



Interesting Times: Oregon After Measure 7

By Randy Tucker

Since the narrow passage of Measure 7 in November 2000, Oregonians have indeed been living in interesting times.

This sweeping but ambiguous constitutional amendment requires state and local governments—i.e., taxpayers—to pay landowners any time a regulation that restricts the use of private property reduces the value of that property. Its approval has led to gloating among supporters, hand-wringing among opponents, and perplexity among local governments.

Virtually ignored before the election, the measure has since been the focus of thousands of column-inches of news coverage, editorials, and letters to the editor. It has spawned a virtual cottage

industry of dissection and interpretation and a “rubber-chicken circuit” of gabfests for planners, lawmakers, attorneys, landowners, and land use advocates wondering how to respond.

An eleventh-hour injunction preventing Measure 7 from taking effect, and a flurry of legal challenges to local governments’ efforts to implement the measure, heightened the drama—and the confusion. The long-awaited legal analysis by Oregon’s attorney general baffled the pundits even further, leading to a renewed spate of inaccurate stories in the news media.

Finally, on February 22, 2001, Marion County Circuit Court Judge Paul Lipscomb ruled that Measure 7 violates the Oregon Constitution. Supporters of the measure announced their plans to appeal, which could keep the measure tied up in court for years. Meanwhile, a new committee of the Oregon House has been created to craft an alternative to Measure 7 that responds to the elusive “will of the voters.”

Contrary to the rhetoric of certain lawmakers, there is no

law of nature that compels legislators to keep faith with this “will of the voters” after a voter-passed initiative is declared unconstitutional. After Measure 40, the so-called “victims’ rights” initiative, was thrown out because it illegally included multiple constitutional amendments which required separate votes, lawmakers did refer its various constituent parts to the ballot for approval. However, when 1998’s Measure 62, which improved campaign finance disclosure rules and protected the rights of union members to make political contributions through payroll deduction, was overturned last fall, legislators were notably silent. And after 1994’s Measure 9, the strict campaign finance reform measure passed by 72% of the voters, was declared unconstitutional in 1997, delighted politicians hardly even paid lip service to the clear wishes of the electorate.

As the terrain of the post-Measure 7 world continues to shift between the representatives of the voters’ will and the courts, here is a snapshot of the current understanding of the measure, its meaning, and some possible responses.

What does Measure 7 mean?

Measure 7 runs less than a page. However, it is so unclear and poorly written that it took twenty lawyers three months and 110 pages to draft the opinion released on February 13, 2001, by Attorney General Hardy Myers—and many of the conclusions in that opinion are, in Myers’ words, “not free from doubt.”

Here are two key paragraphs, which are only one sentence each:

May you
live in
interesting
times.

—ancient Chinese curse

Is Measure 7 retroactive?

A better question would be, how retroactive is it?

(a) If the state, a political subdivision of the state, or a local government passes or enforces a regulation that restricts the use of private real property, and the restriction has the effect of reducing the value of a property upon which the restriction is imposed; the property owner shall be paid just compensation equal to the reduction in the fair market value of the property.

(d) Compensation shall be due the property owner if the regulation was adopted, first enforced or applied after the current owner of the property became the owner, and continues to apply to the property 90 days after the owner applies for compensation under this section.

Two months after the election, there are still more questions than answers about what Measure 7 means. Among the most important questions:

What laws and regulations are within its scope?

Measure 7 applies to any regulation that (a) restricts the use of property, and (b) reduces the value of that property. "Regulation" is defined to include any "enforceable enactment of government." The only exemptions are for regulations implementing federal law "to the minimum extent required"; "historically and commonly recognized nuisance laws"; and regulations on pornography, nude dancing, the sale of alcohol or other controlled substances, and gambling.

It is important to note that while many see Measure 7 as an attack on land use planning, the

measure itself does not even mention land use. More importantly, its impact (if it survives in court) will extend far beyond Oregon's nationally admired land use planning system. The economic consulting firm ECONorthwest developed a list of about 90 categories of regulations that could be covered by Measure 7 ("Fiscal Impacts of Ballot Measure 7 on State and Local Governments: An Analysis of Selected Regulations." ECONorthwest, October 2000. See www.friends.org/m7.html).

Examples of potentially affected regulations include local zoning, air pollution rules, water quality protections, building codes, building height restrictions, building design standards, restrictions on hours of operations, anti-smoking regulations, forest practices regulations, sign codes, mining restrictions, and protections for low-income housing.

During the campaign, Measure 7's supporters claimed that environmental regulations would not be affected because of the measure's exception for nuisances. Yet modern environmental laws exist precisely because the common-law doctrine of nuisance

has proven inadequate to protect public resources like clean air and water.

Moreover, the measure itself limits the nuisance exemption by requiring courts to construe it narrowly "in favor of a finding that just compensation is required."

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ment "passes" or "enforces" a regulation after Measure 7 goes into effect. However, if the state "enforces" a regulation that has been on the books for decades—exclusive farm-use zoning, for example, or Oregon's famous Bottle Bill—the payment requirement is triggered.

The sponsors of Measure 7 may have intended it to apply only when regulations change during the tenure of a particular landowner. That is not what the measure says, however. The poor drafting of paragraph (d) could plausibly be interpreted to mean that any regulation, no matter when it was adopted, could trigger a claim for payment if it were "applied" or "first enforced" after a particular landowner purchased their property.



In November, the Jackson Creek Sand Company filed a federal lawsuit seeking \$50 million from Jacksonville and Jackson County for failing to grant a mining permit.

The attorney general's opinion supports this interpretation. The opinion states that no payment is due unless the govern-

For example, someone could purchase a parcel of farmland outside an urban growth boundary and apply for a permit

to build a subdivision or a regional mall. If the permit were denied, the landowner could claim that a regulation was being “applied,” and file a claim for compensation. While the attorney general’s opinion does not support this interpretation, a court might rule otherwise.

What will Measure 7’s fiscal impact be?

This has been the subject of significant controversy since last summer, when the state’s official Financial Impact Committee (which consists of the Secretary of State, the State Treasurer, and the directors of the state departments of Revenue and Administrative Services) calculated the measure’s fiscal impact at a staggering \$5.4 billion per year—approximately the same as Oregon’s entire annual general fund budget in the current biennium.

The sponsors of Measure 7 immediately cried foul, claiming that the measure’s costs would be in the range of \$50-100 million (at other times they said \$25-50 million). When pressed, however, they were unable to cite any documentation for their guess.

While the exact cost of continuing to enforce basic regulations in a Measure 7 environment may

never be known, it clearly would have been not millions, not hundreds of millions, but billions of dollars. In the summer of 2000, 1000 Friends of Oregon commissioned ECONorthwest to assess the cost of continuing to enforce a handful of regulations if Measure 7 were in effect: urban growth boundaries, the Oregon Forest Practices Act, protections for beach access, local zoning, and limits on subdivision of rural residential land. The study found that simply to maintain the UGBs of Portland, Eugene-Springfield, Bend, and the mid-Willamette Valley cities of Salem, Albany, and Corvallis could cost between \$7.7 and 15.4 billion. (“Fiscal Impacts of Ballot Measure 7 on State and Local Governments: An Analysis of Selected Regulations.” ECONorthwest, October 2000. See www.friends.org/m7.html. Unlike the state’s official estimate of annual costs, these figures represented one-time costs.)

Can governments avoid paying these costs simply by waiving or not enforcing regulations?

It depends. Certainly, governments may legally repeal or change laws that are currently on the books in order to avoid incurring liabilities their taxpayers cannot afford. However, shortly after Measure 7 passed, numerous cities and counties enacted ordinances that asserted

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the right to “waive” or otherwise ignore state regulations, including Oregon’s land use laws, to avoid Measure 7 claims. 1000 Friends of Oregon appealed 58 of these ordinances to the Land Use Board of Appeals, arguing that Measure 7 does not exempt local jurisdictions from compliance with Oregon’s statewide planning goals or the other state regulations that protect the quality of life of our communities.

Approximately eleven of these appeals have been or will be dismissed because the local jurisdiction either repealed or changed its ordinance in response to 1000 Friends’ concerns or stipulated that their ordinance does not provide the authority to waive state regulations. The rest,

with one possible exception, are stayed, pending resolution of the constitutional challenge to Measure 7.

Again, the attorney general’s opinion generally supports our view. The opinion declares that state agencies can ignore regulations to avoid claims only if they have specifically been granted discretion to do so—or if they have completely depleted their budgets paying claims.

Numerous other questions remain: How will Measure 7 affect Oregon’s bond rating? What does it mean to implement federal law “to the minimum extent required”? How will “fair market value” be calculated? What does reduction in value mean? Can landowners make multiple, sequential valid claims?

Whether we learn the answers to these questions depends, in large part, on the answer to another one: Is Measure 7 constitutional?

What happens now?

It has been said that politics is the art of looking for trouble, finding it whether it exists or not, diagnosing it incorrectly, and applying the wrong remedy.

While trouble certainly exists in the case of Measure 7, the “diagnosis” is far from obvious. Does Measure 7 represent a groundswell of rebellion against government regulation? Or was its passage merely the result of a crowded ballot and a misleading ballot title?

The answer, of course, is that just as no one can seem to interpret Measure 7 itself, no one really knows what the voters meant in passing it. As Rep. Max Williams has said, “The voters clearly sent a message, but the message isn’t clear.”

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Nevertheless, now that the measure has been declared unconstitutional, the Oregon Legislature stands poised to enter the Measure 7 fray. On February 26, 2001, the House of Representatives established a new committee, chaired by Rep. Williams, on "land use and regulatory fairness" to address issues raised by the measure's passage. Lawmakers hope to achieve a "peace in our time" that avoids another war of initiatives in 2002.

Conservation groups have long opposed the idea of paying landowners to obey the laws that protect our communities, our environment, and our quality of life. However, 1000 Friends of Oregon and other members of the conservation community recognize the need to address the real concerns Oregonians have about the fairness of our current regulatory system. Its challenge lies in being both responsive to the voters and responsible to the future of our state.

To that end, 1000 Friends has joined in the creation of the Oregon Community Protection Coalition (OCPC), a new alliance formed by conservation groups to respond to the passage of Measure 7. In addition to members of the conservation community, OCPC brings together affordable housing advocates, civic groups, religious leaders, and others concerned about the regulations that protect Oregon's livability.

OCPC believes any response to Measure 7 needs to focus broadly on the issue of fairness. In addition to fairness to individual property owners who have suffered particular hardship due to regulations that restrict their use of their property, any discussion of fairness should include:

- fairness to property owners who may see their land significantly devalued if a restriction on a neighboring property is lifted;
- fairness to communities grappling with concerns about traffic, sprawl, and associated quality of life values;
- protection of public property and resources; and
- fairness to taxpayers.

The following set of principles will guide members of OCPC in their response to proposals that may be put forward.

No Regulatory Rollback:

Coalition members believe it would be inappropriate to respond to Measure 7 by repealing, waiving, or weakening the laws and regulations that protect public resources, such as air and water quality and wildlife habitat, and that help stop sprawl and govern development in neighborhoods. Those actions were not addressed in the text of Measure 7 and were not offered to or approved by the voters.

Indeed, a recent Davis and Hibbitts poll shows that Oregonians—by an overwhelming 9:1 margin—reject the idea of rolling back regulations in order to avoid paying claims.

To the extent that any system allows government to avoid liability for landowner claims by lifting restrictions on property use, it must also provide for compensation to neighboring property owners whose land values are decreased as a result of lifting the restriction.

No Payment for Protection of Health and Safety: No payment should be required for obeying

existing or future regulations that protect public health and safety.

New Resources for New

Obligations: Any new public liability to property owners should be funded from a new dedicated source. Coalition members are opposed to funding claims by cutting funding for critical services, such as education, affordable housing, health care, or assistance to seniors.

The owners of land who have particularly benefited from government actions should bear a larger burden of the cost of payments. For this reason, a logical funding source to pay any claims is a tax on "givings": increases in the value of land, buildings, timber, mineral resources, and crops caused by changes to government regulations or by taxpayer financed government investments, such as roads, sewers, and so on.

No Free Lunch: Any legislative response to the passage of Measure 7 that involves paying certain landowners to comply with regulations must be honest about the costs and tradeoffs involved in creating a new right to payment. Voters must be given a clear choice on each element of that response, including:

- Total cost of claims.
- Nature and type of regulations that could trigger claims.
- Tax increases to pay claims.
- Budget cuts to provide money to pay claims.
- Exemptions or rollbacks of land use laws, environmental regulations, and other public protections to avoid paying claims.

On to November: As this is written, the legislative meat grinder is chewing on its response to Measure 7. The recent court ruling on the measure's constitutionality will certainly be appealed up to the Oregon Supreme Court; a final decision could be years away. Uncertainty over the ultimate legal outcome provides an incentive to both supporters and opponents of Measure 7 to craft a replacement measure that is more workable and less sweeping than the measure itself but still responds to the voters' apparent call for greater regulatory fairness. The Legislature would refer this replacement measure to the ballot in November 2001, hoping to avert another initiative battle in 2002.

Will lawmakers and other interested parties have the will and creativity to achieve this goal? Only time will tell. Before long, however, we will see how the upheaval in Oregon's political terrain caused by Measure 7 plays out on the physical landscape of our state.



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