Oregon's Great Land War
Measure 49 provides fodder for protracted legal battles
By Lisa Baker

Whatever opinion you may have had about Measure 49, there was one thing its proponents made clear: For better or worse, it was going to bring clarity and finality to the question of property rights in Oregon.

And, some voters likely considered, it was about time the civil war over 1970s-era land use debates came to an end. They thought they'd ended it in 2004 when they passed Measure 37, the property rights manifesto that called for government to either compensate land owners whose property lost value in the wake of 1973's land use regulations or allow them to build. Measure 37 seemed clear enough.

But in the intervening years, the measure remained under constant attack. It was called a development free-for-all, a mess, and a legal tangle that could never be untied. Story after story portrayed complications arising out of the measure, the unanswered questions, the dueling interpretations and conflicting orders. Lawsuits mounted, finally topping out at about 300, while claimants tried to press their advantage under 37 and their opponents attempted to stop them.

But in the months since the passage of Measure 49, quiet — at least in the media — has reigned. Finally, it appears safe to go back to the news and hear about Something Else.

Don't let the quiet fool you.

Listen. Under the surface of Measure 49's relative peace, there it is, the low rumble of cannons rolling into position and legal fodder being gathered. The buildup for the next great land war has begun.

Measure 49 carried the promise of clarity in its own ballot language, stating that it "clarifies (the) right to build homes, limits large developments, (and) protects farms, forests, groundwater."

Claimants wanting to build three or fewer homes could be fast-tracked through the process. Those wanting up to 10 houses would jump through more hoops, including simply proving that the claimant's losses due to land use regulation were worth — monetarily — at least the number of houses proposed. No one would get more than 10 and no one could build anything commercial or industrial.

So, it's clear, right?

Michael Morrissey, whose job it is to manage the claims process for the Department of Land Conservation and Development, put his response this way: "Ha ha ha!"

Asked to explain further, he says, “Well, Measure 37 was a one-and-a-half-page document that left a lot up to interpretation. Measure 49 is a 26-page document with a *large* amount of language and detail that we’re trying to make understandable … There are issues that make it complicated.”

Complicated how? “Well, for instance, if a claimant takes the conditional route and wants to demonstrate loss, we will have to have appraisers look at that, see that the appraisal is done to standards, and then translate that (loss) into a number of houses,” he says. “It’s a detailed process we haven’t done yet.”

Then there are Measure 49’s exceptions, which predicate a claim’s success on whether the property is within an urban growth boundary, whether it contains certain soils, is considered “high value” forestland or farmland or in an area where viticulture — by virtue of soils types and elevation — could be successful. Areas considered water-limited are also barred.

Multiple owners or owners with several pieces of land could cause more complication, Morrissey says. Also: Measure 49 added more recent land acquisitions to the equation that were not included in Measure 37.

“So, let’s say they bought their land in 1982,” Morrissey says. “We will have to look at what the (land use) rules were in 1982 and make a conclusion as to what the land owner could have gotten then.”

Because the requirements of the measure are so much more involved, the department is publishing a 10-page book to explain the basics of Measure 49 to the state’s 7,000-some claimants, plus a guide to completing the paperwork involved in handling a claim under the measure. Additionally, the state is working with Oregon State University to set up a database that will determine for claimants whether their land is situated on certain kinds of high-value soils or are in any way subject to any of Measure 49’s other caveats.

As part of its new duties under Measure 49, the department is requesting a staff increase to work the claims, including specialists trained in evaluating land appraisals.

Attorneys say there are enough ambiguities in the measure that guarantee plenty of time in the courts — and more delay for mostly elderly property owners still waiting for answers.

Jim Zupancic, a land use attorney who represents a bevy of Measure 49 claimants puts it this way, “You could say it’s déjà vu all over again, only more so … While it’s true that Measure 49 resolved some of the issues on 37, it opened Pandora’s box to many more issues,” he says. “The question under 37 was relatively simple: When did you acquire the property? But Measure 49 has a whole new set of rules. A plethora of rules, in fact.”

Proving and quantifying adequate loss of value caused by land use regulations is one of the more onerous requirements: calling for an appraiser to evaluate the property’s value

when it was acquired, determine its worth one year after land use regulations went into effect, and include a determination as to whether a residential use would have been the best use of the property at the time the property was acquired, regardless of whether the passage of time would have made it so later. The formula, Measure 49 critics say, is weighted in such a way as to make it impossible for any applicant, especially one whose land would be particularly valuable today, to succeed.

Chris Paulsen, a Portland appraiser, said coming up with a determination, given the age and condition of property records that are 40 years old, might be undoable. “I don’t think even the state understands the complexities,” he says.

Ed Trompke, a land use attorney with Lake Oswego-based Jordan Schrader Ramis PC, represents players on both sides of Measure 49 — government entities and claimants. He says the number of legal questions are on par with those raised by Measure 37.

The most high profile issue is that of vesting, which allows landowners who’ve invested significant amounts of time and money into developments already approved under Measure 37 to proceed with their plans although they no longer would be allowed under 49.

The problem is, there is no rule defining who is vested and who is not; there is no magic monetary figure. The issue is further clouded by a competing legal test: the test of good faith. A claimant who shows he has made a significant investment in his development based on his approved Measure 37 claim could be disqualified from vesting if it’s decided that the claimant was making the investment simply to show that he was vested. So, in sum, you’re vested if you didn’t intend vesting, but if you did, you’re not.

“We were hoping they’d define vesting, but it was a political hot potato, so they punted,” Zupancic says. “So now, everybody’s writing extensive papers on what vested rights are, and there is tremendous confusion throughout the state on what those are and who will determine them and how.”

Trompke says the measure also does not address land within city limits that is not contained in a city’s urban growth boundary (UGB) since the measure bars development outside of UGBs. For most cities, UGBs represent where urban development will go next as population expands, but in some cities, such as Tangent and Damascus, the UGBs have not been expanded despite the fact that urban services have, Trompke says.

And then there’s the issue of the Oregon Constitution, which states that the law governing land use is that which was in effect at the time a land use application was filed, Trompke says. Those who filed development applications under Measure 37, Trompke says, should — according to that policy — be allowed to do what Measure 37 allowed them to do.

David Hunnicutt, one of the original framers of Measure 37, says Measure 49 “is so unclear, it will be hard for the state to give people any solid information.” Hunnicutt says

he's compiled a list he calls "50 Ways You're Going to Get Sued" — a compendium of legal questions he says are raised but not answered by the measure and could result in litigation should claimants attempt to move forward. "I think by the time we get done with this, we will find that the number of lawsuits under Measure 49 will be far more significant that those under Measure 37."

Trompke says he believes Measure 49 is flawed in the same way Measure 37 was, and for the same reason. "No group can write effective legislation unless it's vetted in an open and public process where opponents and proponents can work together over time. It's the same weakness that the initiative system has."

Greg MacPherson, D-Lake Oswego District 38, one of the creators of Measure 49 and an attorney at Portland's Stoel Rives LLP, says that while the measure itself was not debated publicly, the concepts that "gave rise to 49" were discussed in nine public hearings. "There was a lot of public input here. By the staff's count, 369 Oregonians from all over the state got to present on the issues and there was quite a mix of people."

MacPherson says he believes his measure "resolved many of the issues" brought about by Measure 37 and that there are always uncertainties when the stakes are high. "We have narrowed the issues and people are on firmer ground than they were before 49." To say otherwise, he says, "is just ridiculous."

The vesting question is something MacPherson believes should be decided by courts rather than by lawmakers, but he says he believes that any progress on development made after Measure 49 was placed on the ballot should not be considered "good faith" even if the vote had not yet occurred.

Eric Stachon, spokesman for 1000 Friends of Oregon, a conservation group, says reports of chaos in the aftermath of Measure 49 are likely exaggerated for political reasons. "Measure 49 claimants find it in their interest to promote an illusion of uncontrolled chaos. It's hyperbole."

Jim and Virginia Carlson, who began their efforts to split their 75 acres in Astoria into 28 lots three years ago, say the effects of the land war are real and significant. Jim Carlson inherited the property in 1957, when it was unencumbered by zoning regulations. Later, the land was zoned agricultural and slapped with an 80-acre minimum lot size.

The struggle to regain their development rights "has created a significant financial hardship on us and has been extremely stressful which has directly impacted our health," they said in a statement to *BrainstormNW*. "And the rules keep changing, which leaves us in a very precarious position. As lifelong Oregonians, and contributing members of our community, we deserve to be treated with more fairness."

It's an argument that has prompted open mockery on websites such as BlueOregon, in which bloggers refer to claimants, such as 95-year-old Dorothy English who is trying to build eight lots on her 20 acres, as "Greedy Grannies."

Zupancic, the Carlsons' attorney, says he believes the "human side" of Measure 49 "is being lost in the translation of the meaning of what 'is' is," he says. "Rooms full of lawyers talk about legal language, while the lives of real people who've paid their dues and been law-abiding for their entire lives are being jerked around unmercifully."

BrainstormNW February 2008