

MEASURE 37: SOME PRELIMINARY THOUGHTS FOR IMPLEMENTATION BY CITIES¹

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The purpose of this paper to provide for cities initial information about Measure 37 to help them decide how they want to respond to the Measure, particularly in terms of implementation. In deciding how to respond to Measure 37, cities should keep in mind one of the policies the League adopted several years ago: as cities, we need to balance (and recognize) the rights of property owners (including the new rights granted under Measure 37) with the rights of the citizens that a city also serves. To assist cities with that effort, this paper will first provide a summary of Measure 37. It then will discuss some of the potential options available to cities in responding to the Measure.

The choices that each city makes in how to respond to Measure 37 should involve consideration of several factors. First, the council must decide as a matter of policy how it wants to deal with the Measure. Second, the council needs to understand the extent of its powers under its charter. For the most part, if one city in Oregon can adopt a provision as part of a Measure 37 implementation ordinance, other cities should be able to do so as well. However, there may be some provisions that require city charter authority. Third, the council must decide its tolerance for legal risk and willingness to engage in litigation if a potential claimant believes that the council has adopted a provision that violates Measure 37. The various components come with different levels of legal risk. The levels of risk for some of the components also differ among cities, since the risk depends in part on the nature of a city's charter and the powers granted by the charter.

In light of the possible legal risks related to potential options for implementation of Measure 37, we strongly urge city councils to consult with their legal counsel before deciding to adopt one or more of them. That discussion can be structured to occur in executive session.

SUMMARY OF MEASURE

Measure 37 authorizes an owner of property (or interest in property, like a lease) to file a claim with a government that enacts or enforces certain types of land use regulations. To be a valid

¹This paper was prepared for the League of Oregon Cities conference on November 5, shortly after passage of Measure 37. As we continue to work through issues related to Measure 37, and gain more experience and undertake more analysis, we will continue to update this paper. The most current update of the paper will be available at www.harrang.com. The paper, along with much additional information related to Measure 37, also should be available on the League of Oregon Cities website at www.orcities.org/currentissues/m37.cfm.

claim, however, there needs to be more than a land use regulation. That land use regulation must also restrict the use of private real property, and must also reduce the value of the property. Claims **generally** must be filed with the governmental entity within two years of the regulation's enactment or enforcement.

As noted above, the Measure does not apply to all regulations, or even all land use regulations as most people understand that term. Measure 37 creates its own definition of "land use regulations," including both state and local regulations. For local regulations, Measure 37 includes **only** the following:

- (1) "comprehensive plans," "zoning ordinances," "land division ordinances" and "transportation ordinances"; and
- (2) metropolitan service district regional framework plans, functional plans, planning goals and objectives.

Prior to Measure 37, state statutes contained a definition of "land use regulation" that is broader than the definition noted above. Consequently, there are some land use provisions that cities have treated as land use regulations in the past, that will not be "land use regulations" under Measure 37.

Even if a regulation is encompassed within Measure 37's definition of "land use regulation" noted above, the regulation still may fall outside Measure 37's purview if it comes within one of the five exemptions. Those five exemptions – *i.e.*, five categories of regulations that the Measure does not require a government to waive or compensate for them even if they reduce the value of the property – are as follows:

- (1) restrictions on uses commonly and historically recognized as public nuisances under common law;
- (2) restrictions to protect public health and safety, such as fire and building codes, health and sanitation regulations, solid or hazardous waste regulations, and pollution control regulations;
- (3) restrictions required to comply with federal law;
- (4) restrictions on use of property to sell pornography or perform nude dancing; and
- (5) regulations enacted prior to the date of acquisition of the property by the owner or a family member.

Measure 37 does not define most of the terms contained in these exemptions. **It is unclear how broadly or narrowly the courts will construe them.** Consequently, there will be some risk if governments decide to rely on one of the exemptions in order to deny a claim filed under Measure 37.

Measure 37 grants a governmental entity 180 days after a property owner files a Measure 37

claim before the property owner can file a lawsuit. During that 180 days, should the city determine that the claim is a valid claim, the city may:

- (1) pay “just compensation” (equal to reduction in the fair market value of the affected property interest resulting from enactment or enforcement of the land use regulation) and continue to apply and enforce the regulation; **or**
- (2) modify, remove or not apply the regulation to allow the owner to use the property for a use permitted at the time the owner acquired the property.

The city, of course, also could do nothing (in which case the claimant likely would file a lawsuit in circuit court after the 180 day period.) In addition, a city might also be able to acquire the entire parcel (rather than just some type of interest in it).

If the governmental entity does not pay or waive a claim within 180 days, the property owner may file a lawsuit to obtain compensation, **and** likely will now be entitled to have the city pay reasonable attorneys’ fees, expenses and costs. The government probably can (but the Measure is ambiguous on this point) waive or modify the regulation even after the lawsuit is filed. However, the property owner likely will still be entitled to attorneys’ fees, costs and other expenses even if government waives or modifies the restriction after the lawsuit is filed.

Measure 37 expressly allows a government to adopt or apply procedures for processing claims. The Measure also states, however, that those procedures may not act as a prerequisite to the filing of a compensation claim in court.

OPTIONS FOR COUNCILS TO CONSIDER

Implementing ordinance

Claims process: Measure 37 expressly authorizes local (and state) governments to adopt or apply “procedures for the processing of claims.” However, the Measure also explicitly states that “in no event shall these procedures act as a prerequisite to the filing of a compensation claim. . . .” If a city decides that it wants to attempt to recover its costs of processing claims (discussed below), then the city should adopt an ordinance establishing a claims process. The process should define the minimum requirements for filing a claim, the fees that will be charged for processing the claim, and the decision-maker for denial or approval of a claim. At the end of this paper is a preliminary sample ordinance that a city could use as a basis for a claims process ordinance. Section 3 of that sample ordinance identifies the types of information that a city might want to request as part of a claim under Measure 37. Also at the end of this paper is a page that contains a more comprehensive list of

categories of information that a city may want to request as part of a claim. Sections 4 - 6 of the sample ordinance also describe one way a city could process claims. **There is nothing magical about the process.** There are probably only two critical components: (1) take actions within 180 days of receiving the claim (or risk a lawsuit where you have to now pay the claimant's attorneys' fees); and (2) provide that the city council shall be responsible for waiving or modifying a land use regulation.

Except for denials of claims that have no merit – which a city manager or city administrator could lawfully deny under Measure 37 – the city council probably should be involved in decisions on claims. Claims that “have no merit” are those that would be made by an ineligible claimant, that do not concern a “land use regulation” or that are exempt, or that have similar shortcomings. A decision to waive or modify a regulation must be made by the city council (Measure 37 authorizes the governing body that enacted a regulation to modify or waive). Under Measure 37, a decision to compensate a property owner could be made by the city manager or administrator (if the council delegated such power), but only if the council had already appropriated funds for payment of such claims.

The claims processing ordinance should grant the council the authority, where it agrees that a claim is a valid Measure 37 claim, the following options: (1) pay compensation; (2) remove the regulation; (3) modify the regulation; or (4) purchase (or, if necessary, possibly condemn) the entire property either to keep as a city asset, or to re-sell. Section 6 of the sample ordinance contains provisions related to council action.

Fees for processing claims: As noted above, Measure 37 authorizes a city to adopt procedures for processing claims, but compliance with those procedures is not a prerequisite to filing a claim in court. Establishment of a fee likely would fall into that category. Nevertheless, a city council likely can impose a fee for processing such claims. A claims processing ordinance could contain a provision that requires claimants to pay a city's actual cost in processing the claim. Fees would be less for claimants that provide more complete information in their claims. City staff would keep track of their time (including time spent by the city's attorneys) and expenses (such as an appraisal) for processing the particular claim. At the end of the process, the city could send the claimant a bill. If the claimant did not pay the bill, then the city could pursue collection efforts, or record a lien on the property for the amount of the bill. Section 7 of the sample ordinance provides for payment of fees.

Transfer of property voids waiver: Measure 37 requires a government to compensate a property owner for a valid Measure 37 claim, or to remove or modify a regulation “to allow **the owner to use the property** for a use permitted at the time the owner acquired the property.” This

language suggests that a government may be able to limit the waiver to the claimant only. In other words, a government may be able to provide that the waiver is void upon the claimant's transfer of the property to another. Section 6 (4) of the sample ordinance contains such a provision.

Record waiver and restrictions on property: Assuming that a city council agrees that a transfer of the property after a waiver should void the waiver, then the city should record on the property (with county records) the resolution adopted by the council that approved the waiver. A council could (but is not required to) take action to grant a waiver by council resolution. The resolution could specify which regulations were waived, and any limitations on that waiver (such as the waiver becoming void if the property is transferred) so that future property owners would know that they could not rely on the waiver.

Option to waive "additional regulations": Some property owners may come to the city complaining only about particular regulations, rather than, for example, all of the related or linked regulations. In other words, they may attempt to avoid some of the current limitations, but still get some of the benefits of the more recent code. Measure 37 states that a governmental entity can remove or modify regulations to allow a use that was valid at the time the property owner acquired the property. A claims processing ordinance could enable – but not require – a city council to decide to waive more than the specific regulations encompassed in a particular claim.

Option to "modify" regulations to authorize a particular project: There may be some *valid* Measure 37 claims where a property owner is willing to work with the city to develop property in a manner that the city (*i.e.*, the city council) determines would be beneficial, particularly if the alternative is to pay compensation or simply waive the regulations. A claims processing ordinance could allow a city council the opportunity to consider "modifying" the regulations to allow a particular development project.

Private cause of action: Granting a waiver of regulations for a claimant may have the effect of reducing the value of a neighbor's property. Based on powers granted by many city charters, a city council may have the authority to authorize the neighbor whose property was devalued to file a lawsuit (in circuit court) to recover from the claimant the amount of the reduction in value. If a city has a charter with a general grant of power (usually section 3 or 4 of the charter), it is likely that the council has that power. If the city does not have a charter with a general grant of power, and instead, has an enumerated powers charter (containing a specific list of each power that the city possesses), then the question is whether one of the specific powers would authorize this type of provision. Section 8 of the sample ordinance contains this type of provision.

In addition to the options discussed above, there are a number of other questions which have policy implications as well as legal risks associated with them. Below are some of those issues.

Decide how staff should respond to requests for information about prior regulations. City staff likely are going to be asked by potential claimants questions about how to file Measure 37 claims or about prior regulations that would govern in the event of a waiver. Before that happens, the council (or city manager or administrator) should determine the extent to which staff should provide information. Consider having staff provide an information sheet that describes the city's claims processing ordinance (assuming that the council adopts one), and otherwise decline to answer questions related to Measure 37 since the information being requested would relate to threatened litigation. If the city chooses to perform research for potential claimants, then decide whether the city should recover its staff costs in performing that research.

Discuss with county handling of claims for property in urban transition area/urban growth boundary area. Claims that are related to property located outside the city limits, but inside the urban growth boundary, pose particularly tricky policy and administrative issues. Many of these areas are covered by urban transition agreements between the city and county in which the city is delegated the authority and responsibility for administering the land use and building codes. Under Measure 37, only the governing body that enacted a regulation can waive or modify that regulation. Cities should decide how they would like Measure 37 claims arising in this urban transition area handled, and begin in the near future discussions with the county to reach agreement.

Decide as a general matter whether to track possible waivers in nearby jurisdictions that could impact the city. If a jurisdiction with land use authority over property within relatively close to your city grants a waiver, the resulting development could have a significant impact on your city. Measure 37 does not authorize a governing body to waive any regulation for just any reason. Instead, it only authorizes waiver of "land use regulations" (as defined by the Measure) that restrict the use of private real property, and only if the regulation is **not** exempt (for example, health and safety regulations) and reduces the value of the property. In other words, Measure 37 authorizes a waiver only for **valid** Measure 37 claims. If a claim is not valid, but the governing body waives the regulation, a court should be willing to overturn the waiver. A policy question for a city council is whether the city should track claims filed with nearby jurisdictions in case a waiver is granted that will significantly impact your city where the waiver was not authorized.

It is also worth noting that people dissatisfied with a city's waiver or modification of a land use regulation likely will be able to file a lawsuit against your city to challenge that modification or waiver. Such a lawsuit might be filed by the claimant's neighbor who doesn't want a commercial use next to the neighbor's house, or might be filed by a land use or environmental organization.

Review of work program. As noted above, adopting a new, non-exempt “land use regulation” that restricts the use of property and results in a decrease in fair market value would be subject to compensation claims by every existing property owner. In light of that possibility, before a city devotes too much staff time (or funds for consultants) to continue working on updating land use codes or comprehensive plans, the city should ask itself whether the end-product of that work will be subject to a **valid** Measure 37 claim. If the answer to the question is yes, then the city may want to postpone or cancel that work. In many cases, that work is being required by the State as part of a periodic review task. The League has begun discussions with State officials in an attempt to get the State to think about whether such periodic review tasks should be modified.

SUGGESTIONS FOR INFORMATION CITIES SHOULD REQUEST FROM CLAIMANTS

- Name, address and telephone number of claimant
- Names and addresses of all other owners of same property
- Names and addresses of all owners of interests in that property, such as trustees, lien holders and lessees
- Address, tax lot and legal description of the real property that is the subject of the claim
- Copy of the deed transferring ownership to the claimant
- Title report issued within 30 days of the filing of the claim that reflects all of the ownership interests in the property
- If a claim is based on ownership by a family member, then information similar to the above should be provided showing the chain of title back to the original family member
- The current land use regulation or regulations that allegedly restrict the use of the real property
- The amount of the claim, based on the alleged reduction in value, supported by an appraisal by an appraiser licensed by the Appraiser Certification and License Board
- Copies of any leases or Covenants, Conditions and Restrictions (CCRs) applicable to the real property
- A statement as to the preferred resolution of the claim: (1) a monetary payment in a specific amount; (2) waiver of the applicable regulation(s); or (3) modification of the applicable regulation(s), including a description of the desired modification(s)

SAMPLE MEASURE 37 CLAIMS PROCESSING ORDINANCE

ORDINANCE NO. _____

**AN ORDINANCE CONCERNING REAL PROPERTY COMPENSATION;
ADOPTING PROCEDURES FOR PROCESSING CLAIMS; DECLARING AN
EMERGENCY; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE.**

THE CITY OF _____ DOES ORDAIN AS FOLLOWS:

Section 1. - Purpose. This Real Property Compensation Ordinance is intended to implement the provisions added to Chapter 197 of Oregon Revised Statutes by Ballot Measure 37 (November 2, 2004). These provisions establish a prompt, open, thorough and consistent process that enables property owners an adequate and fair opportunity to present their claims to the city; preserves and protects limited public funds; and establishes a record of the city's decision capable of circuit court review.

Section 2 – Definitions. As used in this Ordinance, the following words and phrases mean:

[*City Manager/City Administrator.*]. The [*City Manager/ City Administrator*] of the City of _____, or his or her designee.

Claim. A claim filed under Ballot Measure 37.

Exempt Land Use Regulation. A land use regulation that:

- (a) Restricts or prohibits activities commonly and historically recognized as public nuisances under common law;
- (b) Restricts or prohibits 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) Is required in order to comply with federal law;

(d) Restricts or prohibits the use of property for the purpose of selling pornography or performing nude dancing; or

(e) Was 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.

Family Member. Includes 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.

Land Use Regulation. Includes:

(a) Any statute regulating the use of land or any interest therein;

(b) Administrative rules and goals of the Land Conservation and Development Commission;

(c) Local government comprehensive plans, zoning ordinances, land division ordinances, and transportation ordinances;

(d) Metropolitan service district regional framework plans, functional plans, planning goals and objectives; and

(e) Statutes and administrative rules regulating farming and forest

practices.

Owner. The present owner of the property, or any interest therein.

Valid Claim. A claim submitted by the owner of real property that is subject to a land use regulation adopted or enforced by the city that restricts the use of the private real property in a manner that reduces the fair market value of the real property.

Section 3 – Claim Filing Procedures.

(1) A person seeking to file a claim under sections 1 - 7 of this ordinance must be the present owner of the property that is the subject of the claim at the time the claim is submitted. The claim shall be filed with the city [manager's/administrator's] office, or another city office if so designated by the city [manager/administrator].

(2) A claim shall include:

(a) The name(s), address(es) and telephone number(s) of all owners, and anyone with any interest in the property, including lien holders, trustees, renters, lessees, and a description of the ownership interest of each;

(b) The address, tax lot, and legal description of the real property that is the subject of the claim, together with a title report issued no more than 30 days prior to the submission of the claim that reflects the ownership interest in the property, or other documentation reflecting sole ownership of the property by the claimant, and the date the property was acquired;

(c) The current land use regulation(s) that allegedly restricts the use of the real property and allegedly causes a reduction in the fair market value of the subject property;

(d) The amount of the claim, based on the alleged reduction in value of the real property supported by an appraisal by an appraiser licensed by the Appraiser Certification and Licensure Board of the State of Oregon; and

(e) Copies of any leases or Covenants, Conditions and Restrictions (“CCR’s) applicable to the real property, if any, that impose restrictions on the use of the property.

(3) Notwithstanding a claimant’s failure to provide all of the information required by subsection (2) of this section, the city may review and act on a claim.

Section 4 – City [Manager/Administrator] Investigation and Recommendation.

(1) Following an investigation of a claim, the city [manager/administrator] shall forward a recommendation to the city council that the claim be:

(a) Denied;

(b) Investigated further;

(c) Declared valid, and waive or modify the land use regulation, or compensate the claimant upon completion of an appraisal; or

(d) Evaluated with the expectation of the city acquiring the property by condemnation.

(2) If the city [manager’s/administrator’s] recommendation is that a claim be denied, and no elected official informs the city [manager/administrator] within 14 days that the official disagrees, then the city [manager/administrator] may deny the claim. If an elected official objects, then the city manager shall wait an additional seven days to see whether two more elected officials object to the proposed denial. If they do, then the city

[manager/administrator] shall schedule a work session with the city council. If not, the city [manager/administrator] may deny the claim.

Section 5 -- City Council Public Hearing. The City Council shall conduct a public hearing before taking final action on a recommendation from the City [*Manager / Administrator*]. Notice of the public hearing shall be provided to the claimant, to owners and occupants of property within 300 feet of the perimeter of the subject property, and neighborhood groups or community organizations officially recognized by the City Council whose boundaries include the subject property.

Section 6 – City Council Action on Claim.

(1) Upon conclusion of the public hearing, and prior to the expiration of 180 days from the date the claim was filed, the City Council shall:

(a) Determine that the claim does not meet the requirements of Measure 37 and this Ordinance, and deny the claim; or

(b) Adopt a Resolution with findings therein that supports a determination that the claim is valid and either direct that the claimant be compensated in an amount set forth in the Resolution for the reduction in value of the property, or remove, modify or direct that the challenged land use regulation not be applied to the property.

(2) The City Council's decision to waive or modify a land use regulation or to compensate the owner shall be based on whether the public interest would be better served by compensating the owner or by removing or modifying the challenged land use regulation with respect to the subject property.

(3) If the City Council removes or modifies the challenged land use regulation, it may, at its discretion, put back into effect with respect to the subject property, all of the land use regulations in effect at the time the claimant acquired the property.

(4) A decision by the City Council to remove or modify a land use regulation shall be personal to the claimant(s) and shall automatically become invalid and void upon the transfer of any ownership interest in the subject property by the claimant to anyone. ***[Measure 37 is unclear with respect to whether a waiver can be voided when the owner transfers the property. If a city wants to adopt an implementing ordinance that poses less risk of prompting a lawsuit against the city, the city should delete this subsection.]***

Section 7 – Processing Fee.

(1) The city [manager/administrator] shall maintain a record of the city's costs in processing a claim, including the costs of obtaining information required by section 3 of this ordinance which a property owner does not provide to the city. Following final action by the city on the claim at the local level, the city [manager/administrator] shall send to the property owner a bill for the actual costs, including staff and legal costs, that the city incurred in reviewing and acting on the claim.

(2) If the property owner does not pay the amount due within 30 days, then the city shall pursue collection, including filing a lien on the property. ***[Measure 37 is unclear with respect to whether a city can require a property owner with a valid Measure 37 claim to pay a processing fee. If a city wants to adopt an implementing ordinance that poses less risk of prompting a lawsuit against the city, the city either should***

limit the requirement to payment of a fee to claims that the city determines are not valid, or should delete this subsection.]

Section 8 -- Private Cause of Action. If the city council's approval of a claim by removing or modifying a land use regulation causes a reduction in value of other property located in the vicinity of the claimant, the neighbor(s) shall have a cause of action in state circuit court to recover from the claimant the amount of the reduction, and shall also be entitled to attorney's fees. ***[Measure 37 is unclear with respect to whether a city can create a private cause of action for reduction in the value of a neighbor's property resulting from the waiver. If a city wants to adopt an implementing ordinance that poses less risk of prompting a lawsuit against the city, the city should delete this section.]***

Section 9. Due to the passage of Measure 37 at the General Election on November 2, 2004 with an effective date 30 days thereafter, the City Council declares it is necessary for the preservation of the public health, welfare and safety for this Ordinance to have immediate effect. Therefore, this Ordinance shall become effective immediately upon its passage by the City Council and approval by the Mayor, retention by the Mayor for more than ten days, or readoption over a Mayoral veto by two-thirds of all members of the City Council.

Passed by the City Council this
_____ **day of November, 2004**

Approved by the Mayor this
_____ **day of November, 2004**

City Recorder

Mayor