INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION

Work Session: XI: Oregon Measure 37 - Spawn of *Kelo*

Title: Measure 37: (Un)Intended Consequences on Land Use Planning

by

Presenter: Glenn Klein

Presenter's Title: Shareholder

Presenter's Office: Harrang Long Gary Rudnick P.C.

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MEASURE 37: (UN)INTENDED CONSEQUENCES ON LAND USE PLANNING

Measure 37 was proposed to the voters as a mechanism to compensate property owners when land use regulations are adopted or enforced that reduce the value of property. The Measure, however, contains no funding mechanism, and governments in Oregon do not possess a lot of spare cash to use to pay compensation. As a consequence, Measure 37's biggest effect is not compensating property owners for government regulations. Instead, the primary effects of the Measure are very different. The purpose of this paper is to describe those effects, particularly the effects in urban areas.

In order to truly understand the effects of Measure 37, it is necessary to have a basic understanding of Oregon's land use system. Therefore, the first part of this paper describes that system. Part II of the paper then discusses the three primary effects of Measure 37.

I. Overview of Oregon's Land Use Planning Program

More than 80 years ago, cities in Oregon began using zoning and other mechanisms to plan how their communities should develop. Land use planning and zoning was used then, as it is still used today, to reduce the number, nature and extent of conflicts between land uses. Prior to 1973, however, such planning and zoning was undertaken at the discretion of cities.

In 1973, with the Legislature's passage of SB 100, land use planning and zoning became mandatory for all cities and counties. In one of the first major land use cases to reach the Oregon Supreme Court following the passage of SB 100, *1000 Friends of Oregon v. Land Conservation and Development Commission*, 292 Or 735 (1982), the Court described well both the purpose behind SB 100 and the land use planning system that SB 100 created. That overview helps to illustrate how Measure 37 affects the abilities of cities to engage in and carry out land use planning and zoning.

> "Land use planning and regulation in Oregon occurs within a framework enacted in 1973 as Senate Bill 100 which, with some amendments, now appears as ORS ch. 197. The impetus was legislative concern that state intervention was needed to stop a process of cumulative public harm resulting from uncoordinated land use. To stop that threat and to provide for a more satisfactory future, the legislature established our now familiar system of local and state comprehensive land use planning performed in compliance with statewide land use goals adopted by LCDC. The legislative

concern and remedy are reflected in the legislative findings and policy statement which preceded SB 100 and, with slight modification, are now codified as ORS 197.005 and 197.010:

"ORS 197.005: 'The Legislative Assembly finds that:

> "(1) Uncoordinated use of lands within this state threaten the orderly development, the environment of this state and the health, safety, order, convenience, prosperity and welfare of the people of this state.
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> * * *

"ORS 197.010: 'The Legislative Assembly declares that, in order to assure the highest possible level of livability in Oregon, it is necessary to provide for properly prepared and coordinated comprehensive plans for cities and counties, regional areas and the state as a whole. These comprehensive plans:

> * * *
>
> "(4) Shall be prepared to assure that all public actions are consistent and coordinated with the policies expressed through the comprehensive plans;
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> * * *

"Senate Bill 100 was intended to change the prevailing inconsistent practice of land use decision-making and to substitute a systematic decisional process based on comprehensive consideration of all relevant facts, affected interests and public policies. The reasons for which city boundaries were drawn historically are not necessarily consistent with the policies which, under the legislation, must now be applied for the conservation and development of land. Indeed, land might have been included or excluded from city boundaries for reasons which are entirely contradictory to the procedural and substantive public policies which SB 100 was intended to effectuate. It is inconsistent with the legislative intention to require coordinated land use for LCDC to require that substantial areas of agricultural or other protected land be made available for urban development . . . without regard to social, economic and environmental policies."

Id. at 744 - 747 (footnote omitted).

As part of SB 100, the Legislature created the Land Conservation and Development Commission (LCDC) and directed LCDC to adopt goals and guidelines to be used by cities and counties in preparing, adopting, amending and implementing existing and future comprehensive

plans. LCDC adopted 19 statewide planning goals. Several of those goals are particularly relevant to comprehensive planning and zoning activities by cities, including Goals 9, 10, 11, 12 and 14. Goal 9 generally requires urban communities to inventory commercial and industrial lands, project future needs for those lands, and then plan and zone sufficient land to meet those needs. Goal 10 requires cities to undertake an exercise similar to the one required for Goal 9, except Goal 10 concerns residential lands, requiring the inventorying of existing lands available for residential development, projecting future needs for residential land, and planning and zoning sufficient land to meet the identified need. Goal 11 requires cities to determine how to efficiently extend public services such as sewer, water, and public safety services, rather than simply responding to development wherever it occurs. Goal 12 is similar to Goal 11, except that Goal 12 addresses the need for a safe, convenient and economic transportation system. And finally, Goal 14 – entitled urbanization – generally requires cities to determine the amount of land needed for future growth, and then plan and zone land to meet those needs. To accomplish that task, Goal 14 requires the establishment and amendment of urban growth boundaries (UGBs).

As will be discussed below, one of the more significant effects of Measure 37 on cities is the potential to frustrate the comprehensive planning that has occurred, and should occur in the future, related to Goal 14 and urbanization. "Goal 14 aims . . '[t]o provide for an orderly and efficient transition from rural to *urban land use*.' * * * [I]t is clear that the goal obligates local governments to establish as part of their comprehensive plans urban growth boundaries (UGBs) which 'identify and separate *urbanizable land* from *rural land*.'" *1000 Friends of Oregon v LCDC and Curry County*, 301 Or 447, 455 (1986) (Court's emphasis.) The UGB "is a boundary line established under Goal 14 to separate urbanizable land from rural land." *1000 Friends of Oregon v. Wasco County Court*, 299 Or 344, 350 (1985).

Goal 14 creates three categories of land: rural, urbanizable and urban. The statewide planning goals define "rural land" as land outside a UGB that is non-urban agricultural, forest or open space lands. "Urbanizable land" is land within a UGB which is identified and determined to be necessary and suitable for future urban uses and can be served by urban services and facilities. Goal 14 requires, before converting urbanizable land to urban uses, consideration of "(1) [o]rderly,

economic provision for public facilities and services; . . . and, (4) [e]ncouragement of development within urban areas before conversion of urbanizable areas." *Id*. at 352, *quoting* Goal 14.

In compliance with Goal 14, cities in Oregon have established UGBs in order to separate the urban and urbanizable lands from rural lands. As required by other statewide planning goals, including Goals 9 - 12, cities have adopted comprehensive plans designed to ensure an adequate supply of lands to meet the needs for residential, commercial and industrial lands, along with public facilities and transportation plans designed to extend urban services (including sewer, water, transportation, police and fire) in an efficient and economical manner. As discussed below, one of the most significant effects of Measure 37 on cities is the potential to frustrate that comprehensive planning.

II. Effects of Measure 37 on Cities' Planning Functions

Measure 37 affects cities in at least three very different ways. First, Measure 37 results in land uses in UGBs and outside UGBs that are not contemplated in the comprehensive plans or public facilities plans, and therefore, can prevent the implementation of portions of those plans. Second, the Measure has caused cities to postpone or abandon initiatives to amend comprehensive plans and land use regulations. And third, Measure 37 has eliminated some of the predictability and equity that comprehensive plans, land use regulations and zoning had created. Each of these effects will be briefly discussed.

A. Measure 37 can frustrate the implementation of comprehensive plans.

Measure 37 authorizes government to waive regulations to allow property owners to use their property in ways that are inconsistent with the comprehensive plan, land use regulations and zoning; in fact, due to the lack of funds to pay claims, for all practical purposes, Measure 37 requires waivers and potential inconsistent uses. The inconsistent use might be of a different type of use than that contemplated by the comprehensive plan or zoning: for example, a commercial use rather than a residential use. Or, the inconsistent use might be of a different density or intensity than the planned or zoned use: for example, creation in the UGB of low density ranchettes (one house per 2 acres), instead of high density residential development following annexation (and extension of city

services). These inconsistent uses can frustrate many aspects of the comprehensive plans, including those that were intended to implement statewide planning Goals 9, 10, 11, 12 and 14.

Goals 9 and 10, as noted in the prior section, generally require cities to determine the amount of land that is available for residential use (Goal 10) and for commercial and industrial uses (Goal 9), project the future needs for those lands, and then plan and zone sufficient land to meet those needs, including amending the UGB to include additional land if required to meet the identified needs. If a property owner obtains a waiver under Measure 37 for a land use different than the one planned for the property, or for a density that is less than that contemplated by the plan, then the city may no longer have sufficient land in that particular category. Thus, for example, if property within the UGB is contemplated for high density residential development (following annexation to the city and the extension of city services to the property), and the property owner does not want to wait for annexation or until city services can be extended, the owner may file a Measure 37 claim and obtain a waiver for a low density (for example, one house per two acres) development. Such a development would not necessarily require extension of the city services. However, the amount of housing that would be constructed on that acreage would be far less than the amount contemplated by the Goal 10/residential lands inventory.

That same type of low density development in the UGB also could frustrate the aspects of the comprehensive plan and related public facilities plans that were adopted in response to Goal 11. As discussed above, Goal 11 requires cities to determine how to efficiently extend public services such as sewer, water and public safety services. The creation of a low density development in the middle of a UGB can thwart that goal in a number of ways. First, the public facilities plan is based on certain types of development in certain areas. Land surrounding the low density development may still require the higher level of urban services contemplated, but it may not be as economical to extend such services (since the low density development may no longer be participating at all or to the same degree in the funding of the extension of the services). Second, it may not be as efficient to extend the services since it may not be possible to extend the services through the low density development as originally contemplated; instead, it may be necessary to run those services (such as sewer and water) around the development. And third, a Measure 37 waiver could result in a higher density or more intensive use than that contemplated by the public facilities plans, resulting in an

overloading of the public services. These public services would then lack the capacity to serve development on land designated in plans for future growth.

The transportation component of the comprehensive plan – required by Goal 12 – is subject to the same type of effect as Goal 11. If the nature or intensity of development is different than what is contemplated in the transportation plans, or if that development occurs "out of sequence" – perhaps because of a waiver for land in the UGB before it can be annexed to a city – the transportation system may not be extended in either an efficient or economic fashion.

The approval of waivers inside a UGB, or even just outside a UGB, also affects the ability of cities (and counties) to carry out the portions of their comprehensive plans designed to implement Goal 14. As the Court noted in the *Curry County* case discussed above, "Goal 14 aims not to protect particular natural resources but '[t]o provide for an orderly and efficient transition from rural to *urban land use*.'" 301 Or at 455 (Court's emphasis). Before converting urbanizable land to urban uses, Goal 14 requires consideration of the "orderly, economic provision of public facilities and service . . . and . . . encouragement of development within urban areas before conversion of urbanizable areas." Goal 14. The comprehensive plans adopted by cities are designed to carry out this goal (along with the other statewide planning goals). The granting of waivers under Measure 37 for uses of land (whether inside UGBs or outside but near UGBs) that are inconsistent with the uses contemplated by the plans has the potential to reduce the effectiveness and increase the costs for cities of implementing those comprehensive plans. Indeed, the granting of such a waiver in the UGB could prevent a city from expanding in that direction, even though that expansion is contemplated in a comprehensive plan, because a city may not be able to annex that land after it has been developed. It is also worth noting that those decisions to grant such waivers are not even made by the cities whose comprehensive plans and efforts are being affected; instead, those decisions are being made by counties without a requirement that cities be heard about the potential effects.

B. Cities have postponed or abandoned amendments to plans and regulations.

Measure 37 generally provides that an owner of property has a claim against a government if the government adopts a new land use regulation that restricts the use of property in a way that reduces the fair market value. Therefore, following the passage of Measure 37, if a city amends its

comprehensive plan or a land use regulation, or adopts a new land use regulation, the city is potentially creating large numbers of new Measure 37 claims. Unless the city has spare funds, or is willing to reallocate funds that are currently being used to pay for other city services, the city will need to waive those new requirements if a Measure 37 claim is filed. Due to that potential, many cities have postponed or abandoned initiatives to amend their comprehensive plans and land use regulations. Measure 37 will also require cities to continue to wrestle with the question of whether to postpone or abandon those initiatives.

Measure 37 contains a number of undefined terms and many of its provisions are ambiguous. As a result, there is much uncertainty as to what the Measure means and when a land use regulation might give rise to a valid Measure 37 claim. If a government guesses wrong, the government is subject to paying the property owner's attorney fees. The possibility of having to pay those attorney fees, as well as the cost of having to respond to Measure 37 claims, has created a chilling effect on cities' consideration of changes to either the comprehensive plan or land use regulations.

Coupled with the requirements of periodic review, Measure 37 also places some cities in a catch-22. State statutes on periodic review, ORS 197.628 - 197.633, can require cities (and counties) to adopt new land use regulations and amend existing ones under certain circumstances. For example, Goal 5 – which generally requires the local government to inventory natural resources and adopt protection measures for some of the more significant resources – could require a city as part of periodic review to adopt setbacks from rivers and streams, or restrict development in wildlife habitat areas. Where periodic review requires cities to amend their comprehensive plans or land use regulations in the future to comply with Goal 5 or other goals, cities are caught in this catch-22: cities are required to adopt these new land use restrictions, but Measure 37 then may require that the cities waive those new requirements for any property owner who files a Measure 37 claim.

C. Measure 37 has eliminated predictability and increased conflicts.

One of the objectives of land use planning is to increase predictability of land uses in any given area. When all property is given a designation in a comprehensive plan and is zoned for a particular type of use, the owners of the property, as well as the owners' neighbors and the public at large, have some assurance that the property will be used in a certain way unless the owner and

city go through a prescribed – and public – process to authorize a change in the intended uses. Cities can use comprehensive planning and zoning as one means for reducing conflicts between owners of adjacent or nearby properties, as well as between owners of property and users of nearby public property.

Measure 37 undermines that predictability. Without an analysis of when your neighbor acquired his or her property (and potentially, when the parents or grandparents of your neighbor acquired the property), it is impossible to rely on the current zoning or comprehensive plan designation for the property. As noted above, prior to Measure 37, one could rely on the current zoning, knowing that any change to the zoning would require a public process. With Measure 37, however, a waiver can be granted without any public process or even notification to adjacent or nearby property owners that a waiver has been granted.

Land use planning can be a very effective tool to reduce the number and extent of conflicts between uses of adjacent and nearby properties. However, Measure 37's requirement to waive regulations (assuming that a claim is not paid) significantly undermines that tool by increasing the opportunities for those conflicts. Where such potential conflicts exist today as a result of poor land use planning, Measure 37 reduces the ability of cities to resolve those conflicts through changes in the zoning: any such change carries with it the potential that a property owner will file a Measure 37 claim, resulting in a waiver of the new restrictions and reinstatement of the potential conflict that caused the city to rezone the property.

Measure 37's effective requirement to waive land use regulations also can produce inequities between owners of property in the same neighborhood. Depending on when someone in the neighborhood became the owner of the property, that person may have the right to compensation or waiver. Since cities have no funds with which to pay Measure 37 claims, such owners will receive waivers. This will then create inequities that will further frustrate the objectives of the city's land use planning process.