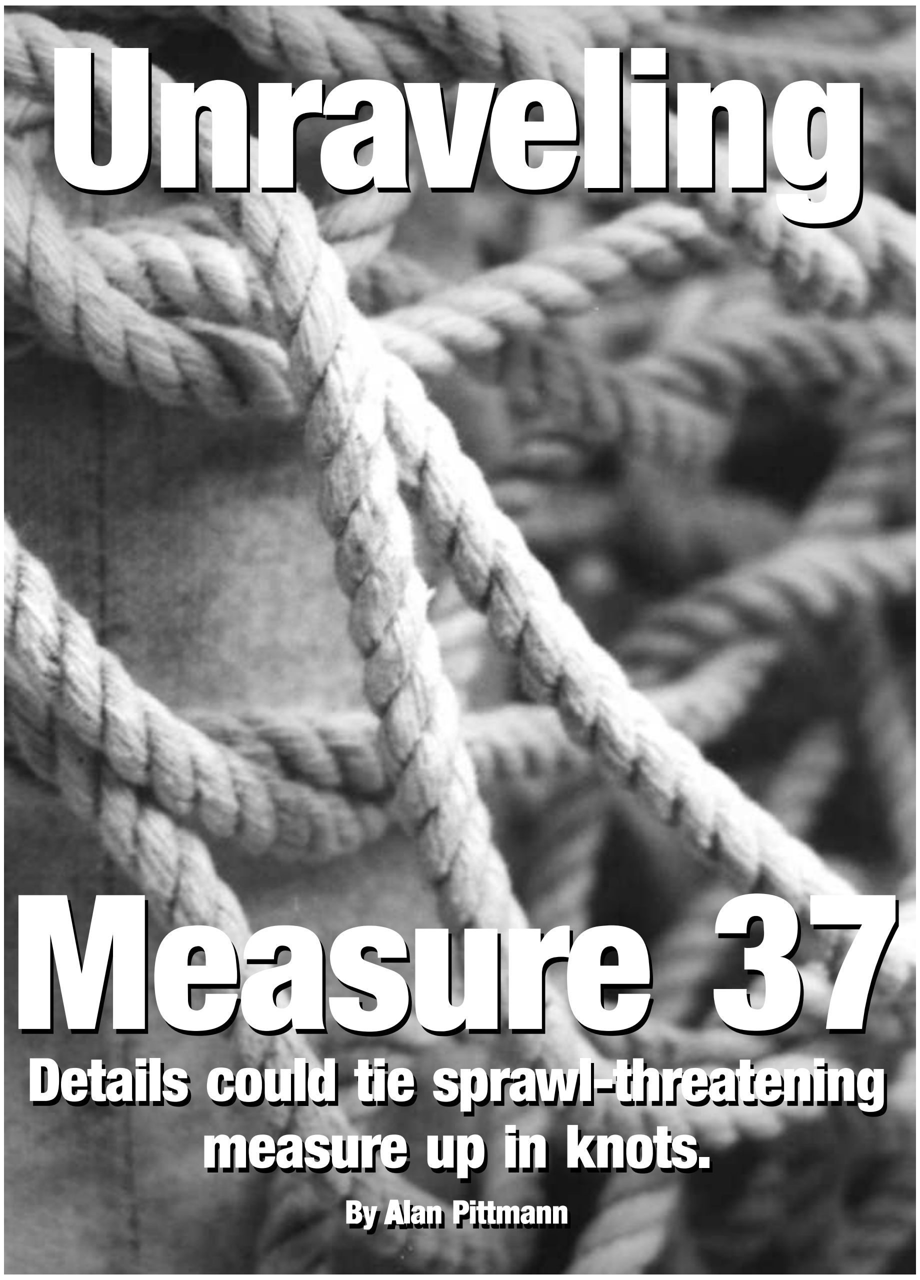

Unraveling Measure 37

Details could tie sprawl-threatening measure up in knots.

By Alan Pittmann

a million Oregonians voted for Measure 37, passing it by a 20 percent margin and putting it into effect Dec. 2. But land use and legal experts are still trying to figure out what the measure means.

The timber- and developer-backed group, Oregonians in Action (OIA), that put 37 on the ballot says it means government now has to compensate owners for any reduction in property value caused by many land use regulations or waive the regulations.

That sounds simple, but the devil is turning out to be in the details. How those legal details are decided by courts will determine whether Measure 37 ends up allowing ugly and expensive urban sprawl to destroy Oregon's scenic livability or ends up so tied in legal knots that it has far less impact.

Transfer Knot

One big legal tangle is whether any waivers of regulations would transfer to a new owner of a property. Eugene City Attorney Glenn Klein says they would not. Klein points to language in Measure 37 stating that a government may waive regulations to "allow the owner" to use the property for an otherwise unpermitted use. The measure text defines "owner" as "the present owner of the property."

"My reading of it is it is not transferable," Klein told the Eugene City Council.

Under Klein's interpretation, landowners could get waivers to allow themselves to build McDonald's restaurants on residential streets, but they couldn't transfer the waiver by selling the property to the McDonald's Corporation to build the fast food restaurant. If an owner built the building and then sold it, the city could force any new owner to tear down the McDonald's.

This transferability interpretation could block much of the sprawl and damaging development opponents feared from Measure 37. Klein told the council that attorneys for big developers have told him they don't plan to use the measure because waivers wouldn't transfer. Banks would be unlikely to lend money to a developer using the measure if a waiver couldn't be transferred to a new owner. That could leave only self-financed development in which the owner couldn't sell the property. A timber baron couldn't make a killing by cutting up cheap forest land to sell off for luxury homes.

OIA calls this interpretation favored by attorneys for the cities of Eugene, Beaverton and Bend "outlandish," on it's web site. The cities' actions are "an obvious attempt to circumvent the intent (and the express language) of Ballot Measure 37, by cities and their lawyers who have no respect for the message sent by Oregonians on November 2nd," OIA states.

The timber barons and developers backing OIA stand to make millions converting cheap forest land to urban sprawl and have more than enough money to challenge cities in court. Local timber baron Aaron Jones contributed $243,000, almost a third of the money used to pass Measure 37. Other local timber baron/developers also invested heavily in the measure: Donna Woolley $25,000, Greg Demers $17,000, John Musumeci $25,000 and the Gonyea and Giustina families $10,000 and $20,000 respectively.

Klein's interpretation on the transferability of Measure 37 waivers isn't accepted by all local governments. A memo from the Portland law firm of Beery, Elsner and Hammond, which represents about a dozen small cities in Oregon, advises that the firm at present believes that a waiver *would* transfer to a new owner. But another memo from Multnomah County staff agrees with Klein that a waiver is limited to a use of the property by the present owner and is arguably not transferable.

Eugene mayor Jim Torrey, a Republican elected with a flood of developer contributions, said Eugene voters didn't pass the measure but the state did and he doesn't want the city to impose a transferability "gotcha" that would prevent development using Measure 37 waivers. Torrey and the current council's pro-developer 5-3 majority, revised an implementation ordinance to remove language referring to Klein's interpretation on transferring waivers.

Councilor Bonny Bettman said the council shouldn't try to "make up for the mistakes of the authors of the measure." She predicted that allowing waiver transfers would "result in an industry of opportunistic entities seeking out Measure 37 claims."

But Klein told councilors the change to the implementation ordinance would have little effect. Klein said he would advise city building permit staff to not recognize a transferred Measure 37 waiver and the whole issue would likely end up decided by the courts.

In court, the state land-use watchdog group 1000 Friends of Oregon will likely be there siding with Klein's interpretation. The group's staff attorney Mary Kyle McCurdy says, "We believe that Measure 37 is clear that a waiver or modification of a land use regulation applies to the current owner of the property and does not run to a new owner."

While OIA now says the intent of Measure 37 was to allow transfers of waivers, that may not have been clear to voters during the campaign. For example, a big part of OIA's campaign centered on a Bend-area couple hoping to build a rural retirement home for themselves. There was little mention of timber barons receiving multimillion-dollar windfalls from subdividing cheaply acquired forest land.

Knotted Knots

Besides the big question of transferability, there are a lot of other legal knots that could tangle Measure 37. Here's some of the more tangled ones:

• Exemptions — The measure explicitly exempts regulations regarding public nuisances, public health and safety, pollution control and those regulations required to comply with federal law. But the measure offers few details. A city could argue that allowing a shopping mall or a McDonald's could create safety hazards from traffic and/or create nuisance traffic congestion or exhaust and grease smells. A government could argue that a regulation requiring wide stream setbacks is for stormwater pollution control and is required by federal Clean Water Act regulations. OIA argues that the exemptions are narrow and courts will likely have to make the difficult decisions on how broad the vaguely-worded exemptions are.

• Appraisals — Determining how much to compensate a landowner will require an appraisal of how much the property would be worth without the regulation. That could be difficult, given the laws of supply and demand. For example, if you own the only site in town where a billboard is allowed, then your property is worth a lot. But 1000 Friends argues that if Measure 37 means billboards can go up all over town, then your property is worth far less for that use.

• Services — Valuable development often requires taxpayer subsidized services such as roads and sewers. But governments could refuse to extend services to development allowed by Measure 37. OIA suggested as much in arguing, "there is nothing in the measure that requires local governments to extend urban services like roads, water and sewer to development outside the UGB [urban growth boundary]. Measure 37 will not allow urban type developments in rural areas, like large retail stores, shopping malls, apartments, or large factories." However, OIA did not address whether the measure would allow near-urban subdivisions and strip malls on septic systems sprawling across scenic rural areas, rendering UGBs meaningless.

• Suing developers — Eugene and other cities have included a private cause of action in their implementation ordinances allowing neighbors whose property value is reduced by nearby Measure 37 development to sue the developer for damages and legal costs. OIA objects that such provisions are designed to intimidate landowners from filing claims and will result in city liability and expansion of