



To: Clients, State Agencies & Local Governments
From: Ralph Bloemers, Staff Attorney - Crag Law Center
Re: The Law Governing Issuance of County Permits for Land Development and Land Divisions Based on Measure 37 Waivers, In Farm, Forest, Range and Farm/Forest Zones
Date: November 9, 2007

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This memorandum describes the current law governing applications for permits for land divisions, land development and other land uses in farm, forest, range and other conservation zones, issued pursuant to Measure 37 (Oregon Revised Statutes 197.352). This memo is organized under a set of general propositions of interpretation of Measure 37. It explains the relevant legal authorities in detail, including the text of Measure 37 (Oregon Revised Statutes 197.352) decisions by Oregon Circuit Courts, the Oregon Land Use Board of Appeals, the Oregon Court of Appeals and the Oregon Attorney General.

Measure 37 is comprised of just 13 short subsections and the lack of detail in its drafting has resulted in a significant amount of litigation and confusion. Most claimants will choose to proceed under Measure 49 while others may proceed with the less certain future provided by Measure 37. The common law on vesting under Measure 37 as it has been modified by Measure 49 is discussed in a separate memo. See July 24, 2007 and November 9, 2007 Crag Law Center Memoranda regarding vesting for a more detailed analysis. (Both are available at www.crag.org/justcompensation).

A. Land development permits issued under Measure 37 cannot be granted to persons who are not the “owner” of the property with a valid Measure 37 claim.

Measure 37, now codified as Oregon Revised Statutes 197.352, provides for two kinds of relief to property owners. The entire Measure refers to, in a set of similar phrases, “property owners”, “owners of property” and “interests” in property:

197.352 Compensation for loss of value due to land use regulation. The following provisions are added to and made a part of ORS chapter 197:

(1) If a public entity enacts or enforces a new land use regulation or enforces a land use regulation enacted prior to December 2, 2004, that restricts the use of private real property or any interest therein and has the effect of reducing the fair market value of the property, or any interest therein, then the owner of the property shall be paid just compensation.

(2) Just compensation shall be equal to the reduction in the fair market value of the affected property interest resulting from enactment or enforcement of the land use regulation as of the date the owner makes written demand for compensation under this section.

The next subsection identifies a series of exemptions from the compensation provisions of Measure 37, including the following:

(3) Subsection (1) of this section shall not apply to land use regulations:

(E) 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.

Subsection (8) contains the provisions which are commonly described as the waiver provisions. These provisions also refer to “the owner..”:

(8) Notwithstanding any other state statute or the availability of funds under subsection (10) of this section, in lieu of payment of just compensation under this section, the governing body responsible for enacting the land use regulation may modify, remove, or not to apply the land use regulation or land use regulations to allow the owner to use the property for a use permitted at the time the owner acquired the property.

Consequently, if someone seeking a waiver (or compensation) is not an “owner of property,” they are not entitled to waiver or compensation.

The circuit courts have found that several types of claimants do not qualify as property owners for the purpose of receiving either waiver or compensation. Many of these cases also address the question of identifying the proper date at which the current owner acquired his or her ownership interest for the purpose of determining which land use regulations are waived. Those (overlapping) questions are presented in subsection B.

- 1. A development permit issued pursuant to Measure 37 cannot be issued to a person whose only interest in the property to be developed is as a contract seller of the property; that person does not qualify as an “owner” of property under Measure 37, and therefore is not entitled to compensation or waiver.**

The Circuit Court for Clackamas County recently considered whether a person who sold property on contract still had an interest in the property to support a Measure 37 claim. In that case, Mr. Burke bought 17.95 acres of land in Clackamas County in 1967. He sold the property on a contract to Dr. Griffin on March 8, 2005, retaining a right to possession and control until December 31, 2006 (a tenancy interest.) Griffin conveyed his purchaser’s interest in the property to Educative LLC on April 11, 2005.

For purposes of determining whether there had been a reduction in value in the property, the Circuit Court held that the proper date for determining a reduction in value for Educative LLC was April 11, 2005, when it bought Griffin’s interest. There was no reduction in value caused by the State of Oregon since no new regulations were adopted

after that date and therefore Educative LLC had no basis to seek compensation under Measure 37.

As for Burke, the court determined that his only interest in the property was as a seller entitled to payments on contract, an interest that dated from March 8, 2005. The state had adopted no new regulations that affected his income from the sale and therefore he had no grounds to receive compensation under Measure 37. *See Burke & Educative LLC v. State of Oregon*, Case No. CV 06060231, decided: June 22, 2007, posted at: http://www.doj.state.or.us/hot_topics/pdf/measure37/burke_decision.pdf

The Circuit Court in Klamath County reached the same conclusion in a case decided in 2006. *Fairclo v. State of Oregon*, Klamath County Circuit Court No. 06-1634 CV decided: September 7, 2006, posted at: http://www.doj.state.or.us/hot_topics/pdf/measure37/fairclo_decision.pdf

2. A land development permit cannot be granted to a landowner whose only interest in property is that of a beneficiary of a revocable trust. The date a person is made the beneficiary of an irrevocable trust is the proper date for applying the waiver provisions of Measure 37.

The Circuit Court in Yamhill County decided a case which addressed the question of whether a person with an interest in a family trust became a property owner, and, therefore, qualified to seek compensation under Measure 37.

Earl and Mary Smith were grantors and trustees of a real estate trust. Earl Smith died at some unknown prior date. Mary Smith died on April 2000. Their son and heir, Randy Smith, filed the claim on behalf of the trust, instead of on his own behalf. He argued that he was entitled to a waiver of regulations based on the date his parents, or the trust, acquired the property and not the date the property passed to him after his mother's death.

The Yamhill County Circuit Court found that Measure 37 creates two forms of relief; compensation or waiver. Claimants are entitled to only one form of relief and it is up to the government to choose which to provide.

Each of these two forms of relief have different dates applied to different claimants. Compensation (reduction in value) is measured from the date of acquisition by a family member. Waiver is measured only from the date of acquisition by the present owner.

The claimant acquired his property interest as successor trustee to the trust only when Mary Smith died and the property passed to him. Prior to that date the trust was revocable at any time, and therefore he was not an "owner of property" entitled to file a Measure 37 claim. *Smith v. State of Oregon et al.*, Yamhill County Circuit Court CV 060239, decided February 8, 2007 posted at: http://www.doj.state.or.us/hot_topics/pdf/measure37/decision_randy_smith.pdf

The same reasoning was applied to reach a different result in a case before the Marion County Circuit Court. The Marion County Circuit Court found that the plaintiffs correctly argued that their property interests dated from their addition of the property to a family trust in 1979, and not the date their mother died in October 2004. The mother had retained her interest in the form of a life estate but her life estate did not negate the children's property interest acquired in 1979. *See Rohde, Alfred, et al v. State DAS, DLCD, LCDC*, Marion County Circuit Court 06C19406, M12250, decided May 16, 2007 posted at: http://www.doj.state.or.us/hot_topics/pdf/measure37/rohde_decision.pdf (Note: In a subsequent June 2007 decision the court denied attorney fees under Oregon Law on the grounds that the state's mistaken interpretation of the statute was reasonable.)

3. A member of a limited liability corporation that holds property does not qualify as an "owner" of property under Measure 37 and is therefore not entitled to compensation or waiver.

In a case from Curry County, the applicants for Measure 37 waiver or compensation were members of a limited liability corporation ("LLC"). They filed as individuals rather than as the LLC, and argued that members of an LLC were "family members" under ORS 197.352(11) for the purpose of filing a claim. The State of Oregon denied their claim and they appealed the decision.

The Curry County Circuit Court held that "ORS 62.239 expressly states that a member of a limited liability company has no interest in specific limited liability property....To interpret Measure 37 to mean a membership interest in an LLC is a property interest in specific property of the LLC would be contrary to ORS 63.239....Only the owner or owners of property may be entitled to compensation or waiver under Measure 37." *Freeman Properties East/West LLC v. Oregon Department of Administrative Services*, Curry County Circuit Court 06CV0772, decided: June 15, 2007, posted at: http://www.doj.state.or.us/hot_topics/pdf/measure37/freeman_decision.pdf

The Klamath County Circuit Court also held that individual members of LLC's cannot receive compensation or waivers under Measure 37 because they are not property owners. *Gavin Rajnus, LLC v. State DLCD*, Klamath County Circuit Court case number 0603137CV M121639, decided July 23, 2007 posted at: http://www.doj.state.or.us/hot_topics/pdf/measure37/rajnus_decision.pdf

B. When deciding what regulations will govern a permit to develop land pursuant to Measure 37, only land use regulations adopted after the current owner acquired his or her ownership interest can be waived. The date that a family member acquired an interest in property is not relevant.

Subsection (8) contains the provisions which are commonly described as the waiver provisions. These provisions also refer to "the owner..." but do not refer to a "family member of the owner"):

(8) Notwithstanding any other state statute or the availability of funds under subsection (10) of this section, in lieu of payment of just compensation under this section, the governing body responsible for enacting the land use regulation may modify, remove, or not to apply the land use regulation or land use regulations to allow the owner to use the property for a use permitted at the time the owner acquired the property.

The wording of subsection (8) is different in an important way from the compensation provisions in subsections (1) and (2) as clarified by the exemption in (3)(E) (quoted in section A of this memo). Specifically, the date for determining the waiver is not the date a “family member” acquired the property, but rather it is the date the current owner acquired the property.

This was explained at length by the Crook County Circuit Court in its 2005 decision. *Crook County v. All Electors*, Crook County Circuit Court No. 05CV0015 (August 1, 2005 letter opinion).

This exemption follows the logic of the measure itself. Anyone who bought property after land use regulations were already in effect could not have suffered from a reduction in value because that reduction in value had already occurred. Several Circuit Courts have found that the date for determining waiver is the date the current owner acquired an ownership interest in the property, and not the date that a spouse or relative acquired the property.

1. The spouse of a landowner is not entitled to a waiver based on the date of the spouse’s ownership interest.

In a case from Marion County, the plaintiff/claimant acquired property in 1971 and then sold it by warranty deed to his wife on May 12, 2004. He sought a determination that the waiver granted be dated from his 1971 date of acquisition based on his continuing property interest in the property as a resident/tenant and spouse of the current owner. He contended that his property interest as a spouse was evidenced by his legal entitlement to a share of the property should he and his wife divorce and also because he was still paying the mortgage on the property. The Marion County Circuit Court found he had no present ownership interest in the property. *Schaffer v. Marion County et al*; Marion County Circuit Court, case number 05C16991 & 05C21655, decided June 21, 2006, posted at: http://www.doj.state.or.us/hot_topics/pdf/measure37/schaffer_decision.pdf

2. Beneficiaries of a family trust are not entitled to waivers based on when other family members in the trust acquired property but only when they acquired their own direct interest in the trust.

In 1971, Eugene Braukman and Farren Kohler jointly acquired the property in Washington County. In 1994, Braukman created a family trust and conveyed his interest in the property to the trust which designated himself and his wife and

trustees/beneficiaries. Kohler did the same in 2001. Plaintiffs contended that the proper date of ownership for the wives was either marriage or the date their husbands acquired the property.

Washington County decided that Mr. Braukman and Mr. Kohler were entitled to waiver of laws and regulations after their acquisition in 1971, but their wives were only entitled to waiver as of their inclusion in the trust (1994 and 2001). A three judge panel of the Washington County Circuit Court upheld the County's decision, finding that the wives acquired an ownership interest only when their name was added to title through the trusts created in 1994 and 2001.

The court found that the "ownership interest" in ORS 197.352(11)(c) did not encompass acquiring an interest in property through marriage alone. Similarly the court found that "owner" in ORS 197.352(1), (3)(E) & (E)(8) and ORS 197.352(8) (waiver provisions) did not include spouses unless their names were on a deed. Therefore the wives could not convey their interest in the property. *Braukman v. Oregon DAS and Washington County*, Washington County Circuit Court Case No. C0615630CV and C061907CV (consolidated), (Letter Opinion of July 16, 2007, posted at: http://www.doj.state.or.us/hot_topics/pdf/measure37/braukman_decision.pdf)

The Yamhill County Circuit Court has also addressed the issue of the waiver date that applies to family members that were part of a family trust. Earl and Mary Smith were grantors and trustees of a real estate trust. Earl Smith died at some unknown prior date. Mary Smith died on April 2000. The son/inheritor, Randy Smith, filed the claim on behalf of the trust, not on his own behalf, and he argued that he was entitled to waiver based on the date his parents, or the trust, acquired the property not the date the property passed to him after his mother's death.

The Yamhill County Circuit Court found that Measure 37 creates two forms of relief - compensation or waiver. Claimants are entitled to only one form of relief and it is up to the government to choose which to provide. Each of these two forms of relief have different dates applied to different claimants. Compensation (reduction in value) is measured from the date of acquisition by a family member. Waiver is measured only from the date of acquisition by the present owner.

The claimant, Randy Smith, acquired his property interest as successor trustee to the trust only when Mary Smith died and the property passed to him. Prior to that date the trust was revocable at any time, and therefore he had no property interest in the land. *Smith v. State of Oregon et al.*, Yamhill County Circuit Court CV 060239; February 8, 2007, posted at: http://www.doj.state.or.us/hot_topics/pdf/measure37/decision_randy_smith.pdf

3. When the original owners transfer their original ownership, even to a family member, and retains only a leasehold interest in the property, any waiver must be based on the date of the leasehold interest, not the original date of acquisition.

Helen Coleman and her husband bought property in 1951. In 2001 they deeded the property to their son. Around the same time, the son gave his parents a lease on the property. Helen Coleman challenged a decision by the Department of Land Conservation and Development that found she was entitled only to waiver of regulations enacted after she acquired her leasehold interest in the property, not from 1951 when she first bought the property. The first part of the decision addressed the issue of whether the Circuit Court or the Court of Appeals had jurisdiction. The Marion County Circuit Court found it did not have jurisdiction. The Circuit Court went on to address the merits and agreed with DLCD's reasoning. *Coleman v. State of Oregon*, Marion County Circuit Court Case No. 06C15761, (Letter Opinion of March 13, 2007.)

C. Only land owners who received a Measure 37 claim can develop their property, not persons who bought the property with an approved waiver; the property must be developed before transfer.

Circuit Courts in Crook, Jackson, Multnomah and Yamhill Counties have found that a land owner cannot transfer their regulatory waiver to another person and enable that person to develop the property. The owner who received the waiver must develop the property himself or herself, before any transfer. *Crook County v. All Electors*, Crook County Circuit Court No. 05CV0015 (August 1, 2005 letter opinion); *Jackson County v. All Electors*, Jackson County Circuit Court No. 05-299-E-3(2) (January 19, 2007 Order); *Mathis v. State, Yamhill County* Circuit Court No. CV060308 (June 25, 2007 Letter Opinion); *Wiley v. Multnomah County*, Multnomah County Circuit Court Nos. 0702-01482 and 0704-04735. (Letter Opinion of September 20, 2007). See also the July 24, 2007 and November 9, 2007 memos on vesting at www.crag.org/justcompensation.

In addition, any subsequent transfer of the developed property does not confer the right to use the property as developed under Measure 37 unless the property owner can show the developed use satisfies tests for nonconforming uses or vested rights. *Wiley v. Multnomah County*, Multnomah County Circuit Court Nos. 0702-01482 and 0704-04735. (Letter Opinion of September 20, 2007) citing *Vanderzanden v. Land Conservation and Development*, Marion County Circuit Court Nos. 05C19565, 06C17267, 06C18036 (January 8, 2007 Letter Opinion.)

D. Land subdivided under a Measure 37 waiver cannot be developed except by the original Measure 37 claimant/land owner.

Two cases have addressed questions related to the division or subdivision of land under Measure 37. The decisions may seem contradictory at first blush, but they are quite distinct. The second decision has serious implications for counties considering development applications under Measure 37.

In a combined set of cases decided by the Marion County Circuit Court in January 2007, the court considered whether the state of Oregon had the authority under Measure 37 to waive regulations governing the division and subdivision of land. The petitioners appealed a decision that approved a residential subdivision on farmland. They contended that Measure 37 only applied to “uses” of land, and divisions or subdivisions of land only governed units of ownership, not the actual use of the land. If Measure 37 did not apply to state laws and rules limiting land divisions and subdivisions, then the state had no authority to waive those laws or rules, nor did local governments

The Circuit Court rejected that argument based on the definitions of state and local land use regulations in ORS 197.352(11)(B)(i) and (III). *Vanderzanden et al v. Land Conservation and Development*, Marion County Circuit Court Nos. 05C19565, 06C17267, 06C18036 (Letter Opinion of January 8, 2007) (On appeal – Decision Pending). This part of the *Vanderzanden* case stands only for the very simple proposition that the state has the authority under Measure 37 to waive state laws regulating land divisions and subdivisions.

The legal question regarding the legitimacy of a demand for a subdivision also came up in a case in Multnomah County Circuit Court in a decision issued on September 20, 2007. In that case, Elinor Wiley purchased 110 acres of land on Sauvie Island in 1955, when it was zoned for 2-acre lots. It was subsequently rezoned for Exclusive Farm Use. In her Measure 37 claim she proposed to subdivide part of her land now and perhaps more of it later. Multnomah County denied her Measure 37 claim and an appeal to the Circuit Court followed. The Circuit Court reviewed the requirements of Measure 37, which establishes a prerequisite that the claimant demonstrate a reduction in value. The claimant’s evidence regarding reduction in value was based on what the subdivided lots would sell for today.

The court noted that Measure 37 claimants cannot transfer a right to develop their land. They can only transfer land that has already been developed and the buyer of such land can only use it for the developed uses if it meets the tests for vested rights or nonconforming uses. If the undeveloped use that was requested was not transferable, there was no basis for showing what the market value was reduced. If there was no basis for showing a reduction in value then there was no authority to grant relief under Measure 37.

The Circuit Court identified a second reason why the appraisal data was not founded on a proper interpretation of the law: “In addition as the Oregon Court of Appeals stated in *Park v Board of County Commissioners*, ‘[p]latted but undeveloped land is not normally regard as a ‘use’ in zoning law for purposes of establishing a prior nonconforming use.’ 11 OR App 177, 196, 501 P2d 85, reh’g den (1972), rev den (1973). The vesting of rights involves a similar analysis. *Clackamas County v. Holmes*, 265 Or 193, 508 P2d 190 (1973). Therefore, neither the doctrine of nonconforming use nor the vesting of rights can be assumed for development rights transferred with undeveloped subdivided lots.”

Because the claimant could not transfer undeveloped properties and because a subdivision of land by itself would not meet the test for nonconforming use or vested rights, Wiley had failed to demonstrate a reduction in value. As a result she had failed to satisfy the basis for a Measure 37 claim.

The *Wiley decision* means that a local government cannot grant development permits for development of lots in an (undeveloped) subdivision unless the applicant is also the person who received a Measure 37 waiver. This case has significant implications on the manner in which Counties and the State of Oregon have determined value, and calls into question decisions where a reduction in value is assumed when the use the person/owner demands is for 4 houses or more.

E. The County cannot grant permits for development that is beyond the scope of the waiver.

The development permit application must be consistent with what the Measure 37 waiver(s) grant(s). This proposition is based directly on the language in ORS 197.352(8). For example, the county should not grant a zone change when the Measure 37 relief allowed only the non-application of land use laws for a specific, requested proposed development. Similarly, the scope of the proposed development should not exceed what was permitted in the waiver. A waiver to allow three houses on 40 acres cannot be the basis for approving twenty 2-acre lots on the property.

F. Any proposed development authorized under Measure 37 must comply with the state and local land use regulations in effect before the applicant acquired the property.

As discussed in section B above, Measure 37 (ORS197.352) exempts land use regulations from the requirements of waiver or compensation if the regulations were enacted before the current owner acquired his or her ownership interest in the property.

If the current owner bought or inherited their property on February 2, 1959, then he or she must satisfy the Oregon Revised Statutes and whatever local land use regulations were in effect before that date. If she or he bought or inherited the land on August 26, 1981, then she or he must satisfy the state laws and local regulations in effect before August 26, 1981.

Below is a description of some of the laws and regulations that were in effect at various dates.

- 1. A proposed subdivision of property within an irrigation district, requires the approval of the irrigation district, if the property was acquired between the effective date of a 1955 law and before its repeal in 1993. If the property was acquired after a 1973 law went into effect and before its repeal, then subdivisions of property inside water and drainage districts require approval by those districts**

The 1955 Oregon Legislature passed the following law requiring proposed subdivision plats within the boundaries of irrigation districts to be approved by the board of the irrigation district:

ORS 192.110 All subdivision plats located within the boundaries of an irrigation district, and all plans or plats for vacating, laying out, widening, extending, parking or locating streets or alleys in irrigation districts shall be submitted to the board of directors of the irrigation district and a report thereon shall be secured from the board in writing before approval by the governing body of the county. No such plan, plat or replat or deed shall be received or recorded in any public office, unless the approval of the board of directors of the irrigation district is indorsed thereon in writing. An appeal from the action of the board to the circuit court for the county in which the land is situated may be taken, perfected and prosecuted in the same manner as an appeal from the justice court. On appeal the matter shall be tried de novo.

In 1973, the law was slightly amended to include drainage and water control district and the procedures for approval were modified:

ORS 192.110 All subdivision plats located within the boundaries of an irrigation district, drainage district, water control district or district improvement company shall be submitted to the board of directors of the district or company and its approval thereof shall be secured from the board in writing before approval of any such plan, plat or replat of any subdivision by the governing body of the county. Except that if a subdivider is unable to obtain action or approval of any district or company within 45 days, the subdivider shall notify the governing body in writing and thereafter the governing body shall serve notice on that district or company by certified mail advising the district, or company that any objections to the plan, plat, or replat, must be filed in writing with the governing body within 20 days and failure of the district or company to respond shall be considered by the governing body as approval of such plan, plat, or replat and the governing body shall indorse hereon a finding that the district or company failed to act and the governing body may thereafter approve such plan, plat or replat without the approval of such district or company indorsed thereon.

The law was repealed in 1993.

2. Property acquired after September 16, 1967 that was receiving farm use assessment is subject to the limitations in state farm use statutes.

The 1963 Oregon Legislature enacted laws that created exclusive farm use (EFU) zoning. The legislation did not require counties to place agricultural land in EFU zones, but it did authorize such zoning. (The requirement that agriculture land be placed in EFU

zones was a result of the passage of Senate Bill 100 in 1973 and the adoption of Goal 3, in 1975, which are discussed below.)

The two sections of the statute defined the limited range of “farm uses” authorized in the zone (former ORS 215.203) and identified the five types of nonfarm uses that could be authorized in such zones (former ORS 215.213.) “Farm uses” included only those dwellings “customarily provided in conjunction with farm use.”

That farm use zoning statute was amended in 1967 when it was linked to a new farm use assessment provision (found at former ORS 308.345 to 308.375). Farm use assessment was as an important tax incentive to protect farmland because it required assessors to assess the value of land only as being used for farming, and not based on its potential development value.

A new subsection of ORS 215.203, defining “farm use” was added, stating:

(b) Except as limited by paragraph (c) of this subsection, farm use land shall not be regarded as being used for the purpose of obtaining a profit in money if the whole parcel has not produced a gross income from farm uses of \$500 per year for three of the five calendar years immediately preceding the assessment day of the tax for which farm use is claimed by the owner of allowed by the assessor, notwithstanding that such land is included within the boundaries of farm use zone....

Subsection (c) defines “current employment” of land in farm use.

In 1968, Yamhill County enacted an “agricultural zone”, the “A” zone. In May 1972, Marla Robison acquired 40-acres of property in the “A” zone. In 2006 she filed a Measure 37 claim seeking to divide the 40 acres into sixteen 2.5 acre lots. The state of Oregon chose not to provide compensation but instead waived any restrictions that were imposed after the date of acquisition. The Oregon Department of Land Conservation and Development (DLCD) contended that the applicant was limited to the uses permitted under the 1969 version of the EFU zoning statute. Ms. Robison appealed that ruling to the Yamhill County Circuit Court. The dispute in the case revolved around whether the county’s “A” zone was a qualified EFU zone under ORS Chapter 215 and therefore the limits in the 1969 version of the EFU statute, ORS 215.213, and not just the A Zone limitations were applicable. At that time, the EFU statute had a much narrower range of authorized uses permitted than today.

Yamhill County’s “A” Zone allowed many nonfarm uses not permitted in the EFU zone and did not refer to the statute. Because of this, which the claimant implied that the “A” zone was not really an EFU zone. In addition, the county was automatically giving EFU property tax assessment to all properties in the county, including rural residential and forest properties, not just farmland, which would mean the “A” Zone could not be a qualified EFU zone.

The court held that the county's intent regarding the "A" Zone (viz. that it was not a qualified EFU zone) was irrelevant; the standard was what the EFU assessment law required. On this basis the judge upheld DLCDC's determination.

3. Land development permits under Measure 37 for property acquired after October 4, 1973 and before January 25, 1975, are subject to the 1973 interim state planning goals.

The 1969 Oregon Legislature adopted Senate Bill 10. In former ORS 215.515(1) through (9) that legislation established nine "Goals for comprehensive physical planning...:

(1) "To preserve the quality of the air and water resources of the state. (2) To conserve open space and protect natural and scenic resources; ... (4) To conserve prime farm lands for the production of crops and provide for an orderly and efficient transition from rural to urban land use. (5) To protect life and property in areas subject to floods, landslides and other natural disasters.... (7) To develop a timely, orderly and efficient arrangement of public facilities and services to serve as a framework for urban and rural development.... (9) To ensure that the development of properties within the state is commensurate with the character and the physical limitations of the land."

http://www.lcd.state.or.us/LCD/MEASURE37/history_statutes_goals_rules.shtml

In a referendum of the legislation in May 1970, Oregon voters ratified this legislation. This first version of the goals were slightly modified and adopted as interim goals under Senate Bill 100. The keystone land use planning law was adopted by the 1973 Legislature and went into effect on October 5, 1973. (Simultaneously the legislature passed Senate Bill 101 which extensively revised the exclusive farm use zoning statute.)

Senate Bill 100 created the new Oregon Land Conservation and Development Commission (LCDC) and the Department of Land Conservation and Development (DLCD) and charged them with adopting permanent land use goals to replace the interim goals. These goals were to be the basis for mandatory land use plans and regulations. The statute gave LCDC and DLCD the responsibility for reviewing and approving local land use plans to ensure that they properly embody and carry out the state planning goals.

In the meantime, before the local plans and regulations were prepared, Senate Bill 100 included a requirement that "[p]rior to approval by the commission of its state-wide planning goals and guidelines under ORS 197.240, the goals listed in ORS 215.515 shall be applied by state agencies, cities, counties and special districts in the preparation, revision, adoption or implementation of any comprehensive plan." Former ORS 197.280.

The interim land use goals, closely modeled on the 1967 goals for physical plans found in former ORS 215.515:

“To preserve the quality of the air, water and land resources of the state. (b) To conserve open space and protect natural and scenic resources; ... (d) To conserve prime farm lands for the production of crops. (e) To provide for an orderly and efficient transition from rural to urban land use. (f) To protect life and property in areas subject to floods, landslides and other natural disasters;... (h) To develop a timely, orderly and efficient arrangement of public facilities and services to serve as a framework for urban and rural development;... (j) To ensure that the development of properties within the state is commensurate with the character and the physical limitations of the land.”

In March 2007, the Marion County Circuit Court rejected Measure 37 applicants (the “Petitioners”) claim for a waiver to subdivide prime farmland. The claimants/petitioners bought their property on June 23, 1974. The Circuit Court said:

“The interim goal at issue is to preserve prime farmland for agriculture. That goal was contained in ORS 215.515 in 1973: “Goals for comprehensive physical planning are:*** (d) To conserve prime farmland for the production of crops” This, and other goals are “regulations” as defined by ORS 197.352(11)(B) [a part of Measure 37]. Therefore, the interim goals were regulations in effect when Petitions purchased the property.” The Petitioners’ land was not yet classified as prime farmland until later is of no consequence,; the pertinent fact is that it is prime farmland, and it would violate the goal of conserving primer farmland for agricultural use to allow Petitioners to divide it into approximately 2-acre parcels and build a home on each.”

LaJoie v. State of Oregon, Marion County Circuit Court case number CV 060162 (Letter Opinion of March 28, 2007.)

The Oregon Department of Agriculture has posted a map on the web showing Measure 37 claims located on prime farmland as defined by the US Natural Resources Conservation Service:

<http://www.oregon.gov/ODA/NRD/docs/pdf/m37/clackamas37prime.pdf>

However, the current definition of “prime farmland”, which duplicates the federal definition, is narrower than the definition intended for those terms in 1973. The 1969 exclusive farm use statute was adopted and the interim goals passed in 1973 as part of Senate Bill 100 both refer to “prime farmland.” At the time, the US Soil Conservation Service (SCS) had not adopted a formal definition of “prime farmland.” Hector Macpherson, a co-author of Senate Bill 100 and 101 wrote a letter in the late 1990s indicating that his use of the phrase “prime farmland” was meant to be an informal description of the more productive lands in Oregon’s valleys that produced crops. The SCS (now the Natural Resources Conservation Service or “NRCS”) adopted a definition of “prime farmland” after 1973 that encompasses only a small percentage of Oregon farmland. For example, it does not include land that now grows wine grapes. When Goal 3 was adopted it defined “agricultural land” to a very broad spectrum of the soils as classified by the Soil Conservation Service (now NRCS).

4. Land development permits under Measure 37 for property acquired after January 25, 1975 and before LCDC approved local land use plans and regulations (early to mid-1980s) are subject to the statewide and regional land use planning goals and related administrative rules.

During 1974, LCDC held hearings around the state on proposed statewide and regional land use goals. On January 25, 1975, LCDC's statewide planning Goals 1 through 14 went into effect. During the late 1970's, cases in the Oregon Court of Appeals and Supreme Court concluded that under the provisions of Senate Bill 100, the goals also applied directly to individual land use decisions made by cities and counties, in the period before their plans are completed and approved by LCDC. (Once the local land use plans and regulations were approved by LCDC, which it often did section by section, the goals no longer applied to individual land use decisions, only the plans and regulations.)

The original text of the statewide planning goals and subsequent adopted amended versions, with their effective dates, can be found on the Department of Land Conservation and Development's website at:
http://www.oregon.gov/LCD/MEASURE37/history_statutes_goals_rules.shtml#OregonRevisedStatutes

Goal 3, "Agricultural Lands," mandated that agricultural land must be placed in the Exclusive Farm Use (EFU) zones described by Oregon Revised Statutes Chapter 215. The goal provided a definition of "agricultural lands" and required counties to preserve these lands. The Goal included standards governing when houses may be built and whether land might be divided into two or more parcels.

Any land now in an Exclusive Farm Use zone was subject to Goal 3 between January 25, 1975 and the time it was replaced by a local land use plan and regulation. This process has been acknowledged by LCDC as properly carrying out Goal 3. A May 2007 decision by Oregon Land Use Board of Appeals (LUBA) illustrated the application of the Goals to property purchased after the Goals went into effect but before the lands were zoned for exclusive farm use by Linn County. LUBA considered an application by the holder of a Measure 37 waiver to subdivide property that is today in an exclusive farm use zone. The landowner had bought the property, which was farmland, in October 1976. This was after Goal 3, "Agricultural Lands" went into effect but before local zoning implementing Goal 3 and ORS Chapter 215 had been adopted and approved by LCDC.

The Land Use Board of Appeals rejected the proposed subdivision because it did not meet the land division standards contained in Goal 3 (which cross reference standards in Oregon statutes in effect since 1973). *Friends of Linn County v. Linn County*, LUBA No. 2006-223, Final Opinion and Order (May 9, 2007).

Goal 4, "Forest Lands", went into effect on January 25, 1975. It required counties to conserve forest lands for timber production by protecting them from development. In other words, any land that is now in a forest zone was also subject to Goal 4 between

January 25, 1975 and when that protection was replaced by a local land use plan and regulation acknowledged by LCDC to properly carried out Goal 4.

Several other important goals also went into effect on January 25, 1975. They include:

- Goal 5 required local governments to carry out a balancing analysis to determine whether and how to conserve specified natural resources.
- Goal 14 (“Urbanization”) required the establishment of urban growth boundaries around all urban areas and prohibited urban development outside of them.
- Goal 15 (“Willamette Greenway”) went into effect on December 24, 1975 and applies to a narrow strip of land along the Willamette River.
- Goal 16 (“Estuaries”), Goal 17 (“Ocean Shorelands”), Goal 18 (“Beaches and Dunes”), and Goal 19 (“Ocean Resources”) went into effect on June 6, 1977. Each of these goals have a conservation emphasis but also allow for a balancing and trade-off of conservation with development.

During this same period LCDC adopted Oregon Administrative Rules that provided more detail regarding what the Goals require from local land use plans. These former administrative rules also apply to land development permits for land acquired during the period when they were in effect.

5. Land development permits under Measure 37 are subject to whatever local land use regulations were in effect before the property was acquired by the current owner.

In the 1960’s and early 1970’s some counties adopted land use plans and regulations for rural areas before the statewide land use laws were adopted. Usually these were the more populous and faster growing counties. Those plans and regulations included some weak protections for some of their agricultural lands. Those local plans and regulations would apply to any property that was acquired after they were in effect and before they were replaced by the more comprehensive and effective plans mandated by Senate Bill 100.

G. Applicants for development permits under Measure 37 must show their development complies with all current state and local laws that protect public health and safety and that regulate public nuisances

Oregon Revised Statutes 197.352(3) states that its provisions:

“shall not apply to land use regulations:

(A) Restricting or prohibiting activities commonly and historically recognized as public nuisances under common law. This subsection shall be construed narrowly in favor of a finding of compensation under this act;

(B) Restricting or prohibiting 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) To the extent the land use regulation is required to comply with federal law...”

The exemption for laws that reflect historic common law nuisance exemptions is particularly relevant and overlaps with the public health and safety exemption. The public nuisance exemption includes any laws and regulations that prohibit one landowner from using his or her land in ways that prevent a neighboring landowner from being able to use their property. Laws prohibiting the generation of large amounts of dust, noise, vibration, bright light at night, or other similar uses could fall within this exemption. In addition, regulations prohibiting or limiting certain dangerous or hazardous uses of property, including the production or use of explosive or flammable materials or liquids could fall within this exemption.

Regulations prohibiting or restricting development cannot be waived. For example...:

- Natural hazard areas, such as fire prone or floodway areas, are exempt from Measure 37 claims and cannot be waived
- Areas that do not have proper soils or facilities for sewage disposal are exempt from Measure 37 claims and cannot be waived.

Further, development plans may be exempt from Measure 37 claims or waivers if they...:

- May generate traffic safety problems. Certain provisions are designed to protect public safety and therefore cannot be the basis for a Measure 37 claim or be waived.
- Are located in groundwater limited areas..
- Are for a dangerous or hazardous activity, such as manufacturing explosive or dangerous chemicals.
- Generate noise and dust that would constitute a public nuisance and or health hazard, including aggregate mining.

H. Applicants must comply with all state and local laws that were enacted in order to comply with federal laws.

Ballot Measure 37 (ORS 197.352), includes an exception for land use regulations "[t]o the extent the land use regulation is required to comply with federal law." ORS 197.352(3)(C).

1. Applicants within the Columbia River Gorge National Scenic Area must comply with local land use regulations enacted to comply with the Scenic Area Act

In February 2007, the Oregon Court of Appeals considered an appeal from a decision by the Hood River County Circuit Court about whether "certain county land use ordinances that restrict development of properties within the Columbia River Gorge National Scenic Area fall within [the 197.352(3)(C)] exception." The court's answer was clear. It stated, "The trial court answered that question affirmatively, and, as amplified below, so do we." *Columbia River Gorge Commission et al v. Hood River County, Multnomah County and Wasco County et al*, Or App , P3rd, (2007)

2. Applicants must comply with state and local laws and regulations enacted to carry out the Federal Clean Air and Clean Water Acts

Under the Federal Clean Water Act and the Federal Clean Air Act, Oregon must adopt and implement various regulations to protect air and water quality. Those regulations apply to a range of activities including timber management and harvesting. Those regulations apply to all land development applications approved pursuant to Measure 37. This is a complex area of the law. Therefore you should contact the Oregon Department of Environmental Quality and your own legal counsel for assistance in tracing the Federal origins of state laws and regulations.

I. Conclusion

This memorandum underscores the uncertainty that faces claimants who choose to proceed under Measure 37 while also seeking to provide direction on the laws that apply at the time of a claimants' acquisition of land. To the extent that Measure 49 allows for development under Measure 37 or incorporates its provisions for claimants seeking to obtain more than 3 homes under the conditional path, this memo is intended to serve as a helpful interpretative guide for local and state government, as well as practitioners statewide.

Ballot Measure 37

Passed 2004; codified in Oregon Revised Statutes Chapter 197

197.352 Compensation for loss of value due to land use regulation. The following provisions are added to and made a part of ORS chapter 197:

(1) If a public entity enacts or enforces a new land use regulation or enforces a land use regulation enacted prior to December 2, 2004, that restricts the use of private real property or any interest therein and has the effect of reducing the fair market value of the property, or any interest therein, then the owner of the property shall be paid just compensation.

(2) Just compensation shall be equal to the reduction in the fair market value of the affected property interest resulting from enactment or enforcement of the land use regulation as of the date the owner makes written demand for compensation under this section.

(3) Subsection (1) of this section shall not apply to land use regulations:

(A) Restricting or prohibiting activities commonly and historically recognized as public nuisances under common law. This subsection shall be construed narrowly in favor of a finding of compensation under this section;

(B) Restricting or prohibiting 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) To the extent the land use regulation is required to comply with federal law;

(D) Restricting or prohibiting the use of a property for the purpose of selling pornography or performing nude dancing. Nothing in this subsection, however, is intended to affect or alter rights provided by the Oregon or United States Constitutions; or

(E) 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.

(4) Just compensation under subsection (1) of this section shall be due the owner of the property if the land use regulation continues to be enforced against the property 180 days after the owner of the property makes written demand for compensation under this section to the public entity enacting or enforcing the land use regulation.

(5) For claims arising from land use regulations enacted prior to December 2, 2004, written demand for compensation under subsection (4) shall be made within two years of December 2, 2004, or the date the public entity applies the land use regulation as an approval criteria to an application submitted by the owner of the property, whichever is later. For claims arising from land use regulations enacted after December 2, 2004, written demand for compensation under subsection (4) shall be made within two years of the enactment of the land use regulation, or the date the owner of the property submits a land use application in which the land use regulation is an approval criteria, whichever is later.

(6) If a land use regulation continues to apply to the subject property more than 180 days after the present owner of the property has made written demand for compensation under this section, the present owner of the property, or any interest therein, shall have a cause of action for compensation under this section in the circuit court in which the real property is located, and the present owner of the real property shall be entitled to reasonable attorney fees, expenses, costs, and other disbursements reasonably incurred to collect the compensation.

(7) A metropolitan service district, city, or county, or state agency may adopt or apply procedures for the processing of claims under this section, but in no event shall these procedures act as a prerequisite to the filing of a compensation claim under subsection (6) of this section, nor shall the failure of an owner of property to file an application for a land use permit with the local government serve as grounds for dismissal, abatement, or delay of a compensation claim under subsection (6) of this section.

(8) Notwithstanding any other state statute or the availability of funds under subsection (10) of this section, in lieu of payment of just compensation under this section, the governing body responsible for enacting the land use regulation may modify, remove, or not to apply the land use regulation or land use regulations to allow the owner to use the property for a use permitted at the time the owner acquired the property.

(9) A decision by a governing body under this section shall not be considered a land use decision as defined in ORS 197.015 (10).

(10) Claims made under this section shall be paid from funds, if any, specifically allocated by the legislature, city, county, or metropolitan service district for payment of claims under this section. Notwithstanding the availability of funds under this subsection, a metropolitan service district, city, county, or state agency shall have discretion to use available funds to pay claims or to modify, remove, or not apply a land use regulation or land use regulations pursuant to subsection (6) of this section. If a claim has not been paid within two years from the date on which it accrues, the owner shall be allowed to use the property as permitted at the time the owner acquired the property.

(11) Definitions - for purposes of this section:

(A) “Family member” shall include 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.

(B) “Land use regulation” shall include:

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

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

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

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

(v) Statutes and administrative rules regulating farming and forest practices.

(C) “Owner” is the present owner of the property, or any interest therein.

(D) “Public entity” shall include the state, a metropolitan service district, a city, or a county.

(12) The remedy created by this section is in addition to any other remedy under the Oregon or United States Constitutions, and is not intended to modify or replace any other remedy.

(13) If any portion or portions of this section are declared invalid by a court of competent jurisdiction, the remaining portions of this section shall remain in full force and effect. [2005 c.1]