



534 SW Third Ave., Suite 300, Portland, OR 97204 • (503) 497-1000 • fax (503) 223-0073 • www.friends.org

Southern Oregon Office • P.O. Box 2442 • Grants Pass, OR 97528 • phone/fax (541) 474-1155

Willamette Valley Office • 189 Liberty St. NE, Suite 307A • Salem, OR 97301 • (503) 371-7261 • fax (503) 371-7596

Lane County Office • 1192 Lawrence • Eugene, OR 97401 • (541) 431-7059 • fax (541) 431-7078

Central Oregon Office • P.O. Box 8813 • Bend, OR 97708 • (541) 382-7557 • fax (541) 382-7552

Date: June 15, 2005
From: Rob Zako, Transportation Advocate
Carrie MacLaren, Staff Attorney
To: Oregon Transportation Commission
Cc: Lane Shetterly, Director, DLCD
Governor Ted Kulongoski
Re: **Potential impacts of Measure 37 on ODOT**

Executive Summary

Measure 37 requires public entities to pay certain landowners to abide by land use regulations enacted after the owner or family member acquired the property, if the regulation restricts the use of the property and results in a reduction of the fair market value. In lieu of compensation, Measure 37 also authorizes public entities to exempt those landowners from regulations enacted after the landowner acquired the property.

Measure 37 may reduce the effectiveness (or increase the cost) of highway investments by allowing types and intensities of land uses in excess of what ODOT anticipates. Such unanticipated uses could include 1) significant growth outside urban growth boundaries that raises the general level of traffic on state highways, 2) significant development close to—but not directly accessing—state highways, especially near interchanges, and 3) access to state highways in violation of access management rules.

ODOT should determine what types of unanticipated uses could be allowed under Measure 37 that would have the greatest impacts on the effectiveness and/or cost of state highways. Then ODOT's modeling section should analyze some important test cases, assuming that what is allowed under Measure 37 actually occurs. Based on the results of this analysis, ODOT might consider revising its plans, policies and/or funding estimates. Depending on what is learned, it might be useful for ODOT to notify the Legislature and other interested stakeholders about potential changes in the effectiveness and/or cost of the state highway system.

Dear Commissioners,

Although we have communicated with this Commission and ODOT about Measure 37's implications for state highways, we wanted to take this opportunity—now six to seven months into the Measure—to highlight the types of challenges ODOT may face in planning and highway projects under Measure 37. Our interest isn't in these examples, per se, but rather to alert ODOT

to potential challenges under Measure 37 and to suggest some short-term steps ODOT might take in response to these potential challenges.

Measure 37

Measure 37 became effective on December 2, 2004 (30 days after the election) and is now the “law of the land.”

The measure provides that a landowner is entitled to receive just compensation when a land use regulation is enacted after the owner or a family member acquired the property if the regulation restricts the use of the property and reduces its fair market value. In lieu of compensation, the measure also provides that the government responsible for the regulation may choose to remove, modify or not apply (“waive”) the regulation. (The full text of Measure 37 is reproduced below.)

Insofar as no source of revenue has yet been identified to pay Measure 37 claims (some of which amount to tens of millions of dollars), many state agencies and local governments have concluded that their only option is to grant waivers to land use regulations. Indeed, since Measure 37 went into effect late last year, over a thousand claims have been filed around the state. Of those claims that have been determined valid, the vast majority have resulted in waivers being granted.

The Legislature has an opportunity to change Measure 37, and is currently working to amend Measure 37 through Senate Bill 1037 and House Bill 3120. At this point, it is uncertain whether any Measure 37 legislation will be adopted this session. Given the uncertainties of many of Measure 37’s provisions, it will probably take a while for courts to sort out exactly how Measure 37 applies.

Potential Impacts on ODOT

In general, Measure 37 may have an impact on ODOT because it *retroactively* allows types and intensities of land uses that were not previously allowed and that have not been anticipated in modeling of the performance of state highways. Measure 37 may also have an impact on ODOT because it could have a chilling effect *prospectively* on local governments looking to manage growth.

Here we offer a few scenarios of ways in which Measure 37 could impact ODOT.

1. Significant growth outside urban growth boundaries

Most of the Measure 37 claims filed so far are for development outside urban growth boundaries (UGBs) on land zoned for Exclusive Farm Use (EFU). While some of these claims are for single-family houses, many others are for residential subdivisions of varying sizes (10 to 100 or more units) or for major commercial developments.

The issue for ODOT is that current modeling practices assume that little development will occur outside UGBs. But we are already seeing that this assumption is invalid under Measure 37 and that significant development is likely to occur outside UGBs under Measure 37 waivers. While such development might not cause Oregon’s overall population to increase more than it otherwise would, it will change how that population is distributed. By allowing people to live, work or shop farther from urban centers, Measure 37 may result in longer trips, thus causing an increase in the average vehicle miles of travel per capita (VMT). Roughly speaking, an increase in VMT will increase the demands on the state’s transportation system, including the state

highway system. The result could be lowered performance of the state highway system, or else increased costs to improve the state highway system more or sooner than would be required in the absence of Measure 37.

Example A: Yamhill County

A good example is Yamhill County, which has seen actual and expected Measure 37 claims totaling almost 13,000 acres, or over 20 square miles. This amount of land is greater than the total land area of McMinnville, Yamhill County's largest city with a population of roughly 30,000.

- **Exhibit A1** is a map of Yamhill County Measure 37 Activity last updated by the Yamhill County Department of Planning and Development on 6/6/05. It shows all properties for which a Measure 37 claim is in the pipeline.
- **Exhibit A2** is the news story "Measure 37 casts 10,000-acre shadow," which appeared in *The (McMinnville) News-Register* on 5/21/05, describing how Yamhill County is updating its map of Measure 37 activity. Note that the total area of Measure 37 claims in Yamhill County has grown by over 2,000 acres just since the story was published!

2. Significant development close to—but *not* directly accessing—state highways, especially near interchanges

Especially near interchanges, ODOT attempts to protect the state highway system by working with cities and counties to limit the types and intensities of development allowed near state highways. One important tool for doing so is an Interchange Area Management Plan (IAMP).

The issue for ODOT is that Measure 37 may allow some property owners to *retrospectively* develop in ways not allowed under an IAMP. Moreover, Measure 37 may have a chilling effect on local governments and discourage them from agreeing to such restrictions near interchanges *prospectively*.

In particular, trip generation caps may not be effective under Measure 37. Such trip caps may fall under the Measure 37 definition of a "land use regulation."¹

Lacking effective controls in an IAMP, developments may occur near interchanges that cause interchanges to fail sooner than they otherwise would, which might cause ODOT to need to spend more money to improve the interchanges.

Example B: Interstate-84/Highway 86 Interchange

A good example is the Interstate-84/Highway 86 Interchange in Baker County just north of Baker City. Mr. Conchlin owns a 16.36-acre parcel that actually straddles the north side of the interchange but lies mostly in the northeast quadrant. Mr. Conchlin has owned the property since 1963. In 1970, Baker County designated the land EFU. Recently, Mr. Conchlin filed a claim under Measure 37. Baker County granted Mr. Conchlin a waiver to do anything he wants with his property, subject only to access requirements and state requirements. Currently, Mr. Conchlin says he just wants to build a house. But a commercial developer wishing to locate close to that interchange might make Mr.

¹ Pursuant to subsection (11)(B)(iii) of Measure 37, a land use regulation shall include "local government comprehensive plans, zoning ordinances, land division ordinances, and transportation ordinances."

Conchlin an offer he would find hard to refuse. In any case, ODOT is in the process of developing an IAMP for the interchange. Given the very real possibility of development on EFU lands under Measure 37, ODOT is planning for the contingency of having to realign access roads to meeting ODOT's spacing standards. Our understanding is that ODOT has no plans (or ability?) to prevent more intense development from occurring near this interchange as a result of Measure 37.

- **Exhibit B1** is a map of the Interstate-84/Highway 86 Interchange area in Baker County. The location of Mr. Conchlin's property is indicated.
- **Exhibit B2** is the North Study Area Map for the Revised Draft Interstate-84 Baker Interchanges Area Management Plan, published on 6/6/05. Mr. Conchlin's property, shown in purple, is Tax Lot #500 just north of and straddling the interchange.

Example C: Woodburn Interchange

Another good example is the Woodburn Interchange between Interstate-5 and Highway 214/219. The City of Woodburn has been holding hearings in advance of revising their land use designations as part of periodic review. According to a news story that recently appeared in *The Woodburn Independent*: "Amanda Dalton, representing North Willamette Association of Realtors said, 'With Ballot Measure 37, this is not the time to further regulate land use,' referring to restrictions on commercial development." It is our understanding that Ms. Dalton was opposing a proposed Interchange Management Area Plan, which would place a trip generation cap on some undeveloped commercial land already within the city (as well as on land proposed to be added into the city).

- **Exhibit C1** is the Proposed Zoning Plan for the City of Woodburn, dated 1/13/05.
- **Exhibit C2** is the news story "Woodburn planning enters second stage of process," which appeared in *The Woodburn Independent* on 3/29/05.

3. Access to state highways in violation of access management rules

Lastly, Measure 37 *might* allow access to state highways in violation of access management rules. While access management rules might not fall under the Measure 37 definition of a "land use regulation," that won't necessarily stop property owners from seeing such rules as land use regulations and thereby filing Measure 37 claims.

In our view, this scenario poses the least risk to ODOT and possibly no risk at all. But as with so much of Measure 37, the legal question may ultimately need to be decided in court.

Example D: North Medford Interchange

One example, although perhaps not a good example, is the North Medford Interchange between Interstate-5 and Highway 62. As you probably know, the Rogue Regency on Biddle Road wants a left-turn lane access in violation of access management rules. Having failed to secure such access through other means, the Rogue Regency recently filed a Measure 37 claim against ODOT. The claim is currently working its way through the system.

- **Exhibit D** is a map of the North Medford (Interstate-5/Highway 62) Interchange area. The location of the Rogue Regency is indicated.

Suggestions for Next Steps

Above we have tried to describe some scenarios where Measure 37 could significantly impact ODOT. There could be other scenarios or variations on these scenarios that we have not yet considered.

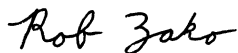
We urge ODOT to identify what kinds of unanticipated uses could be allowed under Measure 37 that would have the greatest impacts on the effectiveness and/or cost of state highways. In particular, we urge ODOT to seek legal opinions on the scenarios we have proposed.

Once ODOT has a better sense of what is possible under Measure 37, we urge ODOT's modeling section to analyze some important test cases, assuming that what is allowed under Measure 37 actually occurs. The intent should not be to predict what *will* happen but to get a sense of the range of what *could* happen: How significant could Measure 37 be to ODOT? ODOT might wish to run models of some projects of statewide significance.

ODOT might also wish to reexamine the scenario developed in the update of the Oregon Transportation Plan that assumes weakened land use controls: Do the assumptions in that scenario go as far as Measure 37 already is, for example, in allowing development across Yamhill County?

We appreciate that there is great uncertainty around Measure 37. Nevertheless, 1000 Friends of Oregon believes it is important for ODOT to begin assessing the potential impact of Measure 37 and respond accordingly—as we ourselves have had to do. We'd be happy share with you or your staff more about Measure 37. Please let us know how we can assist you in your efforts.

Sincerely,



Rob Zako
Transportation Advocate
1280-B East 28th Ave.
Eugene, OR 97403-1616
Phone: (541) 343-5201
Fax: (541) 683-6333
rob@friends.org

/s/ Carrie MacLaren

Carrie MacLaren
Staff Attorney
534 SW Third Ave., Suite 300
Portland, OR 97204
Phone: (503) 497-1000
Fax: (503) 223-0073
carrie@friends.org

Attachments:

- Appendix: Text of Measure 37
- Exhibit A1: Map of Yamhill County Measure 37 Activity (as of 6/6/05)
- Exhibit A2: "Measure 37 casts 10,000-acre shadow," *The (McMinnville) News-Register*, 5/21/05
- Exhibit B1: Map of the Interstate-84/Highway 86 Interchange area in Baker County
- Exhibit B2: North Study Area Map for the Revised Draft Interstate-84 Baker Interchanges Area Management Plan, 6/6/05
- Exhibit C1: Proposed Woodburn Zoning Map, 1/13/05
- Exhibit C2: "Woodburn planning enters second stage of process," *The Woodburn Independent*, 3/29/05
- Exhibit D: Map of the North Medford (Interstate-5/Highway 62) Interchange area

Appendix: Text of Measure 37

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 the effective date of this amendment 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 act.
- (3) Subsection (1) of this act 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;
 - (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 act 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 the effective date of this act, written demand for compensation under subsection (4) shall be made within two years of the effective date of this act, 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 the effective date of this act, 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 act, the present owner of the property, or any interest therein, shall have a cause of action for compensation under this act 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 act, but in no event shall these procedures

act as a prerequisite to the filing of a compensation claim under subsection (6) of this act, 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 act.

- (8) Notwithstanding any other state statute or the availability of funds under subsection (10) of this act, in lieu of payment of just compensation under this act, 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 act 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 act. 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 act. 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 act 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 act are declared invalid by a court of competent jurisdiction, the remaining portions of this act shall remain in full force and effect.