known for certain about the measure until its provisions are interpreted by the courts.

APPENDIX: TEXT OF BALLOT 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 subject property prior to acquisition or inheritance by the owner, whichever occurred first.

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(4) 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.

(5) 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 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 any one 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.

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(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.