Paths Not Taken: Oregon's Response to Measure 37.

By Ed Sullivan

The response by Oregon's planning and environmental communities to the passage of Measure 37 in November, 2004 by a 61-39 margin serves to explain how that measure passed in the first place. Living in righteous denial and discussing the future only with the like-minded, these communities are likely to wind up no better than as of November, 2004, in addition to losing precious time in meeting the difficulties caused by the measure.

Measure 37 provides that a landowner is owed a government payment if he or she can prove that land has been devalued as a result of a land use regulation imposed since the time of acquisition of the property by the landowner or a family member. As an alternative to payment, the governmental entity imposing the regulation may "waive" land use regulations imposed since the current owner took possession by modifying or not applying the same. Because the measure gave state or local governments 180 days to respond to the first claims made under the measure, there was a brief window of time to do so.

As things stood politically following the 2004 elections, the Democrats, who were likely to be sympathetic to changes sought by planners and environmentalists, controlled the State Senate and the Governor's office. Republicans, who were more sympathetic to leaving the Measure with little or no change, controlled the House. Consequently, any legislative modification to the Measure was required to appeal across the political spectrum. The ambiguities in the measure, as well as the prohibition on any process for measuring claims, counseled in favor of legislative action.

On the judicial side, planners and environmentalists had successfully challenged an earlier version of Measure 37 which had passed in 2000 by a 53-47 margin, by convincing several courts that the measure had not met standards for measures to amend the Oregon Constitution. Oregonians in Action, a property rights group that had supported both measures, adapted to the Measure 7 setback and wrote Measure 37 as statutory law, putting forth the same messages about "just compensation" and "fairness." Unfortunately, opponents to both measures did not adapt to put forth a sufficiently responsive message in the election and did not attempt to enjoin the effectiveness of Measure 37, as had occurred four years previously with Measure 7, so Measure 37 went into effect on December 2, 2004. While a facial challenge to the measure was filed by a public interest advocacy group, it did not prevent it becoming effective and the pendency of the

suit has had almost no effect on other efforts to respond to Measure 37. It is not likely to succeed in any event.

When the 180-day began ticking for the first claims filed under Measure 37 on December 2, 2004, there were few claims. By the end of the 180 days, claims totaled over 1000. The amount of compensation demanded just from the state exceeded $500 million dollars. Because the judicial response to Measure 37 was not likely to bear fruit by the end of the 180 day period, all eyes turned to the Oregon Legislature, which met about six weeks after the Measure went into effect.

A comprehensive bill dealing with Measure 37, SB 1037, emerged from the Senate Environment and Land Use Committee in mid-May, 2005. The bill was skewed toward the conservation side by precluding all Measure 37 claims on high value farmland, most claims within urban growth boundaries, and severely limiting those claims in the vicinity of urban growth boundaries and forest lands. Moreover, it provided a means for processing such claims and set up a valuation methodology. Yet it also bowed to some political realities by recognizing the pay or waive provisions of Measure 37 and establishing the right to build one single family dwelling on land that had been off-limits to that use previously.

Although the direction of the legislation was apparent early in the negotiations, the conservation community expended several precious weeks in a futile attempt to persuade legislators and interest groups to adopt a novel compensation-only scheme using transferable development credits. When this quixotic effort failed, much of the conservation community resolved to oppose the bill as being "Worse than Measure 37" (while letting on that the fight was really over the trading stock to be used in negotiations with the House). As a result, the Senate Democrats were split and the bill was tabled. There is no alternative bill ready in the Senate and while a House Bill may come to the Senate, it, too, is unlikely to be palatable to the conservation community and will die in the Senate. Hoped-for intervention by the Governor to bridge the divide has so far failed to materialize. Indeed, throughout the course of the legislative discussions and negotiations, the Governor's office was notable for its absence. As a result, it is unlikely that any legislation addressing Measure 37 will pass this legislative session.

And while the facial challenge to Measure 37 plods along in a trial court, those Counties which face the greatest number and impact of Measure 37 claims, not enamored of the state land use program in any event, and having neither the money nor the stomach to resist claims, have waived land use regulations without awaiting the passage of the 180 day period. These counties have done so without fear of contradiction from the state or conservationists who are too busy with the hoped-for "silver bullet" of invalidation of the measure on its face or with the legislative process. The facial challenge, incidentally, has a leading environmental organization and the State of Oregon in litigation, where these entities might otherwise be cooperating in formulating a response to the Measure and not spending their limited resources against each other.

What the state failed to do in the courts was to choose which claims it could, and should, resist so as to set the best precedent possible to deal with the Measure and determine its contours. Similarly, conservationist organizations expended their resources to bring a high-profile case that may well lose and pursue a legislative strategy that has no immediate prospect of success, instead of selecting cases that were both egregious in terms of claims, and winnable, a strategy that had worked well in the past. Moreover, those organizations might have stood up for those adversely affected by Measure 37 claims to assure that these persons would be heard as those claims were processed, and that adequate judicial review was assured.

As the 2005 Oregon Legislature draws to a close, planners and environmentalists are likely to be in no better position legally or politically than they were on December 2, 2004. In fact, because the 180-day clock is ticking on many new claims, that position is likely to be worse. It is among the worst-kept secrets in the state that the backers of Measure 37 counseled industrial property owners and others with particularly egregious claims to refrain from filing their claims during the legislative session. Those claims will now come forward and state and local governments are left with pitifully few tools with which to soften the blow.

Those reading the history of this part of Oregon's land use program may well ask what the executive branch and conservation groups were thinking in frustrating a legislative response and being so far behind in the courts. Perhaps that program may be saved by a miracle such as that which occurred by deft legal work in 2000, so as to justify the serenity that arises from a righteous position. Yet it is more likely that the program faces a Gotterdammerung, rather than continued residence in that Valhalla constructed over 35 years ago.

The Oregon Chapter of the American Planning Association has long advocated a review of the State's land use system. More than half of today's Oregonians were either not born or in the state when that program was enacted in 1973. While it is unlikely Oregonians will repeal that program, they appear open to blandishments, cleverly put forward though the use of anecdote, to change that program for the worse. The old orthodoxies are no longer sufficient to prevent these "quick fixes." Only a comprehensive and thoughtful review of the system will preserve what is good and provide the consensus to change what must be changed. The failed response to Measure 37 illustrates the need to commence that review.