SUSAN MARMADUKE*

The Effect of Administrative Decisions on Claims for Compensation in Circuit Court Under Measure 37

INTRODUCTION

Measure 37 creates a remedy for an injury that Oregon law did not previously recognize: a less than total reduction in the fair market value of one's real property caused by land-use regulations restricting its use.[1] The measure authorizes both administrative and judicial remedies for that injury. A host of questions have arisen about the interaction of those remedies.

The measure provides that, if a challenged regulation continues to be enforced 180 days after written demand for compensation is made upon the public entity enacting or enforcing the regulation, a claim may lie in the circuit court. It also states that state and local governments' procedures for processing claims for compensation shall not act as a "prerequisite to the filing" of such a claim in the circuit court. Beyond that, the measure is silent as to the effect, if any, of administrative decisions on claims for compensation in circuit court.

When a governmental entity adopts and applies procedures for the processing of claims under Measure 37 and those procedures culminate in a decision other than waiver of the regulation, what

---

* The author is an appellate lawyer and business litigator in the Portland, Oregon, office of Harrang Long Gary Rudnick, PC. She received her B.A. at Portland State University and her J.D. at the University of California at Berkeley, School of Law (Boalt Hall). She is admitted to practice in Oregon and California.

1 *See* Coast Range Conifers, LLC v. State *ex rel.* Or. State Bd. of Forestry, 339 Or. 136, 117 P.3d 990 (2005) (holding that state wildlife nesting regulation which prevented logging company from logging approximately nine acres of its 40-acre parcel did not effect a "taking" because the property considered as a whole still had economically viable use, and declining to extend *Boise Cascade Corp. v. Bd. of Forestry*, 325 Or. 185, 198, 935 P.2d 411 (1997), which held that a complaint alleging deprivation of the only economically viable use of approximately 50 acres of a 64-acre parcel stated a takings claim under the Oregon Constitution).

is the effect of that decision on a subsequent claim for compensation in the circuit court? This article examines some of the issues pertinent to that question.

GOVERNMENTAL PROCEDURES AUTHORIZED BY MEASURE 37

Measure 37 authorizes state and local governments to apply existing procedures or to adopt new ones to process claims for the newly cognizable injury (that is, the reduction in the fair market value of real property caused by restrictions on its use).[2] Processing of such claims will require determinations as to whether the challenged land-use regulation is excluded from the measure's coverage;[3] whether the claim is timely; whether the claimant owns the property; whether the challenged land-use regulation restricts the property's use; whether it was enacted before the owner or the owner's family acquired the property; and whether it has caused a reduction in the property's fair market value.[4] Measure 37 vests in the public entity discretion to pay compensation or to modify, remove, or not apply the regulation.[5]

Many local governments have adopted procedures for administering claims for compensation under Measure 37, as have Metro (a metropolitan service district),[6] and the Department of Administrative Services of the State of Oregon.[7] Those procedures generally are designed to result in decisions focused solely on the rights and duties of the particular claimant or claimants, and they require the decision making body to apply established criteria to particular facts. Agency decisions reached by applying preexisting criteria to concrete facts and "directed at a closely circumscribed factual situation or a relatively small number of

---

[2] Measure 37 § 7, *available at* http://www.sos.state.or.us/elections/nov22004/guide/meas/m37_text.html (last visited Apr. 12, 2006).

[3] Regulations excluded from the measure's coverage include those that are required by federal law, that restrict or prohibit public nuisances or other activities for the protection of public health and safety, and that prohibit nude dancing or the sale of pornography. Measure 37, *supra* note 2, § 3.

[4] Measure 37, *supra* note 2, §§ 1-2.

[5] Measure 37, *supra* note 2, § 8.

[6] The Metropolitan Services District's Council adopted Ordinance No. 05-1087A, effective Dec. 23, 2005, codified at Metro Code, Or., Code § 2.21 (2005), *available at* http://www.metro-region.org/library_docs/about/chap2.21.pdf.

[7] *See*, *e.g.*, OR. ADMIN. R. 125-145(0010)-(0105) (2006) (guide for state agencies processing claims under Measure 37), *available at* http://arcweb.sos.state.or.us/rules/OARS_100/OAR_125/125_145.html.

persons"[8] are generally characterized as "quasi-judicial" decisions.

CONTEXT: ADMINISTRATIVE PROCEDURES ACT AND WRIT OF REVIEW

Certain quasi-judicial decisions are made by state agencies, which are governed by Oregon's Administrative Procedures Act (APA). The APA establishes a comprehensive pattern for judicial review of those decisions. The APA distinguishes between two types of final orders: "orders in a contested case" and "orders in other than a contested case."[9] To be considered a "contested case," the decision must have been reached after a hearing with certain formalities.[10] Measure 37 does not require, nor ordinarily do the administrative rules provide for, a hearing. Therefore, state agency decisions in Measure 37 claims are most likely, at least at the outset, to be viewed as "orders in other than a contested case."

The APA provides that "[j]udicial review of final orders of agencies shall be solely as provided by [the APA]."[11] Accordingly, many Oregon cases hold that the APA provides the exclusive avenue for obtaining judicial review of decisions by state agencies.[12] For example, a party may not circumvent the exclusive APA review process by filing a declaratory judgment action.[13]

Under the APA, when the circuit court reviews an order in other than a contested case, its role is not to determine the facts *de novo.* The scope and contents of the record are determined by the circuit court, and may include evidence that was not before the agency.[14] However, the court is limited to reviewing for er-

[8] Strawberry Hill 4 Wheelers v. Bd. of Comm'rs, 287 Or. 591, 602-03, 601 P.2d 769 (1979).

[9] OR. REV. STAT. § 183.482 (2003) (jurisdiction for review of contested cases); OR. REV. STAT. § 183.484 (2005) (jurisdiction for review of orders other than contested cases).

[10] OR. REV. STAT. § 183.310(2)(a) (2005).

[11] OR. REV. STAT. § 183.480(2) (2005).

[12] *See*, *e.g.*, Eppler v. Bd. of Tax Serv. Examiners, 189 Or. App. 216, 222, 75 P.3d 900, 903 (2003).

[13] Pen-Nor, Inc. v. Or. Dept. of Higher Educ., 87 Or. App. 305, 308, 742 P.2d 643, 645 (1987).

[14] *Id.* at 644-49, 996 P.2d at 960-63.

rors of law, including whether there is substantial evidence in the whole record to support the agency's decision.[15]

Decisions by cities, counties, districts, and other "municipal corporations" in the exercise of their quasi-judicial authority are subject to writ of review procedures, codified at ORS 34.010 *et seq*.[16] The writ of review statutes provide that quasi-judicial decisions by cities, counties, districts, or other "municipal corporations" in the transaction of municipal corporation business are subject to judicial review *only* as provided in the writ of review statutes.[17] When writ of review is available, it is the exclusive remedy for challenging such a decision.[18] The writ of review statutes exclude from their coverage certain defined types of land-use decisions.[19] Decisions by governing bodies under Measure 37 are, by the express terms of the measure, not considered to be such land-use decisions.[20]

It follows from the foregoing that, to the extent that a city, county, district, or other municipal corporation makes decisions in response to Measure 37 claims for compensation in the exercise of its judicial or quasi-judicial functions, the exclusive avenue for judicial review of those decisions would be under the writ of review procedures—unless Measure 37 is interpreted as modifying or replacing those remedies.

In a writ of review proceeding, the circuit court may review the jurisdictional, procedural, legal, or constitutional bases of the challenged decision, but the court does not determine the facts *anew*.[21] Instead, it determines whether the decision-making

---

15 Polaski v. Clark, 158 Or. App. 166, 171, 973 P.2d 381, 383-84 (1999) (explaining the general scope of review in a case other than a contested case).

16 OR. REV. STAT. § 34.010 (2005).

17 Under OR REV. STAT. § 34.020(2):

"[A]ny party to any process or proceeding before or by any inferior court, officer, or tribunal may have the decision or determination thereof reviewed for errors, as provided in ORS 34.010 to 34.100, and not otherwise."

OR. REV. STAT. § 34.020(2) (2005).

18 A person who may challenge a governmental decision by writ of review may not, for example, bring an action for a declaratory judgment regarding that decision. State *ex rel.* City of Powers v. Coos County Airport Dist., 201 Or. App. 222, 229, 119 P.3d 225, 228 (2005).

19 OR. REV. STAT. § 34.102(2) (2005).

20 Measure 37, *supra* note 2, § 9.

21 The writ may be allowed where the decision-making body appears to have:

"(a) Exceeded its jurisdiction;

"(b) Failed to follow the procedure applicable to the matter before it;

"(c) Made a finding or order not supported by substantial evidence in the whole record;

body's finding or order is supported by substantial evidence. With few exceptions, its review is confined to the record made before the inferior tribunal.[22] In the words of the Oregon Supreme Court:

> [T]he reviewing court should not allow new evidence or hold evidentiary hearings. The only possible justification for the continued existence of writs of review is that the procedure is fast and simple. Allowing evidence outside the record would change the nature of the proceeding and expand the scope of a writ of review beyond the statutory authorization.[23]

The APA and writ of review statutes make it clear that the agencies covered by each of them have the right and responsibility to decide matters within their respective jurisdictions. Those administrative procedures must be pursued before the claimant can resort to the courts. However, even when applicable statutes are silent as to those questions, courts may invoke the doctrines of "primary jurisdiction" or "exhaustion of administrative remedies" to require completion of administrative procedures before relief is sought in the courts.[24] Both doctrines were originally created by the courts to allocate the initial responsibility for resolving disputes between courts and agencies. The application

---

"(d) Improperly construed the applicable law; or

"(e) Rendered a decision that is unconstitutional."

OR. REV. STAT. § 34.040 (2005).

22 OR. REV. STAT. §§ 34.020, 34.040 (2005). Under certain limited circumstances, a record may be supplemented or the reviewing court may remand for further proceedings. Alt v. City of Salem, 306 Or. 80, 84, 756 P.2d 637, 640 (1988). Courts will not consider substantive issues outside the record below, but they may take additional evidence on procedural issues (e.g. standing or lack of notice). *See* First Commerce of America, Inc. v. Nimbus Center Assoc., 329 Or. 199, 207, 986 P.2d 556, 560 (1999) (allowing party to present new evidence related to justiciability when facts were not in dispute). However, appellate courts are not required to admit such additional evidence. Hood River Valley Residents' Comm., Inc. v. Bd. of County Comm'rs of Hood River County, 193 Or. App. 485, 505, 91 P.3d 748, 759 (2004).

23 *Alt*, 306 Or. at 84-85, 756 P.2d. at 640.

24 Boise Cascade Corp. v. Bd. of Forestry, 325 Or. 185, 191, 935 P.2d 411, 417 (1997). The court stated:

> There is no fixed formula for determining whether an agency has primary jurisdiction over a dispute or an issue raised in a dispute. In making such determinations, courts consider several factors, including (1) the extent to which the agency' specialized expertise makes it a preferable forum for resolving the issue, (2) the need for uniform resolution of the issue, and (3) the potential that judicial resolution of the issue will have an adverse impact on the agency's performance of its regulatory responsibilities.

Id. at 192, 935 P.2d at 417 (quoting Kenneth Culp Davis and Richard J. Pierce, Jr., II, *Administrative Law Treatise* § 14.1, at 272 (3d ed. 1994)).

of both doctrines may be mandated by statute, but neither is dependent on statutory authority.

THE SIGNIFICANCE OF GOVERNMENTAL PROCEDURES UNDER MEASURE 37

Questions have arisen about whether, or to what extent, Measure 37's "cause of action for compensation . . . in circuit court"[25] may trump the exclusive remedy provisions of the APA and writ of review statutes. Is Measure 37's caveat that governmental procedures shall not act as a "prerequisite" to the filing of such a cause of action more than a statutory effort to avoid application of the doctrines of primary jurisdiction and exhaustion of administrative remedies? Does it mean, as some have argued, that claimants are free to ignore governmental procedures and resulting quasi-judicial decisions on Measure 37 claims? Those questions arise out of the wording of Section 7 of the measure:

> A metropolitan service district, city, or county, or state agency may adopt or apply procedures for the processing of claims under this act, but in no event shall these procedures act as a prerequisite to the filing of a compensation claim [in the circuit court] . . . nor shall the failure of an owner of property to file an application for a land use permit with the local government serve as grounds for dismissal, abatement, or delay of a compensation claim [in the circuit court] . . . .[26]

Applying the methodology set forth in *PGE v. Bureau of Labor and Industries* (BOLI),[27] one begins with an analysis of text and context. A common and ordinary meaning of the word "prerequisite" is: "necessary as a preliminary to a proposed effect or end."[28] By employing the permissive word "may" rather than the mandatory "shall," the provision authorizes public entities to adopt or apply procedures for the processing of Measure 37 claims, but does not require them to do so. The measure, therefore, contemplates that some governmental entities may either fail to adopt such procedures, or fail to apply them.

In that context, the proviso that, "in no event shall these procedures act as a prerequisite to the filing of a compensation claim [in circuit court]" can be understood to mean that the existence

---

[25] Measure 37, *supra* note 2, § 6.

[26] *Id.* § 7.

[27] Portland Gen. Elec. Co. v. Bureau of Labor & Indus., 317 Or. 606, 859 P.2d 1143 (1993).

[28] WEBSTER'S NEW COLLEGIATE DICTIONARY 783 (5th ed. 1937).

or application of the procedures themselves cannot be a necessary precondition to the filing of a claim in the circuit court. In other words, the proviso appears to mean at least that a nonresponsive public entity cannot defeat a claim in circuit court by invoking the doctrines of "exhaustion of administrative remedies" or "primary jurisdiction." But does it go further than that?

Argument that Quasi-Judicial Decisions are Irrelevant

Some may argue that the measure's requirement of timely written demand on the public entity is like the tort claims notice requirements imposed by the Oregon Tort Claims Act.[29] Under that view, the making of a demand is a prerequisite to the filing of a claim in court, but the public entity's response to such a demand—other than waiver of enforcement of the challenged regulation—is irrelevant.

Proponents of that view can be expected to argue that the central purpose behind Measure 37 was to make it easier for property owners to obtain relief from land-use regulations (either in the form of a waiver of enforcement or compensation), and not to give interested governmental entities an opportunity to adjudicate claims. The argument is that a cause of action for compensation under Measure 37 is a "stand alone" claim that does not involve "review" of an agency decision. For example, when a person brought an action against the State of Oregon for breach of a video lottery terminal lease agreement, the Court of Appeals held that a lottery commission order denying any obligation under that agreement did not limit the plaintiff's remedies to those provided in the APA.[30] The APA did not apply because the plaintiff was not seeking review of the agency's order terminating the agreement, but was instead relying on that order to show the defendant's breach.[31]

It may be contended that, by creating a cause of action for which administrative procedures are not a "prerequisite," Measure 37 impliedly carved out an exception to the "exclusive remedy" provisions of the APA and writ of review statutes. Rules of statutory construction, such as the rule that the more specific

29 Or. Rev. Stat. § 30.275(1) (2005).

30 Premier Technology v. State, 136 Or. App. 124, 131-32, 901 P.2d 833, 888 (1995).

31 *Id.*

\\server05\productn\O\OEL\20-2\OEL204.txt unknown Seq: 8 22-JUN-06 16:11

statute (*i.e*., Measure 37) prevails over the more general one (*i.e*., the APA and writ of review statutes),[32] or the rule that the later-enacted statute prevails may support that argument.

Argument that Quasi-Judicial Decisions are Subject to Judicial Review under APA and Writ of Review Statutes

An alternative interpretation of Measure 37 is this: Nonresponsive public entities cannot invoke the doctrines of "exhaustion of remedies" or "ripeness" to thwart claims for compensation, but timely decisions that are the product of quasi-judicial procedures remain subject to challenge only under the APA and writ of review procedures. Proponents of that interpretation can be expected to point out that the measure's text and context are the best indicia of voter intent. The measure states that the cause of action for compensation it creates is "in addition to any other remedy under the Oregon or United States Constitutions," but the cause of action in circuit court "is not intended to modify or replace any other remedy."[33]

Moreover, a frequently invoked maxim of statutory interpretation is that 'the expression of one is the exclusion of another.'[34] Measure 37 states that decisions of governing bodies shall not be considered land-use decisions as defined in ORS 197.015(10).[35] However, the measure contains no comparable provision excluding such decisions from the scope of the APA or writ of review statutes. It does not state, for example, that a decision by a city, county, district, or other municipal corporation regarding a claim for compensation shall not be considered a decision of such entity "acting in a quasi-judicial capacity and made in the transaction of municipal corporation business as defined in ORS 34.102(2)"[36]—decisions that are subject to judicial review only under the writ of review procedures.

Similarly, Measure 37 does not state that a decision by a state agency regarding a claim for compensation shall not be consid-

[32] Or. Rev. Stat. § 174.010(2) (2005).

[33] Measure 37, *supra* note 2, § 12.

[34] State *ex rel.* City of Powers v. Coos County Airport Dist., 201 Or. App. 222, 234, 119 P.3d 225, 231 (2005) (en banc).

[35] Measure 37, *supra* note 2, § 9; *see also* Or. Rev. Stat. § 197.015(10) (2005).

[36] *See* Or. Rev. Stat. § 34.102 (2005) (explaining that decisions are subject to judicial review only under the writ of review procedures).

ered an order subject to judicial review only under the APA, which allows for reversal only in limited circumstances.

Some will argue that this suggests an intent by the voters to preserve the procedures that would otherwise apply to those decisions under the APA and writ of review statutes.

As for the argument that Measure 37 impliedly repealed the "exclusive remedies" features of the APA and writ of review statutes for the purpose of compensation claims, a conclusion of implied repeal "is not favored and must be established by plain, unavoidable, and irreconcilable repugnancy between the prior and subsequent statutes."[37]

In a related vein, the Oregon Supreme Court has observed:

> [W]hen one statute deals with a subject in general terms and another [statute] deals with the same subject in a more minute and definite way, the two should be read together and harmonized, if possible, while giving effect to a consistent legislative policy. . . . [Only] if the two statutes cannot be harmonized, [should] "the specific statute [be] . . . considered an exception to the general statute."[38]

In this instance, Measure 37 and the remedies available under the APA and writ of review statutes may be harmonized in this way: If a governmental entity accepts Measure 37's invitation to adopt and apply procedures for administering compensation claims, and those procedures qualify as an exercise of the agency's quasi-judicial authority under the APA, or of the municipal corporation's quasi-judicial function under writ of review statutes, the remedies under those statutes continue to apply. If, on the other hand, a governmental entity chooses the alternative course contemplated by Measure 37 (that is, to refrain from adopting or applying such procedures), an otherwise proper claim for compensation may be filed in the circuit court.

Preclusive Effect of Findings of Fact

If Measure 37 is interpreted as preserving the remedies available under the writ of review statutes, judicial review of local governments' quasi-judicial decisions regarding Measure 37 would be for substantial evidence. If the measure is instead interpreted

[37] Powers, 201 Or. App. at 233, 119 P.3d at 237 (quoting City of Lowell v. Wilson, 197 Or. App. 291, 309, 105 P.3d 856, 866 (2005)).

[38] Lewis v. CIGNA Ins. Co., 339 Or. 342, 349-50, 121 P.3d 1128, 1132 (2005) (quoting State v. Guzek, 322 Or. 245, 268, 906 P.2d 262, 286 (1995).

as modifying or replacing those remedies to provide a "stand alone" cause of action for compensation in circuit court, the question will soon arise as to whether findings of fact by governmental decision-making bodies will be given binding effect in the circuit court action involving identical issues.[39]

Oregon courts have recognized that some, but not all, types of administrative proceedings are appropriate to establish issue preclusion.[40]

> Whether an administrative decision has preclusive effect depends on: (1) whether the administrative forum maintains procedures that are "sufficiently formal and comprehensive"; (2) whether the proceedings are "trustworthy"; (3) whether the application of issue preclusion would "facilitate prompt, orderly and fair problem resolution"; and (4) whether the "same quality of proceedings and the opportunity to litigate is present in both proceedings."[41]

Therefore, trial courts might give preclusive effect to public entities' findings of fact on Measure 37 claims, depending on the nature of the procedures those entities adopt for processing those claims.[42]

Parties seeking to avoid issue preclusion in the circuit court action for compensation may argue that the nature of the pro-

[39] The Oregon Supreme Court has identified five requirements essential to the application of issue preclusion:

> 1. The issue in the two proceedings is identical.
> 2. The issue actually was litigated and was essential to a final decision on the merits in the prior proceeding.
> 3. The party sought to be precluded has had a full and fair opportunity to be heard on that issue.
> 4. The party sought to be precluded was a party or was in privity with a party to the prior proceeding.
> 5. The prior proceeding was the type of proceeding to which this court will give preclusive effect.

Nelson v. Emerald People's Util. Dist., 318 Or. 99, 104, 862 P.2d 1293, 1296-97 (1993) (citations omitted).

[40] *Id.* at 104 n. 4 (citing N. Clackamas Sch. Dist. v. White, 305 Or. 48, 52, 750 P.2d 485, 486 (1988); State v. Ratliff, 304 Or. 254, 258, 744 P.2d 247, 249 (1987)).

[41] *Id.* at 104.

[42] Claimants may argue that application of the doctrine of issue preclusion to the facts in the public entities' procedures for deciding Measure 37 claims violates the right to a jury trial under the Oregon Constitution. However, claimants have no constitutional right to a jury trial on claims for compensation of the type contemplated by Measure 37 because such claims did not exist when the drafters wrote the Oregon Constitution in 1857. *See* Jensen v. Whitlow, 334 Or. 412, 421-22, 52 P.3d 599, 603-04 (2002) (stating that the "trial by jury" provision of the Oregon Constitution simply guarantees a jury trial in civil actions for which the common law provided a jury trial when the Constitution was adopted).

ceedings before the public entity did not afford a full and fair opportunity to litigate the issue.[43] They may argue that the voters did not intend issues decided by public entities to be accorded preclusive effect in a subsequent claim for compensation in the circuit court. Instead, they may argue, the voters created the cause of action for compensation in the circuit court and provided that agency procedures shall not be "prerequisites" to the filing of such a claim.

Opponents can be expected to point out that Measure 37 could have provided that findings made in agency proceedings are not admissible in any action for compensation in the circuit court, and that its silence allows for application of the usual rules of issue preclusion.

Conclusion

Measure 37 recognizes a new injury and authorizes both administrative and judicial remedies for that injury. When two entities have authority to decide the identical issues, various procedural devices may come into play in order to serve the goals of conserving resources, making the best use of each entity's respective area of expertise, and avoiding inconsistent decisions. Traditionally, those purposes have been served by such doctrines as "primary jurisdiction," "exhaustion of administrative remedies," and issue preclusion, as well as by such devices as the statutory limitations on the scope of judicial review under the APA and writ of review statutes. A host of questions about the application of those principles and procedures under Measure 37 now await resolution by the Oregon courts.

[43] In *Barackman v. Anderson*, 338 Or. 365, 109 P.3d 370 (2005), the court held that where the statute was silent on the issue, the party seeking to avoid preclusive effect of findings in a PIP arbitration bore the burden of demonstrating that the words of the statute reflect a legislative intent to prohibit Oregon courts from applying the doctrine of issue preclusion to arbitration decisions. *Id*. at 370, 109 P.3d at 373.