MacPherson v. Department of Administrative Services: Amicus Curiae Brief of the Oregon Cattlemen's Association, Oregon State Grange, and Oregonians In Action

Foreword by Bill Moshofsky:* Introduction to Brief by David Hunnicutt on Measure 37

The following amicus brief was submitted by David Hunnicutt, president of Oregonians In Action (OIA), to the Oregon Supreme Court in *MacPherson v. Department of Administrative Services*, the lawsuit challenging the constitutionality of Ballot Measure 37.[1] The brief was submitted on behalf of OIA, the Oregon Cattleman's Association, and the Oregon State Grange. In *MacPherson*, the Oregon Supreme Court unanimously upheld the constitutionality of Measure 37.[2]

* President, Oregonians In Action Legal Center. Mr. Moshofsky is a retired attorney, having received his law degree from the University of Oregon in 1948. Since his retirement, he has been active as nearly a full-time volunteer on land-use and property rights issues for the past sixteen years.

[1] MacPherson v. Dep't of Admin. Serv., 340 Or. 117 (2006).

[2] *See id*. at 141.

Oregon citizens voted in favor of Measure 37 in November 2004 with a 61% majority.[3] The measure requires state and local governments to either (1) compensate landowners for loss of use and value caused by certain land-use regulatory restrictions imposed after their land was acquired, or (2) remove the restrictions.[4]

Measure 37 was needed to bring fairness to Oregon's unique and highly controversial land-use regulatory system, which was instituted in 1973 with the passage of Senate Bill 100.[5] As the amicus brief demonstrates, implementation of Oregon's land-use laws has resulted in a disproportionate impact on rural property owners: restrictive farm and forest zones have been imposed on nearly 97% of private rural land with little regard to the productivity of the land for farm and forest uses.[6]

As the amicus brief explains, the impact of Measure 37 has been grossly overstated by its opponents. At current rates, claims made under the measure will impact fewer than 1% of Oregon's 61,000,000 acres.[7] In addition, by exempting regulations needed to protect public health and safety and prevent nuisances,[8] Measure 37 differentiates between regulations needed to "prevent harm" and regulations imposed to "provide public benefits." The measure does not alter rules relating to urban growth and does not require governments to provide services (such as sewer, water, and roads) for developments that may be allowed under Measure 37 outside of urban growth boundaries. Moreover, its retroactive effect is limited to claims of landowners who are still living and who suffer from regulations imposed after they acquired their land.[9]

The amicus brief informs the court and parties that despite the rhetoric of its opponents, Measure 37 has not resulted—and will not result—in a major change to Oregon's existing land-use system. Measure 37 *will* ensure that Oregon property owners who have suffered disproportionately because of land-use laws alleg-

[3] Oregon Dep't of Land Conservation and Dev., Measure 37 Information: Measure 37 Approved by Voters, *available at* http://www.oregon.gov/LCD/measure37.shtml#Measure_37_Approved_by_Voters (last visited Apr. 9, 2006).

[4] Measure 37, OR. REV. STAT. § 197.352 (2003); *MacPherson*, 340 Or. at 121.

[5] Senate Bill 100 is codified as amended in ORS chapter 197.

[6] *See infra*, text accompanying notes 12-13.

[7] *See infra*, paragraph preceding text accompanying note 22.

[8] Measure 37, OR. REV. STAT. § 197.352(3) (2003).

[9] *See id.*

edly intended to benefit the public as a whole will not continue to bear the entire cost of those laws.

INTRODUCTION

The Oregon Cattlemen's Association (Cattlemen) is a nonprofit corporation formed in Baker County in 1913. The Cattlemen serves as the political and legal voice of the cattle industry in Oregon. A major part of the Cattlemen's mission is the protection of the rights of ranchers to make reasonable use of their property, which is why the Cattlemen vigorously supported Measure 37 during the November elections. The Cattlemen believes that Measure 37 is needed to protect the viability of Oregon's ranching industry.

The Oregon State Grange (Grange) is a nonprofit fraternal organization composed of members predominantly from small towns and rural areas. The Grange is part of a national network of grange organizations located in thirty states. As a predominantly rural organization, the Grange advocates for legislation that assists its members, ranging from rural quality-of-life issues and rural economic development to taxation and transportation issues. The Grange was an active supporter of Measure 37, and believes the protection of property rights is an important part of the history and tradition of this state.

Oregonians In Action (OIA) is a nonprofit social welfare corporation which advocates for the protection of the rights of private property owners throughout Oregon. OIA was the lead organization in the campaign for passage of Measure 37, and believes that Measure 37 achieves balance and fairness in Oregon's land-use regulatory system. The arguments presented in this case have a direct impact on OIA's mission, and will affect OIA's ability to advocate for the rights of individuals both in the Legislature and through the initiative.

ARGUMENT

I

MEASURE 37 WILL NOT HAVE A SIGNIFICANT IMPACT ON EXISTING LAND-USE PATTERNS

In the months since Measure 37 became effective, its impact on existing zoning has not been nearly as significant as the measure's opponents would have this Court believe. In fact, a survey

of claims approved by the State since the measure has been in effect illustrates that the amount of land impacted by Measure 37 is not significant.

The Oregon Department of Land Conservation and Development (DLCD) has been designated by the Oregon Department of Administrative Services as the lead agency on nearly all Measure 37 claims filed with the State to date. This should come as no surprise, since nearly all Measure 37 claims involve administrative rules of the Land Conservation and Development Commission (LCDC).

As part of its obligation to inform the public of the status of Measure 37 claims, the DLCD maintains a website listing the approved final orders on each of its Measure 37 claims.[10] Final orders are separated by day and by month, and a copy of each final order, along with the final staff report prepared by the DLCD, is included on the website.[11]

A review of the final orders prepared by the DLCD is both enlightening and unsurprising. A large majority of the final orders are for lands zoned for farm or forest use. This should come as no surprise, given that nearly 97% of the privately owned rural land in Oregon is zoned for exclusive farm or forest use.[12] In fact, of the approximately 61,500,000 acres of land in Oregon, nearly 26,000,000 acres are zoned for exclusive farm or forest use, and nearly 34,000,000 acres are owned by federal, state, or local government, leaving a mere 1,500,000 acres for privately owned land in rural-residential, commercial, or industrial zones, or inside urban growth boundaries.[13]

Thus, when nearly 98% of the state's total land mass is owned by government or is zoned for farm or forest use, it is no wonder that claims arising under Measure 37 are found predominantly on land zoned for farm or forest use (which should not necessarily be equated with land that can actually be used for farm or forest activities).

In the four full months since the DLCD began issuing final orders on Measure 37 claims (June, July, August, and Septem-

[10] The final orders may be found at Oregon Dep't of Land Conservation and Dev., M37 Final Staff Reports and Final Orders, *available at* http://www.oregon.gov/LCD/m37finalstaffreports.shtml (last visited Apr. 9, 2006).

[11] *See id.*

[12] Oregon Dep't of Land Conservation and Dev., "New Figures Show How State's Rural Lands Zoned" (1995).

[13] *Id.*

ber), about 13,400 acres of land have been approved for Measure 37 claims that will result in property owners being allowed to use their property in a manner that would not be allowed under existing zoning. The changes in use may be as minor as allowing a property owner to build one single-family dwelling on a 59.7-acre parcel in Yamhill County[14] or may involve an approval to subdivide a 1337-acre tract in Grant County into thirty-two twenty-acre lots and sixty-five ten-acre lots.[15]

At current rates, about 40,000 acres of land per year will be approved for some type of use not contemplated by current zoning. But these averages will decline significantly in the near term as property subject to Measure 37 claims changes hands, either by death of the current owner or by sale or other transfer of the property prior to filing a Measure 37 claim.

A survey of the State's application of Measure 37 to submitted claims illustrates this point. A few of the Measure 37 claims approved by the DLCD to date involve claimants who have owned their property continuously since before the passage of Senate Bill 100 (1973) and the adoption of the LCDC's statewide land-use planning goals in 1975. These two events made significant changes in Oregon's regulatory land-use system, imposing new burdens on rural property owners. For example, Opal Burkhard purchased 116 acres of land in Columbia County in 1946.[16] As the DLCD correctly notes, at the time of Mrs. Burkhard's purchase there were no state laws regulating the uses of her property, save for a few provisions—currently found in Oregon Revised Statute (ORS) Chapter 92—that do not affect Mrs. Burkhard's claim.[17] Consequently, Mrs. Burkhard will be able to

---

[14] *See* Final Staff Report and Recommendation, James Scheiper, Aug. 11, 2005 *available at* http://www.oregon.gov/LCD/docs/measure37/finalreports/M119870_Schieper_Final_Report.pdf (last visited Apr. 9, 2006).

[15] *See* Final Staff Report and Recommendation, Nelda Martin, Sept. 2, 2005 *available at* http://www.oregon.gov/LCD/docs/measure37/finalreports/M120131_Martin_Final_Report.pdf (last visited Apr. 9, 2006). Whether this level of development will ever occur, whether a market for this type of development exists in Grant County, or whether there are services sufficient to allow development of each of these proposed subdivision lots is not known. But allowing ten- and twenty-acre parcels on land zoned for exclusive farm use is contrary to state law (OR. REV. STAT. § 215.780 (2003)) and is included in the total amount of acreage changed by Measure 37 claims to date, regardless of whether the property use ever actually changes.

[16] *See* Final Staff Report and Recommendation, Opal Burkhard, June 8, 2005 *available at* http://www.oregon.gov/LCD/docs/measure37/finalreports/M118963_Burkhard_Final_Report.pdf (last visited Apr. 9, 2006).

[17] *Id.*

divide her property into parcels of about four acres in size, provided she can do so in a manner that complies with existing health-and-safety laws, which are exempt from Measure 37.

But a review of the claims approved by the DLCD to date shows that a more typical claim involves property purchased sometime *after* the effective date of Senate Bill 100. For example, John and Julie Benton acquired property in Hood River County in 1977, after the effective date of Senate Bill 100 and after the LCDC's statewide planning goals had been adopted.[18] In their Measure 37 claim, the Bentons sought the right to subdivide their fifty-seven-acre parcel, which is currently zoned for exclusive farm use, into residential lots of about one-quarter acre in size.[19]

The DLCD approved the Bentons claim in part, recognizing that the eighty-acre minimum parcel-size standard in ORS 215.780 was adopted in 1993, some sixteen years after the Bentons had acquired their parcel.[20] But the DLCD also recognized that, at the time the Bentons acquired their property in 1977, Hood River County ordinances imposed a five-acre minimum parcel size on the Benton property; moreover, Statewide Planning Goal 3 applied directly to the property because the County's land-use ordinance had not been acknowledged by the LCDC as being in compliance with the goals.[21]

Consequently, not only was a five-acre minimum parcel size the smallest division allowed on the Benton property at the time the Bentons acquired an interest in the property, but the Bentons would be required to demonstrate that any division of their fifty-seven-acre parcel resulting from their Measure 37 claim (1) would create parcels of a size "appropriate for the continuation of the existing commercial agricultural enterprise in the area," and (2) could be shown to comply with the legislative intent established by ORS 215.243.

In other words, not only would the Bentons not qualify for the quarter-acre lots they sought in their Measure 37 application, they likely would not even qualify to divide their fifty-seven-acre

---

[18] *See* Final Staff Report and Recommendation, John and Julie Benton, June 8, 2005 *available at* http://www.oregon.gov/LCD/docs/measure37/finalreportsM118961_Benton_Final_Report.pdf (last visited Apr. 9, 2006).

[19] *Id.*

[20] *Id.*

[21] *Id.*

parcel into five-acre lots. A review of the DLCD's final orders demonstrates that this is the position that the DLCD is taking on all Measure 37 claims for property acquired after the adoption of Senate Bill 100.

For purposes of significant change, therefore, only rural properties acquired by current owners prior to 1973 will change in ways that are significantly different from current zoning—and then only if the properties were not subject to local zoning at the time of acquisition. Nevertheless, because owners like the Bentons *may* be able to make some type of different use of their property, their acreage has been included in the 13,400 acres of land approved by the DLCD for Measure 37 claims.

The requirement of long-term ownership illustrates why Measure 37 approvals will decrease significantly with the passage of time. The Measure 37 claimants who have owned their property since before the adoption of Senate Bill 100, and who will have the ability to make significant changes on that property, already represent a small percentage of the claims filed. By virtue of their length of ownership, these people will be elderly and will either file their claim (or not) in the very near future, presuming Measure 37 survives. Thus, to expect the claims to be approved at a rate of 40,000 acres per year for any length of time is simply not supported by DLCD practice or by common sense.

But even if claims were to average 40,000 acres per year, in ten years (at which point claimants seeking to avoid the enforcement of statewide planning goals and farm/forest zoning will need to demonstrate ownership of their property for more than forty-two years) the amount of acreage changed as a result of Measure 37 claims would total about 400,000 of Oregon's 61,500,000 acres. For all of the hype surrounding Measure 37, current trends indicating that Measure 37 will impact slightly over one-half of one percent (.005) of the state's land mass illustrate that Measure 37 will not end the world as we know it.

For those owning property subject to valid Measure 37 claims, however, the impact of Measure 37 is significant, and represents a return of the rights they obtained with the acquisition of their property. Contrary to the assertions of Judge James[22] that property owners with valid Measure 37 claims are receiving a "windfall," property owners like Opal Burkhard are simply getting

[22] [Editor's note: Judge Mary Mertens James is the Marion County Circuit Court judge who held Measure 37 unconstitutional.]

back the rights that were taken from them in the first place. For these property owners, Measure 37 represents a return of their investment.

II

THE TAKINGS CLAUSE IS A REMEDY IN NAME ONLY FOR PROPERTY OWNERS SUBJECT TO INEQUITABLE LAND-USE REGULATIONS

Given the broad scope of Oregon's land-use regulatory system and its economic impact on property owners, frequent litigation under the just-compensation clause of the Oregon Constitution (article I, section 18) would seem to be an inevitable byproduct. This is particularly true given the method of constitutional interpretation chosen by this Court, in which the court attempts to "identify the historical principles embodied in the constitutional text and to apply those principles faithfully to modern circumstances."[23]

But reported takings challenges to Oregon land-use regulations have been few and far between. There are two primary reasons for this lack of litigation.

A. Lack of Guidance From the Oregon Appellate Courts

First, this Court has interpreted article I, section 18 to provide that no taking occurs if the property owner retains "some substantial beneficial use" of the property.[24] By necessity, this subjective test results in an ad hoc, fact-based inquiry that provides little precedential value for subsequent litigants and gives counsel for property owners little guidance in advising clients.

The seminal case on what constitutes a deprivation of "all economically viable use of the property" for purposes of article I, section 18 is *Dodd v. Hood River County*.[25] In *Dodd*, the plaintiff property owners purchased a forty-acre parcel of land zoned for forest use in 1983 for $33,000.[26] At the time of the purchase, a single-family dwelling was an authorized use on the property.[27]

---

[23] Coast Range Conifers v. State, 339 Or. 136, 142, 117 P.3d 990, 993 (2005).

[24] Fifth Ave. Corp. v. Washington County, 282 Or. 591, 609, 581 P.2d 50, 60 (1978); Dodd v. Hood River County, 317 Or. 172, 184, 855 P.2d 608, 615 (1993).

[25] 317 Or. 172, 855 P.2d 608 (1993).

[26] *Id.* at 176, 855 P.2d at 610.

[27] *Id.*

Subsequent to the purchase of the property, but prior to the plaintiffs' request for approval to site a dwelling, Hood River County—in order to bring its comprehensive plan and zoning ordinance into compliance with Statewide Planning Goal 4—adopted new regulations prohibiting the siting of a dwelling on the plaintiffs' property.[28]

The plaintiffs submitted applications for a land-use permit, conditional-use permit, and zone and comprehensive-plan change to allow construction of a single-family dwelling on their property.[29] As part of the application, plaintiffs submitted a report from a forestry expert indicating that the value of plaintiffs' property without the ability to site a dwelling was $691.[30] The County's forester submitted a report indicating that the value of the timber on plaintiffs' property was $10,000.[31] Plaintiffs' applications were denied by the County, and an appeal ensued.[32]

On review, this Court rejected plaintiffs' takings challenge, eschewing a formula based on the comparison between purchase price and current value under the regulation for determining whether the challenged regulation has resulted in loss of all economically beneficial use of the property.[33] Instead, this Court decided that, on the facts presented in the case, a use that is capable of generating $10,000 in profit on land purchased for $33,000 "certainly constitutes some substantial beneficial use."[34]

Unfortunately, this Court failed to define the factors that should be considered in analyzing a takings claim under the Oregon Constitution.[35] After acknowledging the lack of any defining standards to guide the bench, bar, and citizenry, this Court then failed to indicate what it considered to be the factors needed to analyze a takings claim.

In the end, *Dodd* left as many questions unanswered as it answered. One can glean from *Dodd* that a takings challenge under the Oregon Constitution *will not necessarily* be based on a comparison between the purchase price of the property and the fair market value of the property under the subsequent regula-

[28] *Id.*
[29] *Id.* at 176-77, 855 P.2d at 611.
[30] *Id.* at 177, 855 P.2d at 611.
[31] *Id.*
[32] *Id.*
[33] *Id.* at 185-86, 855 P.2d at 616.
[34] *Id.* at 186, 855 P.2d at 616.
[35] *Id.* at 184 n.14, 855 P.2d at 616 n.14.

tions, but that it *may* be based on this analysis, or on some other analysis that will then be applied to the facts of the case in a manner known only to this Court. Such an analysis hardly inspires confidence in property owners wondering whether a regulation has resulted in a taking of their property, and would make even the bravest of property owners question their sanity before pressing forward with a regulatory-takings claim.

Since *Dodd*, no case has further fleshed out the parameters of what constitutes sufficient deprivation of use so as to constitute a regulatory taking by government.

The Oregon courts have fared no better in analyzing the requirements for a valid regulatory-takings claim under the Takings Clause of the United States Constitution, most likely because the United States Supreme Court has struggled to articulate cohesive guidelines for Fifth Amendment regulatory-takings cases. Although a few Oregon cases cite to the three-prong test for a regulatory taking found in *Penn Central Transportation Co. v. City of New York*,[36] these cases provide no guidance for litigants in the proper interpretation of each prong, and the United States Supreme Court has provided little guidance on applying the test.[37]

Rather than relying on the *Penn Central* methodology, Oregon appellate courts seem to prefer the two-prong test for a Fifth Amendment taking first set out in *Agins v. City of Tiburon*.[38] The reasons for the courts' reliance on *Agins* instead of *Penn Central* are unclear, but one could surmise that the courts feel more comfortable applying *Agins* since the second prong of the *Agins* test approximates the "substantial economic use" test developed by this Court for interpreting regulatory takings under the Oregon takings clause.[39]

---

[36] 438 U.S. 104 (1978)

[37] *See* Marquam Inv. Corp. v. Beers, 47 Or. App. 711, 615 P.2d 1064 (1980); Cope v. City of Cannon Beach, 317 Or. 339, 855 P.2d 1083 (1993); Coast Range Conifers v. State, 339 Or. 136, 117 P.3d 990 (2005).

[38] 447 U.S. 255 (1980).

[39] For cases applying *Agins*, *see* Dolan v. City of Tigard, 113 Or. App. 162, 832 P.2d 853 (1992), *aff'd* 317 Or. 110, 854 P.2d 437 (1993), *rev'd* 512 U.S. 374 (1994); Nelson v. Benton County, 115 Or. App. 453, 839 P.2d 233 (1992); Stevens v. City of Cannon Beach, 317 Or. 131, 854 P.2d 449 (1993); Cope v. City of Cannon Beach, 317 Or. 339, 855 P.2d 1083 (1993); Rogers Machinery, Inc. v. Washington County, 181 Or. App. 369, 45 P.3d 966 (2002). The United States Supreme Court no longer applies the first prong of the *Agins* test as a criteria for evaluating a regulatory takings claim. *See* Lingle v. Chevron 544 U.S. 528 (2005).

Unfortunately, Oregon case law interpreting *Agins* is nearly as cryptic as the case law interpreting article I, section 18 of the Oregon Constitution. The primary Oregon case interpreting *Agins* is *Cope v. City of Cannon Beach*.[40] In *Cope*, the plaintiff landowners challenged a municipal ordinance prohibiting the use of dwellings in residential areas for "transient occupancy," which the City defined as rental of a dwelling for a period of less than fourteen days.[41] Plaintiffs commenced a facial challenge to the ordinance under the Fifth Amendment.[42]

This Court, relying on *Agins*, found that the ordinance did not effect a taking of the plaintiffs' property. Applying the first prong of *Agins*, this Court held that the ordinance substantially advanced a legitimate interest of the City in that it protected the residential character of the area and expanded the supply of affordable housing for area residents.[43]

This Court went on to find that the City's ordinance satisfied the second prong of *Agins*, as owners of dwellings in the City's residential areas could reside in the dwellings or could use them as long-term rentals, either of which constituted economically viable use of the properties.[44] Nothing in this Court's opinion indicates that the plaintiffs offered evidence demonstrating a loss in value to their particular parcel, most likely because the plaintiffs' challenge to the ordinance was facial.

Beyond *Cope*, there is little Oregon appellate-court guidance to property owners wishing to make takings claims in Oregon courts under the Fifth Amendment. What little guidance exists cautions against filing a claim. Oregon property owners wishing to challenge a land-use regulation are thus left with little hope under the Oregon courts' analysis of either the state or federal takings clause.

B. The "Ripeness" Requirement

The second reason for a lack of takings litigation concerning Oregon land-use regulations is the requirement that a property owner "ripen" a takings claim in order to pursue it in court by submitting land-use applications to the appropriate public entity

[40] 317 Or. 339, 855 P.2d 1083 (1993).
[41] *Id.* at 341-42, 855 P.2d 1084.
[42] *Id.* at 342, 885 P.2d 1084.
[43] *Id.* at 345-46, 885 P.2d 1086.
[44] *Id.* at 346, 885 P.2d at 1086.

adequately demonstrating that the regulatory scheme results in deprivation of property use sufficient to constitute a taking.[45] Oregon appellate-court decisions on ripeness mirror those of the United States Supreme Court, and require a property owner to submit at least two applications for uses on the subject property in order to demonstrate a claim is ripe.[46]

However, this "rule" can hardly be characterized as a hard and fast standard. By any account, the determination of whether a claim is "ripe" for judicial review is highly discretionary, fact specific, and—in many cases—a matter left to the cleverness (or lack thereof) of counsel for the government. Neither Oregon appellate-court case law nor that of the United States Supreme Court provide clear guidance for determining when a claim is ripe. In fact, the Oregon Court of Appeals appears satisfied to tell property owners their claims are not ripe but does not seem inclined to provide any guidance as to what is required to ripen claims.

As a result of the high standards set for demonstrating a regulatory-takings claim, the lack of clear guidance from the Oregon appellate courts, and the unwillingness of the courts to provide guidance as to when a takings claim is "ripe," it is nearly impossible for an Oregon property owner to file a successful regulatory-takings claim, even if a land-use regulation triggers a loss of all (or nearly all) of the property's economic value. Thus, property owners hurt by Oregon's land-use scheme have little hope in prevailing on inverse-condemnation claims under either the state or federal constitutions, thereby making Measure 37 the only hope for many Oregon property owners.

CONCLUSION

The statistics compiled by the DLCD concerning Measure 37 claims point to only one conclusion: Measure 37 simply has not had the impact on Oregon's land-use planning system that opponents of the measure feared.

But for those with Measure 37 claims, this opportunity to realize a return on property they purchased—in many cases decades ago—is the only hope they have to get back the "sticks" that

[45] For cases on the "ripeness" doctrine, *see* Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985); MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340 (1986).

[46] Larson v. Multnomah County, 121 Or. App. 119, 122, 854 P.2d 476, 478 *adhered to on recons.* 123 Or. App. 300, 859 P.2d 574 (1993).

were taken from the "bundle" of property rights they purchased with their land. The legislative and executive branches have been unwilling or unable to provide balance to Oregon's land-use planning system. Measure 37 provides that balance. Amici urge this Court to carefully weigh the arguments raised by the parties and consider the effect that a ruling in this case will have on those who have again voted for balance in Oregon's land-use planning system, and who have again acted in accordance with a measure approved by a strong majority of Oregon voters.