

Property Rights Law May Alter Oregon Landscape

By FELICITY BARRINGER

ORTLAND, Ore., Nov. 20 - Over the past three decades, Oregon has earned a reputation for having the most restrictive land-use rules in the nation. Housing was grouped in and near the cities, while vast parcels of farmland and forests were untouched by so much as a suburban cul-de-sac.

Environmentalists and advocates for "smart growth" cheered the ever-growing list of rules as visionary, while some landowners, timber companies and political allies cried foul.

But in a matter of days, the landowners will get a chance to turn the tables. Under a ballot measure approved on Nov. 2, property owners who can prove that environmental or zoning rules have hurt their investments can force the government to compensate them for the losses - or get an exemption from the rules.

Supporters of the measure, which passed 60 percent to 40 percent, call it a landmark in a 30-year battle over property rights.

"I've been getting calls from California, Idaho, Washington, Alaska and Wisconsin," said Ross Day, a Portland lawyer for the conservative group Oregonians in Action who co-wrote the law, Ballot Measure 37. "They all want to find out what our secret recipe was to get it passed."

Whatever the benefits of Oregon's land-use rules, Mr. Day added, "the people paying the cost are property owners."

"If Enron does something like this, people call it theft," he said. "If Oregon does it, they call it land-use planning."

Richard J. Lazarus, a professor at the Georgetown University Law Center who specializes in environmental law, called the measure a blunt instrument that could undermine all zoning and environmental protections and undercut land values. "If you can build a little Houston anywhere, or a gravel pit or a shopping center next to your home, you don't have maximization of property values," Professor Lazarus said.

"If you fail to regulate now, you're reducing property values for future Oregonians," he continued. "A lot of what government is doing in environmental protection is at least trying to balance the needs of present and future generations."

The new law, Professor Lazarus said, "is one of those very simple solutions, but, boy, did they open a can of worms."

Conservatives across the country have championed the idea of compensation for aggrieved landowners since at least the mid-1990's and the 1994 Republican "Contract With America." Four states have laws dating from that period that provide some compensation for affected property owners.

"In Oregon, they're serious," said Michael M. Berger, a partner in the Los Angeles law firm of Manatt, Phelps & Phillips. "It helps make people sit up and take notice that this is something they have to deal with. This is a big shock to the body politic - it's a very red-state thing to do, and Oregon is very blue, so this shows it cut across everyone."

Both sides expect the measure to survive judicial scrutiny, and the state and local governments are to start fielding claims on Dec. 2. If claims are found to be valid and the government will not or cannot pay, it must instead waive any restrictions that went into force after the owners - or their parents or grandparents - acquired the land.

Some fear that the state will be unable to pay and that hillsides in the Cascades now bristling with fir trees and pear orchards could sprout a crop of McMansions, Wal-Marts or resort condominiums in a few years.

The supporters of the new law successfully depicted the current plight of property owners in a campaign with a decidedly populist edge. One advertisement showed a woman penalized for cutting blackberry bushes - potential wildlife habitat - in her backyard in Portland.

Another woman, Dorothy English, 92, was a fixture on drive-time radio advertisements in the final week of the campaign. Ms. English bought land in the hills west of Portland in 1953 and is still fighting for the right to carve several lucrative building lots out of the 20 acres she has left. "They've made fools of people in this state," she said last Wednesday. "I've always been fighting the government and I'm not going to stop."

The Hood River Valley, 60 miles east of Portland and the source of more than a third of the nation's Bosc pears, is one of the places that could be most affected. Many of the farmers are the third or fourth generations of their families to work the same land. Most land-use regulation came after their families did, so their claims could be extensive and expensive. The valley nestles along the Columbia River Gorge, a strong draw for windsurfers; the development pressure is strong.

Sitting in their living room in the town of Hood River, overlooking fields newly planted in cherries, John Benton and his wife, Julie, both 57, said that their income was eroding and that their 100-acre farm had "barely supported us." The Bentons, whose family ownership dates to 1910, said that orchard farmers like themselves could not make a living without an infusion of cash from selling land for home construction.

By contrast, their neighbor Fritz VonLubken, who is 69 and bought his orchards from a grandfather who came to the area in 1912, said he believed that farmland needed to be preserved. "You zone for industrial districts," Mr. VonLubken said. "Well, farming is an industry. It needs to be protected. We're a high-value business, and this is the best location for us."

Mike McCarthy, whose 250 acres scattered on the northeastern apron of Mount Hood produce a plentiful crop of pears, said, "These are the most productive soils in Oregon," and, as such, were irreplaceable.

The success of the ballot measure has led advocates of planning to do some soul searching. It won a majority in all 35 of the state's counties except the one that encompasses Corvallis and Oregon State University and got a thin majority even in the progressive city of Portland.

"It definitely calls into question a lot of the mechanisms we have now," said David Bragdon, the president of the Metro Council, which sets the growth parameters for 460 square miles in three metropolitan Portland counties. "And it undermines the mechanisms we have."

Mr. Bragdon added, "There is a resentment in rural areas of urban policy makers and the urban elite."

The long-used planning philosophy is wryly called "timberland, farmland and ring around the city." Each county has established "urban growth boundaries" around its cities and has tried to keep most development to areas within them.

On farmland, houses can be built only under strict conditions - for instance, the buyer must show that he can generate \$80,000 in annual gross income from farming for a period of years before he can build. Nonfarm dwellings are allowed only in areas with poor soil. In return, farmers receive substantial property tax breaks; their land may be assessed at as little as 0.5 percent of land where development is encouraged.

Even if they succeed, farmers who fight to have the urban growth boundary extended to their lands must pay a one-time tax amounting to perhaps 7.5 percent of the land's new value - in addition to federal and state capital gains taxes on the sale of the property. Thanks to such tight policies, suburban sprawl has been largely banished in Oregon.

Gov. Theodore R. Kulongoski, a Democrat who opposed the compensation measure, said last week that he would push to have claims paid rather than tear holes in the state's land-use system.

But, like many other states, Oregon is strapped. To pay the claims, some pro-planning forces suggest setting high taxes on the profits on newly developable land. If, instead, the government grants exemptions to land-use rules, many property owners might want to sell for the ready profit.

Mr. VonLubken, like Professor Lazarus, said he believed that the first wave of farmland sales would be the most lucrative and that those new residents, having paid a premium for bucolic splendor, would support regulation to help keep a second wave of newcomers away.

The state's population grew 20.4 percent in the 1990's, to about 3.4 million people in 2000. The federal government, largely through the Forest Service, is the largest landowner in Oregon; state, tribal and federal lands constitute about 55 percent of the state's total acreage. Of the remaining 27.7 million acres of privately held land, 56 percent is farmland.

Other states that allow for compensation for aggrieved property owners are Florida, Texas, Louisiana and Mississippi. But they set a threshold, for instance a 25 percent reduction in a property's value, and will pay only for losses caused by new land-use rules. The retroactive feature of the Oregon law could affect many more people. Until the

claims start, though, no one will hazard a guess at just how much land will be affected, and at what cost.

"It's no coincidence that they passed this Measure 37 in a state that has prided itself on having the most extensive planning and regulatory scheme for rural lands," said J. David Breemer, a staff lawyer with the Pacific Legal Foundation, a conservative advocacy organization. "This type of initiative and legislation will be more common now."

The planners, however, are still flying their flags.

"Quality of life is something that is shared," said Robert Liberty, a former president of 1,000 Friends of Oregon, an ardent pro-planning group, who was just elected to the board of the Portland regional planning agency. "A golf course is not. A four-car garage is not. One of the best things about the planning process is that it makes a better community for everyone, regardless of income."