



Measure 37: Summary & Questions

This summary provides a brief overview of Measure 37. It is by no means definitive as there are many unanswered questions about both the substance and the implementation of this measure. Nonetheless, we hope it provides some useful information for citizens, local governments and others involved in land use planning. We will update this summary periodically as we learn more about Measure 37.

Summary of Measure 37

Measure 37 creates a claim for compensation for the enactment or enforcement of a land use regulation if the land use regulation **restricts** the use of the property **and** has the effect of **reducing** the fair market value of the property. Under this measure, state and local governments have a choice to:

- (1) pay compensation (based on date of acquisition by a family member or a legal entity owned by any one or combination of family members) and continue to apply and enforce the land use regulation; or
- (2) modify, remove, or not apply (“waive”) the regulation to allow the owner to use the property for a use permitted at the time the owner acquired the property.

The governing body can apply or adopt procedures for filing claims, **but** these procedures may not act as a prerequisite for a claimant filing a compensation claim in circuit court. When a written demand is made, the state or local government has 180 days to make a decision whether to reject the claim as invalid, pay compensation, or waive the applicable land use regulation. There is no requirement for the governing body to give notice, hold a public hearing, or take public testimony. If the applicable governmental entity does not make a decision within 180 days, the property owner may file a claim for compensation in circuit court and will be entitled to attorneys’ fees, expenses, and costs if the property owner prevails in the lawsuit.

Measure 37 creates a new definition for a “land use regulation,” including any statutes regulating the use of land, administrative rules and goals of the Land Conservation and Development Commission, local government comprehensive plans, zoning ordinances, land division ordinances, transportation ordinances, etc. The measure covers existing and future regulations (i.e., Measure 37 is retroactive and prospective).

Measure 37 exempts certain regulations from being eligible for a compensation claim.¹ In other words, while some regulations may fit the measure’s definition of a “land use regulation,” Measure 37 does not require the government to compensate or waive them, even if they restrict the use and reduce the value of the property.

¹ Exempt regulations include: (1) public nuisances under common law, narrowly construed; (2) public health and safety; (3) required to comply with federal law; (4) pornography or nude dancing; (5) laws enacted prior to the acquisition by a family member.

1. When claims can be brought under Measure 37? What must the impact of the land use regulation be to constitute a claim ?

Under Measure 37, an owner of property (or an interest in property, such as a lease)² may bring a claim against a public entity enacting or enforcing a land use regulation if:

1. The regulation restricts the use of the property and
2. Such regulation reduces the fair market value of the property interest. [See Section (1)]

2. Is Measure 37 retroactive?

Yes. Measure 37 applies to both existing and new regulations. [See Section (1)]

3. How is compensation calculated?

According to the measure, compensation is equal to the reduction in the fair market value of the property resulting from the enactment or enforcement of the land use regulation as of the date the landowner makes a written demand for compensation. [See Section (2)]

Compensation is based on the date of acquisition by the owner, or the date of acquisition by a family member, whichever occurred first.

Example: Grandpa Joe bought a farm in 1940. At that time, there was no zoning on the property. His son Sam inherited the property in 1970 and later sold the farm to his daughter Donna in 1995. Under Measure 37 Donna may make a claim for compensation based on the date of her grandfather's acquisition in 1940.

- The term “family member” is broadly defined in Section (11) of the measure to include grandparents and any “legal entity owned by any one of combination of those family members or the owner of the property.”
- How this works is not entirely clear. Does this family ownership capture every land use regulation in between a grandparent's purchase and a grandchild's inheritance?

The measure provides that compensation, and the fair market value of the property (with the regulation in place), should be measured as of the date of the written demand, but it does not set forth any guidelines for calculating the reduction in value. This raises a number of issues:

Issue: The reasonableness of the use allowed at the time of acquisition relates to valuation. For example, assume a property owner bought forest property prior to the enactment of any zoning. Theoretically, she could have built a shopping mall, but economically and practically speaking such a use would not have been feasible. Under Measure 37 does the property owner get compensated based on the lost ability to build a shopping mall?

Issue: The reasonableness of the use allowed at the time of acquisition related to valuation in another way: a monopoly or scarcity effect. At the time the property owner in the above example acquired the property, all other owners of property also had the theoretical ability to build a shopping mall, because no zoning regulations had yet been enacted. Therefore, to compute valuation as if the property owner had exclusive rights to build a shopping center would be to give that owner a monopoly effect that she did not enjoy at the time she acquired the property. For more discussion, see <http://arec.oregonstate.edu/faculty2/measure37.pdf>.

² Corporations and other legal entities are able to make claims under this measure.

4. **When must a claim be filed?**

Generally, claims must be filed within two years of the enactment of Measure 37 or the land use regulation **or** the date the public entity applies the land use regulation as an approval criterion to an application, whichever is later [See Section (5)]

- Because Measure 37 allows a claim to be filed within two years of the date of the application of the land use regulation, there really is no statute of limitations for filing a claim; a property owner can trigger a new date simply by applying for a use he/she knows will be prohibited or restricted under a land use regulation.
- This applies **both** to land use applications enacted or applied before the adoption of Measure 37 **and** to any land use regulations adopted after.

5. **When can a land use regulation be “waived”?**

In lieu of making a payment for compensation, Section (8) authorizes the governing body to “modify, remove, or not to apply the land use regulation to allow the owner to use the property for a use permitted at the time the owner acquired the property.”

- Unlike monetary compensation, this “waiver” provision is limited to uses the property owner could have done on the date of his acquisition of the property.

Example: Using the example from question #3, recall that Donna’s grandfather purchased the property in 1940, and she acquired it in 1995. Donna’s claim for compensation is based on her grandfather’s acquisition in 1940, **but** if the government makes the decision to waive the land use regulation in lieu of payment, the government is only authorized to waive the land use regulations to allow Donna to use the property for a use permitted at the time she acquired the property – 1995 – and not based on her grandfather’s purchase in 1940.

6. **Is the waiver transferable?**

Measure 37 creates a personal right, and not a transferable property right that runs with the land. See Section (8) of the Measure, which allows “the **owner** to **use** the property for a use permitted at the time the owner acquired the property.” [See Section (8)]

The Attorney General’s opinion is that land use waivers under Measure 37 are personal. In this opinion, the Attorney General explains that if the current owner conveys the property before the new use is established, then the Measure 37 waiver will be lost and concludes: “the relief is personal to the owner making the claim.” For more information, see <http://www.oregon.gov/LCD/docs/measure37/m37dojadvice.pdf>

7. **Who can waive a land use regulation?**

Only the “governing body responsible for enacting the land use regulation” is authorized to modify, remove, or not apply the regulation. At the local level, this measure appears to require county commissions and city councils to make the decision to waive a land use regulation. Likewise if it is an administrative rule, or statute, it is the state commission or legislature that is authorized to grant waivers. In many cases, a property will be subject to both local and state regulation. [See Section (8)]

8. Can a local government waive a land use regulation required by an administrative rule (such as the statewide planning goals) or statute?

Probably not. Section (8) only authorizes the “governing body responsible for enacting the land use regulation” to modify, remove, or not apply the regulation. Therefore, land use regulations enacted by more than one public entity (for example, farmland regulations) will likely need to be waived by both the county and the state.

- The line between where a local government is implementing a required state administrative rule or law, or implementing it with some additional protections is not always clear; this will be an area of ambiguity.

9. Is a public hearing or notice required?

No. Measure 37 does not require a public notice or hearing. The measure specifically provides that a decision made under Measure 37 is not a land use decision and therefore no notice to property owners is required, even if the “waiver” of land use regulations will reduce your property values. But, Measure 37 also does not prohibit state and local governments from holding public hearings or providing some sort of public notice. In fact, several local governments have adopted procedures to hold public hearings, at least on waivers (e.g., City of Eugene, Crook County).

- Note: A local government’s adoption of an ordinance implementing Measure 37 is a land use decision and must comply with those procedural and substantive requirements (including notice).

10. What if the government waives a land use regulation for my neighbor, the effect of which is to devalue the fair market value of my property? Is that covered under Measure 37?

No. For example, if your neighbor purchased her property before the enactment of a land use regulation governing the approval and siting of cell phone towers, and the local government waives that land use regulation, Measure 37 does not allow you to recover for any reduction in your property value as a result of the cell tower.

Ambiguities and Unanswered Questions

- **Is continuity of ownership required?** Unknown. Measure 37 is silent on this issue. However, if no continuity of ownership is required, it will greatly increase the impact of Measure 37.³ For example, if Sally purchases 80 acres of forested property in Coos County in 1960, and sells it to Bob in 1976, can Sally repurchase the property in 2004 and file a claim (for compensation or waiver) under Measure 37 based on her original date of acquisition in 1960?
- **How will compensation be calculated under Measure 37?** Unknown. While the measure specifies that the fair market value of the property with the land use regulation should be measured as of the date the owner makes written demand for compensation, it does not define how the reduction in value should be measured.
- **Is a “waiver” a personal right, or does it run with the land? Put differently, what is the effect of a transfer by the property owner to another person?** As discussed earlier, this provision clearly limits the waiver to allow “the owner to use the property for a use permitted at the time the owner acquired the property.” The Attorney General has also concluded that land use waivers are

³ Note: Discussion about “re-purchasing” property is not simply a hypothetical exercise. Rather, past experience with the original lot-of-record statutes exposed the loophole of previous owners repurchasing property in order to receive authorization to build a dwelling.

personal to the owner making the claim and are therefore not transferable. To see the Attorney General opinion, go to <http://www.oregon.gov/LCD/docs/measure37/m37dojadvice.pdf>.

- **If a waiver is granted, who chooses the “use” that is permitted?** Probably, the local public entity waiving the land use regulation. Measure 37 authorizes public bodies to waive the land use regulation to allow the owner to “use the property for a use permitted at the time the owner acquired the property.”
- **When is a land use regulation a restriction or prohibition for the protection of health and safety?** Unknown. Many land use regulations serve multiple purposes, including important protections for public health and safety.
- **What is the burden of proof for claimants under Measure 37?** To have a claim under Measure 37, a land use regulation must both restrict the use of property and reduce its fair market value. Therefore, it appears that claimant must at least provide information proving ownership, identifying the applicable land use regulation(s) and the restriction(s) on the use of the property, and substantiating some reduction in the fair market value of the property as a result of the particular land use regulations.

That said, while Measure 37 expressly allows a government to adopt local procedures for the processing of claims, the measure also provides that such procedures cannot act as a prerequisite for filing a lawsuit in circuit court. [See *Section (7)*]. Whether procedures requiring a claimant to provide substantial evidence to support a claim for compensation are “substantive” or “procedural” is unclear.

- **Where will funding for Measure 37 come from (both for administrative costs and for compensation)?** Measure 37 does not provide a funding source for either administrative costs or for compensation for claims.

Guidance for Ordinances Implementing Measure 37

Oregonians want fairness in the application of regulations, open government and strong protections for our neighborhoods, farms, forests, and landscapes. While we recognize that Measure 37 imposes large, unfunded administrative costs on city, county, and state governments, we hope that local and state governments continue to engage citizens in the implementation of Measure 37, and in the decisions to pay claims or waive land use regulations. We applaud the actions of many cities and counties who have already done so.

Recommendations for city and county governments:

- Provide for public notice and hearings on decisions to pay claims or waive land use regulations.
- Participate in the state registry of claims managed by the state Department of Administrative Services. To see the list of state claims compiled by the Department of Administrative Services, see <http://www.oregon.gov/DAS/Risk/M37Registry.shtml>

More information:

For more information on local ordinances concerning Measure 37, see

<http://www.orcities.org/currentIssues/m37.cfm>. For information on the state rules for processing Measure 37 claims, see <http://www.oregon.gov/DAS/Risk/docs/Measure37Rule.pdf>

We also encourage neighbors and citizens to participate in the decisions on Measure 37 claims.

- **Submit comments** on Measure 37 claims that affect you or your community.
 - Contact your city or county's planning office for information on how and when to submit comments.
 - Contact the Department of Administrative Services to receive notice of Measure 37 claims filed with the state (note: if you are a neighboring property owner, you should receive notice from the state).

Oregon Department of Administrative Services
State Services Division
Risk Management - Measure 37 Unit
1225 Ferry Street SE, U160
Salem, Oregon 97301-4292
Attn: Jim Pigsley

- **Contact your State Representative and Senator** about Measure 37 claims that affect you or your community. Also contact Senator Charlie Ringo, Chair of the Senate Land Use and Environment Committee, and Representative Bill Garrard, Chair of the House Land Use Committee. For contact information, see <http://www.friends.org/issues/m37officials.html>

Note: This material is provided for general information purposes only, and is not intended to serve as legal advice. You are urged to consult a lawyer concerning your own situation and any specific legal questions you may have. If you have any questions or feedback concerning this summary, contact 1000 Friends of Oregon at 503-497-1000 or info@friends.org.