

***Environs* Hot Sheet --**
Breaking Developments in Environmental Law

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Oregon Supreme Court Upholds Measure 37

On February 21, the Oregon Supreme Court handed down a comprehensive decision upholding the constitutionality of Ballot Measure 37, a 2004 voter-passed initiative that requires compensation when certain land use regulations reduce the value of private property. While many issues concerning the application of Measure 37 remain to be resolved, the Supreme Court's decision closes an important legal chapter in a longstanding controversy over the reform of Oregon's land use laws.

In 2002 the Court had invalidated a prior voter initiative, Measure 7, as an impermissible amendment of more than one portion of the Oregon Constitution in a single ballot measure. In November 2004, the Oregon voters passed Measure 37, which allows property owners to make claims for compensation if the value of the claimant's property has been reduced by land use regulations that are enacted or first enforced after the claimant (or certain family members) came into ownership. While Measure 7 had presented an amendment to the Oregon Constitution, Measure 37 created a purely statutory scheme under which the government was required to compensate the affected property owners unless it chose to "modify, remove, or not to apply" the regulation within 180 days of the owner's written demand for compensation.

The Oregon Supreme Court's latest decision, in *MacPherson, et al. v. Dept. of Administrative Services, et al.*, was unanimous and came quickly, reversing rulings in October by Judge Mary Mertens James of the Marion County Circuit Court. The rulings came in a declaratory judgment suit brought by 1000 Friends of Oregon and a collection of individuals, businesses and Oregon farm bureaus. The Marion County court had held that Measure 37 was unconstitutional, granting the plaintiffs' motion for summary judgment on several grounds. The Oregon Supreme Court considered and rejected each of the arguments involved.

First, relying on previous state and federal case law, Judge James had held that Measure 37 was an impermissible impairment of the state's police, or plenary, legislative power to regulate for public welfare. Noting that there was "no question that the land use regulations themselves are valid, and no claim that the regulations rise to the level of a taking" -- for which the constitution would require compensation -- the Marion County court reasoned that Measure 37 could not, by statute, require the government to pay compensation in order to enforce valid, previously enacted land use regulations. The Supreme Court disagreed, noting that any limitation on the

legislative power to enact Measure 37 must be grounded in some constitutional limitation, and the plaintiffs and the trial court had identified none. The Supreme Court found nothing in the measure that would divest the legislature or the people of the power to enact new land use laws, or to repeal or amend any provision of Measure 37 in the future.

Second, the Supreme Court also rejected the trial court's ruling that Measure 37 violated Article I, § 20 of the Oregon Constitution, which provides that no law may grant to "any citizen or class of citizens privileges, or immunities, which, upon the same terms shall not equally belong to all citizens." Although recognizing that legislation that does not discriminate on the basis of a suspect classification such as race, gender, or religious affiliation is not subject to "strict scrutiny," the trial court had found that Measure 37 failed to satisfy even the more lenient "rational basis" test. In light of its exclusion of property owners who purchased after the enactment of a challenged land use regulation, the trial court had found that Measure 37 was not reasonably related to its stated purpose of compensating property owners for the reduction in property value resulting from land use regulations. Acknowledging that Measure 37 distinguished between the two classes of property owners, the Supreme Court observed that many statutes create classifications, and that it had consistently rejected challenges to classifications that were created by statutes -- as distinguished from situations in which some classification that has independent social significance is selected as a basis for statutory discrimination. The Supreme Court held that Measure 37 did not violate Article I, § 20 of the Oregon Constitution.

Rejecting the Marion County court's holding that Measure 37 violated Article I, § 22 of the Oregon Constitution, providing that "the operation of the laws shall never be suspended, except by the Authority of the Legislative Assembly," the Supreme Court held that Measure amended but did not "suspend" any existing law.

The circuit court had also accepted the plaintiffs arguments that Measure 37 violated the separation of legislative, executive and judicial powers under Article III, § 1 of the Oregon Constitution, by improperly allowing legislative bodies rather than the executive to determine whether and when to enforce a general law. Acknowledging that the Measure provided that the "governing body responsible for enacting the land use regulation" must decide to pay compensation or "modify, remove or not . . . apply" the regulation, the Supreme Court concluded that this language could not be construed to impermissibly concentrate executive power in the legislative branch, noting that the "governing bodies" involved would include state agencies within the executive branch and local bodies that permissibly performed both legislative and executive functions. Accordingly, the Supreme Court held that Measure 37 did not violate the separation of powers.

Rejecting a last state constitutional objection, the Supreme Court also held that Measure 37 was within the scope of a valid waiver of sovereign immunity under Article IV, § 24 of the Oregon Constitution.

Finally, turning to the *Macpherson* plaintiffs' federal arguments, the Oregon Supreme Court sustained the validity of Measure 37 under the Due Process Clause of the Fourteenth Amendment to the United States Constitution. The Court held that the lack of an express

requirement that other affected property owners be given a hearing before any waiver of a land use regulation under Measure 37 did not violate procedural due process, as there was nothing to prevent governmental bodies applying the measure to provide for notice and hearings. The Court noted that Measure 37 did authorize governmental bodies to adopt appropriate procedures for processing claims. The Supreme Court also rejected the plaintiffs' arguments that Measure 37 violated substantive due process, finding that the plaintiffs could not meet the required "heavy burden" of demonstrating that the law had "no reasonable relation to a legitimate state interest." The Supreme Court noted that "[w]hether Measure 37 as a policy choice is wise or foolish" was beyond its purview.

While the application of the law enacted by Measure 37 presents many additional issues of interpretation, including the procedures to be employed and the eligibility of particular claims and claimants, the Oregon Supreme Court's decision appears to have concluded the legal debate over the law's validity -- if not the possibility that it will be further amended in the future. By some estimates the Measure will impact over 2,500 pending development applications statewide, and many localities are still struggling to establish the procedures and staffing to process claims. At the state level a ten-member "Big Look" public task force created by Oregon Senate Bill 82 begins initial hearings this Friday and might make some suggestions for reform of Oregon's land use process as early as 2007 (comprehensive proposals are expected in 2009). With the Supreme Court's decision, Measure 37's "compensation or waiver" scheme also seems destined to attract more attention from other states. In Washington State a similar measure, Initiative 933, is sponsored by the Washington Farm Bureau. The Washington initiative, known as the "Property Fairness Initiative," is in the signature-gathering phase and has until July 7 to collect 224,880 signatures from registered voters. If Initiative 933 makes the ballot and is approved by Washington voters in November, it could have an impact on the implementation of Washington's Growth Management Act and other land use laws by requiring compensation or waiver from land use regulations that affect the value of property.

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