



2007 Land Use Legislation

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I. INTRODUCTION

As in the 2005 legislative session, much of the 2007 Legislative Assembly's attention was focused on responding to Measure 37 (ORS 197.352). Unlike 2005, the 2007 Legislature took action and referred to the ballot a measure that substantially revises Measure 37. This measure—HB 3540—will appear on the ballot as Ballot Measure 49 at a special statewide election held on November 6, 2007, and is described in greater detail below.

Beyond Measure 37, the legislature tackled a number of issues, including funding for school facilities (SB 1036), illegal land divisions (HB 2723), and review of final plats (HB 3025). These measures and others of significance to lawyers are described below.

II. MEASURE 37

A. HB 3540 (BM 49) Revision of Measure 37

HB 3540 substantially revises the substance and procedures for obtaining relief under ORS 197.352 (2005 Or Laws ch 1 (Measure 37)). The revisions can be roughly divided into three categories: (1) revisions that apply to all Measure 37 claims generally, (2) revisions that apply to claims filed before June 28, 2007 (the last day of the 2007 legislative session), regardless of whether a decision has been issued on the claim, and (3) revisions that apply to claims filed after June 28, 2007. This summary will review the general revisions first, then the retroactive revisions, and finally the prospective revisions.

1. General Provisions

HB 3540 allows a claim under Measure 37 only for land use regulations that restrict residential use of property and for limitations on the use of property imposed under the Forest Practices Act (ORS 527.610–527.770). Claims for nonresidential uses are eliminated, although the bill allows these claims to be converted into claims for residential use. HB 3540, §4 (amending ORS 197.352). The bill clarifies that a person's *acquisition date* is the date shown on the deed, and it allows a surviving spouse to claim the decedent's acquisition date. HB 3540, §21. *Owner* is defined to include only the owner of fee title as shown in the deed records, a contract purchaser, or the settler of a revocable trust (until the trust becomes irrevocable, at which time the trustee becomes the owner). HB 3540, §2(16).

Significantly, the bill provides a methodology for determining when a regulation causes a “reduction in the fair market value,” based on the value of the property one year before and one year after the regulation was enacted, plus interest and adjustments for tax consequences (e.g., beneficial assessment or severance taxes). HB 3540, §§7(6), 9(6), 12(2). An appraisal is required to establish a reduction in value. HB 3540, §§7(7), 9(7), 12(2).

Finally, the bill authorizes the state and local governments to adopt a process for reviewing claims. The process is similar to current land use process, including fee, completeness review, and notice requirements.

A writ of review must be used to seek judicial review of decisions by local governments on claims (ORS 34.010 –34.100). Decisions by state agencies on claims may be challenged by filing a petition to review an order other than contested case under the Administrative Procedures Act (ORS 183.484). HB 3540, §16(1).

2. Retroactive Provisions (§§5–11) For claims filed before June 28, 2007, HB 3540 provides different standards and remedies for claims filed on high-value farmland and forestland (HVF/F) and for land inside urban growth boundaries (UGBs). For most purposes, HVF/F includes areas that have been designated as critical groundwater areas and groundwater limited areas.

For claims on HVF/F, the bill retroactively limits approved claims to three new lots or parcels with a dwelling on each lot or parcel. HB 3540, §6. The claimant is not required to demonstrate that the subject land use regulations reduce the value of the property. For claims on non-HVF/F, the affected government may approve up to 10 new lots with a dwelling on each, but the claimant is required to demonstrate that the regulations reduced the value of the property using the methodology provided in the bill. HB 3540, §7(6).

Inside UGBs, a claimant is limited to 10 new lots with a dwelling on each, and the claimant is required to demonstrate a reduction in value according to the prescribed methodology. HB 3540, §9.

The bill imposes a total statewide cap of 20 new lots for any single claimant. HB 3540, §11(5).

For claims that have already been approved, local governments (cities, counties, Metro) are required to review the claims to determine whether relief is due and to request additional information from the claimant if the local government is unable to decide. Notice of a tentative decision is required within 240 days of claim, and final decision within 300 days. HB 3540, §10. For pending claims, the bill similarly requires notice to the claimants and requires the claimants to respond and provide any additional information within 120 days. Notice of the tentative decision is required within 120 days and the final decision within 180 days.

With respect to transferability, the rights established in a waiver attach to and run with the land. HB 3540, §11(6). However, if the property is conveyed to a person other than the claimant's spouse or a revocable trust, the rights must be exercised within 10 years of the conveyance. Finally, an owner who has a claim approved is prohibited from bringing any new claims by reason of any regulation in effect on January 1, 2007. HB 3540, §11(7).

3. Prospective Provisions (§§12–15) Claims may be filed after July 28, 2007 (the last day of the 2007 legislative session), only for land use regulations that are adopted after January 1, 2007, and any waiver may be limited to the amount the property value was reduced. HB 3540, §12. The bill then establishes a process for reviewing the claims that mirrors the existing process for land use applications, including a fee, completeness review, and notice requirements. A final decision on a claim is required within 180 days. HB 3540, §13(5).

Finally, all new claims must be filed within five years after the land use regulation is enacted. HB 3540, §13(4).

4. Effective Date

HB 3540 was referred to the November ballot by HB 2640. The election is scheduled for November 6, 2007.

B. HB 3546 (ch 133) Additional Time to Process Claims

HB 3546 gives state and local governments an additional 360 days to process Measure 37 claims. This will allow these jurisdictions to wait until the November 2007 election determines whether HB 3540 (2007 Ballot Measure 49, amending Measure 37) will go into effect.

PRACTICE TIP: Due to the volume of claims, it is likely that state agencies will continue to process claims and issue decisions throughout the extended period.

HB 3546 took effect on May 10, 2007.

III. ILLEGAL LAND DIVISIONS HB 2723 (ch 866) Validation of Illegally Created Parcels

HB 2723 addresses the problem of illegal land divisions that resulted in the creation of unlawful lots and parcels before January 1, 2007. Most cities and counties will not approve a development permit for these properties, thereby inhibiting the development potential and value of the property. The bill may be analyzed in two parts: retroactive provisions and prospective provisions.

The retroactive provisions of HB 2723 allow a city or county to approve an application to validate an existing property under the standards in effect at the time the property was unlawfully divided. The new parcel's "date of creation" is the date the validation application is approved, not the date the property was first divided. In addition, and notwithstanding the standards in effect at the time the property was first divided, the bill also allows a city or county to validate a parcel if the city or county earlier approved a building permit for a dwelling on the property. Finally, retroactive validation is available only for properties that were unlawfully divided before January 1, 2007. HB 2723, §2.

The bill's prospective provisions attempt to prevent the creation of illegal parcels in the future by adding to the property disclosure statement in ORS 105.464 a question regarding whether the property was lawfully established. HB 2723, §8. Furthermore, the bill requires a person partitioning or subdividing property to include on the deed for each resulting lot or parcel a reference to the recorded plat or other document evidencing the lawful creation of the property. HB 2723, §3.

Finally, the bill amends ORS 92.018 to require an award of attorney fees to the prevailing party in an action by the buyer against the seller of an illegal unit of land. HB 2723, §5.

PRACTICE TIP: For subdivisions and partitions approved after January 1, 2008, the first recorded deed for each new lot or parcel must contain a reference to the recorded plat or other instrument that created the lot or parcel.

IV. LOCAL PROCEDURE

A. HB 2713 (ch 652) Private Utility Easements

HB 2713, §1, amends the definition of *utility easement* in ORS 92.010 to include private utility infrastructure. Under HB 2713, the laws governing public utility infrastructure easements will also govern private utility infrastructure easements. The bill also prohibits the placement of utility infrastructure within one foot of a survey monument. HB 2713, §2 (amending ORS 92.044(7)). Finally, it allows streets dedicated to the public to be encumbered by private utility easements. HB 2713, §3 (amending ORS 92.090(3)(a)).

B. HB 3025 (ch 459) Land Use Decisions

HB 3025 excludes from the definitions of *land use decision* and *limited land use decision* in ORS 197.015 a local government's decision on whether a proposed final plat conforms to the tentative subdivision or partition plan.

PRACTICE TIP: After passage of HB 3025, a local government's decision on a final plat is subject to review by a circuit court using a writ of review under ORS 34.010–34.100 and is not subject to review by LUBA as a land use decision.

HB 3025 took effect on June 18, 2007.

C. HB 3337 (ch 650) Urban Growth Boundaries in Lane County

HB 3337 requires each city in Lane County with a population larger than 50,000 (i.e., Eugene and Springfield) to establish its own “urban growth boundary, consistent with the jurisdictional area of responsibility” in its acknowledged comprehensive plan. HB 3337, §2(1). The bill requires each city to demonstrate that its comprehensive plan provides sufficient buildable lands under ORS 197.296.

D. HB 3436 (ch 689) Population Forecasting

HB 3436 provides a means by which a city can propose its own population forecast for the purpose of evaluating changes to the city’s urban growth boundary. If the coordinated population forecast under ORS 195.036 is less than 10 years old but no longer provides a 20-year forecast for the urban area, the city may propose a new forecast using the same trending rates as the original population forecast. If the coordinated population forecast is more than 10 years old, the city may propose a new population forecast based on the Oregon Office of Economic Analysis starting with the year the city proposes to reevaluate the population forecast. If the “coordinating body,” namely, the county, does not take action on the city’s proposed revisions to the population forecast within six months of the city proposal, the city may adopt the new forecast after notice to the county and other local governments and after it adopts a comprehensive plan amendment. This forecast may be used by the proposing city to amend its urban growth boundary.

HB 3436 took effect on July 1, 2007.

E. SB 311 (ch 232) County Land Use Applications

SB 311 brings the process and timelines for county land use applications in line with the statutory changes made in 2003 for land use applications made to cities.

The bill amends ORS 215.427 to provide that land use applications submitted to a county will be determined to be complete when the county receives:

- (a) All of the missing information;
- (b) Some of the missing information and written notice from the applicant that no other information will be provided; or
- (c) Written notice from the applicant that none of the missing information will be provided.

ORS 215.427(2) (as amended).

If the applicant was notified by the county of the missing information and fails to respond, the application is void on the 181st day after it was submitted. Finally, extension of the 150-/120-day deadlines is limited to a maximum of 215 days beyond the original 150-/120-day deadlines.

V. SCHOOL FACILITY PLANNING AND FINANCING

A. SB 336 (ch 579) School Facility Plans

SB 336 directs cities and counties that contain more than 10% of a “large school district” to include in their comprehensive plans a “school facility plan” prepared by the district in consultation with the city or county. ORS 195.110(2) (as amended). A *large school district* is one that has more than 2,500 students. ORS 195.110(1) (as amended). The school facility plan must cover a 10-year period and include such information as a population projection, a capital improvement plan, a site acquisition plan, and a financial plan. ORS 195.110(5) (as amended).

The measure allows school capacity as an approval criterion in local land use decisions: A city or county may deny an application for residential development based on a lack of school capacity if:

- (a) The issue is raised by the school district;
- (b) The lack of school capacity is based on a school facility plan formally adopted under this section; and
- (c) The city or county has considered options to address school capacity.

ORS 195.110(13) (as amended).

SB 336 directs larger school districts to work with affected cities and counties to develop a school facility plan. But the relationship is not equal; the district gets to make the final decisions on the plan. Once the plan is developed, it must be adopted by the affected cities and counties as part of their comprehensive plans. ORS 195.110(9) (as amended). After the plan amendment is adopted, a lack of school capacity may be used to deny a land use application for residential development. ORS 195.110(13) (as amended). The school district plan must be completed by December 31, 2009, although there is not a specific deadline for adopting it into the affected comprehensive plans. SB 336, §3.

NOTE: SB 336 is apparently intended to work in conjunction with SB 1036. A careful reading of the two bills leads to the conclusion that the “school facility plan” referred to in SB 336 includes the “long-term facilities plan” referred to in SB 1036. Although SB 1036 does not expressly require any action by a city, it clearly contemplates an intergovernmental agreement (or an amendment to an existing intergovernmental agreement) to clarify the roles and responsibilities of the city and school district with respect to assessing and collecting the tax. On the other hand, SB 336 expressly calls for an amendment to the city’s comprehensive plan to include the school facility plan developed jointly by the city and school district. Again, once the plan amendment is adopted, lack of school capacity may be used to deny a land use application.

B. SB 1036 (ch 829) Construction Taxes for School Facilities

SB 1036 authorizes a school district to adopt “a tax on the privilege of constructing improvements to real property” for the purpose of paying for school facilities. SB 1036, §§1(1), 2. At the same time, the bill prohibits other local governments from adopting a similar tax unless the local jurisdiction adopted the tax, or began the adoption process, before May 1, 2007. SB 1036, §1(2).

The construction excise tax applies to new construction or changes to existing buildings that add additional square feet. The tax may not exceed \$1 per square foot for residential construction or \$0.50 for nonresidential construction. For nonresidential development, the bill caps the tax at \$25,000 per building or building permit. SB 1036, §4. Revenue from the tax may be spent only on capital improvements, not on operating costs. SB 1036, §6(1).

SB 1036 provides a number of exemptions from the tax, including public improvements, affordable housing, hospitals, private school facilities, religious facilities, and agricultural buildings. SB 1036, §3. Significantly, the bill expressly provides that the tax authorized by the bill is a “privilege” tax, and the limitations on such taxes do not apply to building permit fees, system development charges, and other forms of local fees incident to development. SB 1036, §1(3).

Before adopting the tax resolution, the school district must adopt a “long-term facilities plan for making capital improvements,” SB 1036, §6(2), and “enter into an intergovernmental agreement with each local government, local service district or special government body collecting the tax,” SB 1036, §5(2).

SB 1036 then specifies what must be in the intergovernmental agreement, including collection responsibilities and a cap on the amount of tax revenue the local government can retain to cover its administrative costs (1% of tax revenues). SB 1036, §5(2). However, the bill does not require local governments to collect the tax for the school district or preclude the school district from doing so on its own. SB 1036, §2(2) (“[C]onstruction taxes imposed by a school district may be collected by another local government.”). Presumably, if a local government was disinclined to collect the tax on behalf of the school district, it could decline to do so. Similarly, if the district was inclined to collect the tax itself, and avoid the 1% administrative charge, the district could do so.

SB 1036 took effect on September 27, 2007.

VI. URBAN AND RURAL RESERVES SB 1011 (ch 723) Adoption of Rural Reserves

SB 1011 authorizes counties and metropolitan service districts to designate “rural reserves” by intergovernmental agreement and establishes criteria for the reserves. SB 1011, §3. It requires concurrent adoption of urban and rural reserves by a county and the district. Consideration of the rural reserves must be coordinated with consideration of any urban reserves. SB 1011, §4(1). The bill modifies the process for designating urban reserves and exempts urban and rural reserve designations from a claim for relief under Measure 37. SB 1011, §4(4).

SB 1011 took effect on June 28, 2007.

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Unless otherwise noted, all legislation is effective January 1, 2008.