

MEASURE 39
IMPACT ON REDEVELOPMENT

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1. Introduction

In November 2006, the voters passed Ballot Measure 39 which, as stated in the official title, "Prohibits public body from condemning private real property if intends to convey to private party." The measure in general¹ prevents a government from condemning property (that is, requiring the owner of private property to sell it to the government) if the government plans to then sell the property to another private owner for development. In Oregon such condemnations occur primarily under urban renewal plans for the revitalization of a blighted area. According to proponents of the measure, there are four exceptions to the Measure 39 prohibition: (1) real property that is a danger to health or safety for specified reasons (contamination, dilapidated structures, improper or insufficient water or sanitary facilities, or any combination of these factors); (2) timber, crops, top soil, gravel or other fixtures may be removed from the property being condemned; (3) real property to be used for transportation or utility-related projects; and (4) real property acquired by a new owner after the government publishes a notice that it is considering condemning the property.² If a property owner believes the government's condemnation of its property violates provisions of Measure 39, a court, without deferring to any local government findings, must decide whether the government may proceed with the condemnation. Many urban renewal practitioners feared the consequences for local redevelopment and economic development plans.

2. Basic Urban Renewal Principles

A. *Overview*

Before examining the direct impact of Measure 39, a bit of grounding in Oregon urban renewal principles is appropriate. There are over fifty urban renewal agencies in Oregon. Many of the agencies are not "urban," but rather function in small communities, and increasingly in unincorporated areas seeking revitalization and economic growth. The urban renewal goal is to "eliminate slum and blight" in order to improve communities. Urban renewal was originally a federal program, adopted by the states, and implemented in Oregon in the 1950's. Blight is broadly defined in ORS 457.010 to mean areas that are detrimental to the health, safety, or welfare of the community by reason of deterioration, faulty planning, inadequate or improper facilities, deleterious land use, or the existence of unsafe structures. All of these are indicia of the blight, and these are the conditions that retard or stop economic reinvestment in real estate, within a discrete geographic area.

¹ Section 4 of the Measure alters the calculation of attorneys fees in condemnation cases.

² This summary is taken from the website of Oregonians in Action in 2006.

The core function of an urban renewal agency is to encourage private investment in blighted areas using a number of methods. Urban renewal agencies have unique access to a source of funds known as “tax increment financing,” or “TIF.” The processes and uses of TIF continue to evolve through citizen initiatives, the legislative process, and the action of the Oregon Supreme Court.

ORS Chapter 457 authorizes the creation of urban renewal agencies,³ describes the substance of an urban renewal plan⁴ and the process for adopting a plan,⁵ and authorizes the collection and expenditure of tax increment revenues.⁶

B. *Land Acquisition and Disposition*

Until November 2006, urban renewal agencies could assemble real estate sites, using condemnation if necessary, and convey them for redevelopment in a manner that furthers the public goals state in an urban renewal plan. Urban renewal work may still be accomplished through voluntary acquisition and disposition of land using development agreements, the making of loans, or other transactions that relate to land. But the ability to assemble land has been seriously curtailed by Measure 39, substantially codified at ORS 457.015.

Under an urban renewal plan, the agency undertakes activities for the redevelopment of blighted areas through a program of cooperation between government and private enterprise. Urban renewal agencies have discretion to negotiate transactions with private developers in the manner most likely to achieve urban renewal plan goals. An urban renewal agency may use the power of eminent domain to assemble parcels of land. It may then dispose of the acquired land at its “fair reuse value”⁷ as determined by the agency. The “fair reuse value” is generally set by an agency considering the value of the land in the context of the overall benefits to be realized through the proposed redevelopment by a private party.⁸ This process of acquisition at or near *fair market value* and disposition at less than *fair market value* is often referred to as “land writedown.”

C. *Other Urban Renewal Activities*

In addition to land assembly, an urban renewal agency may undertake to eliminate blighted areas by making certain investments related to real property and its improvements.

The categories of urban renewal expenditure authority under an urban renewal plan come from ORS 457.170, which provides:

³ ORS 457.035(1)

⁴ ORS 457.085

⁵ ORS 457.095

⁶ ORS 457.420-457.460; ORS 457.170.

⁷ ORS 457.230

⁸ ORS 457.170; ORS 457.230. Under ORS 457.230 an urban renewal agency may determine the “fair reuse” value of land when leasing or selling it. The fair reuse value is the price at which the agency determines the land should be made available in order that it may be developed, redeveloped, cleared, conserved, or rehabilitated for the purposes specified in the plan.

“An urban renewal agency may plan or undertake any urban renewal project to carry out an approved urban renewal plan. In planning or undertaking an urban renewal project, the urban renewal agency has the power:

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“(2) To carry out any rehabilitation or conservation work in an urban renewal area.

“(3) To acquire real property, by condemnation if necessary, when needed to carry out the plan.

“(4) To clear any areas acquired, including the demolition, removal, or rehabilitation of buildings and improvements.

“(5) To install, construct or reconstruct streets, utilities and site improvements in accordance with the urban renewal plan.

“(6) To carry out plans for a program of the voluntary repair and rehabilitation of buildings or other improvements in an urban renewal area in accordance with the urban renewal plan.

“(7) To assist in relocating persons living in, and property situated in, the urban renewal area in accordance with the approved urban renewal plan and to make relocation payments.

“(8) To dispose of, including by sale or lease, any property or part thereof acquired in the urban renewal area in accordance with the approved urban renewal plan.

“(9) To plan, undertake, and carry out neighborhood development programs consisting of urban renewal project undertakings in one or more urban renewal areas which are planned and carried out on the basis of annual increments in accordance with the provisions of this chapter for planning and carrying out urban renewal plans.

“(10) To accomplish a combination of the things listed in this section to carry out an urban renewal plan.”⁹

This statute authorizes urban renewal agencies to do the things listed in the statute within the urban renewal area, or to provide funding that will allow private developers to do them, in order to prevent or eliminate blight within an identified urban renewal area, according to the provisions of an adopted urban renewal plan. All of the activities are specifically related to making changes in the physical or legal condition of real property, or relocating persons or businesses that must move because of those activities. In addition to the authority to act pursuant

⁹ ORS 457.170.

to an urban renewal plan, an urban renewal agency has authority to conduct other activities both inside and outside an urban renewal area, but with some restrictions.

D. Urban Renewal Evolution

The history of urban renewal activities has evolved over nearly fifty years of use in Oregon¹⁰ from a focus on decent housing to economic development. With this shift and changing emphasis, the need and importance of eminent domain for urban renewal acquisitions has changed.

a. *The Focus on Housing.* Urban renewal in Oregon grows from the U.S. Housing Act of 1949. The Housing Act provided significant federal funds to assemble, clear and resell or lease land for primarily residential purposes to private developers or public housing agencies. Urban renewal agencies were formed throughout the country to take advantage of these funds. Oregon responded to the Housing Act by passing an urban renewal law in 1951 that enabled housing authorities to act as urban renewal agencies. In 1957, the authority was expanded to city councils, county commissions or separate boards appointed by those bodies.

Until 1979, most urban renewal agencies focused their activities on housing based on the availability of federal funds. Early “slum clearance” projects such as the South Auditorium Project in southwest Portland and the Eugene downtown generated controversy because of large scale displacement of residents and businesses and demolition of some arguably historic buildings. At that time there was not clear direction about the rights of displaced persons to relocation benefits. The Federal Relocation Act of 1970 and later Oregon legislation has required a uniform approach to property purchase and relocation.

The Housing Act required a local match for the federal funds to be invested. In the 1950’s California and Oregon developed the system of tax increment financing to generate the necessary local match. The Oregon voters adopted a constitutional amendment authorizing TIF in 1960. The first legislation implementing the constitutional authority narrowly defined “blight”, not anticipating that urban renewal would evolve over time from a program primarily to clear slums and develop low-cost housing to a tool emphasizing the stimulation of downtown revitalization and economic development.

b. *Projects to Maximize the TIF Tool.* When Congress passed the Housing and Community Development Act of 1974, it replaced the Housing Act funding programs with block grants that did not provide for urban renewal activities. The result was a shift from federal funding to local funding of urban renewal plans using TIF. This shift enticed agencies to pursue a change in emphasis from redeveloping housing areas to revitalizing business districts, which would substantially increase values and generate increased TIF. The shift coincided with an increasing reluctance of the public to approve GO bonds for public improvements and TIF bonds do not require a vote. And finally, the taxing districts saw the long-term benefit of the increased

¹⁰ *The History of Urban Renewal in Oregon*, researched and written by Tashman Johnson LLC, with Nina Johnson as the primary author. This document is available on the website of the Association of Oregon Redevelopment Agencies (AORA) which is available at www.orurbanrenewal.org.

assessed valuation which lowered the tax rates. So in the years from 1974 to 1979, TIF came into its own.

A wholesale rewrite of ORS Chapter 457 in 1979 marks the genesis of urban renewal activities as undertaken today. The 1979 legislation expanded the permissible uses of TIF recognizing the purpose of economic stimulation and expanded the definition of blight to include conditions that resulted in a “stagnant or unproductive condition of land potentially useful and valuable for contributing to the public health, safety and welfare.” Furthermore, the 1979 legislation responded to identified problems in the practice of urban renewal activities by increasing the public scrutiny of the urban renewal efforts, requiring approval of urban renewal plans and substantial amendments by non-emergency ordinance, and restricting the amount of area and assessed value that that could be included within an urban renewal area.

c. *The Economic Development Emphasis.* The 1980’s began the era of urban renewal agencies as economic development catalysts. Plans of this era often include significant land acquisition programs for redevelopment as industrial or commercial sites, as well as infrastructure contributions to make the acquired land useable. Examples include Portland’s Northwest Front Avenue Urban Renewal Area that included PDC acquisition of an environmentally contaminated site and its clean up and resale to Wacker Siltronic, a German semi-conductor manufacturer. The project provided \$14 million in tax increment for site improvements and generated 800 jobs that were filled with unemployed Portland residents through PDC’s first-source hiring program. The City of Portland adopted the Willamette Industrial Urban Renewal Area in 2005 to stimulate private investment by providing funding for redevelopment activities that will create new jobs in the area, clean-up of environmental contamination and infrastructure to support development and redevelopment.

Other examples of successful industrial development on “greenfields” include the Fairview Urban Renewal Area in Salem and the Leveton Tax Increment District in Tualatin. These areas encompassed undeveloped land with potential, but no infrastructure for industrial development. The agencies purchased the land at bare land prices, incurred urban renewal debt to build the infrastructure and the attracted significant private investment to generate tax increment to pay back the debt. The Fairview District debt has been retired. The urban renewal investment in Rainier has led to the location of a major taxpayer and to significant job creation. Milton-Freewater saw an opportunity to attract a non-agricultural employer and assembled property and made infrastructure improvements to site a software call center.

d. *Downtown Revitalization.* While industrial developments are easily identifiable and often lead to significant and immediate success through attracting just one private partner, the majority of the Oregon urban renewal plans are largely focused on downtown revitalization and infrastructure improvements. This development is not surprising considering the scarcity of other funds available to cities and counties for capitals improvements. After Measure 5, the availability of GO bonds to fund capital improvements without a vote is limited. Issuing urban renewal debt does not require a vote under state law. In addition, the division of taxes system after Measure 50 does not increase the taxes of the taxpayer and is therefore a politically attractive alternative to complete infrastructure projects.

A sampling of current urban renewal plans and their infrastructure components reveals that almost all plans include significant street and water and sewer system upgrades and expansions (Portland's Downtown Waterfront Plan and Airport Way Plan, Canby, Lincoln City and Jackson County); improvements to the amenities of the infrastructure, such as street trees, ornamental street furniture and special paving to enhance downtown areas (Seaside, Bandon and The Dalles); providing off-street parking facilities (Medford, LaGrande, Bend) and contributions to significant city or regional public improvements (Eugene and Portland's North Interstate Plan). Jacksonville's plan has a specific purpose of preserving its historic downtown through public investment in crumbling infrastructure.

Many urban renewal plans restrict or prohibit land acquisition, particularly the use of involuntary acquisition. Other urban renewal agencies have included land acquisition and disposition as part of their downtown revitalization programs (Bend and Medford). Portland's newer urban renewal plans have moved to revitalize areas outside its Central City (Gateway and Lents) and have restricted the acquisition authority in response to community concerns.

The measures of success for plans that emphasize general infrastructure upgrades rather than on improvements to a focused site must be more long-term. But the continuing attraction of urban renewal as a local tool within local control seems evident.

3. Genesis of Measure 39

A. *The Kelo Case.*

In June 2005 the U.S. Supreme Court issued a decision in *Kelo vs. City of New London*, 545 U.S. 469 (2005) in which the Court ruled that the City of New London, Connecticut, may condemn private real property to transfer to another private owner to develop according the City's development plan. In its decision the Court stated that, "Promoting economic development is a traditional and long accepted function of government." The Court cited several earlier cases in which the justices had ruled that condemning property for the private benefit of individuals or to establish a business which the public could enter (such as a theater) is not constitutional, but revitalizing a blighted area is a public benefit under the constitution, and the project cannot be stopped by the owner of a piece of property that is not blighted. In the *Kelo* case, the river-front homes at issue were not individually blighted, but the overall area was economically depressed, and the City of New London had prepared a detailed development plan for revitalization. The Court said that the City as a whole will receive the primary benefit of the City's development plan in the form of new jobs created, increased taxes, and public access to the river next to the property. "Because the plan unquestionably serves a public purpose, the takings challenged here satisfy the public use requirement of the Fifth Amendment," the Court wrote. See the attached Summary of the case from the Legal Information Institute, Cornell Law, [Appendix 1.](#)

Obviously naïve urban renewal practitioners in Oregon sanguinely noted that Oregon's urban renewal program was legally safe after *Kelo*. The authority for acquisitions under Oregon urban renewal law did not rest on economic development as a public use but rather on urban renewal's purpose to cure blight. Oregon law was well settled that condemnation for elimination

of blight was constitutionally acceptable.¹¹ Curing blight was a legislatively acknowledged public purpose.¹² And urban renewal agencies were not private corporations as in the *Kelo* case. All the controversial elements in *Kelo* could be easily resolved to favor Oregon urban renewal condemnation powers.

B. Public Action

However, the Supreme Court's decision surprised and angered many people. In a national outcry, property rights groups such as the Castle Coalition, and their "Keep Your Hand Off My House Campaign," began seeking state legislative prohibitions against condemnation of private property for redevelopment purposes.¹³ The Oregon Legislature was in session, and HB 3505, a bill similar to Measure 39 was passed by the House of Representatives, but the bill did not reach a vote in the Senate. As early as March 2005, the Secretary of State received initiative petitions for measures, both constitutional and statutory, that included prohibitions on condemnation for redevelopment purposes. In September 2005, Oregonians in Action filed Initiative #57 for approval for circulation as a proposed initiation petition. With over 86,700 valid signatures, Initiative #57 became Measure 39.

C. The Election

When the measure was certified for the ballot, various groups reviewed Measure 39 and noted difficulties. For example, section 4 of the measure would change the rules concerning when a government body must pay attorney fees/costs for a property owner. The official Financial Estimate Committee calculated that the State of Oregon would have to pay an additional \$8-17 million each year for additional attorney fees/costs for the State in condemnation cases of all types, including for highway purposes. The assumption is that property owners may be less likely to accept the initial offer and more likely to wait for a court to decide the value of their property, so more of these cases will have to go through a trial before they are resolved. In addition, due to a change in the rules, more property owners will be entitled to recover attorney fees and costs after trial because, from the time of the initial offer (not less than 40 days before filing the court case) and the valuation date set in the filing, property value may have risen above the government's initial offer. Cities and counties also assumed that more cases would go to trial and estimated that their costs for appraisals plus attorney fees for themselves and to reimburse property owners would rise by \$8-13 million per year.

Urban renewal agencies saw the threat to its programs. Measure 39 defined "blight" too narrowly when compared to the current blight definition in ORS 457.010.¹⁴ Condemnation is an

¹¹ Foeller v. Housing Authority of Portland, 198 Or 205, ___ P2d ___ (1953)

¹² ORS 457.020

¹³ By the Spring of 2006, 27 legislatures had passed some form of restriction on the use of condemnation by state and local governments. *Castle Coalition, "Legislative Action Since Kelo," June 20, 2006.*

¹⁴ The statute defines "blighted areas" as:

"[C]haracterized by the existence of one or more of the following conditions:

appropriate tool to use when a development would benefit the entire community by eliminating blight, as it is currently defined in statute and by bringing in jobs and additional tax revenue, they argued.

Furthermore, a few individual property owners should not be able to stop a project that benefits the whole community by refusing to sell. The inability to locate property owners in order to negotiate a property sale should not stop a project with broad public benefit. Significant public benefits have been realized by projects such as the assembly of land for the Intel campus at Ronler Acres in Hillsboro which required condemnation.

Finally, the urban renewal agencies noted that few government agencies in Oregon are authorized to use condemnation to encourage economic development. The local processes to control such actions have resulted in very few instances of condemnation.

“(a) The existence of buildings and structures, used or intended to be used for living, commercial, industrial or other purposes, or any combination of those uses, that are unfit or unsafe to occupy for those purposes because of any one or a combination of the following conditions:

“(A) Defective design and quality of physical construction;

“(B) Faulty interior arrangement and exterior spacing;

“(C) Overcrowding and a high density of population;

“(D) Inadequate provision for ventilation, light, sanitation, open spaces and recreation facilities; or

“(E) Obsolescence, deterioration, dilapidation, mixed character or shifting of uses;

“(b) An economic dislocation, deterioration or disuse of property resulting from faulty planning;

“(c) The division or subdivision and sale of property or lots of irregular form and shape and inadequate size or dimensions for property usefulness and development;

“(d) The laying out of property or lots in disregard of contours, drainage and other physical characteristics of the terrain and surrounding conditions;

“(e) The existence of inadequate streets and other rights of way, open spaces and utilities;

“(f) The existence of property or lots or other areas that are subject to inundation by water;

“(g) A prevalence of depreciated values, impaired investments and social and economic maladjustments to such an extent that the capacity to pay taxes is reduced and tax receipts are inadequate for the cost of public services rendered;

“(h) A growing or total lack of proper utilization of areas, resulting in a stagnant and unproductive condition of land potentially useful and valuable for contributing to the public health, safety and welfare; or

“(i) A loss of population and reduction of proper utilization of the area, resulting in its further deterioration and added costs to the taxpayer for the creation of new public facilities and services elsewhere.”

But the anti-condemnation fever was too hot. Even the Association of Oregon Redevelopment Agencies did not take a public position on the measure because it was unable to secure member consensus. In the end, the measure had virtually no organized opposition and passed by a wide margin.

D. Text of Ballot Measure 39

An annotated version of ORS 35.015 is attached to these materials as Appendix 2. The text is not written with perfect clarity and issues that could be raised about the meaning of the law are noted in Appendix 2. However, to the author's knowledge there have been no court challenges to an attempted taking for redevelopment purposes in Oregon to date. This is likely because of the nature of current urban renewal plans and their projects, political risks of initiating condemnation for other than public infrastructure, and the conservative advice of urban renewal advisors.

E. Impact on Urban Renewal and Redevelopment Activities

As mentioned earlier, many urban renewal plans adopted before Ballot Measure 39 restricted or prohibited land acquisition, particularly the use of involuntary acquisition. As local sentiment has turned away from government land assembly for large projects, and toward government support of private initiatives, urban renewal plans have not authorized involuntary acquisition of land.

Where urban renewal agencies have included land acquisition and disposition as part of their revitalization programs prior to Measure 39, these projects have either been eliminated or delayed pending voluntary acquisition efforts. In at least one case, the condemnation of land for a public parking garage resulted in a series of remnant parcels that have now been sold for redevelopment. Although the acquisition occurred before 2006, it could have been justified even after 2006, assuming a public parking garages is deemed part of a "transportation related project. Obviously, new urban renewal plans and projects since 2006 cannot include condemnation as a tool for land assembly for redevelopment. However, involuntary acquisition for public transportation and utilities remains a common authority in new plans. Interestingly, most new urban renewal plans include the possibility of acquiring land for all the listed potential "public projects," which may include park and open space improvements.

Probably the most significant impact has been in situations where the possibility of a "friendly condemnation" would entice a property owner to sell its land for a redevelopment project. As used here, "friendly condemnation" means the voluntary sale of property to a government agency that has the power to condemn, and has made a "threat of condemnation." A threat of condemnation exists if a representative of a government body or a public official authorized to acquire property for public use informs a property owner that the government body or official has decided to acquire your property. The owner must have reasonable grounds to believe that, if the owner does not sell voluntarily, the property will be condemned. A threat of condemnation also exists if a property owner learns of a decision to acquire its property for public use through a report in a newspaper or other news medium, and this report is confirmed by a representative of the government body or public official involved. The property owner must

have reasonable grounds to believe that they will take necessary steps to condemn your property if the owner does not sell voluntarily.

A property owner may be interested in a friendly condemnation because selling under a threat of condemnation results in beneficial tax treatment of the proceeds of the sale. While well beyond the scope of this presentation, and not specifically within the author's area of expertise, those benefits can be generally described as the ability of a property owner who would otherwise pay taxes on any gain from the condemnation in the year of the sale to postpone reporting the gain for tax purposes if it buys property that is similar or related in service or use to the condemned property within the "replacement period" defined by the Tax Code.

There is now a serious question whether an urban renewal agency can offer the benefits of friendly condemnation to entice a voluntary sale that avoids the prohibition of Ballot Measure 39. In order to create a situation where there is a valid "threat" that gives the property owner the ability to claim a postponement of taxes on the gain from a condemnation award, the government agency must have the authority to condemn the property and have communicated that intent to the property owner. Communication probably has to be at least in writing. Some municipal attorneys insist that the authority to condemn a particular piece of property be formalized by a condemnation resolution for that particular property before they will opine that a valid "threat" exists. Since condemnation for reconveyance to another private party is prohibited by law, the government agency could not adopt a valid resolution. Of course, it is really up to the property owner claiming the postponement of gain, and its attorney and accountant to determine when a threat exists and whether the enticement offered can be used by the taxpayer.

In summary, if the limitations on condemnation were inevitable, Ballot Measure 39 may have come at an opportune time for urban renewal activities in Oregon. The public has a reduced appetite for large land assemblies and the clearance of existing improvements for redevelopment. The days of acquiring the four downtown blocks for Pioneer Place have passed, at least for the present. However, we cannot ignore that the condemnation tool was invoked when circumstances required bold action to produce bold public results. Will the time come again?