

OUT OF SILVER BULLETS

By Edward J. Sullivan

In February, the Oregon Supreme Court ended the hope that, for the second time, the State might avoid the results of a voter-approved measure that requires government payment for regulations of land use or, alternatively, the waiver of those regulations put in place after the current owner took title.

The reality of Measure 37 now cannot be avoided. State and local governments must now face that reality with little hope of change in the foreseeable future. The executive branch is rudderless, the legislative branch gridlocked, and the judicial branch has fairly predictably answered the only question yet put to it. Claims previously suspended must now be confronted and the lack of a statute of limitations on claims guarantees that there will be many more such claims. Conflict will abound and new planning and regulation will be risky.

Oregon planners do not have the luxury of Monday-morning quarterbacking the Measure 37 campaign or the subsequent efforts during the 2005 legislative session to mitigate the effects of the Measure. They cannot relive the failed attempt to craft a “silver bullet” by way of a facial challenge in the courts. The hope of a successful court challenge may have caused some to be less mindful of the need to provide a legislative solution more quickly. The urgency to find that solution is now at hand, even as the tidal wave of claims threatens to occupy the time and efforts that should be devoted to planning.

What then is to be done? Two sets of issues are apparent: first, creating a coherent system to address current and anticipated claims and, second, finding the way to recover the State’s planning program as a useful instrument of public policy. The immediacy of a multitude of claims threatens to occupy the minds of some planners and policy-makers; however, while that reality is urgent, it cannot prevent planners from doing what they do best – transcending the

present and acting with the future in mind. Not to do so guarantees that our present is also our future.

Regarding the short term, there are at least three things planners can do:

1. Remember that this too will pass – The immediacy and enormity of the present should not blind us from its transitory nature. We may have made the mistake of thinking that our planning system would go on forever without change and failing to heed the combination of lethargy and accumulated grievances against that system that could be exploited by clever political operatives. For the moment at least, Measure 37 will likely have less impact on the ground than once feared. Paper “lots” may be available for sale or incongruous uses allowed. However the cost of infrastructure and financing, combined with the lack of transferability of Measure 37 waivers, will make many of those lots or uses unrealizable. The opponents of planning, having little to show for their efforts, may either overplay their hand in a new initiative or be reconciled to a modest victory.
2. Keep Informed – Planners are at the receiving end of claims, which require time and judgment regarding the history of family relationships to a parcel, an evaluation of the law of nuisance, the hierarchy of federal preemption, and what constitutes “health and safety”, and determinations as to which state and local land use regulations were applicable at various points in time. The task will not be easy. One way planners can help themselves is to stay informed and connected with each other. To the extent possible, planners should share information on claims made, as well as their disposition. In addition, DLCD, regional and local governments should participate in seminars and on-line training as to “best practices” in dealing with claims.

3. Planner Participation in Crafting Solutions – The American Planning Association and its Oregon Chapter are focused upon solutions to the Measure 37 conundrum.

Planners have the most experience, if not the most knowledge, as to the workings of the Measure. However, we must share that knowledge and interact with ourselves and others in coming up with solutions. No one will do it for us.

Regardless of the outcome of these short-term actions, we must also plan and act for the long term. At a minimum, we must:

1. Accept Our Civic Responsibility – Planners are not potted plants. We owe a responsibility to our community and our profession to point out the anomalies and impacts of the Measure to the public and decision-makers. Unless the problems presented by the Measure are recognized and understood, solutions will not be possible. While public planners cannot individually be involved with political activity, that prohibition does not extend to the transmission of information and professional observations on the Measure.
2. Working with the Profession – The Oregon Chapter was involved in the (unsuccessful) attempts in the 2005 session to mitigate the worst effects of the Measure. The Chapter will be involved in future legislative sessions and in the work of LCDC to meet the many challenges presented by Measure 37. In undertaking this work, the Chapter needs thoughtful and experienced participants. In other words, the Chapter needs you.

The world hasn't come to an end with the Oregon Supreme Court decision – at least not yet. Because we live in the world, we must deal with its problems. Measure 37

is not the most difficult problem facing the Republic; however it is one that planners are
in the best position to do something about.

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