

What is Measure 37?

Measure 37 is an audacious frontal assault on Oregon's proud history of land use planning. While the measure appears to present an innocuous and fair solution for certain sympathetic individuals, the measure's largest financiers evince the real motive through their long-standing quest to permanently undermine land use planning in Oregon. The Measure attempts to exempt certain individuals from the same land use laws that bind their neighbors. Measure 37 is facilitating claims and threats of claims that forebode a rash of arbitrary and unsustainable development.

Measure 37 states that public entities must compensate owners of property for land use regulations that both (1) restrict the use of the property and (2) reduce the fair market value of the property. The Measure requires compensation to be paid by the public entity within 180 days of a property owner's written demand for compensation. The amount of compensation owed would be equal to the reduction in fair market value caused by the restriction. If the public entity does not pay within 180 days, the property owner can sue in court and recover not only the compensation, but also costs and fees incurred in collecting compensation. As an alternative to compensation, the public entity can "modify, remove, or not apply" the land use regulation at issue and allow the property owner to use the property unrestricted.

Rather than pay out millions of dollars, local and state government will likely choose to waive land use laws and not enforce years of hard work by local citizens to shape the development of their communities. Governments are strapped for funding and are not likely to be able to pay owners for the right to regulate land use. Rather than compensate property owners for doing the right thing, local governments will probably roll back common sense planning solutions across the state.

As the newspaper stories show, land speculators are moving rapidly to try to capitalize on this Measure. Do these speculators fit the mold of the poor old grandmother in her retirement that the Measure 37 backers put forward on TV? The Oregonian reported that four out of every five dollars of support for Measure 37 came from industrial forestland owners and big development interests. Do these large corporations care about your community's land use laws? Is there a risk that landowners with claims may team up with large business interests to pursue claims using means that may subvert or violate the intent behind the law?

The purported ideal behind Measure 37 was to provide relief for certain individuals. That ideal is laudable if the Measure proposed a workable system to do so. However, Measure 37 appears to be a front for rampant abuse by its real backers. This alert seeks to explain Measure 37 and provide a set of suggestions for how the public can ensure that the ideal is implemented in a fair and balanced way. Along the way, the public may well discover it is not possible to work with the artificial markets that Measure 37 has created and also preserve Oregon's social and cultural fabric.

How is Measure 37 limited?

Limits on Measure 37's scope may lessen the damage that the scheme threatens to do to Oregon's historic land use system. These limitations may reduce the number of claims, the amount of compensation due or create a right in neighboring property owners. Measure 37 exempts laws that regulate nuisances, public health or safety, compliance with federal law, and pornography. Ironically, nuisance law, public health and safety, and our federal laws provide the fundamental underpinnings of Oregon's entire modern system of land use law. Citizens have a duty to ensure that these important and predominant aspects of our modern land use system remain intact. In addition, according to the Measure itself, it does not apply to land use regulations enacted prior to the date of acquisition by the present owner or a family member of the present owner.

How can one ensure that Measure 37 is fair and balanced in its implementation?

Get directly involved in local implementation of Measure 37. To ensure its fair and balanced implementation, the public must monitor and advocate for much needed local and state regulations that would preserve the existing land use system to the greatest extent possible. As you proceed, carefully and consider the following list of actions:

1. Encourage governments to enforce land use laws.

Once land use laws are waived they may be lost forever. Land use laws are based on concepts of nuisance, federal laws and are fundamentally derive from the government's police power to regulate for public health and safety. Make sure that all protections for nuisance, federal law and public health and safety stay in full force and effect. By encouraging governments to uphold land use laws, the implications of this Measure will be fully understood. Consider contacting the state fund administrator to urge the government to prioritize the most outrageous threats to your local community land use system.

2. Require local governments to confer with the state.

Land use laws derive in large part from state law, as well as from federal law and compliance with those laws. Request that the state prohibit local governments from waiving land use laws without first obtaining approval from the state via the Department of Land Conservation and Development, and remind your local government of this obligation repeatedly.

3. Stress the need for governments to adopt measures to protect neighbors from losses in property value resulting from the grant of a waiver.

Oregon cities have considered provisions allowing neighbors the right to sue a property owner who has obtained a waiver under Measure 37 for the subsequent loss of value and enjoyment of their property. As a result, a Measure 37 claimant would have to consider the true cost of his request on the value of his neighbors' land because the claimant would potentially be liable for the resulting loss directly

to its neighbors. Request your local government to consider any and all methods to ensure that neighbors are not negatively impacted without recourse.

4. Request that local and state governments require all claimants to pay for administrative costs.

The secretary of state's office estimates that the administrative cost of the measure alone, without the costs resulting from compensation, could be up to \$340 million per year! Many believe the beneficiaries of the Measure should pay for its implementation. This includes reimbursing local government for attorney fees for responding to unsuccessful claims. Some have suggested adopting a capital gain tax for income received from Measure 37 claims to pay for windfall that one claimant gets to the exception of everyone else in the community. The cost of dismantling the land use system for singular personal gain needs to be born by someone.

5. Demand that your local governments require detailed evidence that land use laws are causing a reduction in value.

Demand that local governments require detailed proof of the loss of value of the property value based on the highest and best use for the property based on an appraisal prepared using generally accepted appraisal practices. The use and value the claimant makes may be highly variable given the uncertain flood of potential waivers and resulting development. The value the claimant seeks is unlikely to match economic reality. Demand that the supporting documentation include detailed evidence of: (A) the land use restrictions in place at the time the property was first purchased; (B) the value of the property without those restrictions brought to present value; (C) whether the proposed use was allowed at the time; (D) what the most valuable allowed use was at that time, and its present value; and (E) whether any other uses were permitted at that time. In addition, request that the local government require the claimant to prove that the land use laws for which the claimant is requesting compensation or from which the claims is requesting a waiver does not fit within one of the exceptions for public health, safety, federal laws or nuisance. Request that all information filed with the local or state government be made publicly available without charge to the public.

6. Encourage local governments to condition the expansion of public services on compliance with land use laws.

Measure 37 exacts compensation from local and state governments for land use restrictions that the community has supported for decades. Consider encouraging your local and state government to enact implementing rules and regulation that require payment for providing expanded public services associated with any new development that is exempted from land use laws that are the result of decades of community hard work and compromise.

7. Advocate for limiting the transferability of Measure 37 claims.

One way to protect against abuse is to limit the transferability of claims. This may be done in at least three ways: (1) not provide compensation for claims that do not show a continuous chain of ownership; (2) not permit waivers to transfer to any subsequent purchasers; and (3) pass a local ordinance stating that any transfer of a waiver or a development built under a waiver becomes an actionable nuisance that gives rise to a claim by a neighboring property owner.

Each of these measures would limit the number and scope of claims filed. In particular, local citizens should get directly involved in scrutinizing claims made by corporations to determine whether there was a continuous chain of ownership. Citizens should demand that the local government require proof that there was no change in ownership or control of the effected entity that would break the chain of ownership. Citizens should object to the buy-back of land that was previously owned by someone in order to attempt to re-establish Measure 37 claims.

8. Demand public process.

For citizens to have a say there must be a public process that includes the full disclosure of information and the ability of neighbors and others to offer evidence on the value of the property at issue and neighboring properties. Citizens should demand that the local government pass an ordinance giving local citizens standing to contest the validity of any claims made in their communities.

9. Write Letters to the Editor and Editorials.

Read the news and respond to stories about the Measure. In your response, focus on the negative impacts on the community, expose fallacies in the arguments used to support claims and question the constitutionality under state and federal law. Most importantly, advocate a positive vision of land use laws that shows the public what they are losing.